STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP001765 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAWN M. HACKEL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Jefferson County Circuit Court, Judge Jacqueline R. Erwin, Presiding, and from an Order Denying Postconviction Motion Entered by Judge David J. Wambach

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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

ARGUMENT

Ms. Hackel's Right to an Impartial Jury and a Fair Trial Was Violated by Commentary During Voir Dire By Deputy Whitehouse and Defense Counsel.

A. Ms. Hackel was denied the right to effective assistance of counsel.

1. Deficient performance.

In its defense of trial counsel's performance, the state makes a couple of points that are beyond dispute. First, Ms. Hackel agrees that "*voir dire* is an important tool that should be used by parties and the trial courts to screen out potentially biased jurors." (State's brief at 12). Second, the state is correct that counsel's questioning during voir dire resulted in the removal of several prospective jurors for cause. (Id. at 19-20). But the state fails to address the heart of Ms. Hackel's claim: Trial counsel performed deficiently by failing to move to strike the panel following Deputy Whitehouse's comments that, based upon his experience with drunk driving cases, he believed the state must have sufficient evidence to prove Ms. Hackel guilty.

The state provides extensive quotation from Attorney Keane's voir dire and argues that she "properly asked questions of prospective jurors that were intended to discern how they felt about the guilt of the defendant, which is one of the most important purposes of *voir dire*." (Id. at 20). Absent from the state's brief is any argument directly responding to Ms. Hackel's contention that counsel performed deficiently by failing to move to strike the panel when counsel's questioning elicited damaging commentary from a sheriff's deputy.

As argued in Ms. Hackel's brief-in-chief, counsel's primary deficiency during voir dire was her failure to recognize the danger that the deputy's comments tainted the entire panel. Whitehouse told the panel that he had arrested drunk drivers, he knew "the evidence that you need to gather" and he had "testified as a deputy on drinking cases as well." (103:53). He then opined:

> So, for the State to bring this on, I believe that there's sufficient evidence and they are confident that the evidence that they have is to prove that she's guilty so –

(103:53-54). Rather than remind the deputy of the presumption of innocence or ask the court to address the entire panel regarding the presumption of innocence or move to strike the panel, counsel posed two additional questions to Whitehouse that only served to highlight that his opinion was based upon his training and experience.

> MS. KEANE: And you say sufficient evidence, sufficient evidence that she is guilty.
>
> POTENTIAL JUROR WHITEHOUSE: Mm-hmm.
>
> MS. KEANE: So because of your – umm – professional training and your occupation, you believe that the State has sufficient evidence to convict her – umm – and so based on those – your understanding of those facts as they stand, do you believe that Ms. Hackel is therefore guilty of what she's alleged to have done?
>
> POTENTIAL JUROR WHITEHOUSE: Yes.

(103:54). Although Whitehouse and several other potential jurors were ultimately removed for cause, counsel performed deficiently by not recognizing the damage caused by having

Deputy Whitehouse's opinion placed before the entire jury panel.

Citing ***State v. Mayo***, 2007 WI 78, ¶63, 301 Wis. 2d 642, 734 N.W.2d 115, the state argues that counsel's strategic decisions are entitled to deference. (State's brief at 23-24). But Attorney Keane's failure to move to strike the panel was not a strategic decision. It was the product of oversight. When questioned at the postconviction hearing about her thought process immediately following Whitehouse's comments, Keane testified as follows:

> Q. So, at that point in the voir dire did you consider moving to strike the panel due to Deputy Whitehouse's statements?
>
> A. No.
>
> Q. Is it something you actually contemplated doing and decided not to or did you not think of it?
>
> A. It didn't occur to me.
>
> Q. Did you have any concerns about the effect of the deputy's statements on the other panel members?
>
> A. It's hard for me to sort out, of course, because I have been thinking about it since having received the motion and the documentation that was included with the motion. I understand very clearly now, and it's difficult for me to address my lack of recognition of that notion at the time, other than I was consumed with the task of picking a trial (sic) and proceeding to jury trial with Ms. Hackel on that day, but I was really thinking about that witness and the others who expressed opinions about my question, or in

> response to my questions. I wasn't thinking about the other people in the room, the other panel members.
>
> Q. Mm-hmm. Mm-hmm. So is it fair to say that, at that point during the voir dire, you hadn't really thought about the impact this might have – his statements on the other potential jurors?
>
> A. That's correct.

(105:8-9).

While the state is correct that a reviewing court will defer to counsel's reasonable strategic decisions, the court "'will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment.'" ***State v. Jacobs***, 2012 WI App 104, ¶28, 344 Wis. 2d 142, 822 N.W.2d 885, *quoting* ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). Counsel's failure to move to strike the panel was not the product of an exercise of judgment but, rather, was an oversight. Attorney Keane did not think of it, nor did she consider the impact of Deputy Whitehouse's comments on the other prospective jurors.

In her testimony, she also expressed "grave concerns" about some of her own comments during voir dire. (105:11). Keane's strategy was to encourage the prospective jurors "to open up" and "to tell me what their true opinions and feelings were …." (*Id*. at 10). But she acknowledged that some of her statements may have been construed by panel members as endorsing the view expressed by some that Ms. Hackel must be guilty in order for the state to expend the resources necessary to take the case to trial. (*Id*. at 11-12). Such an impression would only compound the damage caused by

Deputy Whitehouse's comments and further heighten the need to strike the panel and start fresh.

2. Prejudice.

The state argues that in order to "show prejudice for trial counsel's deficient performance during the selection of a jury, a defendant must show that counsel's performance resulted in a biased juror member hearing her case …." (State's brief at 21). The state cites a series of cases for that proposition. But none of those cases involves, as here, a prospective juror's comments during voir dire that tainted the entire panel.

The key distinction between this case and the cases relied upon by the state is that the reviewing court need not speculate about the impact of the alleged error. Rather, this court can see exactly what Deputy Whitehouse said during voir dire and determine whether those comments tainted the panel. It is the sort of assessment that a reviewing court makes when determining whether counsel's failure to object to inadmissible testimony or to improper closing argument resulted in prejudice. None of the cases relied upon by the state involves a claim that trial counsel was ineffective in failing to strike a tainted jury panel.

In ***State v. Koller***, 2001 WI App 253, ¶11, 248 Wis. 2d 259, 635 N.W.2d 838, the defendant alleged his attorney was ineffective by failing to sufficiently question several prospective jurors about their personal experiences with sexual assault. This court concluded that the defendant's "assertion of possible juror bias is mere speculation." ***Id***. at ¶15. Unlike in ***Koller***, the record in this case is not silent and this court need not speculate. It can review the alleged improper opinion "testimony" that Deputy Whitehouse

provided during voir dire and assess whether, as Ms. Hackel claims, those comments tainted the panel.

Nor is this a case where a juror who should have been removed for cause was, instead, removed by a peremptory challenge. *See* ***State v. Traylor***, 170 Wis. 2d 393, 399-400, 489 N.W.2d 626 (Ct. App. 1992); ***State v. Lindell***, 2001 WI 108, ¶5, 245 Wis. 2d 689, 629 N.W.2d 223. In those cases, the biased juror did not serve on the jury so there was no violation of the defendant's substantial rights. Further, in ***State v. Erickson***, 227 Wis. 2d 758, ¶¶5-10, 596 N.W.2d 749 (1999), the supreme court rejected an ineffective claim based upon counsel's failure to recognize that the correct number of peremptories was seven, not four as the parties received at trial. Noting that the defendant conceded he was tried by an impartial jury (***id***. at ¶29), the supreme court concluded that any prejudice was purely speculative.

> We can only speculate the effect that the additional six persons, coupled with the six additional peremptory strikes, would have had on the ultimate composition of the jury.

Id. at ¶35.

In those cases, there was no claim that the entire panel was tainted by comments made by a biased juror. Ms. Hackel does *not* concede that the jury was impartial. To the contrary, her claim is that the comments by Deputy Whitehouse and some of the comments by her own attorney tainted the jury panel such that she was denied her right to an impartial jury and a fair trial. Prejudice is not based upon speculation but upon what appears in this record and is fully reviewable by this court.

As argued in Ms. Hackel's brief-in-chief, Deputy Whitehouse's comments were akin to impermissible vouching testimony. The appellate courts have reversed convictions due to the prejudical effect of vouching testimony from an expert, such as a psychiatrist, social worker, or as here, a police officer. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984); ***State v. Romero***, 147 Wis. 2d 264, 269 & 277, 432 N.W.2d 899 (1988). In ***State v. Krueger***, 2008 WI App 162, ¶17, 314 Wis. 2d 605, 762 N.W.2d 114, this court held that trial counsel's failure to object to vouching testimony from a social worker was both deficient and prejudicial. *See also* ***Earls v. McCaughtry***, 379 F.3d 489, 493-96 (7th Cir. 2004) (counsel's failure to object to social worker's vouching testimony was deficient and prejudicial).

Like vouching testimony, Deputy Whitehouse's comments were prejudicial because they invaded the province of the jury and created a real possibility that the panel was influenced by his "expert opinion." This case is like ***Mach v. Stewart***, 137 F.3d 630, 633 (9th Cir. 1998), where the jury's exposure during voir dire "to an intrinsically prejudicial statement" from a panel member who was also a social worker "severely infected the process from the very beginning."

The state is correct that ***Mach*** does not involve an ineffective assistance of counsel claim. The state is also correct that in other respects the facts of ***Mach*** are "similar to the facts of this case …." (State's brief at 28). Although ***Mach*** is not binding authority, the factual similarity – the prejudicial impact of vouching comments during voir dire – makes the case particularly persuasive. More so than the two Seventh Circuit cases relied upon by the state.

Neither ***United States v. Hernandez***, 84 F.3d 931 (7th Cir. 1996) nor ***United States v. Jones***, 696 F.2d 479 (7th Cir. 1982) involves comments from a panel member vouching for the strength of the state's case. In ***Hernandez***, 84 F.3d at 933 & 936, panel members expressed frustration with the criminal justice system. In ***Jones***, 696 F.2d at 491, a panel member said he could not set aside what he read in the newspaper without specifying what he had read, and another commented he might be swayed if the defendant did not testify.

Neither case involves the two critical ingredients which tainted the panel in ***Mach*** and, likewise, tainted the panel called to hear Ms. Hackel's case.

First, the comments were made by a prospective juror who would reasonably be perceived by other panel members as an expert on the sort of case for which the jury was being selected. In ***Mach***, 137 F.3d at 631-32, the defendant was charged with sexual assault of a child, and the comments were made by a social worker employed by the state's child protective services. Here, Ms. Hackel was charged with operating while intoxicated, and the comments were made by a sheriff's deputy with experience gathering evidence and testifying in drunk-driving cases.

Second, the comments from the "expert" panel member vouched for the strength of the state's case and the credibility of its most important witness. In ***Mach***, the social worker told the panel that sexual assault had been confirmed in every case in which her client reported an assault and she was unaware of a case in which a child lied about being sexually assaulted. ***Id***. at 632. Here, Deputy Whitehouse told the panel that he knew the evidence an officer would need to gather in a drunk-driving case and so for the state to bring the

case to trial, it must have sufficient evidence to prove Ms. Hackel guilty.

Although ***Mach*** did not involve a claim of ineffective assistance of counsel, the court reversed the defendant's conviction because the comments were so prejudicial they tainted the entire panel. The court characterized the social worker's comments as "an unequivocal and prejudicial statement made before a jury was sworn …." ***Id***. at 633. The error was so great that the court likened it to structural error. ***Id***. The court concluded that the defendant's right to an impartial jury was violated because the social worker's comments "resulted in the swearing in of a tainted jury, and severely infected the process from the very beginning." ***Id***. "[A]ll of the 'other evidence' presented during the case was received by a jury that was biased from the outset." ***Id***.

This court should reach the same conclusion here. Deputy Whitehouse's comments impermissibly vouched for the strength of the state's case and the credibility of its witnesses, especially the state's first witness, a sheriff's deputy who arrested Ms. Hackel. As in ***Mach***, the entire panel was tainted by the deputy's comments, violating Ms. Hackel's right to an impartial jury.

B. A new trial is warranted in the interest of justice.

As argued in Ms. Hackel's brief-in-chief, this court has authority under Wis. Stat. § 752.35 to reverse her conviction due to the improper comments during voir dire, if it concludes that the comments prevented the real controversy from being fully tried. It may reverse regardless of whether there is a substantial likelihood of a different result on retrial. ***State v. Van Loh***, 157 Wis. 2d 91, 102, 458 N.W.2d 556 (Ct. App. 1990). Indeed, the supreme court has used its discretionary

reversal power because of improper vouching testimony by a police officer and social worker. ***Romero***, 247 Wis. 2d at 276-80.

The state responds that reversal is unnecessary because the comments at issue here – primarily from Deputy Whitehouse but also to some extent from trial counsel – were all made during voir dire and were not part of the testimony. The state relies upon ***Lorenz v. Wolff***, 45 Wis. 2d 407, 426, 173 N.W.2d 129 (1970), where the supreme court reversed in the interest of justice due to comments made by defense counsel while questioning a witness and in closing argument. The state's distinction is not persuasive.

In ***Lorenz***, the comments were made by defense counsel *who was not testifying* but, rather, was questioning a witness and later making closing argument. ***Id***. at 416-19. The statements were prejudicial even though they were not from a testifying witness. The supreme court concluded that the attorney's "observations were not properly before the jury and should not have been placed before the jury in any form." ***Id***. at 426. The "injection of highly prejudicial and unsworn testimony into the case" prevented a fair trial. ***Id***.

The same is true here. In some ways, the vouching that occurred in voir dire is more damaging than had it occurred during sworn witness testimony. After all, Deputy Whitehouse's comments were placed before the jury without being subject to cross-examination, without objection and without a limiting instruction.

Although Attorney Keane may have been trying to encourage prospective jurors to openly express their views, the result was impermissible commentary from a sheriff's deputy and statements from counsel herself that appeared to undermine the presumption of innocence. Twice during

counsel's voir dire the court intervened, including after Keane told the jury that the state believes it has "rock solid evidence" (103:52, 59). Given that counsel's strategy for voir dire went awry, reversal in the interest of justice is particularly appropriate.

The state contends that reversing Ms. Hackel's conviction might dissuade attorneys from asking questions aimed at revealing bias or encourage attorneys to request individual voir dire. As to the former, much of the problem might have been avoided had counsel promptly reminded prospective jurors of the presumption of innocence. As to the latter, an individual voir dire would seem wise when in a drunk-driving case counsel knows that a panel member is a sheriff's deputy or in the child sexual assault case that a panel member is a social worker for child protective services. An individual voir dire would avoid the danger of tainting the entire panel, as occurred in ***Mach*** and at Ms. Hackel's trial.

CONCLUSION

Ms. Hackel respectfully requests that the court reverse the judgment of conviction and the order denying postconviction relief, and remand for a new trial.

Dated this 13th day of January, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,903 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of January, 2015.

Signed:

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