STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2014AP2813-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY P. LEPSCH,

Defendant-Appellant-Petitioner.

STATE PUBLIC DEFENDER'S NON-PARTY BRIEF

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

INTRODUCTION

The Sixth and Fourteenth Amendments to the United States Constitution and Article I §7 of the Wisconsin Constitution guarantee a criminal defendant the right to an impartial jury. A juror is subjectively biased when he has "'expressed or formed any opinion' about the case prior to hearing the evidence." ***State v. Funk***, 2011 WI 62, ¶37, 335 Wis. 2d 369, 799 N.W.2d 421 (quoting ***State v. Faucher***, 227 Wis. 2d 700, 717, 579 N.W.2d 654). Under Wisconsin law, a prospective juror who has formed such an opinion may still sit on the jury if:

> [H]e is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have.

State v. Kiernan, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999); ***State v. Williams***, 2015 WI 75, ¶79, 364 Wis. 2d 126, 867 N.W.2d 736.

Under the Sixth Amendment, a juror who has expressed or formed an opinion in a case may still sit on the jury if the trial court answers this question "yes.":

> 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 be believed?

Patton v. Yount, 467 U.S. 1025, 1036 (1984).

The two standards are neither identical nor coterminous. The Sixth Amendment standard is more stringent. Wisconsin may provide its citizens more protections than the United States Constitution, but it cannot provide them less. ***State v. Doe***, 78 Wis. 2d 161, 172, 254 N.W.2d 210 (1977); ***State v. Dubose***, 2005 WI 126, ¶41, 285 Wis. 2d 143, 699 N.W.2d 582.

ARGUMENT

I. The Sixth Amendment Test for Juror Bias.

At least since Aaron Burr's trial for treason, American courts have struggled over how to ensure that a defendant receives his Sixth Amendment right to an impartial jury when a prospective juror has formed and expressed an opinion before he hears the case**.** ***U.S. v. Burr***, 25 F. Cas. 49 (1807). ***Burr*** drew a line between "light impressions" that might "yield to testimony" and "strong and deep impressions" that "close the mind against testimony that may be offered in opposition to them." ***Id.*** at 51. It considered "those who have deliberately formed and delivered an opinion on the guilt of the prisoner as not being in a state of mind fairly to weigh the testimony and therefore as being disqualified to serve as jurors on the case." ***Id.***

To illustrate his point, Chief Justice Marshall contemplated the problem in reverse. If the jury panel for Burr's case instead included men who had formed and expressed an opinion that he was innocent of the crime charged, would they be considered impartial jurors? "I cannot believe they would be thought so," he wrote. "I am confident I should not think them so. I cannot declare a juror to be impartial who has advanced opinions against the prisoner which would be cause of challenge if advanced in his favor." ***Id.*** at 52.

Irvin v. Dowd, 366 U.S. 717 (1961) established the minimum threshold for juror impartiality under the Sixth Amendment:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. ***It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court***.

Id. at 723 (citations omitted; emphasis supplied).

Of course juror testimony during voir dire "is ambiguous and at times contradictory." ***Patton***, 467 U.S. at 1039. Jurors "cannot be expected invariably to express themselves carefully or even consistently." ***Id***. That is why the trial judge's impressions of a juror's ability to serve impartially are so important. ***Id***. Because jurors will equivocate during voir dire a trial court must ultimately make a finding of historical fact:

> [D]id 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 be believed?

Id. at 1036. In short, under ***Patton*** a juror must (1) swear (2) that he can set aside any opinions he might have and (3) decide the case on the evidence. If so, then the trial court decides (4) whether the juror's protestation of impartiality should be believed.

The Seventh Circuit Court of Appeals interprets ***Patton*** to mean that a prospective juror is impartial when:

> [she] has ***given final, unequivocal assurances***, ***deemed credible by the judge***, that for purposes of deciding the case, she can "set aside any opinion [she] might hold," ***Patton v. Yount***, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1987), "relinquish her prior beliefs***,"*** ***Thompson***, 248 F.3d at 626, or "lay aside her biases or her prejudicial personal experiences," ***United States v. Gonzalez***, 214 F.3d 1109, 114 (9th Cir. 2000). *See* ***Thompson***, 248 F.3d at 626 (collecting cases).

U.S v. Allen, 605 F.3d 461, 464-465 (7th Cir. 2010)(emphasis supplied).

The Seventh Circuit's "final, unequivocal assurance of impartiality" approach to satisfying ***Patton*** appears to have originated in ***Thompson v. Altheimer & Gray***, 248 F.3d 621

(7th Cir. 2001), an employment discrimination case where a juror expressed a belief that some claims against employers are spurious. Her opinion was explored through voir dire, but her last comment to the judge was that she would "try to be fair." Constitutionally, that was not good enough. The Seventh Circuit held that if the trial judge had pushed her to give a final unequivocal assurance that he deemed credible, a finding that she was impartial could not be disturbed on appeal. ***Id***. at 626. That final, unequivocal assurance proves that her belief or opinion is "shakable" ***Id***. at 627. The Seventh Circuit has recently and repeatedly reaffirmed this approach for determining juror impartiality. ***U. S. v. Taylor***, 777 F.3d 434, 441 (7th Cir. 2015); ***Allen***, 605 F.3d at 464-465. Other federal circuits applying ***Patton*** have also looked for a final assurance of impartiality. *See* ***Miller v. Webb***, 385 F.3d 666, 675 (6th Cir. 2004); ***U.S. v. Nelson***, 347 F.3d 701, 711 (8th Cir. 2003); ***U.S. v. Gonzalez***, 214 F.3d 1109, 112 n.3 (9th Cir. 2000).

II. Wisconsin's Rule that Jurors Need Not Give Unequivocal Declarations of Impartiality Requires Clarification.

Wisconsin law holds that jurors need not give unequivocal assurances of impartiality during voir dire. ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999). The defendant in ***Erickson*** was convicted of child enticement. During voir dire one of the jurors revealed that at age 12 she had been fondled by a contractor working at her family's home. When asked if she would give the victim's testimony more weight because of her experience she said "I don't think so." And when asked if she could be fair and impartial she said "I think so." ***Id.*** at 762-763. The defendant argued that the juror should have been stricken for cause because her answers revealed a subjective inability to commit to impartiality. ***Id.*** at 776. Rejecting that argument, this Court held:

> [W]e reiterate what we said in ***Ferron***, 219 Wis. 2d at 502 n.9, 579 N.W.2d 654: a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality. Indeed we expect a circuit court to use voir dire to explore a prospective juror's fear, biases and predilections and fully expect a juror's honest answers at time to be less than equivocal***. Id***. at 507, 579 N.W.2d 654 (Geske, J. dissenting).

Erickson, at 776.

Now consider ***Ferron***'s holding:

> There are no magic 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. Suffice it to say that without appropriate follow-up questions by the circuit court, ***a juror's final word of "probably" is insufficient to indicate sincere willingness to set aside his or her bias*** against parties who choose to exercise their constitutional rights.

State v. Ferron, 219 Wis. 2d 481, 501, 579 N.W.2d 654 (1998) (emphasis supplied).

There are three reasons why ***Erickson***'s holding should be clarified. First, while it is true that jurors can and will give equivocal answers like "I think so" or "probably" in response to questions during voir dire, this does not exempt them from the Sixth Amendment's minimum threshold: having to "swear that they can set aside any opinions they might hold and decide the case on the evidence" as ***Patton*** requires, or, as the Seventh Circuit puts it, give a "final, unequivocal assurance of impartiality." No person would want his liberty decided by a juror who could not make that commitment.

Second, ***Ferron*** acknowledged as much when it said a "final word" of "probably" is insufficient to indicate a juror's sincere willingness to set aside his or her bias. ***Ferron***, 219 Wis. 2d at 501. *See also*, ***Faucher***, 227 Wis. 2d at 731 (juror

knew and had formed an opinion of prosecution witness but was not stricken because he was "unambiguous in his belief" that he could set aside his bias and "stated unequivocally that he would follow the law.")

Third, the ***Patton*** rule better serves important policies often cited in Wisconsin's juror bias case law. Specifically, for many decades this Court has urged trial courts to err on the side of striking prospective jurors when they reasonably suspect that bias is present. Doing so avoids the appearance of bias and saves judicial time and resources in the long run. ***State v. Lindell***, 2001 WI 108, ¶49, 245 Wis. 2d 689, 629 N.W.2d 223; ***State v. Sellhausen***, 2012 WI 5, ¶29, 338 Wis. 2d 286, 809 N.W.2d 14. Requiring trial courts to elicit from a juror who has expressed an opinion in the case a final, unequivocal assurance of impartiality will nudge them in that direction. At the same time, the trial court's unique ability to assess a juror's inflection and demeanor when answering questions during voir dire will be as important as ever. If a juror swears that he can set aside his opinion and decide the issue based solely on the evidence in the case, then—at that point—the trial court must still assess whether that assurance is credible.

In the end, ***Patton*** offers trial courts a clear rule to apply. It gives appellate courts the ability to reverse when the rule is not followed and the final assurance is absent from the voir dire record. Yet it still requires an appellate court to defer where the trial court has elicited the requisite assurance from the prospective juror and then judged her to be credible.

III. Under ***Patton***, Lepsch Is Entitled to a New Trial.

A defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." Thus, if even one member of a jury was not impartial, then the jury was not impartial. ***Parker v. Gladden***, 385 U.S. 363, 366 (1966). Lepsch was denied his Sixth Amendment right to an impartial jury because—at the very least—two members of his jury

failed to meet the minimum threshold for impartiality under the Sixth Amendment.

Miller v. Webb, 385 F.3d 666 (6th Cir. 2004), which like this case, involved a robbery and shooting death, illustrates how the ***Patton*** rule applies in a situation where a juror favors a State's witness. During voir dire a juror said that she would "kind of be partial" to the State's key witness, a victim who survived the shooting, because the witness had been in her bible study class. The court asked the juror whether her feeling would cause her to be more sympathetic with the witness so that she "couldn't sit and be fair and impartial." The juror responded that "I believe I could be fair about it all but I do have some feelings about [the witness.]" ***Id.*** at 668-669. Neither the trial court nor the parties followed up on this statement. The Sixth Circuit held that because the juror did not give an unequivocal statement—"swear that [she] could set aside any opinion [she] might hold and decide the case based on the evidence" per ***Patton***, she was actually biased. Because the juror sat on Miller's jury, the Sixth Circuit granted him a new trial. ***Id.*** at 675.

By the same reasoning, ***Patton*** compels a new trial here. The credibility of law enforcement officers was a critical issue in the case. In fact, 13 of the State's 31 witnesses were police or other law enforcement officials. Furthermore, Lepsch claimed that a surveillance video showed another possible suspect at the scene of the homicides and robbery at issue in this case. A law enforcement investigator who viewed the video but failed to preserve it testified that it showed no such person. (Lepsch's Initial Br. at 15-16).

Prior to voir dire, the trial court gave the venire panel an 11-page questionnaire. Juror Darrick M. wrote on his questionnaire that he would give police officers more credibility than witnesses who are not police officers because "I know many police officers, and they are all professionals." (App. 120). The trial court and parties later questioned him

individually. Nobody asked him a single question about his belief that police officers are more credible than other witnesses. (App. 127-131). Thus, Darrick M. did not (1) swear, or give a final unequivocal assurance, that (2) he would set aside this belief, and (3) decide this case based solely on the evidence presented at trial. The trial court thus did not and could not (4) assess the whether his "protestation of impartiality" on this matter should be believed. The protestation was never given.

Juror John A. also wrote on his questionnaire that he would give witnesses who were police officers more credibility than other witnesses because "I believe police officers value their credibility reputation as an asset to their career." (App.136). He further indicated that he had expressed an opinion that Lepsch was guilty, that he had made up his mind that Lepsch was guilty, but he would not have trouble putting these feelings out of his mind if he were chosen as a juror. (App. 136, 138).

During his individual voir dire, he was not questioned about his belief that police officers are more credible than other witnesses. (App. 143-145). Like Darrick M., he did not (1) swear, or give a final unequivocal assurance, that (2) he would set aside this belief and (3) decide this case based solely on the evidence presented at trial. The trial court thus did not and could not (4) assess the whether his "protestations of impartiality" on these this matter should be believed. The protestations were never given.

Darrick M. and John A. sat on Lepsch's jury. Their failure to swear that they could set aside their opinion that police officers are more credible than other witnesses and decide the case solely on the evidence means that they were subjectively biased. Contemplate this problem in reverse, as Chief Justice Marshall did in ***Burr***. If the jurors in Lepsch's case had checked the box indicating that police witnesses are ***less*** credible than other witnesses, those jurors would not be

deemed impartial. Under ***Patton*** and ***Miller***, Lepsch is entitled to new trial.

CONCLUSION

For the reasons stated above, the State Public Defender respectfully requests that the Wisconsin Supreme Court follow ***Patton v. Yount***, 467 U.S. 1025 (1984) and ensure Wisconsin jurisprudence meets this minimum threshold for juror impartiality under the Sixth Amendment of the United States Constitution.

Dated this 15th day of September, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,595 words.

CERTIFICATE 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 § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of September, 2016.

Signed:

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