STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2813-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY P. LEPSCH,

Defendant-Appellant.

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

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

The State rephrases the issues on appeal as follows:

1. Whether the administration of the oath to the jury venire is part of "voir dire" within the meaning of Wis. Stat. § 971.04(1)(c), thereby entitling Lepsch to be present.

Because the administration of the oath to the jury venire is not part of "voir" dire" within the meaning of Wis. Stat § 971.04(1)(c), Lepsch's due process rights were not violated when he was not present for the oath's administration.

2. Whether the trial court violated Lepsch's Sixth and Fourteen Amendment rights to an impartial jury when it seated jurors who were biased based on their answers to a pre-trial questionnaire and/or their answers during voir dire.

   Because Lepsch has failed to prove that the trial court seated any jurors who were either subjectively or objectively biased, Lepsch's Sixth and Fourteen Amendments rights to an impartial jury were not violated.

3. Whether Lepsch's trial counsel provided ineffective assistance during the voir dire process.

   Lepsch cannot prove deficient performance. His attorney's trial strategy was reasonable under the prevailing professional norms. Even if his attorney was deficient, Lepsch cannot prove prejudice, as he has failed to prove that there is a reasonable probability that, but for counsel's errors, he would not have been convicted.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

It is the State's position that the issues in this case can be resolved by applying well-established decisions and legal principles to the facts of this case. It does not request oral argument or publication.

SUPPLEMENTAL FACTS AND PROCEDURAL BACKGROUND

While committing a robbery of Paul Petras' store, May's Photo, Lepsch shot and killed Petras and his nineteen-year-old son, Andrew (5; A-Ap. 100-02).

Evidence at trial showed that Lepsch walked into the store with a hood over his head (208:24-25). Lepsch shot Paul twice: once in the neck and once in the head (207:151-52). Lepsch shot Andrew in head also, but Andrew additionally suffered blunt-force impact to the head, consistent with someone striking his head with a gun (207:157, 158, 173).

Lepsch left the store in a van carrying baggage with $17,000 worth of stolen camera equipment (208:27-28, 39). Police found Andrew's body near the store's safe and Paul's body in the store's bathroom, just hours after Sherri Petras discovered them, when she went to check on her husband and son (207:55, 177, 184).

Surveillance video, cell phone records, and vehicle records led police to Lepsch's home (208:50-51, 54-55, 87). At trial, investigators traced the equipment stolen from May's Photo to Lepsch (208:96-112, 123-135).

A jury deliberated less than five hours after a six-day trial and found Lepsch guilty of two counts of first degree intentional homicide, armed robbery with the use of force, and possession of a firearm by a felon (169-172; 211:86-87). The court sentenced Lepsch to consecutive life terms without extended supervision (176:1; A-Ap. 103-05).[1]

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[1] On the count of armed robbery with use of force, the court sentenced Lepsch to 25 years initial confinement followed by 15 years extended supervision (176:2). On the count of possession of a firearm by felon, the court sentenced Lepsch to 5 years initial confinement followed by 5 years extended supervision (*id.*). Both sentences were to run consecution to each other (*id.*).

Lepsch moved for postconviction relief, requesting a new trial (188). He argued, *inter alia*, that his constitutional right to due process was violated because he was denied the right to an impartial jury, and he also argued that he received ineffective assistance of counsel (188:1, 39).

The court held a *Machner* hearing at which Lepsch's counsel testified (213). After the hearing, the court issued a decision denying Lepsch's motion (200; A-Ap. 328-47).

The Postconviction Court's Decision:

1. Right to an Impartial Jury

a. Failing to administer the oath in the jury panel's presence.

Lepsch argued that his right to an impartial jury was violated because the jury panel in this case was sworn prior to the beginning of voir dire, when neither Lepsch nor his attorney was present. On this issue the postconviction court concluded, "If Lepsch did have a right to have the jury sworn in his presence, denial of that right does not entitle him to a new trial," (200:3; A-Ap. 330). Rather, agreeing with the State, the court concluded, "an error relating to the administration of the jury oath is subject to a harmless error analysis" (*id*.).

The court then concluded that, "even assuming, without finding, that failure to administer the jury oath in Lepsch's presence constituted error, such error was not prejudicial to Lepsch" (200:4; A-Ap. 331). It noted that "Lepsch could not have learned anything about any prospective jurors from their recitation of the oath or gained any useful knowledge from observing it. Therefore, any error would be harmless" (200:4-5; A-Ap. 331-32.).

b. Juror bias.

Lepsch also argued that nine jurors were biased. The court rejected this claim, first noting that it "took extra precaution to ensure an impartial jury"(200:6; A-Ap. 333). It found that it was "absolutely certain" that Lepsch was tried by a fair and impartial jury, and it relied on Lepsch's attorney's testimony at the *Machner* hearing:

> My recollection . . . generally of the voir dire . . was that the people I didn't move to strike for cause answered and appeared to be genuine . . . in the way they were talking to me about their intent to set aside any bias they had about stuff they'd seen in the media; and sometimes the way they said it was more a figure of speech, I think I can, which I took to mean them saying yes. . . . I didn't see the benefit to Mr. Lepsch's case, in pursuing them and getting them to say the word "yes" when . . . I felt they had conveyed to me that they could be objective . . . in the way they were responding to me. In fact, I thought there was some utility in not offending the individuals of the jury or offending the larger group by badgering them when I already felt I understood their answer.

(200:9; A-Ap. 336, citing 213:43). The court found that it was "able to best determine juror bias," and that it was convinced that each juror was able to put aside any potential biases (200:10; A-Ap. 337).

c. Peremptory Challenges.

Lepsch's final argument regarding his right to an impartial jury was that the trial court allotted an incorrect number peremptory challenges. The postconviction court acknowledged that both parties received one fewer peremptory challenge than was permitted under Wis. Stat. § 972.03 (200:10; A-Ap. 337). But it concluded that none of the jurors "who ultimately sat were biased" (200:12; A-Ap. 339). It also concluded that the error was harmless: "Since both the State and Lepsch were given the same number of challenges, and Lepsch was not 'forced' to use his peremptory challenges to strike biased jurors, the error in

granting the parties only six strikes was harmless" (200:13; A-Ap. 340).

Finally, addressing all of Lepsch's right-to-an-impartial-jury claims, the postconviction concluded that "[b]ecause a defendant's right is to a fair, impartial jury, not to the exact jury that the defendant prefers, [*State v.*] *Sellhausen*, [2012 WI 5, ¶39, 338 Wis. 2d 286, 809 N.W.2d 14] Lepsch is not entitled to a new trial" (200:14; A-Ap. 341).

2. Ineffective Assistance of Counsel

In his postconviction motion, Lepsch argued that his attorney's "collective" performance was ineffective (188:39-40). The court disagreed, concluding that Lepsch's attorney was not deficient (200:18; A-Ap. 345). It opined that his attorney's trial strategy regarding jury selection was "well prepared" and "clear" (200:19; A-Ap. 346). Citing to Lepsch's attorney's testimony at the *Machner* hearing, the court noted that Lepsch's counsel testified that he:

> Wanted jurors to be skeptical of professionals and police because there were forensic issues in this case that were important. . . We wanted people that would look at the theory of confirmation bias, that the police made up their mind early in the case; and . . . failed to do a thorough examination because they had made their minds up.

(200:19; A-Ap. 346, citing 213:40). The court concluded that it would "not overturn such well-thought out strategic decisions made by a team of three experienced, well-qualified defense attorneys" (200:20; A-Ap. 347).

Lepsch appeals.

ARGUMENT

I. The administration of the oath to the jury venire is not part of "voir dire" within the meaning of Wis. Stat. § 971.04(1)(c). Therefore, Lepsch's due process rights were not violated because he was not entitled to be present.

Whether a defendant has been denied his right to due process is a question of constitutional fact that this Court reviews de novo. *State v. Fawcet*t, 145 Wis. 2d 244, 250, 426 N.W.2d 91, 94 (Ct. App. 1988). Both the United States and Wisconsin Constitutions grant a defendant the right to be present and to have counsel present during every critical stage of a criminal proceeding, including during jury voir dire. U.S. Const. amends. VI and XIV; Wis. Const. art. I, § 7. A defendant also has a statutory right to be present during voir dire of the jury. Wis. Stat. § 971.04(1)(c). The right to be present during voir dire and the right to have counsel present during voir dire cannot be waived. *State v. Harris*, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999).

The jury panel in this case was sworn prior to the beginning of voir dire. Neither Lepsch nor his attorney was present, and the clerk, as opposed to the trial judge, administered the oath (189:14).[2] Lepsch argues that because

[2] As Lepsch points out, Wis. Stat. § 805.08(1) provides that the "court shall examine on oath each person who is called as a juror" (emphasis added). Wisconsin Stat. § 756.001(5) provides that judges may delegate responsibility for administering the jury system to the clerk of the circuit court. Where delegation occurs, the clerk is responsible to "select and manage juries under the policies and rules established by the judges in that circuit." Wis. Stat. § 756.001(5). The State did not provide testimony at the *Machner* hearing whether there is such a delegation to clerks. However, in the court's postconviction decision, it stated: "In this case, and, in fact, in every jury case in this county for many years, La Crosse County Clerk of Circuit Court Pamela Radtke administered the oath, required by Wis. Stat. § 805.08(1), to the prospective jurors before bringing them into the courtroom" (A-Ap. 329-30).

the clerk administered the oath outside of his presence, his constitutional right to be present at all critical stages of trial was violated (Lepsch Brief at 6). The State disagrees.

First, Lepsch never raised this issue below, and so it is deemed forfeited. *See, e.g., State v. Huebner,* 2000 WI 59, ¶¶10-11 & n.2, 235 Wis. 2d 486, 611 N.W.2d 727 (providing that the forfeiture rule gives the parties and court notice of the issue and a fair opportunity to address the objection). While Lepsch argues that he "never received notice of a possible infringement on his public trial rights" (Lepsch Brief at 8), Lepsch's attorney made no inquiry about the administration of the oath to the jury. Had trial counsel believed that the oath was not properly administered, an objection would have easily remedied the problem.

Reaching the merits of Lepsch's claims, Lepsch argues that under *Harris*, his right to be present at "all proceedings when the jury is being selected" includes the administration of the oath to prospective jurors (Lepsch Brief at 6). But *Harris* was decided under a prior version of Wis. Stat. § 971.04(1)(c) (1995-96), which provided that a defendant shall be present "[a]t all proceedings when the jury is being selected." Wisconsin Stat. § 971.04(1)(c) (2013-14) now provides that a defendant shall be present "[d]uring voir dire of the trial by jury." Therefore, the State submits that the appropriate inquiry in this case is the following: whether the administration of the oath is part of "voir dire" within the meaning of Wis. Stat. § 971.04(1)(c)? The State submits that it is not.

Whether the administration of the oath is part of "voir dire" within the meaning of Wis. Stat. § 971.04(1)(c) presents a question of law, subject to de novo review. *See State v. Gribble*, 2001 WI App. 227, ¶13, 248 Wis. 2d 409, 636 N.W.2d 488 (providing, "[w]hether the trial court's questioning here of the prospective jurors on hardship and infirmity reasons for not serving is a critical stage of the trial under the constitutional standard presents a question of law, which we review de novo.").

Gribble provides guidance on this issue. In that case, the trial court questioned jurors outside of the defendant's presence on whether "they had reasons of hardship or infirmity for not being able to serve as jurors." 248 Wis. 2d 409, ¶7. The defendant argued that this violated his constitutional and statutory right to be present "at every critical stage of the proceedings." *Id.* ¶10. The postconviction court ruled that his rights had not been violated because its questioning was "part of the court's administrative duties." *Id*. On appeal, this Court agreed.

This Court held that "[t]his type of questioning by the court does not implicate the purposes of voir dire that are the premise for a defendant's constitutional entitlement to be present with counsel." *Gribble,* 248 Wis. 2d 409, ¶16. The *Gribble* Court continued:

> [S]ince the questions are not directed at eliciting information on prospective jurors' backgrounds, or any other information that might reveal bias, there is no need for the defendant and counsel to be present in order to scrutinize gestures and attitudes to ensure impartiality. We therefore conclude that Gribble did not have a federal or state constitutional right to be present with counsel when the court questioned the prospective jurors to determine whether to excuse or defer service of any under § 756.03.

Id. (internal citations omitted). Therefore, this Court held that such questioning did not constitute "voir dire" within meaning of Wis. Stat. § 971.04(1). *Id.* ¶12. It noted that such questioning could be conducted by the clerk of court, and it concluded that the legislature could not have intended to require a defendant's presence when the judge or clerk was acting in an administrative capacity. *Id*. ¶18.

Administration of the oath to the jury panel is a similar administrative procedure. In administering the oath, courts are not ruling on bias or impartiality or parties' objections. They are performing in an administrative capacity. There is no reading of the evidence, no argument of counsel, and no colloquy between the judge and jury.

But Lepsch cites *Harris* for the proposition that when a the administration of the oath occurs outside the presence of the defendant and his counsel, reversible error occurs (Lepsch Brief at 6). "[D]eprivation of both the defendant's right to be present and to have counsel present during voir dire is reviewed on appeal for harmless error." *State v. Tulley,* 2001 WI App. 236, ¶7, 248 Wis. 2d 505, 635 N.W.2d 807. "Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction." *Id*. "A 'reasonable possibility' is one sufficient to undermine confidence in the outcome." *Id*. "The burden of proof is on the beneficiary of the error[3] to establish that the error was not prejudicial." *Id*.

In this case, Lepsch was not prejudiced by the administration of the oath – which the State submits is not constitute voir dire within the meaning of Wis. Stat. § 971.04(1)(c) – outside of his presence. He could not have objected to the giving of the oath, learned anything about the jurors from the performance of the oath, or gained any useful knowledge from observing the formality of having the jurors take the oath.

Further, *Harris* involved facts not present here: while the defendant and his counsel were not present, the circuit court had spoken at length with the entire venire, excusing several for cause but permitting others to serve on the jury that convicted Harris. 229 Wis. 2d at 835-36. This Court held that the circuit court's error was not harmless because the defendant and his counsel were not able to observe the responses of the jurors who remained on the panel and because the jurors who were not excused might have drawn negative inferences from Harris's absence. *Id*. at 844-45. But unlike *Harris*, in this case there is no allegation that the circuit court questioned the prospective jurors on anything

[3] As previously indicated, both parties were denied the extra peremptory strike.

outside of his presence, let alone matters relating to their ability to be fair and impartial.

Two other cases support the harmless error analysis. In *State v. Block*, 170 Wis. 2d 676, 489 N.W.2d 715 (Ct. App. 1992), this Court found the fact that the jury wasn't sworn until after several witnesses had testified to be harmless error. It cited numerous cases that found the failure to properly administer an oath is to be analyzed under a harmless error analysis. *Id*. at 681-682. Therefore, without a showing of prejudice, the fact that the jury was sworn outside the defendant's presence was not reversible error. *Id*. at 682. And, in *State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126, the defendant was not present for the court's questioning of two jurors during the trial to determine bias. Both attorneys were present, but not the defendant. *Id*. ¶4. The Supreme Court concluded that the trial court's decision to exclude the defendant did not deprive him of a fair trial:

> As the United States Supreme Court has outlined, the factors a trial court should consider in determining whether a defendant's presence is required to ensure a fair and just hearing include whether the defendant could meaningfully participate, whether he would gain anything by attending, and whether the presence of the defendant would be counterproductive. *United States v. Gagnon,* 470 U.S. 522, 527, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Alexander would not have been able to contribute anything to the circuit court's inquiry of the jurors, and may in fact have intimidated them if he had been present. Additionally, both of Alexander's attorneys were present at the in-chambers meetings. Alexander's absence thus did not violate his constitutional right to be present at his trial.

Alexander, 349 Wis. 2d 327, ¶4.

Lepsch also argues that the clerk's administration of the oath, which was provided in the "'jury assembly room'" – as opposed to "the courtroom in the presence of Lepsch, trial counsel and the public at large" – violated his right to a public trial (Lepsch Brief at 7, 8). He argues that such a

violation is structural in nature, that it "taints the entire framework of the trial," and is therefore not subject to the harmless error analysis (Lepsch Brief at 7-9). The State disagrees, as he is essentially arguing, again, that the administration of the oath is part of "voir dire" proceedings upon which he was entitled to be present. But as the State argued above (and to avoid redundancy), *Gribble, Block,* and *Alexander* reject such an argument. The administration of the oath to the jury venire is not part of "voir dire" within the meaning of Wis. Stat. § 971.04(1)(c). Therefore, Lepsch was not required to be present, and his absence from the oath's administration did not violate his right to a public trial.

Even if Lepsch did have a right to be present, the denial of that right does not entitle him to a new trial. *Tulley,* 248 Wis. 2d 505, ¶7. In this case, there is no reasonable possibility that the error contributed to Lepsch's conviction. As previously discussed, he could not have objected to the giving of the oath, learned anything about the jurors from their taking the oath, or gained any information from observing the administration of the oath.

II. Lepsch has failed to prove that the trial court seated jurors who were biased. Consequently, the trial court did not violate Lepsch's Sixth and Fourteenth Amendment rights to an impartial jury.

Lepsch argues that nine jurors who ultimately sat on the jury were biased. It is a fundamental principle that a criminal defendant has the right to a trial by an impartial jury. *State v. Faucher,* 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). "To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial." *Id.* There are three types of bias in examining whether a prospective juror or juror is impartial: statutory, subjective, and objective. *State v. Lindell*, 2001 WI 108, ¶¶34-36, 38, 245 Wis. 2d 689, 629 N.W.2d 223.

Lepsch maintains that all challenged jurors were both objectively and subjectively biased (Lepsch Brief at 11, 42-43). The Supreme Court has explained the inquiry into objective bias:

> [T]he focus of the inquiry into 'objective bias' is not upon the individual prospective juror's state of mind, but rather upon whether the reasonable person in the individual prospective juror's position could be impartial. 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. However, the emphasis of this assessment remains on the reasonable person in light of those facts and circumstances.... [W]hen 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, . . . 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 prior knowledge.

Faucher, 227 Wis. 2d at 718-19.

Regarding subjective bias:

> [W]hether a prospective juror is subjectively biased turns on his or her responses on *voir dire* and a circuit court's assessment of the individual's honesty and credibility, among other relevant factors. And just as was true of a circuit court's finding on actual bias, we believe that the circuit court sits in a superior position to assess the demeanor and disposition of prospective jurors, and thus, whether they are subjectively biased. Given the circuit court's superior position to so assess the demeanor and disposition of prospective jurors, we remain convinced that "[i]n most cases a circuit court's discretion in determining the potential for [subjective] juror impartiality or bias will suffice to protect a defendant's right to an impartial jury." On review, we will uphold the circuit court's factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous.

Id. at 718 (internal citation omitted). This Court has "been very hesitant to find a category of persons is per se biased."

Lindell, 245 Wis. 2d 689, ¶40. Claims of juror bias are subject to a harmless error analysis. *Id.* ¶80.

In *Lindell*, the Supreme Court quoted Justice Geske's dissent from another case, explaining a trial court's duty to investigate possible bias:

> "In almost every serious felony case, honest prospective jurors express concerns about the heinous factual allegations, the presumptions of innocence, a prior record, other acts testimony, a defendant's option not to testify, evaluating a police officer's testimony in the same manner as other witnesses, or the victimization of a child, elderly or disabled person. We encourage trial judges to explore those fears, biases, and natural reactions with the members of the prospective jury panel. Few people can honestly tell the court that they are bothered by some of these factors in the case and then absolutely, without equivocation, reassure the judge that they are certain they can disregard their concerns. Most honest people can only commit that they will do their best to be fair."

Lindell, 245 Wis. 2d 689, ¶101 (citation omitted). In this case, several of Lepsch's claims rest on the specific wording used by the jurors during voir dire, arguing that phrases such as, "I think so," or, "I believe so," are equivocal and, therefore, show bias. These claims were addressed by the Wisconsin Supreme Court in *State v. Erickson*, where the defendant made a similar argument:

> Erickson seizes largely on Juror L's answer of "I think so" to the circuit court's question of whether she would be able to fairly and impartially weigh the evidence. As the State noted in oral argument, the transcript cannot reveal Juror L's inflections when she stated those words. She may have stated them with timidity or she may have stated them with earnestness. An appellate court cannot know which is the more apt description.

227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999).

As *Erickson* explains, when spoken, a trial court is able to hear a juror's voice and volume, any hesitation or inflections, and it is able to witness a juror's nonverbal actions and eye contact. So to argue the phrases, "I think so," or, "I believe so," as read from the written transcript, show equivocation is insufficient to demonstrate a subjective or objective bias.

At the *Machner* hearing in this case, Lepsch's attorney testified that he took account into things like a juror's nodding of the head, eye contact, smiling or frowning, hand gestures, hesitations, and other things when communicating with the jurors (213:43-44). He testified that something he looks for "very specifically is how they're reacting to me with their countenance, their nonverbal response" (213:45). He further testified that it's "a specific strategic consideration I have going into a voir dire is how I'm interacting with the jury." *Id*.

With this *Machner* hearing testimony, and with the understanding that Lepsch has to demonstrate from the transcript that a juror was subjectively and/or objectively biased, and that the trial court should have *sua sponte* dismissed the juror for cause (Lepsch Brief at 15), the State now turns to the specific claims against jurors. Lepsch's attorney's testimony at the *Machner* hearing regarding some specific jurors is also discussed, as he claims ineffective assistance of counsel for failing to move to strike these jurors in Issue IV.

A. Jurors who had expressed an opinion about the Lepsch's guilt.

1. John A., Juror #15

Lepsch argues that three jurors had "made up"[4] their minds about Lepsch's guilt (Lepsch Brief at 30-32). Lepsch argues John A. was biased because he indicated in his questionnaire that he had expressed an opinion about Lepsch's guilt and that he had "made up" his mind (Lepsch Brief at 30-31). But when asked by the court as to his ability to base a decision on the evidence heard in the courtroom, John A. relied on his experience as a past juror and replied "I believe so . . . from my previous jury experience I was able to" (206:86).

There is nothing equivocal about this answer and no indication John A. was subjectively biased. Lepsch also fails to explain how this juror was objectively biased; there was no reason for the court to dismiss this juror for cause.

As the postconviction court recognized in its decision, regarding all prospective jurors who were challenged solely on their questionnaire answers: they were "given a chance to state whether they could set aside their potentially biased beliefs, fairly listen to the evidence presented to them, and decide the case based only on the evidence presented to them" (200:6; A-Ap. 333).

2. James T., Juror #6

Lepsch argues James T. was biased because he indicated in his questionnaire that he had expressed an opinion about Lepsch's guilt (Lepsch Brief at 31). However, when asked by Lepsch's attorney if he could look at the evidence presented to him in the case, he answered, "I'd say yes" (206:40).

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[4] The questionnaire asked all potential jurors, "Do you have any feelings at this time that you have made up your mind as to Mr. Lepsch's guilt?" (*see* A-Ap. at 131).

There is nothing equivocal about this answer and no indication that James T. was subjectively biased. Lepsch also fails to explain how this juror is objectively biased; there was no reason for the court to dismiss this juror for cause.

3. Mandy F., Juror #17

Lepsch argues Mandy F. was biased because she indicated in her questionnaire that she had expressed an opinion about Lepsch's guilt and that she had made up her mind (Lepsch Brief at 31-32). But when questioned by the State, Mandy F. indicated she had an open mind. And when questioned about her being able to base her decision on the evidence in the courtroom, she replied, "Absolutely." (206:105).[5]

There is nothing equivocal about the word "absolutely," and no indication Mandy F. was subjectively biased. Lepsch also fails to explain how Mandy F. is objectively biased; there was no reason for the court to dismiss her for cause.

B. Jurors who believed police officers have more credibility than other witnesses.

1. Darrick M., Juror #23

Lepsch argues Darrick M. was biased because he stated on his jury questionnaire that he believed police officers were more credible than other witnesses (Lepsch Brief at 22)[6]. Neither the court nor the parties asked Darrick M. about this specific answer during voir dire. Regardless,

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[5] At the *Machner* hearing, Lepsch's attorney testified that he was satisfied with this response (213:16).

[6] The questionnaire provided, "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 witness who were not police officers?" (*see* A-Ap. 113).

this one question does not prove that Darrick M. harbored subjective or objective bias. When he answered this question, Darrick M. did not know what the evidence or testimony would be in this case, and it is reasonable for a court to assume – as the questionnaires showed in this case – that some potential jurors would initially believe that police officers have more credibility.

And at the *Machner* hearing, Lepsch's attorney stated, "Why I didn't ask him [was because] he was someone that I thought might be favorable because he wrote on the questionnaire that he believes in facts and not – not in people, again keeping with the theme of objectivity rather than what people had – may or may not have come in with prior to the – the beginning of the evidence, if that make – if that answer made sense" (213:23).

2. John. A., Juror #15

Lepsch argues John A. was biased because he believed police officers were more credible than other witnesses in his jury questionnaire (Lepsch Brief at 22; *see* A-Ap. 129). In explaining his answer, John A. wrote, "I believe police officers value their credibility reputation as an asset to their career" (A-Ap. 129). Lepsch notes that neither the trial court nor the parties asked John A. any questions regarding his opinion as to the credibility of police officers as witnesses (Lepsch Brief 22). Lepsch argues that he was therefore not "rehabilitated" (*id.*).

When asked about John A. at the *Machner* hearing, Lepsch's attorney noted that John A. *also* wrote on the questionnaire that he could be impartial (213:15; *see* A-Ap. 132). Lepsch's attorney testified that he believed that John. A. could be objective (213:15).

Considering this into consideration, there was no reason for the court to dismiss John A. for cause.

3. Christopher R., Juror #5

Lepsch argues that Christopher R. was biased because when asked if he could judge all the witnesses the same, Christopher R. answered, "I - I would think – I would think so, yeah" (206:34). According to Lepsch, this answer was not unequivocal (Lepsch Brief at 24).

At the *Machner* hearing, Lepsch's counsel testified that he believed Christopher R. was an impartial juror (213:21). Lepsch's attorney also testified that Christopher R. had had three OWI convictions, and that it was his "experience that dealing with people that have participated in the criminal justice system know that it's imperfect and—are more able to see that . . . the police aren't perfect and can see that the police make errors just like other human beings" (213:49).

Based on Christopher R.'s answer that he could judge all the witnesses the same, and considering Lepsch's attorney's *Machner* testimony, Lepsch cannot prove subjective or objective bias. The court should not have dismissed Christopher R. for cause.

4. Lisa K., Juror #20.

Lepsch argues Lisa K. was biased because she indicated in her questionnaire that she believed police officers were more credible than other witnesses (Lepsch Brief at 26). During voir dire the court asked her,

> But are you satisfied that the law asks you, when they are here, when law enforcement is testifying as a witness, that as a juror you are to judge their credibility the same as you would judge anyone else's? So we use all of the intangibles that we use as human beings to determine whether someone is telling us the truth. Do you believe you could do that?

(206:114-15). Lisa K. responded, "Yes." (206:115).

There is nothing equivocal about this answer and no indication she was subjectively biased. Lepsch fails to explain how this juror is objectively biased, and there was no reason for the court to dismiss her for cause.

5. Nathan N., Juror # 12

Lepsch argues Nathan N. was biased because he provided on his questionnaire that he believed police officers were "more credible" than other witnesses. Nathan N. explained this answer, however, stating that he believed police officers "are trained to be at a heightened level of awareness during crisis situations. They have more ability and skill sets to notice a high level of detail" (A-Ap. 159). *See* 206:71. When asked if he could listen to people testify and make up his mind based on the evidence presented in the courtroom, Nathan N. responded, "Absolutely" (206:71).

There is nothing equivocal about those answers and no indication he was subjectively biased. Lepsch fails to explain how this juror is objectively biased, and there was no reason for the court to dismiss him for cause.

6. Pamela H., Juror # 19

Lepsch argues Pamela H. was biased because she believed police officers were more credible than other witnesses (Lepsch Brief at 25).

When asked if she could judge a police officer's credibility the same as other witness, she answered "Yes." (206:112). There was no equivocation and no indication she was subjectively biased. Lepsch fails to explain how this juror is objectively biased, and there was no reason for the court to dismiss this juror for cause.

7. Roxanne F., Juror # 32[7]

Lepsch argues Roxanne F. was biased because on the questionnaire she provided that she believed police officers were more credible than other witnesses. When asked by Lepsch's attorney about this, Roxanne F. explained she felt "safer" with law enforcement than someone who wasn't a police officer (206:147). But when subsequently asked by the court if she could judge their credibility the same as another witness, Roxanne F. responded, "Yes," and that should could "look at them as [she] would any other witness" (206:147-48).

There was no equivocation and no indication Roxanne F. was subjectively biased. Lepsch fails to prove how this juror is objectively biased, and there was no reason the court to dismiss this juror for cause.

Finally, with regard to this issue – that the court should have dismiss the jurors who initially expressed an opinion in the questionnaire that police officers have more credibility than other witnesses – at the *Machner* hearing, Lepsch's attorney was asked, "in this case when you were questioning people, did you really have any concerns with any of them that they were gonna be so biased for law enforcement that they couldn't be fair?" (213:48). His attorney responded: "No, those – the people that I had those concerns about I either moved to remove from the pool before the voir dire or moved to strike for cause during the voir dire" (*id.*).

C. Juror who believed that someone brought to trial was "probably" guilty.

1. Christopher R., Juror #5

Lepsch argues Christopher R. was biased because he indicated on his questionnaire that if someone is brought to

[7] Lepsch refers to Roxanne F. as Juror #26; the transcript refers to her as Juror #32, and so will the State (206:144).

trial that they are "probably" guilty (Lepsch Brief at 32; *See* A-Ap. 175). But when asked by Lepsch's attorney if he was okay with the principle that Lepsch was innocent until proven guilty, Christopher R. responded, "Yeah." (206:36).

There is nothing equivocal about this answer and no indication he was subjectively or objectively biased. Further, when asked about Christopher R. at the *Machner* hearing, Lepsch's attorney testified that he thought Christopher R. would be a favorable juror "before we got into the courtroom," and that during voir dire Christopher R. brought up "false convictions" (213:48-49). It was Lepsch's attorney's opinion that "it would be great to have someone on my jury . . . that believed that false convictions can occur when that's exactly the theory of defense we would be presenting to the jury." (213:49).

Lepsch fails to explain how this juror was objectively biased, and there was no reason for the court to dismiss this juror for cause.

Finally, Lepsch argues in his brief that the trial court had an obligation to "take certain measures to avoid or a least minimize" the "risks of bias or prejudice created by the pre-trial publicity"[8] (Lepsch Brief at 36). The trial court was well aware of pre-trial publicity, and its involvement in the entire voir dire proceedings shows that. As the postconviction court recognized:

> The court and both parties were aware that this case was going to be well-known in the community long before the trial ever began. For that exact reason, the court took extra precaution to ensure an impartial jury, beyond what it would do for most jury trials. The extensive questionnaire sent out to the jurors was used to eliminate 24 jurors who exhibited a bias indicating

[8] The State notes, however, that Lepsch's citations to the media's "coverage of the trial," and the "year-end poll" (Lepsch Brief at 36) both occurred *after* voir dire.

> they could not sit as objective jurors, before they ever reported for jury duty and by the agreement of both parties. After those potential jurors had been eliminated, the potential jurors who reported were brought into the courtroom one at a time. They were questioned by the court and both parties regarding pretrial publicity, their ability to decide the case only on the evidence presented, and about any potentially problematic answers on their questionnaire.

(200:6-7; A-Ap. 333-34).

Lepsch has failed to prove that the trial court should have *sua sponte* removed the above-challenged prospective jurors based on any subjective or objective bias. Similarly, as will be discussed below, because Lepsch has failed to prove that the jurors were biased, and because his attorney had a reasonable strategy in keeping the alleged biased jurors, his trial attorney was not deficient for failing to strike them for cause.

III. Lepsch is not entitled to a new trial just because the court failed to give each side an additional peremptory strike.

The postconviction court acknowledged that both parties received one fewer peremptory challenge than was permitted under Wis. Stat. § 972.03 (200:10; A-Ap. 337).[9] Lepsch argues that he was forced to utilize all of his peremptory strikes to exclude certain jurors who should have been excused for cause (Lepsch Brief at 47). According to Lepsch, had he been provided with the one additional

[9] Under Wis. Stat. § 972.03, both parties were entitled to one additional peremptory strike, which would have given both parties seven strikes. This is because Lepsch was charged with a crime punishable by life imprisonment, which entitled both parties to six peremptory challenges, and, in this case, an additional strike because the court selected three additional jurors as alternates. Wis. Stat. § 972.03.

peremptory strike, he would have used it to exclude another "objectionable" juror[10] (*id.*).

The postconviction court disagreed, however, concluding that none of the jurors "who ultimately sat on the jury were biased" (200:12; A-Ap. 339). It also concluded that the error was harmless: "Since both the State and Lepsch were given the same number of challenges, and Lepsch was not 'forced' to use his peremptory challenges to strike biased jurors, the error in granting the parties only six strikes was harmless" (200:13; A-Ap. 340).

The postconviction court's decision is consistent with *Erickson*, 227 Wis. 2d at 772, where this Court concluded that where both sides were given an equal number of strikes (even though "the number [was] less than provided for in the statute"), the defendant was not entitled to a new trial absent a showing of prejudice. Consistent with *Erickson*, the State will address this issue further within the ineffective-assistance-of-counsel framework below.

IV. Lepsch's claims of ineffective assistance of counsel fail. He cannot prove deficient performance. His attorney's trial strategy was reasonable under the prevailing professional norms.

Lepsch argues that his trial counsel was ineffective for failing to: (1) ensure that the trial court administered the oath to the jury venire in Lepsch's presence (Lepsch Brief at 10); (2) sufficiently challenge prospective jurors for cause (Lepsch Brief at 43); and (3) utilize peremptory strikes (Lepsch Brief at 60).

[10] Lepsch then discusses the jurors that he believed showed bias as discussed under Section II of this brief (*see* Lepsch Brief at 47-49).

A. *Strickland* and Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697. To prove deficient performance, a defendant must show that his lawyer's acts or omissions were not reasonable under the prevailing professional norms. *Id.* at 688.

To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Id.* at 689. Thus, in order to succeed on the prejudice aspect of the *Strickland* analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Under *Strickland*, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. An attorney's trial strategy is to be given great deference:

> Indeed, the Court in *Strickland* went so far as to say that 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.' *Strickland*, 466 U.S. at 690, 104 S. Ct. 2052. Even decisions made with less than a thorough investigation may be sustained if reasonable, given the strong presumption of effective assistance and deference to strategic decisions. *State v. Carter*, 2010 WI 40, ¶ 23, 324 Wis. 2d 640, 782 N.W.2d 695 (citing *Strickland*, 466 U.S. at 690-91, 104 S. Ct. 2052).

State v. Balliette, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334.

B. Lepsch's Claims of Ineffective Assistance.

1. Failing to object to the administration of the oath outside of Lepsch's presence.

Lepsch argues that his trial counsel was ineffective for failing to "ensure that that trial court properly administered the oath to the jury venire in Lepsch's presence" (Lepsch Brief at 10). To avoid redundancy, the State directs this Court to its discussion of this issue in Section I. It is the State's position that because the administration of the oath is not part of "voir dire" within the meaning of Wis. Stat. § 971.04(1), that Lepsch was not required to be present. Because Lepsch was not entitled to be present, his attorney was not deficient for failing to require that he was present. And, as previously argued, there was no prejudice. Lepsch could not have objected to the giving of the oath, learned anything about the jurors from the performance of the oath, or gained any useful knowledge from observing the formality of having the jurors take the oath.

Additionally, at the *Machner* hearing, Lepsch's counsel was asked if there was any reason why he did not object to the oath being administered outside of Lepsch's presence. His counsel responded, "no" (213:35). When asked at the *Machner* hearing if he can think of any prejudice during the trial that would have resulted from the jury being sworn outside of his presence, Lepsch's counsel answered, "Not specifically," and that he "didn't see any specific bias result from it" (213:51-52).

2. Failing to challenge prospective jurors for cause.

Lepsch next argues that his trial counsel was ineffective for failing to sufficiently examine and challenge prospective jurors for cause because they were biased. 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. *State v. Carter,* 2002 WI App 55, ¶15, 250 Wis. 2d 851, 641 N.W.2d 517. However, as previously discussed in Lepsch's claim of *trial* court error in Issue II., Lepsch has not shown that the jurors in this case were biased. It is therefore the State's position that Lepsch has failed to show that trial counsel's performance at voir dire was deficient because it did not result in the seating of a biased juror. And, as the postconviction court opined, Lepsch's attorney's trial strategy regarding jury selection was "well prepared" and "clear" (200:19; A-Ap. 346). It noted that Lepsch's counsel testified at the *Machner* hearing that he:

> Wanted jurors to be skeptical of professionals and police because there were forensic issues in this case that were important. . . We wanted people that would look at the theory of confirmation bias, that the police made up their mind early in the case; and . . . failed to do a thorough examination because they had made their minds up.

(A-Ap. 346, citing 213:40).

Lepsch's counsel further testified that

> The people that I didn't move to strike for cause answered and appeared to be genuine about – in – in the way there were talking to me about their intent to set aside any bias they had about stuff they'd seen in the media; and sometimes the way they said it was more a figure of speech, I think I can, which I took to mean them saying yes.

(213:43). He also testified that strategy was to seat a jury "that could be objective and look at the police as human beings, at the police as people that were capable of making mistakes, and objectively examine the evidence that was presented. That was my theory, and that's – those are the people I thought I came out with" (213:62).

The postconviction court aptly concluded that Lepsch's counsel strategy was "well-thought out" (200:20; A-Ap. 347). Considering his counsel's *Machner* hearing testimony, Lepsch cannot prove that his attorney's trial strategy in choosing the jury was unreasonable under the prevailing professional norms. *Strickland,* 467 U.S. at 688. Nor can he prove a reasonable probability sufficient to undermine confidence in the outcome of the case. *Id.* at 694. As previously argued, Lepsch has failed to show that any juror was either subjectively or objectively biased. Thus, his assertions of possible juror bias are mere speculation. *See Erickson*, 227 Wis. 2d at 774, (speculation is insufficient to satisfy the prejudice prong of *Strickland*). Based on Lepsch's failure to show both deficient performance and prejudice, this Court should reject his claim that he was denied effective assistance of counsel.

3. Failing to object to the number of peremptory strikes given to each side.

Lepsch argues that his trial attorney was ineffective because he failed to make sure that he received correct number of preemptory strikes. As previously indicated, in this case, both parties were provided with six, instead of the required seven, peremptory strikes. When asked at the *Machner* hearing about this issue, Lepsch's attorney stated that "the parties agreed," mistakenly, that "six was the appropriate amount" of strikes, and so he "didn't ask for more" (213:33).

In a similar case, *Erickson*, the circuit court gave each side four preemptory strikes instead of the required seven. 227 Wis. 2d at 772. The Supreme Court concluded that where both sides are given an equal number of strikes, the defendant is not entitled to a new trial absent a showing of prejudice. *Id*. Regarding prejudice, this Court stated:

> It is not enough for a defendant to merely show that the error "had some conceivable effect on the outcome" of the trial. *Strickland,* 466 U.S. at 693, 104 S. Ct. 2052. Rather, the defendant must demonstrate that but for his trial attorney's error there is a reasonable probability—a "probability sufficient to undermine confidence in the outcome" —that the result of his trial would have been different. *Id.* at 694, 104 S. Ct. 2052 . . . .
>
> Because he is challenging the validity of his conviction, Erickson must show that "absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052. To determine whether Erickson has satisfactorily made his required showing, a court looks to the totality of the evidence in the case. . . .

Id. at 773. The *Erickson* court then recognized that had the circuit court granted the correct number of strikes, it would have not affected only Erickson, but the State as well. *Id*. at 773. And, therefore, any benefit Erickson would have realized from the additional strikes may have been offset by the additional strikes given to the State. *Id*. at 773-74.

The Court said it could "only speculate" the effect that the additional persons, coupled with the additional peremptory strikes, would have had on the ultimate composition of the jury. *Id.* at 774. And, therefore, it was "not enough, for *Strickland* . . . require[s] that Erickson offer more than rank speculation to satisfy the prejudice prong. Because he failed to do so, he has suffered no prejudice from his trial attorney's error and we deny his ineffective assistance of counsel claim." *Id*. at 774-75.

Erickson is applicable and controls. Lepsch's argument that he was prejudiced by one fewer peremptory strike is mere speculation. Lepsch's trial attorney only asked to remove one juror for cause that the court denied. Regarding that juror, Juror Mary S. (Juror #22), she was a one-time customer in the store and had been waited on by one of the victims (206:122-23). When Lepsch's attorney asked for her to be excused, the court ruled, "We have a one-time customer at the shop. It's not an ongoing relationship. The juror has indicated she can set it aside. Your request is denied" (206:125). The other jurors that Lepsch struck were never asked to be removed for cause. And Lepsch uses the same arguments as before regarding the jurors having an opinion about his guilt or believing that police officers had more credibility. As the State has previously argued, however, the transcripts do not reveal any subjective or objective bias on the part of any of those jurors, and Lepsch has failed to prove how any of the jurors were subjectively or objectively biased.

CONCLUSION

The administration of the oath to the jury venire is not part of "voir dire" within the meaning of Wis. Sat. § 971.04(1)(c). Lepsch's due process rights were therefore not violated because he was not entitled to be present. Lepsch has also failed to prove that the trial court seated jurors who were biased, and so his Sixth and Fourteenth Amendment rights to an impartial jury were not violated. Finally, Lepsch's claims of ineffective assistance of counsel fail. He cannot prove deficient performance because his attorney's trial strategy was reasonable under the prevailing professional norms. He also cannot show prejudice. The State requests that this Court affirm the judgment of conviction and postconviction order denying Lepsch a new trial.

Dated this 15th day of May, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8415 words.

_____
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief 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 with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of May, 2015.

_____
Sara Lynn Larson
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