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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2014AP2813-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JEFFREY P. LEPSCH, Defendant-Appellant-Petitioner

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING THE LACROSSE COUNTY CIRCUIT COURT, THE HONORABLE RAMONA G. GONZALEZ PRESIDING.

DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Harmless error doctrine does not apply to claim that trial court seated bias jurors.

As an initial matter, Lepsch must address the State's assertion that "[c]laims of juror bias are subject to a harmless error test" and its reliance on **State v. Lindell**, 2001 WI 108, ¶80, 245 Wis.2d 689, 629 N.W.2d 223 for such proposition. The State is wrong. It is a well established principle of 6th Amendment law that the presence of a biased juror cannot be harmless. See **United States v. Martinez-Salazar**, 528 U.S. 304, 316 (2000); **Oswald v. Bertrand**, 374 F.3d 475, 482 (7th Cir. 2004); **United States v. Gonzalez**, 214 F.3d 1109, 1114 (9th Cir. 2000); **Johnson v. Armontrout**, 961 F.2d 748, 755 (8th Cir. 1992). Moreover, **Lindell** does not make such holding or come close to it. This court in **Lindell** only contemplated "harmless error" in a situation where counsel uses a peremptory challenge to remove an objectionable juror and then on appeal claims that the trial court erred by not removing the juror for cause. See **State v. Lindell**, 2001 WI 108 at ¶¶80-81. The court expressly recognized that a harmless error analysis does not apply to situations in which a

defendant asserts a violation of his or her Sixth Amendment right to an impartial jury. **Id**. at ¶111.

II. Lepsch has shown that at least one juror was probably biased.

If even one member of the jury was not impartial, then the entire jury cannot be considered impartial. See **Parker v. Gladden**, 385 U.S. 363, 366 (1966). The standard of proof for establishing that a juror was not impartial is minimal. Lepsch must merely show that "it is more probable than not that the juror was biased." See **State v. Louis**, 156 Wis.2d 470, 478, 457 N.W.2d 484 (1990). Of course, in mounting this challenge, Lepsch is entitled to have doubts regarding bias resolved against the juror in question. See **United States v. Gonzalez**, 214 F.3d at 1114; **Burton v. Johnson**, 948 F.2d 1150, 1158 (10th Cir. 1991); and **United States v. Nell**, 526 F.2d 1223, 1230 (5th Cir. 1976).

With this context in mind, it is hard to see how Lepsch has not successfully proven that at least one of the jurors was not impartial. The clearest examples lie with Darrick M. and John A., and their beliefs about the credibility of law enforcement officers.[1] With respect to Darrick M.,

[1] Darrick M.'s belief that law enforcement officers were more credible was enhanced by his indication on the questionnaire that he "(knew) many police officers." A-Ap.120.

nowhere in the State's brief does it show, or even attempt to show, that Darrick M. stated that he could set aside his beliefs and decide the case on the evidence. The State explores Darrick M.'s answers to other questions in the questionnaire and trial counsel's stated rationale for not challenging Darrick M., State's brief at p.14, but the State wholly fails to show that Darrick M. stated anywhere that he could set aside his belief or that Darrick M. was even questioned about it. Despite all other issues raised in this case, this one alone is fatal for the State. Even if we disregard **Patton v. Yount**, 467 U.S. 1025 (1984) and federal case law for a moment, **State v. Carter**, 2002 WI APP 55, ¶12, 250 Wis.2d 851, 641 N.W.2d 517 instructs that where a juror openly admits a bias and his partiality is never questioned, the juror is subjectively biased as a matter of law. Significantly, the State does not discuss **Carter** in its brief. This is curious given that Darrick M. plainly fell within **Carter**'**s** criteria for a subjectively biased juror. So too did John A. As with Darrick M., the State wholly fails to show that John A. stated anywhere that he could set aside his belief or that John A. was even questioned about it. [2] The State notes that John A. answered "no" to question No. 38 of the questionnaire

[2] John A.'s belief that law enforcement officers were more credible was made more problematic by his belief that Lepsch was guilty and that he had made up his mind. A-Ap.138.

which asked, "[i]s there any reason why you could not be impartial in this case?" A-Ap.139. But such response creates more confusion than clarity. The response plainly conflicts with John A.'s response regarding his beliefs about the credibility of police officers and Lepsch's guilt. In essence, John A. did not recognize that his own beliefs prevented him from being impartial. It is striking that neither the trial court, trial counsel nor the prosecutor asked John A. any questions regarding this apparent contradiction. Because John A.'s view on the credibility of law enforcement went unexamined in this regard, like Darrick M., he too was plainly subjectively biased under **Carter**.

In analyzing the statements made by Pamela H., Roxanne F. and Lisa K. regarding their beliefs about law enforcement's credibility, the State sets forth matters stated by the jurors which do not amount to assurances that they can 1)set aside the beliefs at issue and 2)decide the case solely on the evidence. What the State attempts to do is reconstruct or interpret statements made by jurors during voir dire and then present them as the requisite assurances. By way of example Lepsch points to the following:

Pamela H.-

With respect to Pamela H., trial counsel merely asked if it was "okay if the law and the Court ask you to listen to the witnesses in the—in the courtroom and assess their credibility on what you hear in the courtroom." A-Ap.207. Pamela H. stated "yes." A-Ap.207.[3]

Roxanne F.-

With respect to Roxanne F., the trial court merely asked if she could judge police officers or "look at them as (she) would any other witness." A-Ap.160. Roxanne F. stated "yes." A-Ap. 160-161.

Lisa K.-

With respect to Lisa K., the trial court merely asked if she could "judge (law enforcement's) credibility the same as you would judge anyone else's?" A-Ap.221. Lisa K. stated "yes." A-Ap. 221-222.[4]

[3] Pamela H. went beyond merely expressing a belief that law enforcement witnesses were more credible than non-law enforcement witnesses. On voir dire she indicated that "they should be above us 'cause they're, you know, policemen. They're supposed to be trustworthy." A-Ap.207.
[4] In addition to expressing the belief that law enforcement officers were more credible than non-law enforcement witnesses, Lisa K. indicated on voir dire that her uncle was a retired City of LaCrosse police officer. A-Ap.222.

While these statements may come close to constituting an assurance of an ability to set aside each juror's beliefs, they do not fully make it. Similarly, such statements plainly do not constitute an assurance of being able to decide the case solely on the evidence.

With respect to Christopher R.'s beliefs that defendants proceeding to trial were "probably" guilty, that the presumption of innocence should not apply in all cases, and that a presumption of guilt should apply in some cases, the State points to no statements made by Christopher R. during voir dire which sufficiently constitute an affirmation that he could set aside all such beliefs and decide the case solely on the evidence. All we have is trial counsel's statements, "[t]he judge is gonna at some point in the case instruct you about the presumption of innocence, that you have to start out with looking at Mr. Lepsch as he is innocent," and that "[h]e's innocent as he sits here today." A-Ap.193. In response, Christopher R. states, "[m]m-hmm," and "[y]ep." A-Ap.193. Given the gravity of Christopher R.'s beliefs, such responses cannot reasonably be viewed as an assurance that he can set aside his beliefs and decide the case solely on the evidence.

With respect to those jurors who stated in their questionnaires that they formed an opinion or made up their minds as to Lepsch's guilt, Lisa K., John A., James T. and Mandy F., the State notes that such jurors checked a box in the questionnaire which indicated that they would not have any difficulty putting the feelings out their minds if selected as jurors. See State's brief, pp.17-19. Lepsch acknowledges that this point has some initial persuasive value. But it ultimately fails because the checking of the box does not equate to an in-court, on-the-record examination by the trial court as to whether the juror can set aside the belief. To satisfy Lepsch's right to be present for voir dire and to a public trial, the jurors' requisite assurances had to have been made in-court, on-the record and in the presence of Lepsch. Having said this, Lepsch would acknowledge that John A., James T., Mandy F. and Lisa K., were all examined on the record during voir dire, at least to a minimal degree, regarding their stated beliefs that Lepsch was guilty and/or that their minds were made up. Lepsch would further acknowledge that the jurors used language during voir dire which came close to meeting the requisite assurances.[5] The gravamen of

[5] Lepsch uses the phrase "came close" because while Lisa K., James T. and Mandy F. all indicated that they could set aside or put aside their beliefs, they did not state that they could decide the case solely based on the evidence in court. Instead, they acknowledged that they could "focus" on the

Lepsch's complaint about these jurors is that assuming arguendo that such jurors swore that they could set aside their beliefs and decide the case solely on the evidence, such statements should not be believed because they are so objectively unreasonable. That is to say, for the reasons argued in Lepsch's brief-in-chief at pp.19-21, the jurors' beliefs constituted a "presumption of partiality." The jurors' ostensible relinquishment of such beliefs cannot therefore reasonably be believed as the second part of the **Patton** test requires.

III. Wisconsin case law regarding juror impartiality does not sufficiently comply with the 6th Amendment.

Justices O'Connor and Kennedy in **Mu'Min v. Virginia**, 500 U.S. 415 (1991) reiterated the test for juror impartiality under **Patton**. **Id.** at 432 and 449. Justice Kennedy was especially clear:

> The question is "one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." **Id**. at 449.

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evidence or "listen" to the evidence which is different than deciding the case solely on the evidence. See A-Ap.222 (Lisa K.), 238-239 (James T.) and 253 (Mandy F.).

While **Patton** does not use the term "unequivocal assurances," decisions from various federal circuit courts applying **Patton** do.[6] Lepsch recognizes of course that such decisions are not binding on this court. However, they are as the State notes in its brief at p.27, "persuasive authority." The State fails to reconcile or even attempt to reconcile the decisions which interpret **Patton** to require "unequivocal assurances" with the Wisconsin case law which expressly rejects the need for them. Perhaps this is because they cannot be reconciled. Lepsch has already acknowledged that **Patton** and the Seventh Circuit authorities countenance that jurors may give ambiguous and contradictory statements during voir dire. See Lepsch's brief at p.30. But among such statements must be those which affirm that the juror can set aside his beliefs and decide the case solely on the evidence. And here is where the jurisprudence of this state and the federal system depart. As argued more fully in Lepsch's brief-in-chief at pp.26-28, the Wisconsin cases seemingly do not require an affirmative swearing by the juror that he or she can set aside his or her opinion and decide the case on the evidence. Rather, such cases allow a trial

[6] See **Thompson v. Altheimer & Gray**, 248 F.3d 621, 626 (7th Cir. 2001), **United States v. Allen**, 605 F.3d 461, 466 (7th Cir. 2010), **Marshall v. City of Chicago**, 762 F.3d 573, 576 (7th Cir. 2014), **United States v. Gonzalez**, 214 F.3d 1109, 1113-1114, (9th Cir. 2000), **United States v. Evans**, 272 F.3d 1069, 1079 (8th Cir. 2001), and **Wolfe v. Brigano**, 232 F.3d 499, 502 (6th Cir. 2000).

court to conclude from other statements made by the juror and the juror's demeanor that the juror is not "subjectively biased" or "objectively biased." The State again fails to reconcile or even attempt to reconcile this tension in the jurisprudence. Instead, the State argues that the Wisconsin cases follow **Patton** in that they provide for a determination of impartiality based on a court's observations of demeanor, nonverbal actions and the like. See State's brief at pp.25-27. To be sure, the cases do follow **Patton** in such regard. But the issue is not how are they similar but how are they different. They are significantly different in that the state case law permits what the federal law does not. The District Court and Seventh Circuit clearly recognized the issue in **Oswald v. Bertrand**, 249 F.Supp.2d 1078 (E.D. Wis. 2003), affirmed 374 F.3d 475 (7th Cir. 2004). Curiously, the State wholly fails to discuss these cases in its brief.

IV. If this case does not present at least the "appearance of bias," perhaps no case will.

On pp.33-38 of Lepsch's brief-in-chief, Lepsch discusses considerations which urge the conclusion that even if bias did not exist on the part of any one juror, the "appearance of bias" did. The State's response in turn is that

the court of appeals concluded that "because each of the jurors expressed the ability to remain impartial at trial, none of the jurors exhibited the appearance of bias." See State's brief at p.28. This is illogical. An expression of an ability to remain impartial does not negate the appearance of bias. Further, in terms of discussing the appropriateness of the trial court's voir dire process, the State wholly fails to explain the trial court's failure to replace the nine jurors at issue with nine of the fifty-six other prospective jurors who were "blank slates." See Lepsch's brief at p.35. This is plainly what the trial court should have done especially in light of its obligations and duties to minimize the risk of bias. See Lepsch's brief at pp.34-35.

V. Trial counsel's decision to seat a biased juror cannot be strategic as a matter of law.

On pp.39-41 of the State's brief, the State responds to Lepsch's ineffective assistance of counsel argument by couching trial counsel's conduct in terms of strategy or tactics. But the question of whether to seat a biased juror is not a discretionary or strategic decision. **Hughes v. United States**, 258 F.3d 453, 463 (6th Cir. 2001). "If counsel's decision not to challenge a biased venire

person could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury." See **Hughes,** 258 F.3d at 464, and **State v. Carter**, 2002 WI App 55 at ¶15. [However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury "without the fully informed and publicly acknowledged consent of the client, then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury.] **Hughes,** 258 F.3d at 463. [Indeed, given that the presence of a biased juror, like the presence of a biased judge, is a "structural defect in the constitution of the trial mechanism" that defies harmless error analysis, to argue sound trial strategy in support of creating such a structural defect seems brazen at best.] **Id**. "We find that no sound strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury." **Id**.

VI. Lepsch's reply to State's arguments about administration of oath.

Forfeiture

Lepsch discusses forfeiture at p.42 of his brief-in-chief.

Administration of oath is part of voir dire.

The State argues that since the oath is not part of voir dire, Lepsch's right to be present for a critical stage and his right to a public trial do not attach to such an event. See State's brief at pp.31-33. The State's argument 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.

Harmless error doctrine is not applicable to alleged violations of right to public trial and impartial jury.

On p.34 of its brief, the State makes a harmless error argument under **State v. Tulley**, 2001 WI App 236, 248 Wis.2d 505, 635 N.W.2d 807. The argument is misplaced for a couple of reasons. First, **Tulley**, does not involve public trial or impartial jury claims and therefore it is not instructive as to those issues. Second, as discussed in Lepsch's brief-in-chief at p.42, 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 (2006); **Neder v. U. S**.

527 U.S. 1, 8 (1999); **Arizona v. Fulminante**, 499 U.S. 279, 310 (1991); **Waller v. Georgia**, 467 U.S. 39, 49-50 (1984).

In terms of harmless error as it relates to the violation of Lepsch's right to be present at a critical stage, Lepsch discusses actual prejudice at p.43 of his brief-in-chief.

CONCLUSION

Lepsch requests that this Court vacate the judgment of conviction and sentence and order a new trial.

Dated this _____day of August 2016.

Respectfully submitted,
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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 3440 words.

Dated this _____day of August 2016

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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 August 2016.

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