STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 2014AP2813-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JEFFREY P. LEPSCH, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE LACROSSE COUNTY CIRCUIT COURT, THE HONORABLE RAMONA G. GONZALEZ PRESIDING.

DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED

Is Lepsch entitled to a new trial because 1)trial court improperly administered oath to jury venire; 2)jury was not impartial under both state and federal law; 3)trial court deprived Lepsch of due process and right to impartial jury by arbitrarily depriving Lepsch of right to receive proper number of peremptory strikes, right to full use of peremptory strikes, and right to have biased jurors removed; and 4)Lepsch received ineffective assistance of counsel?

The trial court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will be warranted as this appeal involves two issues of statewide importance which have not yet been resolved by this Court or the Wisconsin Supreme Court: one, can the oath required to be administered to the jury venire by the circuit court under Wis. State. Sec. 805.08 properly be administered by a clerk outside the presence of the defendant and in a "jury assembly room" rather than by the circuit court

judge in the actual courtroom in the presence of the defendant; and two, does Wisconsin law regarding jury bias comport with the 6th Amendment requirement that in order to be impartial, a prospective juror must provide "unequivocal assurances" of impartiality.

STATEMENT OF THE CASE

The State charged Lepsch with two counts of first degree intentional homicide, armed robbery, and felon in possession of a firearm. A-Ap.100-102. The case originated from the robbery of a LaCrosse camera shop during which the shop's owner and his son were shot and killed. A-Ap.100-102.

The case proceeded to a five day jury trial wherein the jury found Lepsch guilty of all charges. A-Ap.103. At sentencing, the trial court sentenced Lepsch to consecutive terms of life imprisonment without any term of extended supervision for each homicide charge, 25 years confinement/15 years extended supervision on the armed robbery charge, and 5 years confinement/5 years extended supervision on the felon in possession of a firearm charge. A-Ap.103-104. Lepsch timely filed a notice of intent to

pursue postconviction relief pursuant to which the State Public Defender appointed the undersigned counsel. By and through counsel, Lepsch filed a motion for new trial which asserted all issues raised in this appeal. After conducting an evidentiary hearing, the trial court denied the motion. A-Ap.328-348. These proceedings follow.

STATEMENT OF FACTS

The facts relevant to this appeal are extensive as they relate to the voir dire of 14 different prospective jurors. In the interest of a logical and meaningful presentation of such facts, Lepsch references all relevant facts below with specific reference to the record and/or to this brief's appendix.

ARGUMENT

I. Lepsch is entitled to a new trial because the trial court's administration of the oath to the jury venire outside Lepsch's presence violated Lepsch's rights to be present at a critical stage in the proceeding, to receive a public trial and to receive a trial by a jury properly sworn to be impartial as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I Section 7 of the Wisconsin Constitution.

A. Standard of review

A reviewing court evaluates constitutional issues independently of the determinations rendered by the circuit court. See **State v. Harvey**, 139 Wis. 2d 353,382, 407 N.W.2d 235 (1987).

B. Trial court's administration of the oath to the jury venire outside Lepsch's presence violated Lepsch's rights to be present at a critical stage in the proceeding, to receive a public trial, and to receive a trial by a jury properly sworn to be impartial.

Both federal and state law require that prospective jurors take an oath as part of the jury selection process. The Sixth Amendment to the United States Constitution requires that a prospective juror swear that he or she can set aside any opinion he or she might hold and decide the case on the evidence. See **Oswald v. Bertrand**, 249 F.Supp.2d 1078, 1103 (E.D. Wis. 2003), affirmed 374 F.3d 475 (7th Cir. 2004). A juror does not meet the federal standard for being "impartial" unless he or she makes such a swearing. **Id**. Similarly, Wis. Stat. Sec. 805.08 provides in relevant part:

> The court *shall examine on oath* each person who is called as a juror to discover whether the juror…has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Italics added.

In recognition of this duty, the Wisconsin Judicial Bench Book, Criminal and Traffic, 2013, advises trial court judges to "Give panel oath before voir dire examination," and recommends the following:

> "Do you and each of you solemnly swear (or affirm) that you will true answers make to such questions as shall be put to you touching on your qualifications to act as jurors in the pending case, so help you God?" CR 23-4 (2013).

In this case, LaCrosse County Clerk of Court Pam Radtke administered the oath to the jury in a "jury assembly room" before the prospective jurors moved into the actual courtroom. 189:14. Neither Lepsch nor trial counsel were present for the administration of the oath. 188:155. The administration of the oath in such a fashion has apparently been standard practice in LaCrosse County for "many years." 200:2-3.

Although it may be standard local practice for the clerk to administer the oath in such manner, such practice is problematic and actually unlawful for a number of reasons. As an initial matter, Section 805.08 does not authorize the clerk to administer the oath. In fact, Section 805.08 uses mandatory language in specifying that "The *court shall* examine on oath…" the prospective jurors. See Wis. Stat. Sec. 805.08. Italics added. The Judicial Bench Book, as referenced above, similarly contemplates that it is the court that must administer the oath. The requirement that the court rather than the

clerk administer the oath makes sense when we consider the various constitutional problems that materialize when, as in this case, the court does not administer the oath to the prospective jurors in the courtroom in the presence of the defendant. First, because the voir dire process is a "critical stage" in the criminal proceeding, Lepsch, like all defendants, had a right under both the United States and Wisconsin Constitutions to be present with counsel. See **State v. Tulley**, 2001 WI App 236,¶ 248 Wis.2d 505, 635 N.W.2d 807; **State v. Harris**, 229 Wis.2d 832, 601 N.W.2d 682 (Ct. App. 1999); Wis. Stat. Sec.971.04(c). Lepsch specifically had a right to be present "at *all* proceedings when the jury is being selected." See **State v. Harris**, supra, p.839. As noted above, Wis. Stat. Sec. 805.08 mandates that a trial court "examine on oath" each prospective juror to discover whether the juror has expressed or formed any opinion, or is aware of any bias or prejudice in the case. Under **State v. Harris**, "*all proceedings* when the jury is being selected" logically includes the administration of the oath to the prospective jurors. After all, the juror's oath is an integral element of a defendant's fundamental right to have his guilt decided by an impartial jury. See **State v. Block,** 170 Wis.2d 676, 680, 489 N.W.715 (Ct. App. 1992). Lepsch, like all defendants, therefore had a constitutional interest in ensuring that the trial

court properly administered the oath to the prospective jurors and that all prospective jurors did in fact swear or affirm as required by Section 805.08 and federal law. In order to protect such interest, Lepsch had to be present for the oath given to and taken by the prospective jurors; he was not. Second, the administration of the oath in the "jury assembly room" violated Lesch's right to a public trial. The Sixth Amendment to the United States Constitution provides an accused the right to a public trial. **State v. Pino/State v. Seaton**, 2014 WI 74,¶40, 356 Wis.2d 106, 850 N.W.2d 207 citing **Presley v. Georgia**, 558 U. S. 209, 212, 1305 S.Ct. 721, 175 L.Ed.2d 675 (2010).[1] The right to a public trial includes voir dire. **Id**. at ¶43 citing **Presley** 558 U.S. at 213. The United States Supreme Court has repeatedly recognized that a violation of the public trial right is a defect that is structural in nature. **U.S. v. Gonzalez-Lopez**, 548 U.S. 140, 148-49, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); **Neder v. U. S**. 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); **Arizona v. Fulminante**, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); **Waller v. Georgia**, 467 U.S. 39, 49-50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). A structural error or defect taints the entire framework of the trial and is not subject to the harmless error analysis.

[1] Wisconsin Constitution Article I, Section 7 also provides a defendant the right to public trial.

Arizona v. **Fulminante**, 499 U.S. at 309-310. In this case, a crucial part of the voir dire proceeding, the administration of the oath, was not made part of Lepsch's public trial. To satisfy Lepsch's right to a public trial, the entire voir dire process, including the administration of the oath, should have occurred in the courtroom in the presence of Lepsch, trial counsel and the public at large. As discussed above, it did not. Lepsch is aware that the Wisconsin Supreme Court has held that a defendant may forfeit his right to a public trial under circumstances where the defendant is aware that the judge has excluded the public from the courtroom and the defendant fails to object to the judge's decision to do so. See **State v. Pinno/ State v. Seaton**, 2014 WI 74 at ¶7. Such is not the case here. At no time during the proceedings did the trial court inform Lepsch that the oath to the prospective jurors would be administered in the "jury assembly room" by the clerk rather than the judge in open court. Unlike the defendants in **Pinno/Seaton**, Lepsch never received notice of a possible infringement on his public trial right. For this reason, the forfeiture exception carved out in **State v. Pinno/Seaton** does not apply here. Finally, the defect or error in the manner in which prospective jurors took their oath or were "sworn," compromised whether the jurors selected could be considered "impartial." As will be more fully examined later in this

brief, Lepsch maintains that he did not receive a trial by an "impartial" jury, as required by the 6th Amendment and Article I, Section 7, because of certain biases held by many of the jurors. Before examining whether such biases precluded the jurors from being "impartial," the failure of the jurors to be properly sworn precluded them from being considered "impartial." Under federal law, a juror must *swear* that he or she can set aside any opinion he or she might hold and decide the case on the evidence. **Oswald v. Bertrand**, supra. As discussed earlier, Wisconsin law also requires that jurors make a certain oath as part of the process by which they show themselves to be "indifferent." If the oath has been administered in a defective or erroneous fashion, which it was in this case, then the jurors cannot properly be considered "impartial" under the 6th Amendment or Article I, Section 7 of the Wisconsin Constitution.

C. Trial counsel's failure to ensure that the trial court properly administered the oath to the jury venire in Lepsch's presence constituted ineffective assistance of counsel

Under **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective assistance of counsel must show that counsel's performance was both deficient and prejudicial. **Strickland**, 466 U.S. at 687. To meet the deficiency prong, the defendant must show that counsel's conduct fell below an objective standard of reasonableness. **State v. Thiel**, 2003 WI 111, ¶19, 264 Wis.2d 571, 665 N.W.2d 305. Prejudice exists when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." **State v. Johnson**, 133 Wis.2d 207, 222, 395 N.W.2d 176 (1986) (quoting **Strickland**, 466 U.S. at 687). Trial counsel was deficient in failing to ensure that prospective jurors were properly sworn as part of the voir dire process. In support of this allegation, Lepsch would incorporate herein by reference the specific arguments set forth above in Section B. In general, trial counsel failed to take steps to safeguard Lepsch's rights to be present at a "critical stage" of the proceeding, to receive a public trial and to receive a trial by an impartial jury. In terms of prejudice, this Court should find that prejudice exists as a matter of law or otherwise presume prejudice

given that the failure to properly administer the oath to prospective jurors amounted to structural error. As discussed in the above section, a violation of a defendant's public trial right is structural error. **See U.S. v. Gonzalez-Lopez**, 548 U.S. at 148-49; **Neder v. U. S**. 527 U.S. at 8 (1999); **Arizona v. Fulimante**, 499 U.S. at 310; and **Waller v. Georgia**, 467 U.S. at 49-50. So too is a violation of the right to trial by an impartial jury. See **Hughes v. United States**, 258 F.3d 453, 463 (6th Cir. 2001) citing **Johnson v. Armontrout**, 961 F.2d 748, 756 (8th Cir. 1992) and **Arizona v. Fulimante**, 499 U.S. at 309. Given the structural nature of the violations, prejudice is presumed. See **Hughes v. United States,** 258 F.3d at 463.

II. Lepsch is entitled to a new trial because the trial court seated jurors who failed to provide "unequivocal assurances" that they could set aside prior opinions and return a verdict based solely on the evidence as required by the 6th and 14th Amendments to the United States Constitution, and who were subjectively and objectively biased under Wisconsin law.

A. Standard of review

Whether a jury was impartial for purposes of the 6th Amendment is a mixed question which involves application of constitutional principles to facts as

found by the trial court. See **Irwin v. Dowd**, 366 U.S. 717,723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Similarly, under Wisconsin law, in analyzing a Sixth Amendment claim, a reviewing court applies constitutional principles to historical facts. See **State v. Ndina**, 2009 WI 21, ¶45, 315 Wis.2d 653, 761 N.W.2d 612. The reviewing court upholds the circuit court's findings of historical fact unless they are clearly erroneous. See **id.** The reviewing court determines the application of constitutional principles to those evidentiary or historical facts independently of the circuit court but benefiting from that court's analysis. See **id.**

Under Wisconsin law, a circuit court's factual findings that a prospective juror is or is not subjectively biased is subject to a clearly erroneous standard. **State v. Faucher**, 227 Wis.2d 700, 718, 596 N.W.2d 770 (1999). Factual findings that a prospective juror is or is not objectively biased are also subject to a clearly erroneous standard. **Id**. at 720. A reviewing court gives weight to a circuit's court conclusion that a prospective juror is or is not objectively biased and will reverse such conclusion only if as a matter of law a reasonable judge could not have reached such conclusion. **Id**. at 720-721.

In this case, the trial court, both at trial and as part of the decision and order on Lepsch's postconviction motion, A-Ap.328-348, failed to make any specific factual findings pertaining to the impartiality or biases of each of the prospective jurors at issue. As such, Lepsch maintains that the trial court made no factual findings to which this Court can defer and that this Court must ultimately conduct an independent review. To the extent that the circuit court's decision and order, A-Ap.328-348, can be interpreted as making specific factual findings, for the reasons discussed below, such findings were clearly erroneous.

B. Test for juror impartiality under the 6th Amendment requires juror to provide "unequivocal assurances" that he or she can set aside prior opinions and return a verdict based solely on the evidence.

The United States Constitution guarantees a criminal defendant the right to an impartial jury. U.S. Constitution, Amendment VI. The Fourteenth Amendment guarantees a right to a jury in all state criminal cases which, if tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury. **Oswald v. Bertrand**, 249 F.Supp.2d at 1090. The right to an impartial tribunal is one of the handful of rights of a criminal defendant that is

not subject to the doctrine of harmless error. **Oswald v. Bertrand**, 374 F.3d at p.482. If any one member of a jury is not impartial and would be unable to render a fair verdict, then the jury cannot be considered impartial. **Oswald v. Bertrand**, 249 F.Supp.2d at 1090 and 1097. Finally, even if there is no showing of actual bias, due process is denied by circumstances that create the likelihood or the appearance of bias. **Id**. To be impartial, a juror must be able to lay aside his impression or opinion and render a verdict based on the evidence presented in court. **Id**. at 1103. Under the Sixth Amendment, a juror's impartiality is determined by the following test: did the "juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed. **Id**. at 1103. The Seventh Circuit has made clear that jurors who are unable to give *unequivocal assurances* that they can relinquish their prior beliefs and decide the case solely on the evidence must be removed for cause. **Id** citing **Thompson v. Altheimer & Gray**, 248 F.3d 621,626 (7th Cir. 2001*);* italics added.; see also, **Marshall v. City of Chicago**, 762 F.3d 573, 576 (7th Cir. 2014). Doubts regarding bias must be resolved against the juror. See **Oswald v. Bertrand**, 249 F.Supp.2d at 1104. The rule that a juror may not be found to be impartial unless he can provide *unequivocal assurances* that he

is able to lay aside his opinion and render a verdict based solely on the evidence is a federal constitutional requirement and Wisconsin courts are not free to disregard or dilute it. See **Oswald v. Bertrand**, 249 F.Supp.2d at 1105. When a trial court is confronted with a biased juror, the trial court has a *sua sponte* obligation to dismiss the prospective juror for cause. **United States v. Torres**, 128 F.3d 38, 43 (2nd Cir. 1997) citing **Frazier v. United States**, 335 U.S. 497,511, 69 S.Ct. 201, 93 L.Ed. 187 (1948). Italics added. The sua sponte obligation on the part of the trial court is significant because it means that the State cannot use trial counsel's failure to object to or challenge a certain juror as part of a waiver or forfeiture based argument. The Sixth Amendment requirements apply regardless of whether blame for a biased jury is assigned to counsel or the court who ultimately share the voir dire responsibility of removing biased venirepersons. **Hughes v. United States**, 258 F.3d at 463. When a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias. See **Johnson v. Armontrout**, 961 F.2d at 754. Actual bias is 'bias in fact'—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. **Hughes v. United States**, 258 F.3d at 463 citing **United States v. Torres**, 128 F.3d at 43. If a defendant shows that jurors were

actually biased, the conviction must be set aside. **Johnson v. Armontrout**, 961 F.2d at 754. If a court mistakenly seats a juror who should have been struck for cause, the error is a structural one and a new trial is required. **Gray v. Mississippi**, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987)

It is important to note that **Oswald v. Bertrand** began as an appeal to this Court involving a claim of juror bias.[2] Although this Court denied the appeal, the United States District Court for the Eastern District of Wisconsin, affirmed by the Seventh Circuit Court of Appeals, granted habeas corpus relief. The federal courts specifically rejected this Court's reliance on "something less than an equivocal statement" as a basis for a finding of juror impartiality. See **Oswald v. Bertrand**, 249 F.Supp.2d at 1105. Of course, this Court's rejection of the need for "unequivocal assurances" was based on Wisconsin Supreme Court precedent. See **State v. Erickson**, 227 Wis.2d 758, 776, 596 N.W.2d 749 (1999); **State v. Faucher**, 227 Wis.2d 700, 731, note 8, 596 N.W.2d 770 (1999); **State v. Kiernan**, 227 Wis.2d 736, 750 at note 10, 596 N.W.2d 760 (1999); and **State v Lindell**, 2001 WI 108, ¶100, 245 Wis.2d 689, 629 N.W.2d 223. Given the federal jurisprudence which requires that jurors provide "unequivocal assurances" in order to be

[2] **State v. Theodore Oswald**, 2000 WI App 2, 232 Wis.2d 62, 606 N.W.2d 207.

considered impartial for 6th Amendment purposes, there is therefore a conflict between Wisconsin case law and 6th Amendment case law. Wisconsin courts indicate that a juror does not have to provide "unequivocal assurances," where federal courts, most notably the 7th Circuit, indicate otherwise. The Wisconsin constitution may provide a defendant with greater constitutional protections than its federal counterpart but it cannot provide him with less. This Court or the Wisconsin Supreme Court should clarify the line of cases including **Lindell, Erickson**, **Kiernan**, and **Faucher**, to address this issue.

C. Lepsch did not receive a trial by an impartial jury because the jury included jurors who did not provide "unequivocal assurances" that they could set aside prior opinions and return a verdict based solely on the evidence.

Out of the 12 jurors on the Lepsch jury, 9, jurors, Christopher R., James T., Nathan N., John A., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., ultimately identified in the Random Listing Report-Voire Dire, A-Ap.106-107, as juror nos. 5, 6, 12, 15, 17, 19, 20, 23 and 26, exhibited biases which required that they be excused by the trial court. These biases stemmed from beliefs or opinions expressed by the jurors regarding four basic areas: 1)the juror's belief or opinion that Lepsch was guilty, 2)the juror's belief or opinion

that his or her "mind was made up," 3) the juror's belief or opinion as to the presumption of innocence, and 4) the juror's belief or opinion that law enforcement witnesses were more credible than non-law enforcement witnesses. In this section of the brief, Lepsch will identify the specific beliefs or opinions held by each respective juror which prevented him or her from being impartial, and demonstrate by reference to the record, or lack thereof, that the respective juror failed to provide the requisite "unequivocal assurances."[3]

Juror belief that law enforcement witnesses are more credible than non-law enforcement witnesses

The Eighth Circuit has stated that "[a] juror who 'would probably give [law enforcement officers] the benefit of the doubt,' is not what we would consider impartial." See **United States v. Sithithongtham**, 192 F.3d 1119, 1121 (8th Cir. 1999). "A defendant cannot receive a fair trial at the hands of jurors "who [are] inclined to give unqualified credence to [ ] law enforcement officer[s] simply because [they are] officer[s]." **U.S. v. Amerson**, 938 F.2d 116, 118 (8th Cir. 1991) citing **Chavez v. United States**, 258 F.2d 816, 819

[3] The appendix includes transcript excerpts of the complete voir dire of each prospective juror.

(10th Cir. 1958); see also, **United States v. Jones**, 193 F.3d 948, 951-952 (8th Cir. 1999).

In this case, the State's evidence consisted largely of testimony from police officers or other law enforcement officials. Of the 31 witnesses called by the State, 13 fell into the category of police or law enforcement not including crime lab analysts. Beyond the basic number of police or law enforcement witnesses, the case also involved an issue of the police's failure to preserve potentially exculpatory evidence. As part of the State's case, it introduced surveillance video obtained from a nearby bank which showed a vehicle arriving at the crime scene area around 1:50 p.m. and then leaving around 3:00 p.m.. 208:37, 44. The footage also showed a man with a baseball-style hat with a hooded sweatshirt walking on the street toward the photo shop around 1:53 p.m., 208:24, and entering the shop. 208:38. The video then showed the man exiting the store, 208:39, and then walking in the opposite direction at about 2:58 p.m. 208:23. In the 2:58 p.m. footage, the man is observed with a three bags and a backback. 208:25. Although police could not see the man's face in the video, not even a single feature or if the man was black or white, 208:48, the State used the footage to argue that the crime occurred during this time period and that the man in the video was Lepsch.

211:28-29. Lepsch however introduced evidence that police had received information that there had actually been some person in the photo shop after 4:15 p.m. 209:8. Other video obtained from a different business captured images from the front of the photo store during the time frame of 1:30 p.m. to 5:30 p.m. 209:4-5. The day after the incident, Vern Vandeberg, an investigator with the Wisconsin Department of Justice, reviewed such footage. 208:170. Vandeberg however did not download the footage or otherwise take steps to preserve it and when, days later, he went back to the business to collect the footage as evidence, only footage for the time period 1:30-3:30 was still recorded. 208:172. Contrary to the defense's position that the video would have shown an alternate suspect leaving the photo shop after 4:15 p.m., Vandeberg testified at trial that based on his review of the video, the "lost" or "destroyed" portion of the video showed no such person. 208:172. As such, a significant issue to both the State and defense turned on Vandeberg's credibility and veracity. A pre-voir dire jury questionnaire[4] sought to flesh out how prospective jurors felt, among other things, about the credibility of police officers. Question no. 30 of the jury questionnaire asked in relevant part:

[4] Each prospective juror's completed questionnaire is included in the appendix.

You will be hearing testimony from several police officers in this case. Do you think you would give police officers more credibility, less credibility or the same amount of credibility as other witnesses who were not police offers?

_____more credibility_____less credibility_____the same credibility

Of the 12 jury members, 7 jurors, Christopher R., Nathan N., John A., Pamela H., Lisa K., and Darrick M., and Roxanne F., juror nos. 5, 12, 15, 19, 20, 23, and 26, answered that they would give police officers "more credibility." A-Ap.174, 159, 129, 191, 206, 113, 143. Such responses necessarily depicted the partiality of the jurors who gave them. As a result, to be considered "impartial" under the 6th Amendment, each juror had to provide "unequivocal assurances" that he or she could one, set aside such opinion, and two, render a verdict based solely on the evidence. The trial court then had to make a finding that the assurances were "believable."

Darrick M., juror no. 23, 206:132-136, A-Ap.109-124

The record reflects that neither the trial court, trial counsel nor prosecutor asked Darrick M. any questions regarding his opinion as to the credibility of police officers as witnesses. Darrick M. was not "rehabilitated" in any respect and his response to the jury questionnaire stood entirely uncontradicted or modified. Clearly, the record as such demonstrates that Darrick M. did not provide "unequivocal assurances" that he could one, set aside his opinion, and two, render a verdict based solely on the evidence.

John A., juror no. 15, 206:85-87, A-Ap.125-138

The record reflects that neither the trial court, trial counsel nor prosecutor asked John A. any questions regarding his opinion as to the credibility of police officers as witnesses. John A. was not "rehabilitated" in any respect and his response to the jury questionnaire stood entirely uncontradicted or modified. Clearly, the record as such demonstrates that John A. did not provide "unequivocal assurances" that he could one, set aside his opinion, and two, render a verdict based solely on the evidence. Of course, as discussed later in this brief, John A.'s additional belief that Lepsch was

guilty and that he had "made up" his mind as to Lepsch's guilt further eroded his status as an impartial juror.

Roxanne F., juror no. 26, 206:144-148, A-Ap.139-154

The record reflects that only trial counsel asked Roxanne F. about her belief regarding the credibility of police officers as witnesses. In response to trial counsel's questions, Roxanne F. did not provide anything close to an "unequivocal assurance" that she could one, set aside her opinion, and two, render a verdict based solely on the evidence. If anything, Roxanne F.'s statements on voir dire, especially that she felt that police officers were "like, just under an oath to be honest, to tell the truth at all times," A-Ap.152, cemented her partiality towards law enforcement witnesses.

Nathan N., juror no. 12, 206:69-72, A-Ap.155-169

The record reflects that trial counsel was the only one who asked Nathan N. about his belief regarding the credibility of police officers as witnesses. However, trial counsel only asked Nathan N. if he would "listen to the evidence in the courtroom, listen to the person testify, and then make up

your decision about how credible they are--." A-Ap.168. Nathan N. answered, "absolutely." A-A.168. Such response did not constitute an "unequivocal assurance" that he could one, set aside his opinion, and two, render a verdict based solely on the evidence. Nathan N.'s response indicated only that he would "listen" to the evidence in determining credibility. The response stated nothing about Nathan N.'s ability to set aside his opinon and render a verdict based solely on the evidence.

Christopher R., juror no. 5, 206:31-36, A-Ap.170-186

The record reflects that both the trial court and trial counsel asked Christopher R. about his belief regarding the credibility of police officers as witnesses. Neither in responses to trial counsel nor to the trial court did Christopher R. provide anything close to an "unequivocal assurance" that he could one, set aside his opinion, and two, render a verdict based solely on the evidence. The closest Christoper R. came was in responding to the trial court's question of whether he would be able to follow an instruction that "the witnesses are—all the credibility is to be judged the same," and Christopher R. stated, "Yeah, I—I would think—I would think so, yeah."

A-Ap.184. The trial court's question of whether Christopher R. would follow a certain instruction was not the same as whether Christopher R. would be able to set aside his opinion and render a verdict based solely on the evidence. Further, Christopher R.'s response was uncertain rather than unequivocal. Finally, as discussed later in this brief, Christopher R.'s disbelief in the presumption of innocence further eroded his status as an impartial juror.

Pamela H. juror no. 19,206 :110-113, A-Ap.198-201

The record reflects that only trial counsel asked Pamela H. about her belief regarding the credibility of police officers as witnesses. In response to trial counsel's questions, Pamela H. did not provide an "unequivocal assurance" that she could one, set aside her opinion, and two, render a verdict based solely on the evidence. The closest Pamela H. came was in responding to trial counsel's question of whether she would "just listen to the witnesses in the—in the courtroom and assess their credibility on what you hear in the courtroom," and Pamela H. stated, "Yes". A-Ap.200.

Lisa K., juror no. 20, 206:113-116, A-Ap.202-216

The record reflects that only the trial court asked Lisa K. about her belief regarding the credibility of police officers as witnesses. The trial court inquired whether Lisa K. could, "when law enforcement is testifying as a witness…judge their credibility the same as you would judge anyone else's," A-Ap.214, to which Lisa K. responded, "Yes." A-Ap.214. Such response did not constitute an "unequivocal assurance" that she could one, set aside her opinion, and two, render a verdict based solely on the evidence. Lisa K.'s response indicated only that she would judge the credibility of a law enforcement witness "as anyone else's." The response stated nothing about Lisa K.'s ability to set aside her opinion and render a verdict based solely on the evidence. Of course, as discussed later in this brief, Lisa K.'s additional belief that Lepsch was guilty further eroded her status as an impartial juror.

Juror beliefs that Lepsch was guilty and that juror had "made up" his or her mind

Question No. 35 of the jury questionnaire asked in relevant part the following:

Have you ever expressed the opinion that Mr. Lepsch was guilty? ____Yes____No

Do you have any feelings at this time that you have made up your mind as to Mr.

Lepsch's guilt? _____Yes_____No

IF YES, would you have any difficulty putting these feelings out of your mind if you were chosen to be a juror? _____Yes_____No

Of the twelve (12) jury members, four (4) jurors answered that they had expressed the opinion that Lepsch was guilty.[5] These included James T., John A., Mandy F., and Lisa K., juror nos. 6, 15, 17, and 20.[6] A-Ap. 223, 131, 238, 209. Three (3) of those jurors also expressed the opinion or belief that they had "made up (their) mind(s)" that Lepsch was guilty. These included James T., John A., and Mandy F. juror nos. 6, 15, 17. A-Ap. 223, 131, 238. Despite such opinions or beliefs, all three jurors indicated that "(they) would not have any difficulty putting the feelings out of (their) mind(s) if chosen as a juror(s)." Even without considering what each juror said during voir dire, which Lepsch does below, each juror's answers to Question 35 precludes a finding of "unequivocal assurances." Indeed, based on each juror's belief that he or she had "made up (his) or

[5] It is significant to note that in answering Question 35 of the jury questionnaire, of the three (3) alternate jurors, Jane L. (juror no.1), Nicole M. (juror no. 2) and Jeanne C. (juror no. 25) all expressed the belief that Lepsch was guilty. Jeanne C. and Jane L. additionally expressed the belief that they had "made up (their) minds" as to Lepsch's guilt. In response to the question of whether she "would have difficulty putting the feelings out of her mind if (she) were chosen to be a juror," Jeanne C., checked the box "no," but made the following qualifier: "Depending on the evidence-especially any violence in his past."

[6] As discussed previously this brief, John A. and Lisa K. were also biased in their beliefs that law enforcement witnesses were more credible than non-law enforcement witnesses.

(her) mind" about Lepsch's guilt, such beliefs were of such a nature and strength so as to establish a "presumption of partiality." See **Irvin v. Dowd**, 467 U.S. at 723. Clearly, the opinion of each juror that Lepsch was guilty depicts partiality or bias. The more troubling part however of each juror's answer is the second part, that he or she had "made up" his or her mind. Perhaps depending on what else a juror may say on voir dire, a juror's mere expression of his or her opinion that a defendant is guilty, may not be fatal to the juror's impartiality status. But when the juror accompanies such opinion of the defendant's guilt with the acknowledgment that he or she has "made up" his or her mind, the juror cannot, no matter what he or she may later say, reasonably be viewed as providing "unequivocal assurances" of impartiality. Each juror's belief that he or she had "made up" his or her mind as to Lepsch's guilt, was inherently contradictory with the ability to set aside such belief. There is a difference between merely having an opinion or belief as to an issue and having one's mind "made up." One can have an opinion or belief without yet having one's mind made up on the issue. The belief or opinion may yet to be fixed or established. The belief or opinion could still be reasonably set aside. But where one's mind is "made up" the belief or

opinion is fixed and established. That is the essence of having one's mind "made up." It is unreasonable to conclude that the ordinary person in the juror's position would be able to set aside his or her belief that Lepsch was guilty, and that his or her "mind was made up," and decide the case only on the evidence presented in court. The reasonable person whose "mind is made up" has been informed by his emotional and intellectual sensibilities which have established a conclusion in the person's conscious and unconscious mind. It is unreasonable to think that average person can simply disregard or eliminate the information that has already been provided by his or her emotional and intellectual sensibilities as well as the conclusion such sensibilities have already rendered. Additionally, once each respective juror expressed the belief that Lepsch was guilty and that the juror's mind was "made up," such beliefs automatically compromised the presumption of innocence as well as the burden of proof. A juror whose "mind is made up" does not start the case with the presumption that the defendant is innocent. He or she starts the case with the reverse presumption, that the defendant is guilty. More troubling, since the juror's "mind is made up," it becomes the defendant's burden to "unmake" the juror's mind or persuade the juror of his innocence. Such mind-set on the part of the juror impermissibly shifts the

burden of proof from the state to the defendant. Finally, even if we were to consider the jurors' indication on the questionnaire that they could "(put) the feelings out of (their) minds" as sufficient to meet the first part of the "unequivocal assurances" test, we cannot consider such indication as sufficient to meet the second part, that they swore they could return a verdict based solely on the evidence. Neither James T., John A. or Mandy F. made such an affirmation in the questionnaire.

When we go beyond the jury questionnaire and examine specific statements made by John A., James T., and Mandy F. on voir dire, we further see that such statements do not provide the necessary "unequivocal assurances."

John A., juror no. 15, 206:85-87, A-Ap.125-138

The trial court was the only one who examined John A. regarding his opinions that Lepsch was guilty and that he had "made up" his mind. While the trial court asked John A. if "you could listen to the evidence in the courtroom; and you could make your determinations based upon what you hear in the courtroom," A-Ap.137, such questions were not sufficiently

precise. The proper questions were whether John A. could lay aside his beliefs that Lepsch was guilty and that his mind was made up, and whether John A. could render a verdict based solely on the evidence. The trial court did not ask these questions. As such, John A.'s statements on voir dire did not provide "unequivocal assurances" that he could set aside his opinions and two, render a verdict based solely on the evidence.

James T., juror no.6, 206:37-40, A-Ap.217-23B

The record reflects that the trial court, the prosecutor and trial counsel all asked James T. at least some questions regarding his opinions that Lepsch was guilty and that he had "made up" his mind. While the record reflects that James T. indicated that he could set aside such opinions, it does not reflect that James indicated that he could return a verdict based solely on the evidence.

Mandy F., juror no. 17, 206:102-105, A-Ap.232-246

As with James T., the record reflects that the trial court, the prosecutor and trial counsel all asked Mandy F. at least some questions regarding her

opinions that Lepsch was guilty and that she had "made up" her mind. As with James T., while the record reflects that Mandy F. indicated that she could set aside such opinions, it does not reflect that Mandy indicated that she could return a verdict based solely on the evidence.

Juror disbelief in the presumption of innocence

Question 34 of the jury questionnaire asked the following:

Do you think if that state goes to the trouble of bringing someone to trial, the person is probably guilty? _____Yes No_____

Why would you say that?

One juror, Christopher R., juror no. 5, wrote as follows:

Probably? Yes. Definitely? Not necessarily. I would hope that the courts would not bring someone in just so they have someone to try. I would hope there would at least be a fair amount of evidence or cause before bringing someone in. A-Ap.175.

Question 32 asked:

Do you have any problem with the legal proposition that a defendant must be presumed innocent unless and until the prosecution can prove he or she is guilty?

Christopher R. responded as follows:

In general, no. But I do not believe that this should be the case 100% of the time. I believe that there are cases in which there is immediate & overwhelming evidence (I.E. physical evidence, audio/video evidence, confessions, etc.)(sic) should be presumed guilty until trial. A-Ap.175.

Christopher R.'s beliefs, as set forth above, are deeply troubling in that they go to the very heart of the criminal process, the presumption of innocence. Given the nature and strength of such beliefs, Lepsch maintains that they established a "presumption of partiality." At the very least, such beliefs did not constitute an "unequivocal" affirmation of the juror's ability to be impartial. At worst, such beliefs manifested a bias, an inherent rejection by Christopher R. of a fundamental right enjoyed by all citizens. Curiously, the trial court did not ask Christopher R. any questions regarding his beliefs as to the presumption of innocence. Not surprisingly, trial counsel was the only one to examine Christopher R. regarding such beliefs. Nevertheless, trial counsel only asked a few questions and none of them squarely elicited "unequivocal assurances" from Christopher R. that he could set aside his beliefs. Trial counsel only asked Christoper R. if he was "okay, with the principle (of the presumption of innocence)" and Christopher R. responded, "Yeah." A-Ap.186. The inquiry made by trial counsel and Christopher R.'s response to it failed to establish "unequivocal assurances" that Christopher R. could set aside his beliefs that the presumption of innocence should not apply in all cases, that in some cases there should be a

presumption of guilt, and that if the state goes to the trouble of bringing somebody to trial, they are "probably" guilty. Trial counsel's inquiry similarly failed to establish that Christopher R. could return a verdict based solely on the evidence introduced at trial. Finally, as discussed earlier in this brief, Christopher R.'s impartiality was additionally compromised by his belief that police officer witnesses were more credible than non-police officer witnesses.

D. Even in absence of actual bias, Lepsch's due process rights were denied by circumstances which created the likelihood or appearance of bias, and the trial court's failure to conduct a sufficient inquiry regarding such circumstances.

It is clear under United States Supreme Court precedent that even if there is no showing of actual bias, due process is denied by circumstances that create the "likelihood or the appearance of bias." See **Peters v. Kiff**, 407 U.S. 493, 502, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).[7] While Lepsch maintains that he has already demonstrated actual bias, at the very least Lepsch has

[7] With respect to even the "appearance of bias," the Wisconsin Supreme Court has stated, [We caution and encourage the circuit court's to strike prospective jurors for cause when the circuit courts "reasonably suspect" that juror bias exists.] **State v. Lindell**, 245 Wis.2d 689,716, 629 N.W.2d 223 (2001). This is a decades-old standard that encourages circuit courts to err on the side of striking prospective jurors who appear to be biased, even if the appellate court would not reverse their determinations of impartiality. **Id**. Such action will avoid the appearance of bias, and may save judicial time and resources in the long run. **Id**.

demonstrated "circumstances that created the likelihood or the appearance of bias." The jurors at issue in this appeal presented multiple layers and combinations of bias. Of the twelve jurors, four jurors (James T., John A., Mandy F., and Lisa K.) believed Lepsch was guilty before hearing even one piece of evidence. On top of that, three of the four (James T., John A., and Mandy F.) believed that their minds were "made up." On top of that, two (John A. and Lisa K.), along with Christopher R., Nathan N., Pamela H., Darrick M., and Roxanne F., believed that police officer witnesses were more credible than other witnesses. With respect to Christopher R., on top of his bias regarding the credibility of police officers, he held the belief that those defendants proceeding to trial were "probably" guilty, that the presumption of innocence should not apply in all cases, and that a presumption of guilt should exist in some cases. Of the three (3) alternate jurors, Jane L., juror no.1, Nicole M., juror no. 2, and Jeanne C, juror no. 25, all expressed the belief that Lepsch was guilty. Jeanne C. and Jane L. additionally expressed the belief that they had "made up (their) minds" as to Lepsch's guilt. If the beliefs and opinions of these jurors did not constitute "bias," they presented at a minimum the "appearance of bias." Adding to the "appearance of bias" or "likelihood of bias," was the extensive pre-trial publicity that surrounded

the case. According to a data base maintained by Newspaper Source Plus, media sources published no less than 64 stories about the case prior to the time of trial. 188: 44-51. According to year-end polls taken by "LaCrosse Tribune" of both its staff and readers, the Lepsch case was voted the "Number One" story of the year. 188:149. Various media "streamed" live coverage of the trial on the internet. 206:7. The LaCrosse Tribune "streamed" an interactive blog. 206:77. Not surprisingly, of the 62 prospective jurors who completed the jury questionnaires, only six (6), Daniel G. (prospective juror no. 24), Stephen H. (juror no. 27), Nathan N. (juror no. 12), Kyle M. (excused for cause), Nicole N. (absent from jury duty), and Renee V. (prospective juror no. 30), had no knowledge of Lepsch or the case. Given the significant risks of bias and prejudice created by the pre-trial publicity, the trial court had an obligation to take certain measures to avoid or at least minimize such risks. The Supreme Court imposes a duty of vigilance on trial judges to ensure that defendants are tried by impartial juries. Due process requires that the "trial judge [be] ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." **Smith v. Phillips**, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). The Supreme Court has described the

trial judge's duty to be vigilant in a number of ways. See **Chandler v. Florida**, 449 U.S. 560, 574, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) (stating that trial courts "must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law"); **Sheppard v. Maxwell**, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.E.2d 600 (1966) (stating that courts must take such remedial measures as are necessary to prevent prejudicial outside interference at its inception); **Remmer v. United States**, 347 U.S. 227, 230, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (indicating that when a trial court becomes aware of an occurrence that may have biased a juror, the court must "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial"); **Dennis v. United States**, 339 U.S. 162,168, 70 S.Ct. 519, 94 L.Ed. 734 (1950) (stating that when empanelling a jury, a trial court must be zealous in protecting the rights of the accused); and finally, when a trial court is confronted with a biased juror, the trial court has a sua sponte obligation to dismiss the prospective juror for cause. **Frazier v. United States**, supra. Italics added. Irrespective of trial counsel's performance and obligations, the trial court had an independent obligation to ensure that the voir dire in the case was conducted according to 6th and 14th Amendment principles, and in

particular, to ensure that any and all jurors selected were "impartial" as that term is defined by federal constitutional law. The trial court in this case did not satisfy those obligations. First, in assessing the trial court's actions, it is noteworthy to consider the availability of extra prospective jurors. See **State v. Lindell**, 245 Wis.2d 689 at p.717, footnote 6. In this case, the trial court had 65 prospective jurors from which to select the jury. A-Ap.106-107. Therefore, at the time the jurors were individually questioned regarding their answers to the jury questionnaire, there were 56 other prospective jurors who were "blank slates," who had not, based on their own answers to the jury questionnaire, demonstrated the biases exhibited by Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., juror nos. 5, 6, 15, 12, 17, 19, 20, 23 and 26. To avoid the appearance of bias, the trial court should have simply excused Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F, and replaced them with 9 of the other 56 prospective jurors. Second, given that the trial court kept Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F. on the venire, the trial court should have examined each of them more fully regarding their beliefs and opinions, and their exposure to pre-trial publicity. Jury selection

started on the morning of July 23, 2013 at 8:00 a.m. and by 2:00 p.m. the jury had been selected. A-Ap.106-107. As such, the jury selection process was fast and short especially considering the gravity of the charges and the extent of the pre-trial publicity. Perhaps both a reason for and a consequence of such an abbreviated process is that the trial court did not provide for a comprehensive examination of each prospective juror, especially those who presented beliefs or opinions which made them ripe for dismissal. With respect to James T., John A., and Mandy F., the trial court did not ask any questions which sufficiently probed the circumstances and impact of pre-trial publicity on their beliefs that Lepsch was guilty and that they had "made up" their minds. The trial court similarly did not ask any questions that probed the inherent conflict of having one's mind "made up" and having the ability to lay aside such belief and decide the case solely on the evidence. The trial court never asked James T., John A., and Mandy F. if they themselves believed they could be fair and impartial. With respect to Christopher R., the trial court never asked Christopher R. any questions which probed his belief that defendants proceeding to trial were "probably" guilty, that the presumption of innocence should not apply in all cases, and that a presumption of guilt should exist in some cases. Finally, as discussed

throughout this brief, the trial court made no mention of, or applied, the requirement that a juror provide "unequivocal assurances."[8] In ignoring or dismissing this standard, the trial court could not conduct a legally sufficient inquiry into those circumstances which created, at the very least, the "appearance or likelihood" of bias. The trial court's obligation to conduct a sufficient inquiry to avoid the "appearance or likelihood" of bias under the 6th Amendment required it to apply the proper legal standard. It did not. Given the severity of the charges against Lepsch, the extent of the pre-trial publicity, and the nature of the biases expressed by the prospective jurors, a reviewing court cannot fairly look at the voir dire of James T., John A., Mandy F., and Christopher R., and conclude that such voir dire satisfied the trial court's independent obligation to safeguard Lepsch's right to an impartial jury and to due process.

E. Lepsch did not receive a trial by an impartial jury under Article I, Section 7 of the Wisconsin Constitution because jury included jurors who were subjectively and objectively biased under Wisconsin law.

Like the 6th Amendment, Article I, Section 7 of the Wisconsin Constitution, provides a defendant with the right to an impartial jury. The presence of

[8] Similarly, the trial court in denying Lepsch's motion for new trial, expressly rejected federal precedent with respect to juror impartiality, and applied only Wisconsin law, specifically, **Lindell** and **Erickson**. This was error.

Christopher R., James T., Nathan N., John A., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., or any one of them, on the jury, violated such right in that such jurors were subjectively and objectively biased under Wisconsin law. "Subjective bias" refers to bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind. **State v. Faucher**, 227 Wis.2d 716. Discerning whether a juror exhibits this type of bias depends upon that juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those responses. **State v. Lindell**, 245 Wis.2d at 711. "Objective bias" refers to whether the reasonable person in the individual prospective juror's position could be impartial. See **State v. Faucher**, 227 Wis.2d at 718. When assessing whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case. **Id**. When a prospective juror is challenged on voir dire because there was some evidence demonstrating that the prospective juror had formed an opinion or prior knowledge, the question of whether the juror should be removed for cause turns on whether a reasonable person in the prospective juror's position could set aside the opinion or knowledge. See **id.** at p.719. When determining whether a defendant should receive a new trial because of

extraneous, prejudicial information reached by one or more jurors prior to the verdict, the objective inquiry is whether there is a reasonable possibility that the information in [the juror's] possession would have a prejudicial effect upon a hypothetical average juror. See **id**. "Objective bias" exists where the record does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. See **State v. Ferron**, 219 Wis.2d 481, 485, 579 N.W.2d 654 (1998).

In Section C, Lepsch discussed the beliefs and opinions maintained by Christopher R., James T., Nathan N., John A., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., which precluded them from being "impartial" under the 6th Amendment. Those same beliefs and opinions made these jurors subjectively and objectively biased under Wisconsin law, and precluded them from being "impartial" under Article I, Section 7. James T., John A., Mandy F., and Lisa K. all believed Lepsch was guilty before hearing even one piece of evidence. Such belief made each individual subjectively and objectively biased. Of course, James T., John A., and Mandy F. also believed that their minds were "made up." Such belief similarly made each individual subjectively and objectively biased. John A. and Lisa K., along with Christopher R., Nathan N., Pamela H., Darrick M., and Roxanne F., also

believed that police officer witnesses were more credible than other witnesses. This belief as well made each individual subjectively and objectively biased. Finally, with respect to Christopher R., on top of his bias regarding the credibility of police officers, his beliefs that those defendants proceeding to trial were "probably" guilty, that the presumption of innocence should not apply in all cases, and that a presumption of guilt should exist in some cases, also made him subjectively and objectively biased. Lepsch maintains that each juror was subjectively biased based on the mind set expressed by each one. Lepsch maintains that each juror was objectively biased because the record, namely the voir dire of each juror, failed to support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge.

F. Trial counsel was ineffective in failing to sufficiently examine and challenge prospective jurors for cause

When a venireperson expressly admits bias on voir dire, without a court response or follow-up, for counsel not to respond in turn is simply a failure "to exercise the customary skill and diligence that a reasonably competent attorney would provide." **Hughes v. United States**, 258 F.3d at 462.

Additionally, the failure to attempt to bar the seating of obviously biased jurors constitutes ineffective assistance of counsel of a fundamental degree. See **Johnson v. Armontrout**, 961 F.2d at 756. Similarly, under Wisconsin case law, a lawyer's failure to act to remove a biased juror who ultimately sat on the jury constitutes deficient performance resulting in prejudice to his or her client. See **State v. Carter**, 2002 WI App 55, ¶15, 250 Wis.2d 851, 641 N.W.2d 517. As discussed in Sections C and D above, James T., John A., Mandy F., Lisa K., Christopher R., Nathan N., Pamela H., Darrick M. and Roxanne F. openly expressed opinions and beliefs which precluded them from being considered impartial under both the 6th Amendment and Article I, Section 7 At a minimum, trial counsel therefore should have examined each prospective juror thoroughly with respect to the opinions or beliefs each expressed and made sure that each prosective juror provided the requisite "unequivocal assurances." Trial counsel failed to do so. Trial counsel also failed to challenge such jurors for cause. These omissions by trial counsel constituted deficient performance. Given that trial counsel's omissions resulted in the seating of biased jurors, prejudice is presumed. See **Hughes v. United States**, 258 F.3d at 463. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction. **United**

States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). Failure to remove biased jurors taints the entire trial, and therefore...[the resulting] conviction must be overturned." **Hughes v. United States**, 258 F.3d at 463, citing **Wolfe v. Brigano**, 232 F.3d 499, 503 (6th Cir. 2000).

III. Lepsch is entitled to a new trial because the trial court deprived him of due process and the right to an impartial jury under the 6th and 14th Amendments to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution, by arbitrarily depriving Lepsch of 1)right to receive proper number of peremptory strikes, 2)right to full use of peremptory strikes, and 3)right to have biased jurors removed.

When a state grants criminal defendants certain statutory rights, it may create a "substantial and legitimate expectation" on their part that they will not be deprived of their liberty in violation of such rights. **Oswald v. Bertrand**, 249 F. Supp.2d at 1101 citing **Hicks v. Oklahoma**, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). If the state arbitrarily disregards the rights it has created, it may be found to have violated due process of law. **Id**.

A. Trial court failed to provide Lepsch with proper number of peremptory strikes.

Under Wis. Stat. Sec. 972.03, because Lepsch faced a charge made punishable by life imprisonment, he was entitled to six (6) peremptory strikes. Because the trial court also selected an alternate juror, actually, three (3) alternate jurors, Lepsch was entitled, also under Section 972.03, to one additional peremptory strike which would have properly given him seven (7) peremptory strikes. The trial court gave Lepsch only 6 peremptory strikes, A-Ap.106-07, and committed error in doing so.

B. Trial court's failure to remove biased jurors for cause deprived Lepsch of full use of his peremptory strikes.

A district court's decision to excuse a juror for cause is subject to an abuse of discretion standard. See **Marshall v. City of Chicago**, 762 F.3d at 576. Wisconsin statute provides that "[i]f a juror is not indifferent in the case, the juror shall be excused." See Wis. Stat. Sec. 805.08(1). Where a defendant is forced to use most or all of his peremptory strikes to strike jurors who should have been properly excused by the trial court for cause, the error is harmful. See **State v. Sellhausen**, 2012 WI 5,¶17, 338 Wis.2d 286, 809 N.W.2d 14

citing **State v. Lindell**, supra at ¶113. Similarly, the **Sellhausen** Court cited **Pool v. Milwaukee Mechanics' Ins. Co.,** 94 Wis. 447,453, 69 N.W.65 (1986) for the proposition that "The true rule, we hold, is…that it is not prejudicial error to overrule a challenge for cause, unless it is shown that an objectionable juror was forced upon the party, and sat upon the case after such party had exhausted his peremptory challenges. **Id**. at ¶17. In this case, Lepsch was forced to utilize all of his peremptory strikes to exclude certain jurors who should have been excused by the trial court for cause. These jurors included Robert B., Mary S., Beverly R., Mary Sw. and Stephen H., juror nos. 8, 10, 16, 22 and 27. Because Lepsch was required to exhaust his peremptory strikes on these jurors, he did not have sufficient strikes left to exclude other objectionable jurors, specifically, Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., and such objectionable jurors therefore sat upon the case much to Lepsch's prejudice. This problem was exacerbated by the fact that the trial court improperly gave Lepsch six (6) peremptory strikes as opposed to the seven (7) required by statute. Significantly, had the trial court properly excused Robert B., Mary S., Beverly R., Mary Sw. and Stephen H., for cause, and given Lepsch the one additional peremptory strike to which he was entitled,

Lepsch could have used 4 of those 7 peremptory strikes to exclude James T., John A., Mandy F., and Lisa K., the jurors who had expressed the belief that Lepsch was "guilty" and the belief that they had "made up (their) minds" about Lepsch's guilt. Lepsch additionally could have excluded Christopher R., the juror who did not believe in the presumption of innocence "100%" of the time and instead thought that in some cases there should be a presumption of guilt.

Like James. T., John A., Mandy F. and Lisa K., prospective jurors Robert B., Beverly R., and Mary Sw., in answering the jury questionnaire, expressed the belief that Lepsch was guilty. Robert B. and Mary Sw. also expressed that each had "made up (his or her) mind" that Lepsch was guilty.[9] Robert B., along with other prospective jurors Mary S. (prospective juror no. 10), and Stephen H. (prospective juror no. 27), expressed the belief that witnesses who were police officers were more credible than non-police officer witnesses. Mary Sw. (prospective juror no. 22) additionally knew and personally interacted with A.J. and Paul Petras at their store. Beverly R. (prospective juror no. 16), additionally had a

[9] Robert B.'s questionnaire is not included in the record.

daughter who was attacked by a parolee. Mary S. (prospective juror no. 10), additionally knew Paul Petras's sister. Lepsch maintains that all of these prospective jurors were not impartial as required by federal and state law and the trial court should have excluded them for cause. Because the trial court failed to do so, Lepsch was required to exhaust all of his peremptory challenges to exclude them, thereby preventing Lepsch from using such strikes to exclude other objectionable jurors. As a result, the other objectionable jurors sat upon the case. The circumstances were therefore harmful and prejudicial under the principles of **Pool, Sellhausen** and **Lindell**.

C. Trial court should have excluded five prospective jurors for cause because such prospective jurors were not impartial under the 6th Amendment, and because they were subjectively and objectively biased under Wisconsin law.

The presiding trial judge has the authority and responsibility, either *sua sponte* or upon counsel's motion, to dismiss prospective jurors for cause. **United States v. Torres**, 128 F.3d at 43, quoting **Frazier v. United States**, 335 U.S. 497 at 511. In this case, the trial court should have exlcluded Robert B., Mary S., Beverly R., Mary Sw. and Stephen H. for cause.

Robert B., 206:.42-49, A-Ap.247-254

In answering the written jury questionnaire, Robert B. expressed the belief that Lepsch was guilty and that he had made up his mind as to Lepsch's guilty. 206:44,47; A-Ap.249. Robert B. also expressed the belief that law enforcement witnesses were more credible than non-law enforcement witnesses. 206:46-47.; A-Ap.251-252. Finally, Robert B. indicated that when he was about 12 years of age, his brother was shot and killed while working in a convenience store. 206:45-47; A-Ap.250-252. Lepsch maintains that the above factors precluded Robert B. from being impartial and that the trial court should have excused Robert B. for cause. Under state law, these beliefs and the underlying record made Robert B. both subjectively and objectively biased. Under the 6th Amendment, for the record to sustain a finding of impartiality, Robert B. had to give unequivocal assurances that he could set aside his beliefs as to these three areas of bias, and decide the case solely on the evidence. Robert B. did not do so. As to Robert B.'s capacity to "set aside" his beliefs, the closet we come to this requirement is where both the prosecutor and trial counsel elicited statements from Robert B. that he could set aside his beliefs that Lepsch was guilty and that his mind was made up 206:44, 48; A-Ap.249, 253. But there are no such affirmative statements

about Robert B.'s capacity to set aside information about his brother's murder and his belief that law enforcement witnesses were more credible than non-law enforcement witnesses. Finally, nowhere in the record is there an unequivocal statement by Robert B. that he could decide the case solely on the evidence. The record as such is deficient in terms of establishing the requisite unequivocal assurances by Robert B. For these reasons, the trial court therefore should have excused Robert B. for cause.

Mary Sw., 206: 119-125; A-Ap.255-272

In answering the written jury questionnaire, Mary Sw. expressed the belief that Lepsch was guilty and that she had made up her mind as to Lepsch's guilt. 206:120.; A-Ap.261. In answering whether she would have "difficulty putting such feelings out (her) mind if (she) were chosen as a juror," Mary Sw. initially checked the box, "yes." 206:120; A-Ap.267. Mary Sw. then crossed out such response and checked, "no." 206:120; A-Ap.267. When the trial court asked Mary Sw. for an "explanation" as to the change in her answers, Mary Sw. responded that she "would try my best." 206:120; A-Ap.267. When pressed by the trial court, Mary Sw. again responded that, "Well, I would try my best….." A-Ap.267-268. When the trial court pressed further, Mary Sw. once more responded, "I think I would try, sure…,"

206:120-121; A-Ap.267-268. Mary Sw.'s responses plainly demonstrated that she could not and did not give the requisite unequivocal assurances that she could set aside her belief that Lepsch was guilty and that her "mind was made up" as to Lepsch's guilty. Mary Sw.'s responses were clearly contradictory and equivocal. Significantly, Mary Sw.'s repeated statements that she "would try" to set aside her beliefs as to Lepsch's guilt were patently the type of statements that have been rejected by the Seventh Circuit and other federal appellate courts as constituting "unequivocal assurances;" see **Thompson v. Altheimer & Gray**, supra at 626, (juror's statement that she would "try to be fair," required excusal); **Wolf v. Brigano**, supra at 503, (juror's statement that she "would try to decide this case on the evidence presented at trial," was insufficient). Of course, statements by two jurors that they would "try" to set aside their beliefs and decide the case only on the evidence were similarly rejected as deficient in **Oswald v. Bertrand**, supra at 1105-1107. As such, Mary Sw. clearly did not provide the unequivocal assurances necessary for a juror to be characterized as impartial. On this basis alone Mary Sw. should have been excused for cause. But there was another consideration which precluded Mary Sw. from being impartial. Mary Sw. had previously interacted at the store with one of the alleged victims, A.J.

Petras, who she characterized as very nice, very accommodating. 206:124; A-Ap.271. Mary Sw. additionally stated that her realization that A.J. Petras was involved in the case made her feel bad. 206:124; A-Ap.271. When trial counsel asked Mary Sw. if the memory of interacting with A.J. Petras was going to impact her while she was in the jury room thinking about the case, Mary Sw. responded, "I don't think so, no." 206:124; A-Ap.271. Lepsch maintains that such response, especially when coupled with Mary Sw.'s beliefs about Lepsch's guilt, was not sufficiently unequivocal. Such response reflected hesitancy and uncertainty. Mary Sw. as such did not provide unequivocal assurances that she could set aside her personal memories of her personal interaction with A.J. Petras. Mary Sw. similarly did not provide any assurance that she could render a verdict based solely on the evidence. The beliefs expressed by Mary Sw. and the underlying record established that she was subjectively and objectively biased under Wisconsin law, and not impartial for purposes of the 6th Amendment. For these reasons, the trial court therefore should have excused Mary Sw. for cause.

Beverly R., 206:94-102; A-Ap.273-292

In answering the written questionnaire, Beverly R. expressed the belief that Lepsch was guilty. 206:95-96; A-Ap.279. When asked by the trial court whether she could set aside the information she had obtained through the media, Beverly R. responded, "I would hope so." 206:95; A-Ap.285. When the prosecutor asked Beverly R. if she would have "difficulty focusing your attention on the evidence in the courtroom and making a decision based on that rather than what you've heard or read previously," Beverly R. responded, "I think I could." 206:96; A-Ap.286. Trial counsel then pressed Beverly R. about whether she could set aside what she read in the newspaper and Beverly R. responded, "You know, I think I can; but, um, it's—it's hard not to—this case was such a huge one that it's hard just to erase everything that you have heard –or I've heard." 206:97; A-Ap.287. Trial counsel pressed further and clarified that "neither are we asking you to erase it. We're asking you to set it aside and only look at the evidence that's presented in the courtroom about the case. That's what we're asking you to do…" 206:97; A-Ap.287. Beverly R. responded, "You want me to say yes." 206:97; A-Ap.287. Trial counsel then said, "I want you to say yes or no, whatever is your honest belief about that." 206:.97-98; A-Ap.287-288. Beverly R. then said, "I think I could."

206:98; A-Ap.288. Beverly R.'s statements evinced clear uncertainty and doubt about her ability to set aside her beliefs. Beverly R.'s statement to trial counsel, "You want me to say yes" screamed out that although she recognized what was wanted from her, that is, an unequivocal assurance of impartiality, she just could not give it. The trial court should have recognized that such hesitancy and uncertainty failed to comprise the type of unequivocal assurance needed for an impartial juror. The trial court failed to do so. Plus, there were further problems with Beverly R. Trial counsel asked Beverly R. about the fact that her daughter, at the age of 14, had been sexually assaulted by a parolee. 206:.98; A-Ap.288. Trial counsel specifically asked about Beverly R.'s feelings about the criminal justice process. 206:.98; A-Ap.288. Beverly R. responded that "It was difficult." 206:98; A-Ap.288. Significantly, there was no statement by Beverly R., let alone unequivocal assurance by Beverly R., that she could set aside her feelings about her daughter's assault and the way it was handled in the criminal justice process. Together with Beverly R.'s exposure to the pre-trial publicity and her belief in Lepsch's guilt, Beverly R.'s own experience with the criminal justice system established that she was subjectively and objectively biased under Wisconsin

law, and precluded a finding that she was impartial for purposes of the 6th Amendment. The trial court should have excused Beverly R. for cause.

Stephen H., 206:148-151; A-Ap.293-308

Stephen H.'s written responses to the jury questionnaire indicated that he believed that law enforcement witnesses were more credible than non-law enforcement witnesses. A-Ap.297. The voir dire of Stephen H. failed to demonstrate unequivocal assurances that he could set aside such belief. The voir dire similarly failed to demonstrate the Stephen H. could return a verdict based solely on the evidence. Of the trial court, the prosecutor and trial counsel, only trial counsel asked Stephen H. about his belief as to the credibility of law enforcement witnesses. Trial counsel asked Stephen H. if he could "set aside what your expectations are and assess the person and the evidence and the testimony that come from them by what you hear in the courtroom. Do you have a problem with doing that for the police?" 206:151; A-Ap.307. Stephen H. answered by saying, "I don't think so," and then "I'm not sure." 206:151; A-Ap.307. Trial counsel then asked, "…I guess I'm asking you to answer yes or no, can you set that stuff aside and be objective about--," to which Stephen H. responded, "I think I can be objective."

206:151; A-Ap.307. Stephen H.'s responses as such were not unequivocal. The statement, "I'm not sure," plainly demonstrated uncertainty and hesitancy about Stephen H.'s capacity to set aside his belief. Moreover, the voir dire failed to demonstrate any assurance, unequivocal or otherwise about Stephen H.'s capacity to return a verdict based solely on the evidence. Stephen H.'s voir dire responses therefore failed to establish the unequivocal assurances necessary for a finding of impartiality under the 6th Amendment. Such responses similarly established that he was subjectively and objectively biased under state law. For these reasons, the trial court should have excused Stephen H. for cause.

Mary S., 206:52-60; A-Ap.309-327

Mary S.'s written responses to the jury questionnaire indicated that she believed that law enforcement witnesses were more credible than non-law enforcement witnesses. A-A.313. Mary S. also indicated that she knew Paul Petra's sister, a Mary Stark. For six or seven years, she was a neighbor to Ms. Stark and her family. 206:53; A-Ap.321. The family's eldest son and Mary S.'s youngest son played football together. 206:53; A-Ap.321. Another Stark

son was also on a ball team with one of Mary S.'s sons, so the families occasionally ran into each other. 206:53; A-Ap.321. Both families got along well. 206:55; A-Ap.323.

The voir dire of Mary S. failed to demonstrate unequivocal assurances that Mary S. could set aside her belief that law enforcement witnesses were more credible than non-law enforcement witnesses. The closest Mary S. came was where the trial court asked Mary S. if she would follow an instruction that "all witnesses were to be judged the same credibility, um, using everything that we use as human beings to determine whether somebody is giving us a lie or telling us the truth." 206:54; A-Ap.322. Mary S. responded, "I believe I would." 206:54; A-Ap.322. Such response was not sufficient. Mary S.'s response did not provide unequivocal assuarance that she could set aside her belief. Her response merely indicated that she "believed" she would follow an instruction. Also, "believing" that one could or would do something is not the same thing as affirmatively stating that one would or could do something. Additionally, Mary S.'s response did not establish that she could return a verdict based solely on the evidence.

With respect to Mary S.'s feelings towards the victims' family due to her own relationship with the family, trial counsel asked Mary S. if she was able to set

aside and not consider "things about the Starks or Petrases" outside of this case." 206:57; A-Ap.325. Mary S. indicated on voir dire that "Yes, I *think* I could separate that." 206:57; A-Ap.325. With respect to whether Mary S. had more sympathy toward people in the case because she knew them, Mary S. indicated, "*I would like to say, no*, I don't *think* so." 206:.58; A-Ap.326. Mary S.'s responses in this regard failed to constitute an unequivocal assurance that she could set aside her personal knowledge of and feelings for the victims' family. Mary S.'s statement that "I would like to say no, I don't think so," plainly evinced doubt and uncertainty. "Wanting to say no" is not the same as saying no. The statement inherently reflected equivocation. Similarly, "thinking" that one could set aside one's beliefs or feelings is not the same thing as providing an unwavering affirmation that one can. The trial court should have excused Mary S. for cause due to her belief regarding the credibility of law enforcement witnesses and her personal feelings towards the victims' family. Such beliefs and the underlying record established that Mary S. was subjectively and objectively biased under state law, and precluded a finding that she was impartial under the 6th Amendment.

D. Trial counsel was ineffective in utilizing Lepsch's peremptory strikes and in failing to challenge prospective jurors for cause

As discussed earlier in this brief, Lepsch should have received seven rather than six peremptory strikes. Trial counsel failed to note this problem and take proper steps to correct it. As a result, trial counsel had one less peremptory strike to work with when he could have used all the strikes that he could get. Making matters worse, trial counsel used five of Lepsch's six peremptory strikes to exclude prospective jurors which should have been challenged for cause. As discussed earlier in this brief, trial counsel had an obligation to challenge for cause any biased venire person, see **Hughes v. United States,** 258 F.3d at 463-464, and to attempt to bar the seating of obviously biased jurors, see **Johnson v. Armentrout**, 961 F.2d at 755. Trial counsel failed to do so. Trial counsel did not challenge Robert B., Mary Sw., Beverly R., Stephen H. and Mary S. for cause due to their various biases, but instead chose to exclude them through use of Lepsch's peremptory strikes. Such conduct by trial counsel was deficient and prejudicial. Because trial counsel exhausted his peremptory strikes on these prospective jurors, prospective jurors who should have been excluded for cause, he did not have sufficient strikes left to apply to other objectionable jurors, specifically, Christopher R.,

James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., and such objectionable jurors therefore sat upon the case. Given that trial counsel's omissions resulted in the seating of biased jurors, prejudice is presumed. See **Hughes v. United States**, 258 F.3d at 463, and **State v. Carter**, 2002 WI App 55, at ¶15.

Conclusion

For all reasons stated in this brief, this Court should reverse and remand the case for a new trial.

Respectfully submitted,

BY:_____/s/_____ _____day of February 2015

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic petition is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served upon all opposing parties.

Dated this ____day of February 2015.

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CERTIFICATION

I hereby certify that this petition meets the form and length requirements of Wis. Stat. Rules 909.62(4) and 809.19(8)(b) and (d) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 12967 words.

Dated this _____day of February 2015

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