STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP2813-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY P. LEPSCH,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE RAMONA G. GONZALEZ, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLELMENTAL APPENDIX

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ISSUES PRESENTED

The State rephrases the issues on appeal as follows:

A jury convicted Jeffrey P. Lepsch of two counts of first-degree intentional homicide, armed robbery with use of force, and possession of a firearm by a felon. On appeal, Lepsch argues that his counsel was ineffective during voir dire because nine impartial jurors ultimately sat on his jury panel. The arguments on appeal concern the following:

1. Can Lepsch meet his burden of proving that each of the nine jurors harbored both subjective and objective bias?

2. This Court's caselaw provides that trial courts can look to a juror's demeanor during voir dire, and that courts can use voir dire to explore a prospective juror's fears, biases, and predilections. Does this Court's caselaw on juror impartiality violate or "dilute" federal law or the Sixth Amendment to the United State's Constitution?

3. Can Lepsch meet his burden of showing "the appearance" of bias or that the trial court conducted an "insufficient inquiry" to ensure an impartial jury?

4. The jurors who sat on Lepsch's jury signed an oath in their jury questionnaire, and they also gave an oath before trial. Does the circuit court clerk's administration of the oath to the jury *venire*, which was made outside of Lepsch's presence, violate his right to a public trial?

5. Both parties received one less peremptory strike than was permitted by statute. Was Lepsch prejudiced by his attorney's failure to obtain the additional strike?

6. Lepsch's counsel testified at the *Machner* hearing that his deliberate strategy was to seat a jury that could be objective and examine the evidence that was presented. He also testified that the jurors he didn't move to strike were "genuine" about their intent to set aside any bias. Was Lepsch's attorney's decision not to choose to strike any of the nine jurors deficient? Was his attorney's trial strategy in choosing the jury unreasonable under the prevailing professional norms?

The court of appeals and the circuit court answered "no" to all of the above arguments.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents issues challenging the court of appeals' application of Wisconsin Supreme Court case law. It therefore merits oral argument and publication.

SUPPLEMENTAL FACTS AND PROCEDURAL BACKGROUND

- **The Jury Trial**

While committing a robbery of a photography store in La Crosse, Lepsch shot and killed Paul Petras and his nineteen-year-old son, Andrew. (5.)

In October 2012, Lepsch was charged with two counts of first-degree intentional homicide, armed robbery with use of force, and possession of a firearm by a felon. (8:1.) Lepsch pled not guilty and proceeded to trial.

Prior to the prospective jurors appearing in the courtroom for jury voir dire, the clerk of the circuit court administered the oath to the jury venire in a jury assembly room. (189:14.) However, after the jury panel was selected, the trial court administered the oath to the jury in the courtroom. (207:4.) Regarding the jury panel, Lepsch's

defense was looking for jurors who "were going to be objective . . . [T]hat was the most important thing we wanted." (206:40.) Along with objectivity, the defense wanted jurors who would also be "skeptical of professionals and police because there were forensic issues in [the] case that were important." (*Id*.). Lepsch's attorneys wanted jurors who would "look at the police as human beings, at the police as people that were capable of making mistakes[.]" (206:62.)

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

Lepsch left Petras' 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, but only after Sherri Petras arrived to check on her husband and son, to find that they had been killed. (207:55, 177, 184.)

The evidence at trial was substantial. No insufficiency-of-the-evidence claim has been made. 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 the photography store to Lepsch. (208:96-112, 123-135.)

A jury deliberated less than five hours after a six-day trial and found Lepsch guilty on all counts. (169-172; 211:86-87.) The court sentenced Lepsch to consecutive life terms without extended supervision. (176:1.)

Lepsch moved for postconviction relief, requesting a new trial. (188.) The court held a *Machner*[1] hearing, and Lepsch's counsel testified. (213.)

- **The Postconviction Court's Decision: "Absolutely certain" that Lepsch received an impartial jury.**

Lepsch argued that nine jurors in his trial were biased. The court rejected this claim, first noting that it "took extra precaution to ensure an impartial jury." (200:6; A-App. 260.) 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:

> [T]he 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-App. 263, 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-App. 264.)

Lepsch also argued that his right to an impartial jury was violated because the jury panel was sworn prior to the beginning of voir dire, when neither Lepsch nor his attorney was present. The postconviction court concluded, "If Lepsch

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

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-App. 257.) 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-App. 258.) It opined 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." (200:4-5; A-App. 258-59.)

Lepsch's also argued that his right to an impartial jury was violated when the trial court allotted an incorrect number of 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-App. 264.) But it concluded that none of the jurors "who ultimately sat were biased." (200:12; A-App. 266.) 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-App. 267.)

Lepsch next argued that his attorney's collective performance was ineffective. (188:39-40.) The postconviction court disagreed, concluding that Lepsch's attorney was not deficient. (200:18; A-App. 272.) It opined that his attorney's trial strategy regarding jury selection was "well prepared" and "clear." (200:19; A-App. 273.) 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-App. 273, citing 213:40.) The court ultimately 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-App. 274.)

Lepsch appealed.

- **The Court of Appeals' Decision: "None of the jurors were objectively or subjectively biased."**

1. Lepsch failed to show any subjective or objective bias.

The Court of Appeals affirmed Lepsch's conviction in *State v. Lepsch*, Case No. 2014AP2813-CR, 2015 WL 7287026 (Wis. Ct. App. Nov. 19, 2015) (unpublished) (per curiam). (R-App. 101-13.) Regarding Lepsch's claims of juror bias, it concluded that the record did not indicate *any* juror was either subjectively or objectively biased (*Lepsch,* 2015 WL 7287026, ¶ 9; R-App. 105-06), and that none of the jurors exhibited the "appearance of bias." *Id*. ¶ 9 n.4. (R-App. 106.) Rather, *each* of the jurors expressed the ability to remain impartial at trial:

> Our review of the individual voir dire of each of the challenged jury members does not support Lepsch's claims of subjective or objective bias. As to the seven jury members who had stated a belief that law enforcement officers are more credible than non-law enforcement officers, five were questioned further as to that belief during individual voir dire. They each stated that they would be able to judge the credibility of all witnesses equally at trial. As to the two jurors who were not questioned specifically on that subject, one stated during voir dire that he would be able to listen to the evidence in the courtroom and base his decision on that evidence; the other stated elsewhere on his questionnaire that he

> believed in facts, not people. Both also indicated on their questionnaires that there was no reason they could not be impartial in this case.
>
> As to the four jurors who stated in the jury questionnaire that he or she had an opinion as to Lepsch's guilt and/or that he or she had made up his or her mind as to Lepsch's guilt, each stated during voir dire that he or she had the ability to put that opinion out of his or her mind, listen to the evidence, and make a decision based on the evidence.
>
> Finally, as to the juror who stated a disagreement with the presumption of innocence, that juror was reminded in voir dire that, under the presumption of innocence, jurors had to start out looking at Lepsch as innocent, and that Lepsch was innocent as he sat there that day. The juror was asked if he "was okay with" that principal, and the juror responded in the affirmative.

Lepsch, 2015 WL 7287026, ¶¶ 12-14 (footnote omitted). (R-App. 108.)

The court of appeals also noted that the postconviction court explained that, based on its position of observing the jurors, it was convinced that each juror was able to put aside any potential subjective bias and decide the case based solely on the evidence. *Id.* ¶ 16. (R-App. 109.) And, because the trial court's determinations on subjective bias were not clearly erroneous and the court's determinations as to objective bias were reasonable, the court of appeals decided that it would not "disturb those determinations." *Id.*

2. The court of appeals chose to apply Wisconsin Supreme Court caselaw, not federal district court caselaw.

The court of appeals also addressed Lepsch's claim that the court should follow the standard for juror bias as set forth in *Oswald v. Bertrand*, 249 F. Supp. 2d 1078, 1104

(E.D. Wis. 2003). The court of appeals refused to disregard Wisconsin Supreme Court caselaw:

> Lepsch also contends that the Sixth Amendment to the United States Constitution requires that jurors establish impartiality by "unequivocal assurances" that they can set aside prior beliefs and decide a case solely on the evidence, citing *Oswald v. Bertrand*, 249 F. Supp. 2d 1078, 1104 (E.D. Wis. 2003.) Lepsch concedes that Wisconsin case law does not require unequivocal assurances, *see State v. Erickson*, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999), and that this court is not bound by federal district court interpretations of the United States Constitution, *see State v. Beauchamp*, 2010 WI App 42, ¶ 17, 324 Wis. 2d 162, 781 N.W.2d 254. Nonetheless, Lepsch contends that *Oswald* sets forth a higher standard for jury impartiality under the Sixth Amendment than recognized by current Wisconsin law, and argues that this court should adopt that higher standard. We may not disregard Wisconsin Supreme Court case law. Accordingly, we apply the test for juror impartiality set forth in Wisconsin case law.

Lepsch, 2015 WL 7287026, ¶ 9 n.3. (R-App. 106.)

3. Lepsch failed to show the "likelihood or appearance of bias."

Lepsch also argued that to avoid the appearance of bias, the circuit court should have either dismissed the nine jurors or questioned them more as to their beliefs, opinions, and exposure to pre-trial publicity. But the court of appeals concluded that the record did not indicate *any* juror was subjectively or objectively biased: "Because each of the jurors expressed the ability to remain impartial at trial, we conclude that none of the jurors exhibited the appearance of bias." *Lepsch*, 2015 WL 7287026, ¶ 9 n.4. (R-App. 106.)

4. Lepsch failed to prove a due process violation for utilizing six peremptory strikes, the same number of strikes the State utilized.

The court of appeals assumed without deciding that Lepsch's attorney was deficient by failing to obtain the statutory seven peremptory strikes, but it concluded that Lepsch failed to establish prejudice. Citing *State v. Erickson*, 227 Wis. 2d 758, 769-73, 596 N.W.2d 749, the court stated, "Here, as in *Erickson*, Lepsch and the State received an equal number of peremptory strikes, and Lepsch has not shown that a biased juror actually sat on the jury panel." *Lepsch*, 2015 WL 7287026, ¶ 20 (emphasis added). (R-Ap. 111.)

5. Lepsch failed to prove that he received ineffective assistance of trial counsel.

The court of appeals concluded that Lepsch failed to prove that his counsel was ineffective for failing to move to strike prospective jurors for cause. The court of appeals concluded that because Lepsch had not shown that *any* juror on his jury panel was biased, he failed to show that he was prejudiced. *Lepsch*, 2015 WL 7287026, ¶ 22. (R-App. 112-13.) (Citing *State v. Traylor*, 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992) (rejecting a claim of ineffective assistance of counsel for failing to move to strike potential jurors for cause, which resulted in use of peremptory strikes against those jurors, because a defendant "cannot prove prejudice unless he can show that the exhaustion of peremptory challenges left him with a jury that included an objectionable or incompetent member," and citing "Wisconsin's longstanding rule . . . that where a fair and impartial jury is impaneled, there is no basis for concluding that a defendant was wrongly required to use peremptory challenges.")).

6. Lepsch forfeited his argument that the administration of the jury oath violated his right to a public trial.

The court of appeals concluded that Lepsch forfeited his claim that the administration of the oath to the jury venire by the clerk, which was administered in the jury assembly room outside of Lepsch's presence, violated his constitutional rights. *Lepsch*, 2015 WL 7287026, ¶ 7. (R-App. 104.)

The court also rejected Lepsch's argument that his trial counsel was ineffective for failing to object to the administration of the oath. The court determined that Lepsch did not develop any argument that he was actually prejudiced by his counsel's failure to object; rather, he argued that the errors were structural and prejudice presumed. *Lepsch*, 2015 WL 7287026, ¶ 8. (R-App. 104-05.) The court concluded that Lepsch did not develop an argument distinguishing the claimed structural errors in this case from the errors in *State v. Pinno*, 2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207, "which were deemed not to give rise to a presumption of prejudice." *Lepsch*, 2015 WL 7287026, ¶ 8. (R-App. 105.)

Lepsch appeals.

ARGUMENT

I. Lepsch has failed to prove that the trial court denied him a trial by an impartial jury because Lepsch fails to show that any of the nine jurors who sat on the panel were either subjectively or objectively biased.

Lepsch argues that nine jurors who sat on his jury were biased. When the partiality of an individual juror is placed at issue, the question is one of historical fact. *See Patton v. Yount,* 467 U.S. 1025, 1036 (1984). "To be

impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial." *Id.*

Prospective jurors are presumed to be impartial. *State v. Louis,* 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990), *cert. denied,* 498 U.S. 1122 (1991). The determination of whether a prospective juror should be dismissed from the jury panel with cause is a matter within the trial court's discretion. *State v. Gesch,* 167 Wis. 2d 660, 666, 482 N.W.2d 99 (1992). Absent an erroneous exercise of discretion, a trial court's decision concerning voir dire should not be disturbed on appeal. *State v. Koch,* 144 Wis. 2d 838, 847, 426 N.W.2d 586 (1988). Lepsch bears the burden of proving that "it is more probable than not that the juror was biased." *Louis,* 156 Wis. 2d at 478. He also must show that bias is "manifest." *Id.* at 478-79.

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. Claims of juror bias are subject to a harmless error analysis. *Id.* ¶ 80.

A. Caselaw on the types of bias.

Lepsch maintains that nine jurors were both objectively and subjectively biased. (Lepsch Br. 11, 24.) This 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.

State v. Faucher, 227 Wis. 2d 700, 718-19, 596 N.W.2d 770 (1999). A trial court is "particularly well-positioned to make a determination of objective bias, and it has special competence in this area. It is intimately familiar with the voir dire proceeding, and is best situated to reflect upon the prospective juror's subjective state of mind which is relevant as well to the determination of objective bias." *Id.* at 720. This Court "will reverse its conclusion only if as a matter of law a reasonable judge could not have reached such a conclusion." *Id.* at 721.

This Court also explained subjective bias in *Faucher*:

> [M]ost frequently the prospective juror's subjective bias will only be revealed through his or her demeanor. Therefore, we caution that whether 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.

227 Wis. 2d at 718 (internal citation omitted.)

In this case, some of Lepsch's claims of bias rest on the specific wording used by jurors during voir dire, such as, "I believe so" (206:86), as opposed to, "yes." Similar claims were addressed by this Court in *State v. Erickson*, where the defendant made such an 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.

B. The voir dire of the jurors in this case.

Lepsch contends that the nine jurors displayed bias by (1) the answers they provided in their questionnaires, and (2) their failure to set aside their beliefs that they provided in those questionnaires during voir dire.

But the postconviction court determined that all prospective jurors who were challenged solely on their questionnaire answers 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-App. 260.) A review of the applicable voir dire, Lepsch's attorney's testimony at the subsequent *Machner* hearing, and some of the postconviction court's findings are provided below:

1. The jurors who stated in their questionnaire that they believed that police officers are "more credible" than other witnesses.

With each of the following jurors, Lepsch has not met his burden of proving either objective or subjective bias:

- **Darrick M.**

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?" (A-App. 120.) 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 Br. 16.)

But the questionnaire also asked potential jurors, "Do you think if the state goes to the trouble of bringing someone to trial, the person is probably guilty?" Darrick M. answered, "No." (A-App. 121.) And, the next question provided, "Why do you say that?" Darrick M. answered, "I believe in facts, not people. So until I know something it's just talk." (A-App. 121.)

At the *Machner* hearing, Lepsch's attorney explained his strategy in wanting Darrick M. on Lepsch's jury: "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.)

- **John. A.**

Lepsch argues John A. was biased because he, too answered that he believed police officers were more credible than other witnesses. (A-App. 136.) But in explaining his answer, John A. wrote on the questionnaire, "I believe police officers value their credibility reputation as an asset to their career." (*Id*.) Like juror Darrick M., Lepsch notes that neither the trial court nor the parties asked John A. any questions about this answer. (Lepsch Br. 16.) But 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-App. 139.) Lepsch's attorney further testified that he believed John. A. could be objective. (213:15.)

- **Christopher R.**

Lepsch argues that Christopher R. was biased. (Lepsch Br. 18.) But when Christopher R. was asked if he could judge all the witnesses the same, Christopher R. answered, "I - I would think – I would think so, yeah." (206:34.) 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 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.)

- **Lisa K.**

Lisa K. indicated in her questionnaire that she believed police officers were more credible. But during voir dire the court secured an answer from Lisa K. that she could judge an officer's credibility the same as "anyone else's" credibility:

> 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.)

- **Nathan N.**

Nathan N. also reported that he thought police officers were "more credible." (A-App. 166.) 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." (*Id.*) When asked during voir dire 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.)

- **Pamela H.**

Lepsch argues Pamela H. was biased because she reported on her questionnaire that she believed police officers were more credible. (Lepsch Br. 18.) But when asked if she could judge a police officer's credibility the same as other witness, Pamela H. answered, "Yes." (206:112.)

- **Roxanne F.**

Finally, Lepsch argues Roxanne F. was biased because she reported that she believed police officers were more credible. (Lepsch Br. 18.) When asked by the court during voir dire if she could judge officers 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.)

***Machner* hearing testimony from Lepsch's attorney regarding jurors who indicated on their questionnaires that police officers are more credible 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*.)

2. The jurors who stated in their questionnaire that they had formed an opinion or made up their minds.

With all of the following jurors, Lepsch has failed to show objective or subjective bias. He also fails to prove that they were "not rehabilitated in any respect" (Lepsch Br. 16), or that the questions asked were "imprecise if not incorrect and did not elicit from the juror[] the requisite assurances." (Lepsch Br. 17.)

- **Lisa K.**

The questionnaire asked all potential jurors, "Have you ever expressed the opinion that Mr. Lepsch was guilty[,]" and "Do you have any feelings at this time that you have made up your mind as to Mr. Lepsch's guilt?" (A-App. at 216.) Lepsch argues that four jurors were impartial because they had expressed an opinion about his guilt or had made up their minds that Lepsch was guilty. (Lepsch Br. 18.) But the ***follow-up*** question was, "IF YES, would have any difficulty putting these feelings out of your mind if you were chosen to be a juror? (A-App. 216.)

Lisa K. said she had never expressed an opinion about Lepsch's guilt, but that she did have feelings at the time about his guilt. (A-App. 216.) She did not answer the follow-up question.

During voir dire, however, the State asked Lisa K. about her opinion as to Lepsch's guilt:

> **The State:** [Y]ou indicated that you had expressed an opinion that Mr. Lepsch was guilty?
>
> **Lisa K:** When I initially read the article I guess when it came out like a year ago, I kind of thought that, you know, not knowing all the evidence but . . .
>
> **The State:** Okay. Since then do you think you can set that aside and focus on the evidence that's brought forth in court?
>
> **Lisa K:** *Yes*. I haven't read anything, I guess, since the article came out last September.

(206:115; A-App. 222) (emphasis added).

- **John A.**

John A. answered that he had expressed an opinion as to Lepsch's guilt and that he did have feelings at this time that he had made up his mind as to Lepsch's guilt. (A-App. 138.) To the follow-up question, however, John A. answered, "No," that he would not have any difficulty putting his feelings out of his mind if he were chosen to be a jury. (A-App. 138.) And, 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.)

At the *Machner* hearing, Lepsch's attorney testified that he believed the trial court's examination of John A. on whether John A. could set feelings aside was sufficient. (213:14.) According to Lepsch's attorney, he felt John A. could be objective, and that if he thought John A. couldn't be objective, he would have moved to have John A. struck for cause. (213:15.)

- **James T.**

James T. answered "Yes" to the question in the questionnaire, "Do you have any feelings at this time that you have made up your mind as to Mr. Lepsch's guilt?" (A-App. 230). But what Lepsch fails to point out is that James T. answered, "No," to the follow-up question, that he would *not* have any difficulty putting these feelings out of his mind if chosen to be a juror. (*Id.*). Also, when asked by Lepsch's attorney if he could still put those feelings aside and just look at the evidence presented to him in the case, James T. answered, "I'd say yes." (206:40; A-App. 239.)

Lepsch's counsel discussed James T. at the *Machner* hearing, noting that James T. "wrote that, a situation can look a certain way until it is more closely examined by nonbiased parties." (213:11.) Lepsch attorney stated it "was a sign to me that this person could be objective and review the evidence in this case." (*Id.*).

- **Mandy F.**

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 Br. 18.) But again, the very next question: "IF YES, would you have any difficulty putting these feelings out of your mind if you were chosen to be a juror?" Mandy F. answered, "No." (A-App. 246.) Also, when questioned by the State during voir dire, Mandy F. indicated that she had an open mind. (206:103.) And when questioned about whether she can base her decision on the evidence in the courtroom,

she replied, "Absolutely." (206:105.) At the *Machner* hearing, Lepsch's attorney testified that he was satisfied with this response. (213:16.)

3. The juror who stated in his questionnaire that he believed a person brought to trial was "probably" guilty.

- **Christopher R.**

Lepsch argues that Christopher R.'s beliefs are "deeply troubling" because he indicated that if someone is brought to trial, that they are "probably" guilty. (Lepsch Br. 22-23, citing A-App. 182.) Because Lepsch does not include what Christopher R. stated additionally in his questionnaire, a review of the questions and his answer is necessary:

> Q: 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?
>
> A: No. . . .
>
> Q: Do you have any problem with the legal proposition that a defendant must be proved guilty beyond a reasonable doubt or he or she must be found guilty?
>
> A: No. . . .
>
> Q: Do you think if the state goes to the trouble of bringing someone to trial, that person is probably guilty?
>
> A: Yes.
>
> Q: Why do you say that?
>
> A: 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 brining someone in.

(A-App. 182.)

> Q: Do you have any feelings at this time that you have made up your mind as to Mr. Lepsch's guilt?
>
> A: No.

(A-App. 183).

> Q: Is there any reason why you could not be impartial in this case?
>
> A: No.

(A-App. 184.)

During voir dire, 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.) Christopher R. also agreed with defense counsel that Lepsch is "innocent as he sits here today." (*Id*.).

Further, 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." (*See* 213:21, 48-49) (emphasis added). 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.)

C. Lepsch fails to prove that the trial court erred by failing to remove any of the jurors based on subjective or objective bias.

Lepsch's attorney did not move to strike for cause *any* of the jurors challenged on appeal. As indicated, the jurors either explained more in their questionnaire, the jurors were rehabilitated during voir dire, or Lepsch's attorney had a strategy for wanting them on the jury panel. Therefore, Lepsch claims that the *trial court* should have questioned the jurors more fully and removed them for cause. (Lepsch Br. 23, 27-28.) But the trial court "took extra precaution to ensure an impartial jury." (200:6, A-App. 260.) As it stated, "Each prospective juror was 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." (*Id.*)

The court also noted that "the extensive questionnaire sent out to the jurors was used to eliminate 24 jurors who exhibited a bias indicating they could not sit as objective jurors[.]" (200:6-7, A-App. 260-61.) The court stated its assurance that Lepsch received an impartial jury:

> From the court's position of being able to best determine juror bias, the court is absolutely convinced that each juror was able to put any potential biases out of their minds. The court is absolutely certain that Lepsch was tried by a fair and impartial jury who decided the case based solely on the evidence before them.

(206:10; A-App. 264).

But Lepsch argues that the test for juror impartiality under *Patton v. Yount*, 467 U.S. 1025 is stronger and that Wisconsin case law on juror impartiality "allow[s] for less." (Lepsch Br. 25.) Therefore, Lepsch argues that the court of appeals' decision and this Court's caselaw on juror

impartiality does "not sufficiently comport" with federal caselaw. (*Id.*)

II. This Court's caselaw that focuses on determining juror impartiality does not violate federal law or the Sixth Amendment to the United State's Constitution.

Lepsch suggests that Wisconsin courts, including this Court, have been ignoring federal constitutional requirements for over 30 years. Not likely, and in this case, not true.

Lepsch argues that a juror "must give *a final, unequivocal statement*." (Lepsch Br. 30, italics in brief.) According to Lepsch, this Court's caselaw "dilutes" this "federal constitutional requirement" in determining whether a juror is impartial. (Lepsch Br. 25.)

Lepsch notes that Wisconsin caselaw allows trial judges to consider a juror's demeanor, which, Lepsch argues, "fall[s] short of express, affirmative assurances by the juror himself or herself that he or she can set aside his or her opinion and decide the case on the evidence." (Lepsch Br. 27.)[2] He argues that this Court's cases and the court of appeals' cases are problematic because they "seemingly *do not* require an affirmative swearing by the juror that he or she can set aside his opinion and decide the case on the evidence." (Lepsch Br. 26.) "[S]pecifically *Erickson, Ferron, Kiernan*, and *Faucher* and *Lindell*" "disregard[]" or "dilute[]" the "federal constitutional requirement." (Lepsch Br. 31.)

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[2] Lepsch argues that a commitment from a juror that he or she "will do their best to be fair," is not enough. (Lepsch Br. 30, citing *State v. Ferron,* 219 Wis. 2d 481, 507, 579 N.W. 2d 654 (1998), *abrogated on other grounds by State v. Lindell*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223). But this language is taken from Justice Geske's dissent in *Ferron,* which was subsequently adopted in *Lindell*, and Lepsch points to no juror in his case who made such a statement or similar statement.

The State respectfully disagrees with Lepsch's portrayal of both *Patton* and Wisconsin caselaw.

A. *Patton v. Yount*.

Nowhere in *Patton* did the Supreme Court hold that a juror must provide a "final, *unequivocal* statement" that he or she can set aside his or her opinion and decide the case on the evidence. (*See* Lepsch Br. 30.) And nowhere in *Patton* did the Supreme Court hold that trial courts cannot look to a juror's demeanor in considering impartiality. (*See* Lepsch Br. 27.) In fact, *Patton* stated that a trial court's determination of bias "is essentially one of credibility, and therefore *largely* one of demeanor." *Patton* 467 U.S. at 1038 (emphasis added.) In the Supreme Court's concise but careful discussion of the issue, the *Patton* Court recognized:

> The testimony of each of the three challenged jurors is ambiguous and at times contradictory. This is not unusual on voir dire examination, particularly in a highly publicized criminal case. It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. *Jurors thus cannot be expected invariably to express themselves carefully or even consistently*. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

467 U.S. at 1038-39.

The *Patton* Court noted that while a "cold record" can "arouse[ ] some concern," only a trial judge can tell "which of these answers was said with the greatest comprehension and certainty." *Id*.

B. Wisconsin caselaw.

Echoing the *Patton* Court, this Court noted in *Lindell* that jurors can equivocate, and so requiring a juror's "final, unequivocal statement" is not the test to determine juror impartiality.

> "In almost every serious felony case, honest prospective jurors express concerns about the heinous factual allegations, the presumption 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. The trial judge must then, based upon his or her own assessment of that person's sincerity and ability to be fair, decide whether that person is qualified to sit on that particular case."

Lepsch, 2015 WL 7287026, ¶ 15 (quoting *Lindell*, 245 Wis. 2d 689, ¶ 101) (emphasis added). (R-App. 109.)

This Court's caselaw therefore does not "dilute" United State's Supreme Court caselaw. It *follows* United State's Supreme Court caselaw. The *Erickson* case does as well.

In *Erickson*, this Court stated that "a prospective juror need not respond to voir dire questions with unequivocal

declarations of impartiality." *Erickson,* 227 Wis. 2d at 776. Rather, this Court expects a trial court "to use voir dire to explore a prospective juror's fears, biases, and predilections and fully expect a juror's honest answers at times to be less than unequivocal." *Id.* (citing *State v. Ferron*, 219 Wis. 2d 481, 507, 579 N.W. 2d 654, *abrogated on other grounds by State v. Lindell*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223) (Geske, J., dissenting)[3]. *Erickson* recognized that the trial court, "being able to fully observe the prospective juror during voir dire, is in a far superior position to ascertain bias than is an appellate court whose only link to the voir dire is through the 'bare words on a transcript' of the proceedings." 227 Wis. 2d at 775. Both *Lindell* and *Erickson* reflect that when spoken, a trial court is able to hear a juror's voice and volume, any hesitation or inflections, and this court is also able to witness a juror's nonverbal actions.

Faucher also adheres to *Patton,* in which this Court stated that a "prospective juror's subjective bias will only be revealed through his or her demeanor," and that "a prospective juror need not unambiguously state his or her ability to set aside a bias." 227 Wis. 2d at 718, 731 n.8 (citation omitted). Likewise, *State v. Kiernan*, 227 Wis. 2d 736, 746, 596 N.W. 2d 760 (1999), does not violate *Patton*, as it provides that "subjective bias is based on the juror's responses and demeanor at voir dire. Even with a transcript, an appellate court is at a disadvantage to gauge subjective bias because the demeanor and sincerity of the juror are difficult to convey in the paper record of a proceeding.")

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[3] In *Ferron*, a prospective juror "continued to express his belief that criminal defendants who elect not to testify on their own behalf are guilty." 219 Wis. 2d at 500. The record reflected that the juror stated he could "probably" set aside his bias. *See id.* at 501. The *Ferron* Court made clear that "[t]here are no magical words that need be spoken by the prospective juror, and the juror need not affirmatively state that he or she can 'definitely' set the bias aside." *Id.*

And in this case, the postconviction court explained that, based on its position of observing the jurors, it was convinced that each juror was (1) able to put aside any potential subjective bias and (2) decide the case based solely on the evidence (A-App. 337; *see* Lepsch Br. 13, 29, arguing that "under *Patton*, [a juror] had to 1) swear that he or she could set aside such beliefs or opinions, and 2) swear that he or she could decide the case on the evidence."). The record supports this conclusion.

In sum, the court's decision-making, taking into account jurors' demeanor and "making its assessment of a person's sincerity and ability to be fair" (200:9; A-App. 263), is allowed under both *Patton* and Wisconsin caselaw. Because the court's determination as to subjective bias was not clearly erroneous (*see Faucher*, 227 Wis. 2d at 718), and its determination as to objective bias was reasonable (*see id.* at 719), this Court should not disturb those determinations.[4]

[4] Lepsch also argues the Seventh Circuit provides that a juror must provide "unequivocal assurances," citing *Marshall v. City of Chicago*, 762 F.3d 573, 576 (7th Cir. 2014), *United States v. Allen*, 605 F.3d 461, 466 (7th Cir. 2010), and *Thompson v. Altheimer & Gray*, 248 F.3d 621, 626 (7th Cir. 2001). But this Court has recognized that the Seventh Circuit is not binding: "Although we may of course seek guidance in the persuasive authority of other jurisdictions, only United States Supreme Court interpretations of federal law are binding on this court. *Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶ 7, 232 Wis. 2d 587, 605 N.W.2d 515 (citing *State v. Webster,* 114 Wis. 2d 418, 426 n. 4, 338 N.W.2d 474 (1983). *See also Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 68, 358 Wis. 2d 1, 851 N.W.2d 337, *reconsideration denied,* 2015 WI 1, ¶ 68, 360 Wis. 2d 178, 857 N.W.2d 620 (providing that Seventh Circuit caselaw is not binding on this Court).

III. Lepsch fails to show the "appearance" of bias or that the trial court conducted an "insufficient inquiry" to ensure an impartial jury.

Lepsch next argues that his due process rights were violated by circumstances that created the "likelihood or appearance of bias." (Lepsch Br. 32.) According to Lepsch, to avoid the appearance of bias, the trial court should have "examined each of [the nine jurors] more fully[.]" (Lepsch Br. 36.)

The court of appeals rejected this argument, concluding that the record did not indicate *any* juror was subjectively or objectively biased, and that "because each of the jurors expressed the ability to remain impartial at trial, we conclude that none of the jurors exhibited *the appearance* of bias." *Lepsch*, 2015 WL 7287026, ¶ 9 n.4. (R-App. 106) (emphasis added).

But Lepsch argues that "the jury selection process was fast and short especially considering the gravity of the charges and the extent of the pre-trial publicity." (Lepsch Br. 36.) Yet the trial court was well aware of pre-trial publicity. 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 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-App. 260-61.)

Lepsch fails to show the appearance of bias. He is not entitled to relief on this claim.

IV. Whether the clerk's administration of the oath to the jury venire, which was made outside of Lepsch's presence, violated his right to a public trial.

The jury venire 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.).[5] The jury venire did, however, sign an oath on their jury questionnaire (*see, i.e.,* A-App. 142.), and the court provided the jury *panel* an oath before trial. (207:4.)

[5] 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 postconviction court noted: "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-App. 256-57.)

A. Lepsch has forfeited this issue.

As the State argued in the court of appeals, Lepsch never raised this issue at trial, and so it is deemed forfeited. Relying on *Pinno*, 356 Wis. 2d 106, the court of appeals agreed. *Lepsch*, 2015 WL 7287026, ¶ 6. (R-App. 103-04.)

In *Pinno*, this Court held that claims of constitutional errors, even structural errors such as denial of the right to a public trial, may be deemed forfeited if a timely objection is not made. 356 Wis. 2d 106, ¶¶ 7-8. This Court explained that "[i]t would be inimical to an efficient judicial system if a defendant could sit on his hands and try his luck" with trial despite the structural error "only to argue after his conviction" that his constitutional rights had been violated. *See id.* ¶ 7. *See also 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). The court of appeals in this case found "no basis to deviate from that rule here." *Lepsch*, 2015 WL 7287026, ¶ 6. (R-App. 104.)

The court also noted that Lepsch did "not develop an argument distinguishing the claimed structural errors in this case from the errors in *Pinno*, 356 Wis. 2d 106, ¶¶ 83-86, which were deemed not to give rise to a presumption of prejudice." *Id.* ¶ 8. (R-App. 105.) It declined to extend "the rare presumption of prejudice to the claimed errors in this case." *Id.*

The court of appeals also rejected Lepsch's claim that he had no notice as to the manner in which the oath had been administered: "Clearly, Lepsch was aware at the time of the jury voir dire that the oath had not been administered to the jury venire in his presence in open court." *Lepsch*, 2015 WL 7287026, ¶6. (R-App. 103-04.) Yet Lepsch's attorney made no inquiry about the administration of the oath to the jury. Had Lepsch's attorney believed that the oath was not properly administered, an objection would have easily remedied the problem.

The court of appeals also noted that Lepsch did *not* dispute that the jury venire was, in fact, properly administered the oath. *Lepsch*, 2015 WL 7287026, ¶ 7. (R-App. 104.) Rather, his argument was limited that his rights were violated because the oath was not administered in his presence in an open courtroom. With that claim, the court of appeals found that Lepsch did not develop a persuasive argument that his claims of constitutional violations are not subject to forfeiture under *Pinno*.

The State agrees. Lepsch has forfeited his arguments on this issue and there is no basis to deviate from the forfeiture rule in this case. He is not entitled to relief on this claim.

B. Even if Lepsch did not forfeit this issue, he loses on the merits 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).

Even if this Court disagrees with the State and the court of appeals, Lepsch's claim fails on the merits. Lepsch argues that under *State v. Harris*, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. Ap. 1999), his right to be present at "all proceedings when the jury is being selected" includes the administration of the oath to prospective jurors. (Lepsch Br. 40). 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 is the following: 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)? The State submits that it is not.

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) presents a question of law. *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.* The court of appeals disagreed. It 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, the *Gribble* 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 venire 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. Similarly, Lepsch could not have objected to the giving of the oath or gained any useful knowledge from observing the formality of having the jurors take the oath.

But Lepsch cites *Harris* for the proposition that when the administration of the oath to the jury venire occurs outside the presence of the defendant and his counsel, reversible error occurs. (Lepsch Br. 41.) The State disagrees.

"[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 to establish that the error was not prejudicial." *Id.*

In this case, Lepsch was not prejudiced by the administration of the oath to the jury venire outside of his presence.[6] He could not have objected to the giving of the oath or gained any useful knowledge from observing the formality of having the jurors take the oath. Further, *Harris*

[6] As indicated in footnote 1, *supra*, all jurors signed an oath on their questionnaire as well.

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. *Harris* 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 or excused prospective jurors outside of Lepsch's presence.

Lepsch also argues that the clerk's administration of the oath in the jury assembly room, as opposed to the courtroom, violated his right to a public trial. (Lepsch Br. 40.) He argues that such a violation is structural in nature. The State disagrees, as he is arguing, again, that the administration of the oath is part of "voir dire" proceedings upon which he was entitled to be present. But *Gribble*s rejected this 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 to the jury venire did not violate his right to a public trial. And, even if Lepsch did have a right to be present, the denial of that right does not entitle him to a new trial. *See Tulley*, 248 Wis. 2d 505, ¶7. There is no reasonable possibility that any such error contributed to Lepsch's conviction.

C. Lepsch's claim that his counsel was ineffective for failing to object to the administration of the oath.

Lepsch also argues that his trial counsel was ineffective by failing to raise the proper objections to the administration of the oath. (Lepsch Br. 48.)

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).

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

The court of appeals found that Lepsch did "not develop any argument that he was actually prejudiced by his counsel's failure to object; rather, he contends that the errors were structural and thus prejudice should be presumed." *Lepsch*, 2015 WL 7287026, ¶ 8 (citing *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001). (R-App. 105.) Lepsch contends the same in his brief to this Court. *See Lepsch* Br. 49 (requesting that "this Court should presume prejudice given that the failure to properly administer the oath to prospective jurors amounted to structural error").

But the court of appeals found that Lepsch failed to distinguish the claimed structural errors in this case from the errors in *Pinno*, which were deemed not to give rise to a presumption of prejudice. *Lepsch*, 2015 WL 7287026, ¶ 8 (R-App. 105.) *See Pinno*, 356 Wis. 2d 106, ¶¶ 83-86 (providing that "the circumstances in which prejudice is presumed are rare," and that "an error does not automatically receive a presumption of prejudice merely because it is deemed structural. . . . Indeed, a rule that prejudice must be presumed when counsel fails to object . . . would effectively nullify the forfeiture rule").

The court of appeals therefore rejected Lepsch's claim and declined "to extend the rare presumption of prejudice to the claimed errors in this case." *Lepsch*, 2015 WL 7287026, ¶ 8. The State requests that this Court decide the same. While Lepsch argues that this case is difference from *Pinno* in that "[a]t 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" (Lepsch Br. 42), as the court of appeals noted, "Lepsch was aware at the time of the jury voir dire that the oath had not been administered to the jury venire in his presence in open court." *Lepsch*, 2015 WL 7287026, ¶ 7. (R-App. 104.)

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 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.)

The State agrees. Lepsch could not have objected to the giving of the oath or gained any useful knowledge from observing the formality of having the jurors take the oath. Counsel was not deficient for not objecting, and there was no prejudice. Lepsch is not entitled to relief on this claim.

V. Whether the trial court's mistake of allowing only six peremptory strikes was "harmful and prejudicial," and whether Lepsch's trial attorney was ineffective for failing to obtain the additional strike.

The postconviction court acknowledged that both parties received one fewer peremptory challenge than was permitted under Wis. Stat. § 972.03. (200:10; A-App. 264.)[7] Each side was afforded six peremptory strikes. This Court will "decline to presume prejudice where there is a denial of an equal number of peremptory strikes to both the defense." *Erickson*, 227 Wis. 2d at 777.

Lepsch argues that he should have been afforded the required seven peremptory strikes because he was forced to utilize all of his peremptory strikes to exclude certain jurors

[7] Under Wis. Stat. § 972.03, because the court selected three additional jurors as alternates, both parties were entitled to one additional peremptory strike, making it seven strikes. Wis. Stat. § 972.03.

who should have been excused for cause. (Lepsch Br. 46.) Because Lepsch did not object to the loss of one peremptory strike at trial,[8] the issue of whether the insufficient number of peremptory strikes entitles Lepsch to a new trial is analyzed under the rubric of ineffective assistance of counsel. *See Lepsch*, 2015 WL 7287026, ¶ 18 (citing *Erickson*, 227 Wis. 2d at 765-68). (R-App. 110.)

The court of appeals assumed without deciding that Lepsch's attorney was deficient by failing to obtain the additional strike, but it concluded that Lepsch failed to establish prejudice. It relied on this Court's decision in *Erickson*, 227 Wis. 2d at 769-73:

> In *Erickson*, the [S]upreme [C]ourt rejected Erickson's claim that prejudice should be presumed whenever counsel's deficient performance deprived the defendant of a peremptory strike. The court explained that the circumstances did not warrant the rare presumption of prejudice, noting that "[t]here is little doubt that Erickson was judged by an impartial jury" and that "both sides equally lost out on the use of peremptory strikes." [227 Wis. 2d] at 771-72. Turning to the question of actual prejudice, the court explained that Erickson would have to show "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 773 (quoted source omitted.) In concluding that Erickson had not met that burden, the court noted that any benefit Erickson may have received from the additional strikes would have potentially been offset by the State receiving the same additional strikes. *Id.* at 773-74. The court explained that Erickson had offered only rank speculation as to how the outcome of his trial would have been different had his counsel

[8] At the *Machner* hearing, Lepsch's attorney testified that the trial court asked the parties "whether six was the appropriate amount, and the parties agreed on it." (213:23-33.)

> not erred, which was insufficient to show prejudice. *Id*. at 774.

Lepsch, 2015 WL 7287026, ¶19. (R-App. 110-11.)

The court then noted, "*Here, as in Erickson,* Lepsch and the State received an equal number of peremptory strikes, and Lepsch has not shown that a biased juror actually sat on the jury panel." *Lepsch*, 2015 WL 7287026, ¶ 20 (emphasis added). (R-App. 111.)

The State agrees. As the postconviction court concluded, none of the jurors "who ultimately sat on the jury were biased." (200:12; A-App. 266.) Rather, 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. Because Lepsch was not denied an impartial jury, Lepsch's claim that his counsel was ineffective by failing to obtain the additional strike is without merit.

VI. Lepsch has failed to prove that his counsel rendered deficient performance.

As Lepsch notes in his brief, "Due to trial counsel's failure to preserve the issues at trial, all of the issues litigated in this appeal have been raised via a claim of ineffective assistance of counsel under *Strickland v. Washington*." (Lepsch. Br. 48.) In addition to the other ineffective assistance claims already discussed in this brief, Lepsch argues that his trial counsel was ineffective for failing to sufficiently examine and challenge prospective jurors for cause. (Lepsch Br. 49-50.)

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. The postconviction court opined that Lepsch's attorney's trial strategy regarding jury selection was "well prepared"

and "clear." (200:19; A-App. 273.) It determined 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-App. 274.)

Specifically, Lepsch's counsel testified at the *Machner* hearing that his 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.) He also testified that the jurors he "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) (emphasis added).

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*.

Again, while the gist of Lepsch's appeal is that his attorney did not secure solid "yes," answers, Lepsch's lawyer explained explained that he "didn't see the benefit to Mr. Lepsch's case, in pursuing [the jurors] 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." (200:9; A-App. 263, citing 213:43.) "In fact," he continued, "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-App. 263, citing 213:43.) Lepsch's attorney was questioned:

> Q: If somebody said words to the effect of, I hope so or I thinks so, and you took that to be the equivalent of a yes given added nonverbal cues, you said there might be some problem alienating them by asking them further to say just the word "yes" and nothing more?
>
> A: Yes in – in fact, that's a specific strategic consideration I have going into a voir dire is how I'm interacting with the jury. I don't want to alienate them. I want to try to build some level of rapport so they're listening to me and what I'm saying.

(213:45).

The court of appeals agreed with the postconviction court that Lepsch failed to establish ineffective assistance, concluding that "Lepsch does not develop an argument that further inquiry of the jurors by trial counsel would have led to a different result. Because Lepsch has not shown that any juror on the jury panel was biased, or that further questioning would have revealed bias, we reject his claim[.]" *Lepsch*, 2015 WL 7287026, ¶ 17. (R-Ap. 110.)

Lepsch's lawyer had a strategy going into voir dire, and no biased juror ultimately sat on his jury. The strategy was deliberate, and it was based on articulated reasons which were not unreasonable or irrational. 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. His decision not to move to strike any of the nine impartial jurors was not deficient, and his client was not prejudiced because of his decision.

CONCLUSION

The voir dire in this case, as well as the defense's strategy, resulted in Lepsch receiving a fair and impartial jury. The State respectfully requests that this Court affirm the judgment of conviction and order denying postconviction relief.

Dated this 21st day of July, 2016.

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 11,703 words.

_____
Sara Lynn Shaeffer
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).

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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 21st day of July, 2016.

_____
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