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 REPLY BRIEF

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ARGUMENT

I. The administration of the oath to the jury venire *is* part of voir dire within the meaning of Wis. Stat. Sec. 971.04(1)(c).

The State responds to Lepsch's argument that the trial court violated his right to be present at a critical stage and to a public trial by arguing that the administration of the oath is not part of voir dire and that therefore, Lepsch had no right to be present. See State's brief at pp. 7-11. The State similarly relies on such argument in responding to Lepsch's claim that trial counsel was ineffective for failing to ensure that the trial court properly administered the oath. See State's brief at p.26. The State's argument that the administration of the oath is not part of voir dire is inconsistent with Sec. 805.08(1) which explicitly requires the oath as part of the voir dire process:

> 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. Wis. Stat. Sec. 805.08(1).

The plain language of the statute makes clear that the oath is indeed part of voir dire. Nonetheless, ignoring the express language of Sec. 805.08(1), the State relies on a certain interpretation of Sec. 971.04(1)(c) and **State v. Gribble**, 2001 WI App 227, 248 Wis.2d 409, 636 N.W.2d 488 in support

of its position. The State is correct in noting that the legislature changed the relevant language of Sec. 971.04(1)(c) to provide that a defendant shall be present "[d]uring voir dire of the trial by jury." Wis. Stat. Sec. 971.04(1)(c) (2013-2014). But this change amounts to a distinction without a difference for purposes of Lepsch's arguments. The notes to Sec. 971.04(1)(c) provide as follows:

> **Judicial Council Note, 1996:** This statute [sub. (1) (c)] defines the proceedings at which a criminal defendant has the right to be present. The prior statute's [sub. (1) (c)] reference to "all proceedings when the jury is being selected" *was probably intended to include only those at which the jurors themselves were present*, not the selection of names from lists which occurs at several stages before the defendant is charged or the trial jury picked. Italics added.

The Council's notes suggest that the intent of Sec. 971.04(1)(c) in its earlier form was to require the presence of the defendant at only those proceedings "at which the jurors themselves were present" as opposed to some other proceeding pertaining to jury selection which did not involve the presence of the jurors. Stated another way, the phrase, "all proceedings when the jury is being selected" was too broad. Such phraseology theoretically commanded the defendant's presence at any task, whether it be clerical or administrative, pertaining to jury selection. The change in wording to require the defendant's presence "[d]uring voir dire of the trial by jury"

thus ostensibly more accurately reflected the legislative intent of linking the defendant's presence to the presence of the "jurors themselves." Of course, the jurors are present during voir dire and therefore so too must the defendant. But the jurors are also necessarily present when the trial court administers the oath to the venire under Sec. 805.08. As such, even under the newer version of Sec. 971.04(1)(c), the defendant must be present for the administration of the oath because the "jurors themselves" are also present.

The State next relies on **State v. Gribble** which is curious given that **Gribble** actually helps Lepsch not the State. First, **Gribble** by its express language supports Lepsch's position rather than that of the State. In this regard, **Gribble** explicitly provides as follows:

> [We conclude that the procedure described in § 805.08(1) is the "voir dire of the trial jury" referred to in § 971.04(1)(c)]. **Id**. at ¶18.

As such, under **Gribble**, the administration of the oath is plainly part and parcel of voir dire. Second, **Gribble**'s holding is very narrow. The holding applies only to the situation where a trial court questions individual jurors regarding hardship and infirmity excuses under Wis. Stat. Sec. 756.03. The essence of the holding is that such exercise by the trial court is purely

administrative. **Id**. at ¶18. Under Wis. Stat. Sec. 756.03(3) even a circuit clerk is authorized to grant such excuses or deferrals. **Id**. Additionally, the prospective juror does not have to be in court to obtain the excuse or deferral and may obtain such excuse or deferral in advance of a particular trial. **Id**. Clearly, it would be nonsensical to require the defendant's presence at an encounter which could materialize out-of-court and advance of trial. Third, the trial court in **Gribble** administered the oath under Sec. 805.08(1) properly, that is, in-court, in the presence of the defendant and the attorneys, and in the presence of the entire panel. **Id**. at ¶9. Finally, it should be noted that before questioning any of the jurors, the trial court sought and received consent from both Gribble and his attorney. **Id**. For the above reasons, this Court should read **Gribble** to support Lepsch not the State. The plain language of the statute, legislative intent and case law all indicate that the administration of the oath is part of voir dire.

II. Violation of Lepsch's right to a public trial and to an impartial jury are not subject to harmless error analysis.

The State relies on a number of cases, **State v. Tulley**, 2001 WI App 236, 248 Wis.2d 505, 635 N.W.2d 807, **State v. Block,** 170 Wis.2d 676, 489 N.W.2d 715 (Ct. App. 1999), and **State v. Alexander**, 2013 WI 70, 349 Wis.2d 327, 833 N.W.2d 126 in support of a harmless error argument. See State's brief at pp.10-12. The State's reliance on such cases is wholly misplaced as to Lepsch's claim that the defective administrative of the oath violated his right to a public trial and to an impartial jury.[1] First, **Tulley**, **Block** and **Alexander** did not involve public trial or impartial jury claims and therefore are not instructive as to those issues. Second, as discussed in Lepsch's brief-in-chief at pp.7-8, the violation of a defendant's right to a public trial is a structural error or defect which is not subject to the harmless error analysis. See **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,

[1] The State's brief does not respond to the claim made in Lepsch's brief-in-chief at pp.8-9 that "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." By not directly responding to this argument, the State must be deemed to have conceded the issue. See **State v. Anker**, 2014 WI App 107, ¶2, ¶13, 357 Wis.2d 565, 855 N.W.2d 483.

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). As similarly discussed in Lepsch's brief-in-chief, pp.8-9, so too is Lepsch's right to 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. In this regard, to the extent that the administration of the oath was defective, which Lepsch maintains it was, it precluded him from receiving a trial by an impartial jury which is plainly a structural error not subject to harmless error review. The oath taken by a jury is not ceremonial or symbolic. Rather, a 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 at 680. Similarly, if a juror is not sworn or not sworn properly, then that juror cannot be deemed to be an "impartial" juror for purposes of the 6th Amendment. After all, the 6th Amendment requires that a prospective juror *swear* both that he or she can set aside any opinion and decide the case on the evidence. See **Oswald v. Bertrand**, 249 F.Supp.2d at 1103, citing **Patton v. Yount**, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). The defective or erroneous manner of administering the oath precluded the jury from being deemed impartial for purposes of both

the 6th Amendment and Article I Section 7. The error as such was structural not harmless.

With respect to Lepsch's right to be present for voir dire, Lepsch recognizes that the violation of such right may ordinarily be analyzed under the harmless error doctrine. See **State v. Tulley** supra. Lepsch maintains however that such violation was not harmless in this case. Despite the constitutional significance of the oath, there is no proof in the record that all jurors actually took the oath. Given that the clerk administered the oath to the panel outside the courtroom, there is no record as to the time it specifically occurred and more importantly as to the identities of the panel members who actually took it. [2] If the trial court administers the oath to the jury panel in the courtroom, the trial court, prosecutor, defense counsel and the defendant, can all observe the panel members take the oath as they are seated in their typically assigned and numbered seats. This process ensures that all panel members are present

[2] It should be noted that the clerk's administration of the oath in such fashion violated SCR 71.01 which requires in relevant part as follows:
(2) All proceedings in the circuit court shall be reported, except for the following:

(a) A proceeding before a court commissioner that may be reviewed de novo;
(b) Settlement conferences, pretrial conferences, and matters related to scheduling;
(c) In a criminal proceeding, a matter preceding the filing of a criminal complaint.

and accounted for when the judge administers the oath. Where the process instead involves a clerk administering the oath in a "jury assembly room" or elsewhere, this is not the case. Not only is there the basic risk that the clerk may forget or otherwise fail to administer the oath, but there is a risk that not all venire or panel members may be present. Perhaps a venire or panel member could be in the restroom or in the hallway using a cellphone while the clerk administers the oath. Without the orderly management and placement of the panel members that usually occurs as they are positioned in the actual courtroom, there is no certainty that all panel members actually take the oath. It is easy to envision a situation where a venire or panel member in a large "jury assembly room" slips out to use the restroom and misses the administration of the oath. Such person, though unsworn, could then potentially serve on the jury. This is a bad practice. Perhaps, as noted in Lepsch's brief-in-chief at p.5, this is why the Wisconsin Judicial Bench Book, Criminal and Traffic, 2013, advises the trial judge to administer the oath right before the examination begins. Perhaps, as also noted in Lepsch's brief-in-chief at p.5, this is why Section 805.08 uses mandatory language in specifying that "*The court* shall examine on oath…" the prospective jurors. Lepsch had a significant interest in ensuring first hand that his jury was in fact fully and

properly sworn. Lepsch's absence from the process prevented him from doing so.

III. The State has failed to respond to Lepsch's argument that 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 and must be deemed to have conceded the issue.

The gravamen of Lepsch's argument that he did not receive a trial by an impartial jury is that nine jurors did not meet the standard for impartiality under the Sixth Amendment. Under the Sixth Amendment, a juror's impartiality is determined by a specific 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. See **Patton v. Yount**, 467 U.S. at 1036; **Murphy v. Florida**, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed. 2d 589 (1975). If this test has not been met, the juror does not meet the federal constitutional standard for impartiality. The fatal defect with the State's brief is that it wholly fails to apply this test or even respond to Lepsch's application of it in the context of each particular juror. Instead, the State merely analyzes Lepsch's claims by applying Wisconsin case law, specifically **State v. Faucher**, 227 Wis.2d 700, 596 N.W.2d 770 (1999), and

analyzing the impartiality of each juror in terms of whether they were "subjectively" or "objectively" biased. See State's brief at pp.12-13. Of course, Lepsch also examines the impartiality of the jurors in the context of Wisconsin case law, Lepsch's brief-in-chief at pp.40-43, but secondarily to his claims under federal constitutional law. Rather than fully responding to or refuting all of Lepsch's juror impartiality claims, the State has only responded to some of them, specifically, those alleging that the jurors where "objectively" or "subjectively" biased. This is insufficient. In order to refute Lepsch's 6th Amendment claims, the State had to apply the test under **Patton** and show that each juror did in fact 1)swear that he or she could set aside his or her beliefs and 2)swear that he or she could decide the case based solely on the evidence. The State failed to do so. By not refuting Lepsch's federal constitutional claims, the State must be deemed to have conceded the issue. See **State v. Anker**, 2014 WI App 107, ¶2, ¶13, 357 Wis.2d 565, 855 N.W.2d 483. This Court will not abandon its neutrality to develop arguments for the parties. **Id**. at ¶13.

Perhaps the State failed to refute Lepsch's federal claims because it simply could not do so under the record. Darrick M./juror no.23, and John A./juror no.15 present the best examples of this. As discussed in Lepsch's brief-in-

chief, both Darrick M. and John. A. expressed the belief that law enforcement witnesses were more credible than non-law enforcement witnesses. The expression of such belief by each juror depicted a bias towards law enforcement and the State. To satisfy 6th Amendment standards, Darrick M. and John A. had to swear that 1)they could set aside such beliefs and 2)decide the case on the evidence. The record indicates that they did neither. In fact, neither Darrick M. nor John A. was examined about his opinion as to the credibility of police officers by the trial court, the prosecutor or trial counsel. Darrick M. and John A. therefore sat upon the jury with an admitted bias towards law enforcement. Under the federal constitutional test for an impartial juror, both Darrick M. and John A. plainly failed. The case can and should be reversed on this basis alone. Of course, as examined in Lepsch's brief-in-chief, Lepsch maintains that seven other jurors similarly failed the federal constitutional test for impartiality because they did not sufficiently, by providing unequivocal assurances, swear that they could set aside their beliefs and decide the case on the evidence.

Perhaps the State believes that an analysis of whether the jurors were "subjectively" or "objectively" biased under Wisconsin law constitutes the

same analysis required by the federal constitutional standard or otherwise leads to the same result. The State would be wrong. In **State v. Oswald**, 2000 WI App 2, 232 Wis.2d 62, 606 N.W.2d 207, this Court analyzed Oswald's juror bias claim by evaluating whether three specific jurors were either "subjectively" or "objectively" biased. **Id**. at 74-82. The Court concluded that all three jurors were neither "subjectively" nor "objectively" biased. **Id**. On a habeas petition, the United States District Court for the Eastern District of Wisconsin, affirmed by the Seventh Circuit Court of Appeals, concluded that the same three jurors did not meet the federal constitutional test for impartiality because they did not provide "unequivocal assurances" that they could set aside their beliefs and decide the case solely on the evidence. See **Oswald v. Bertrand**, 249 F.Supp.2d 1078, 1105-1109 (E.D. Wis. 2003) aff'd, 374 F.3d 475 (7th Cir. 2004). As discussed more fully in Lepsch's brief-in-chief, pp.16-17, Lepsch respectfully maintains that there is a conflict between the standards for juror impartiality under Wisconsin law and those under the 6th Amendment as enunciated by the United States Supreme Court in **Patton** and **Murphy** and followed by the Seventh Circuit in **Thompson v. Altheimer & Gray**, 248 F.3d 621 (7th Cir. 2001). Of course, Lepsch recognizes that on federal

questions, Wisconsin courts are bound only by decisions of the United States Supreme Court. See **State v. Beauchamp**, 2010 WI App 42, ¶17, 324 Wis.2d 162, 781 N.W.2d 254; **State v. Webster**, 114 Wis.2d 418, 426, 338 N.W.2d 474 (1983). But Lepsch also believes that opinions by lower federal courts may be instructive or persuasive to this Court as they pertain to standards for juror impartiality under the 6th Amendment.

IV. *State v. Erickson* is not dispositive as to the issue of the trial court's failure to award proper number of peremptory strikes.

In **Erickson**, there was no allegation by the defendant that the jury was not impartial. In fact, Erickson agreed that the jury was "fair and impartial." **Id**. at ¶30. There was similarly no argument by Erickson as to why he needed the strike, how he would have used it, and how he was harmed by not receiving it. In this case, Lepsch has obviously argued that the jury was not impartial, that he had a particularized need for the strike, and that he suffered harm by not receiving it. This case is simply distinguishable from **Erickson**.

CONCLUSION

For all the reasons stated in this brief as well as the brief-in-chief, Lepsch requests that this Court vacate the judgment of conviction and sentence and order a new trial.

Dated this _____day of June 2015.

Respectfully submitted,
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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 June 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 2884 words.

Dated this _____day of June 2015

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