STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP254-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

TODD BRIAN TOBATTO,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING A NEW TRIAL, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MARY TRIGGIANO, PRESIDING AT TRIAL; THE HONORABLE LINDSEY GRADY, PRESIDING AT THE POSTCONVICTION STAGE

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Was trial counsel ineffective for deciding against moving to strike for cause, or exercising a peremptory strike against, Juror No. 10?

Juror No. 10 was one of several prospective jurors who stated during voir dire that they had experienced domestic

violence or harassment after a breakup. Juror No. 10 said that she was threatened by her ex-boyfriend and she obtained a "no contact" order against him. Defense counsel strategically decided not to strike Juror No. 10 because she said she would follow the law, she seemed focused and unemotional, and her demeanor led counsel to believe she would be "a good juror for our case." The trial judge (Triggiano) did not *sua sponte* strike Juror No. 10 for cause. Juror No. 10 remained on the jury of twelve that found Tobatto guilty of stalking his ex-girlfriend and violating an injunction or restraining order.

The circuit judge on postconviction review (Grady) ordered a new trial. Judge Grady found that trial counsel was guilty of "incompetence," and prejudicially so, for not asking follow-up questions of Juror No. 10, for not moving to strike her for cause, or for not exercising a peremptory strike against her.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument.

Publication may be of benefit with regard to the proper standard for appellate review of a decision by a circuit judge who was not present at voir dire but who must review at the postconviction stage the actions of trial counsel and of the trial judge who were present.

STATEMENT OF THE CASE

The State of Wisconsin appeals (54) from an order granting Todd Tobatto a new trial, entered December 29, 2014, in the Circuit Court for Milwaukee County, the Honorable Mary Triggiano, presiding at trial, and the Honorable Lindsey Grady, presiding at the postconviction stage (49; A-Ap. 101).

A Milwaukee County jury found Tobatto guilty of one count of stalking after having been previously convicted of a crime against the same victim within seven years, and one count of violating a restraining order or injunction, after a trial held May 20-22, 2013, before Circuit Court Judge Mary Triggiano (20-21; 65:4). Tobatto was sentenced to five years of initial confinement, followed by three years of extended supervision for stalking, and a concurrent sentence of one year of initial confinement, followed by one year of extended supervision for violating a restraining order or injunction (66:19). A judgment of conviction was entered August 5, 2013 (29; A-Ap. 103-05).

Tobatto filed a postconviction motion seeking a new trial May 12, 2014. He challenged the effectiveness of trial counsel with respect to jury selection on several grounds (32). A *Machner*[1] hearing at which trial counsel testified was held October 9, 2014, before Milwaukee County Circuit Court Judge Lindsey Grady (67). The case had been reassigned from trial Judge Triggiano to Judge Grady because of Milwaukee County's judicial rotation system. Judge Grady issued an oral decision from the bench granting a new trial at a hearing held December 29, 2014. Judge Grady ruled that trial counsel was ineffective for not moving to strike or exercising a peremptory strike against Juror No. 10 to remove her from the jury that ultimately found him guilty (68:17-30; A-Ap. 107-20). He entered a written order vacating the judgment and granting a new trial the same day (49; A-Ap. 101).[2] The state now appeals.

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

[2] The new trial order was amended February 24, 2015, without any change in substance (53; A-Ap. 102).

The voir dire.

Thirty prospective jurors were examined during voir dire May 20, 2013, and thirteen of them were selected for trial (61:4, 29-36). At the outset of voir dire, the trial court explained its purpose to the prospective jurors: "There's really only one question we are asking, can you be fair and make a reasonable decision based upon the evidence presented at trial? Every question that we ask relates back to that, can you be fair and impartial?" (61:11).

In response to the trial court's open-ended questions shortly thereafter, all of the prospective jurors collectively assured the court that they would give Tobatto the presumption of innocence (61:13), and they did not carry any bias or prejudice into this case (61:18). Later, in response to an open-ended question by the prosecutor, all of the prospective jurors collectively agreed to follow the court's instructions (61:40-41).

The prosecutor then asked an open-ended question whether any of the prospective jurors had been through a "bad breakup." More than half ("about 60 percent") raised their hands (61:47). Seven of the prospective jurors (Nos. 8, 9, 10, 11, 18, 21, 24) said they had been victims of domestic violence or other forms of harassment after a breakup or divorce (61:47-64; 67:19-23).

Defense counsel, Andrew Meetz, exercised five peremptory strikes to remove juror Nos. 3, 8, 9, 18 and 21. Attorney Meetz had asked the trial court to strike Juror No. 21 for cause, but the court refused. Meetz then used one of his peremptory strikes against Juror No. 21, and three other strikes against jurors who said they had been victims of domestic violence or harassment (Nos. 8, 9, and 18) (61:72-73; 67:23; 70).[3] The trial court also struck Juror Nos. 6 and 7

[3] Defense counsel exercised his fifth allotted peremptory strike against a prospective juror (No. 3) who did not report any prior domestic violence or harassment experience (67:23; 70).

for cause, along with Juror No. 11, one of the seven who experienced domestic abuse, without objection (61:72).

The thirteen jurors selected for trial were: Nos. 1, 2, 4, 10, 12, 13, 14, 15, 17, 20, 22, 24, and 26 (61:66-67; 70). In the end, two of the seven prospective jurors who said they had experienced domestic harassment or violence, Juror Nos. 10 and 24, remained on the panel of twelve that found Tobatto guilty (61:66-67; 70). Defense counsel did not object to the final panel selected for trial (61:73).[4]

Juror No. 10 identified herself as Sarah Aragon.[5] She described herself as a single graduate student and researcher who had never been on a jury before (61:31). The prosecutor then questioned Aragon at length regarding her domestic violence or harassment experience. Aragon said that after a breakup, her boyfriend threatened to "whip my ass" (61:49). She filed for and obtained a "no contact" order against him (61:49-50). Although he later called her in violation of that order, Aragon said no criminal charges were brought (61:50). Aragon added that she and her ex-boyfriend have a child together and "we're still going through the system" (61:51).[6]

The prosecutor then asked Aragon whether she could remain fair and impartial despite this experience. She answered: "I don't know if I'll be a hundred percent objective because I had my personal experiences that impact what I believe now as far as the law. I mean, I'm not going to go

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[4] Of the thirteen jurors who remained on the panel for trial (including an alternate), one juror (No. 2) was dismissed by the trial court mid-trial without objection because he kept dozing off (62:62; 63:60-61, 67-68).

[5] Throughout this brief, the state will refer to this juror either as "Juror No. 10" or as "Aragon."

[6] It appears the threat may have been conveyed electronically to Aragon by her ex-boyfriend (61:64).

against what that [the law] says, but I know that's for interpretation as well" (61:51).[7]

The postconviction proceedings.

Defense Attorney Meetz testified at the *Machner* hearing that he decided to keep Juror No. 10 on the panel because he believed from her demeanor and background that she would be a "good juror for our case" (67:17). Aragon appeared to be "logical and not emotional about the issues when she answered, rather straightforward and confident" (67:17-18). Counsel added that, although Aragon's harassment experience gave him pause, "from her demeanor, it didn't seem like [Aragon] was upset by it, and I believe she said that she would follow up, be fair and impartial the best she could" (67:18). Nothing in Juror No. 10's demeanor at trial changed that opinion. Meetz described her demeanor during the trial this way: "I do remember[.] I thought she stood out to me as paying close attention to what I was saying. She was actually sitting right in the middle" (67:18). Attorney Meetz testified that he did not ask Juror No. 10 follow-up questions because he learned enough from her answers to the prosecutor's questions to satisfy him, including her assurance that she would do her best to follow the law (67:32-33).

[7] It may be that the court reporter did not transcribe the punctuation of Aragon's answer correctly. Her answer may have been as follows: "I don't know if I'll be a hundred percent objective because I had my personal experiences that impact what I believe[.] [N]ow[,] as far as the law[,] I mean I'm not going to go against what that says, but that's for interpretation as well."

Counsel exercised his five peremptory strikes against prospective jurors based at least in part on his assessment of their body language, demeanor and lack of confidence in their answers (67:19-20). After the trial court denied his motion to strike Juror No. 21 for cause, Meetz exercised a peremptory strike against that prospective juror (67:20, 26). Attorney Meetz exercised peremptory strikes against Juror Nos. 3, 8, 9, 18, and 21. Four of those five strikes were against jurors who reported prior domestic violence or harassment experience (67:23). Meetz testified that he exercised his five peremptory strikes against the prospective jurors whom he believed would be the least favorable to the defense case (67:40).

The circuit court, Judge Grady now presiding on postconviction review, issued an oral decision granting a new trial from the bench at a hearing held December 29, 2014 (68:17-30; A-Ap.107-20). Judge Grady held that Attorney Meetz was ineffective for: (a) not asking follow-up questions of Juror No. 10 (68:17-18, 26; A-Ap. 107-08, 116), (b) failing to move to strike Juror No. 10 for cause, or (c) failing to exercise a peremptory strike against her (68:26; A-Ap. 116). Judge Grady was troubled by the fact that Meetz struck Juror No. 21 but not Juror No. 10, both of whom reported domestic violence or harassment experience, because Meetz said he was comfortable with Juror No. 10's demeanor and with her answers to the prosecutor's questions (68:29; A-Ap. 119). Judge Grady found that Meetz's decision was due to "incompetence" and not "trial strategy" (68:28; A-Ap. 118).

At another hearing held January 27, 2015, Judge Grady addressed the issue of prejudice. He concluded that Meetz's failure to remove Juror No. 10 from the panel created a reasonable probability of a different outcome that undermined confidence in the verdict (69:4-6; A-Ap. 122-24).[8] The state appealed the order granting Tobatto a new trial (54).

[8] In his postconviction motion, Tobatto also challenged the decision by Attorney Meetz to keep Juror No. 24 on the jury and/or the failure of Judge Triggiano to strike Juror No. 24 for cause (32:2-3, 13-15; 47:10-11). Judge Grady did not discuss Juror No. 24 in his decision granting a new trial. His focus was only on counsel's decision to keep Juror No. 10 on the jury. That is understandable because Tobatto's trial briefs focused primarily on Juror No. 10 as well (32; 47). In any event, Tobatto failed to prove that Juror No. 24 was subjectively or objectively biased. Juror No. 24 said the abusive behavior ended when she got a restraining order against the father of her two children and he was incarcerated for violating it (61:54-55), she "was able to move on," and unequivocally answered "yes" to the prosecutor's question whether she could remain fair and impartial despite this experience (61:55). In response to follow-up questions by Attorney Meetz, Juror No. 24 clarified that this abusive conduct by her "ex" occurred "about 20 years ago," and "[e]verything turned out fine for me" (61:65). It was reasonable for Attorney Meetz to believe Juror No. 24's assurance that she would remain fair and impartial despite this experience and to let her stay on the jury for the same reasons that, the state is about to show, it was reasonable for Meetz to let Juror No. 10 stay on the jury (67:39-40).

ARGUMENT

JUDGE GRADY, WHO WAS NOT PRESENT AT VOIR DIRE, ERRED WHEN HE DID NOT DEFER TO TRIAL COUNSEL'S STRATEGIC ASSESSMENT OF JUROR NO. TEN'S DEMEANOR AND THE CREDIBILITY OF HER ASSURANCE THAT SHE WOULD FOLLOW THE LAW.

More than half of the prospective jurors said they had been through a "bad breakup" at some point. Seven of those jurors said they had experienced domestic violence or harassment. Juror No. 10 was one of those seven. She had been threatened by an ex-boyfriend, and obtained a "no contact" order against him, but did not suffer violence at his hands. Juror No. 10 assured everyone that she would follow the law, but candidly admitted she did "not know" whether she could be "one hundred percent" objective because of her experience.

The outcome of this appeal turns on whether Juror No. 10, Sarah Aragon, should have been allowed to serve on Tobatto's jury of twelve.[9]

No prospective juror who went through a "bad breakup," or experienced domestic harassment or violence, was for that reason alone ineligible to serve on Tobatto's jury. No prospective juror should have been struck by trial Judge Triggiano for that reason alone, either *sua sponte* or in response to a defense motion to strike for cause. Defense counsel saw no reason to peremptorily strike Juror No. 10

[9] At the postconviction hearing, Tobatto also challenged Attorney Meetz's performance at voir dire with respect to several other jurors, as well as Judge Triggiano's denial of Meetz's motion to strike Juror No. 21 for cause. None of those prospective jurors, except Juror No. 24, ended up on the final panel of thirteen. Because Tobatto was tried by a fair and impartial jury, he suffered no prejudice from counsel's performance with respect to those jurors, and any error by Judge Triggiano was harmless. *State v. Lindell,* 2001 WI 108, ¶¶ 51-52, 131, 245 Wis. 2d 689, 629 N.W.2d 223.

based on his observations of her, especially after she assured everyone that she would follow the law despite her domestic harassment experience. Trial Judge Triggiano, who oversaw the voir dire and who struck several other jurors for cause *sua sponte*, saw no reason to also strike Juror No. 10 for cause.

Attorney Meetz's strategic decision to keep Juror No. 10 on the panel, and Judge Triggiano's decision not to *sua sponte* strike her for cause, were both eminently reasonable. Both decisions, based as they were on observations that could only have been made by those who participated in and observed the voir dire, could not be second-guessed. Unlike Attorney Meetz and Judge Triggiano, Judge Grady was in no position on postconviction review to have observed Juror No. 10's demeanor, her voice inflection, her body language, her eye contact or her attentiveness. Judge Grady was in no position to evaluate the credibility of this graduate student and researcher's assurance to counsel and the court that she would follow the law despite her negative experience with an ex-boyfriend. Judge Grady far overstepped his bounds when he essentially found to be not credible Juror No. 10's assurance that she would follow the law; and when he found that Meetz was incompetent to rely on Juror No. 10's assurance that she would follow the law. Judge Grady was wrong to second-guess Meetz's strategic decision to keep her on the jury.

The law does not require "one hundred percent" objectivity. It only requires that a prospective juror demonstrate a sincere willingness as a reasonable person to set prior experience aside and to make an honest effort to be objective when applying the law to the facts. Juror No. 10 was qualified to serve, and Attorney Meetz acted reasonably in deciding that Aragon, better than the other five he peremptorily struck, would follow the law and do her best to be fair and impartial.

A. The applicable law and standard for review regarding challenges to the effectiveness of trial counsel.

Tobatto bore the burden of proving that trial counsel's strategic decision to let Juror No. 10 remain on the jury was both deficient and prejudicial. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of law and fact. The trial court's findings of historical fact will not be disturbed unless they are clearly erroneous. *See* Wis. Stat. § 805.17(2). The ultimate determinations based upon those findings of fact whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to independent review in this Court. *State v. Trawitzki,* 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801; *Johnson*, 153 Wis. 2d at 127-28. *See also State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985); *State v. Wright*, 2003 WI App 252, ¶ 30, 268 Wis. 2d 694, 673 N.W.2d 386.

> "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky,* 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* 466 U.S., at 689-90, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.

Harrington v. Richter, 131 S. Ct. 770, 788 (2011).

1. Deficient performance.

To establish deficient performance, Tobatto had to prove that trial counsel's decision to leave Juror No. 10 on the jury was so seriously defective that it denied him the "counsel" guaranteed by the Sixth Amendment. He had to overcome a strong presumption that counsel performed reasonably and within professional norms. *Strickland*, 466 U.S. at 690. *See Bieghler v. McBride*, 389 F.3d 701, 707-08 (7th Cir. 2004).

Attorney Meetz is strongly presumed to have rendered effective assistance and to have made the decision to leave Juror No. 10 on the jury in the exercise of reasonable professional judgment. *Id.*; *Eckstein v. Kingston*, 460 F.3d 844, 848 (7th Cir. 2006). Decisions such as this that fall "squarely within the realm of strategic choice" are not reviewable under *Strickland. United States v. Cieslowski,* 410 F.3d 353, 361 (7th Cir. 2005). *See Knowles v. Mirzayance,* 556 U.S. 111, 124 (2009). "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland,* 466 U.S. at 690). *See Yu Tian Li v. United States*, 648 F.3d 524, 528 (7th Cir. 2011).

The reviewing court is not to evaluate counsel's conduct in hindsight, but must make every effort to evaluate counsel's conduct from his perspective at the time of the strategic decision. "'The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.'" *Eckstein*, 460 F.3d at 848 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986)). Ordinarily, the defendant does not prove deficient performance unless he shows that counsel's deficiencies sunk to the level of professional malpractice. *See State v. Maloney*, 2005 WI 74, ¶ 23 n.11, 281 Wis. 2d 595, 698 N.W.2d 583. Counsel need not even be very good to be deemed constitutionally adequate. *State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386; *State v. Mosley,*

201 Wis. 2d 36, 49, 547 N.W.2d 806 (Ct. App. 1996); *McAfee,* 589 F.3d at 355-56 (citing *Dean v. Young,* 777 F.2d 1239, 1245 (7th Cir. 1985)).

2. Prejudice.

Assuming he could overcome the presumption of reasonable competence, Tobatto had to next prove prejudice, *i.e.,* a reasonable probability of a different outcome had counsel kept Juror No. 10 off the jury. *Strickland*, 466 U.S. at 687. Tobatto could not speculate. He had to affirmatively prove prejudice. *State v. Balliette*, 2011 WI 79, ¶¶ 24, 63, 70, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Erickson,* 227 Wis. 2d 758, 773-74, 596 N.W.2d 749 (1999). "The likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

B. The applicable law and standard for review of a claim that a biased juror was allowed to serve on the jury.

Juror No. 10 is presumed to have been fair and impartial. Tobatto bore the burden of overcoming that presumption with proof that she was biased. *State v. Funk,* 2011 WI 62, ¶ 63, 335 Wis. 2d 369, 799 N.W.2d 421; *State v. Smith,* 2006 WI 74, ¶ 19, 291 Wis. 2d 569, 716 N.W.2d 482, (citing *State v. Louis,* 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990)).

The decision whether a prospective juror should be struck for cause is left largely to the trial court's discretion. *Erickson,* 227 Wis. 2d at 775. A prospective juror must be struck for cause if the defendant proves that he or she exhibits bias. There are three forms of bias: statutory, subjective and objective. *Funk,* 335 Wis. 2d 369, ¶¶ 36-38; *State v. Faucher*, 227 Wis. 2d 700, 716-21, 596 N.W.2d 770 (1999). *See also State v. Mendoza*, 227 Wis. 2d 838, 848-50, 596 N.W.2d 736 (1999); *State v. Kiernan*, 227 Wis. 2d 736,

744-45, 596 N.W.2d 760 (1999). The latter two forms of bias — subjective and objective — are at issue here.[10]

1. Subjective bias.

Our Supreme Court has described subjective bias as follows:

> This category of bias inquires whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. *Ferron*, 219 Wis. 2d at 498; *see also State v. Delgado*, 223 Wis. 2d 270, 282, 588 N.W.2d 1 (1999). *Discerning whether a juror exhibits this type of bias depends upon that juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those responses. These observations are best within the province of the circuit court.* On review, we will uphold the circuit court's factual findings regarding a prospective juror's subjective bias unless they are clearly erroneous.

Kiernan, 227 Wis. 2d at 745 (emphasis added).

A prospective juror is not subjectively biased merely because she equivocated when answering questions about her impartiality. A prospective juror need not utter magic words or state unambiguously that she will be able to set aside her bias. *State v. Jimmie R.R.,* 2000 WI App 5, ¶ 28, 232 Wis. 2d 138, 606 N.W.2d 196. This is so because,

> 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 fears, biases, and predilections and fully expect a juror's honest answers at times to be less than unequivocal.

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[10] Tobatto does not argue that Juror No. 10 fell within that category of jurors who are statutorily deemed to be biased. *See* Wis. Stat. § 805.08(1). S*ee also State v. Kiernan*, 227 Wis. 2d 736, 744, 596 N.W.2d 760 (1999). It is plain that Juror No. 10 was not statutorily biased merely because her ex-boyfriend had threatened her in the past. Tobatto also does not argue that Juror No. 10 was not a reasonable person unwilling to set aside her experience.

Erickson, 227 Wis. 2d at 776 (citation omitted).

Subjective bias is a factual determination that will be upheld on appeal unless clearly erroneous. *Mendoza*, 227 Wis. 2d at 849. The circuit court is uniquely situated at voir dire to assess the juror's demeanor, voice inflection and confidence (or lack thereof) when answering questions regarding her ability to remain fair and impartial. *Erickson,* 227 Wis. 2d at 776. *See State v. Oswald,* 2000 WI App 2, ¶ 22, 232 Wis. 2d 62, 606 N.W.2d 207.[11]

2. Objective bias.

The determination whether a particular juror was objectively biased is a matter "best left to the case-by-case discretion of the circuit court." *Smith,* 291 Wis. 2d 569, ¶¶ 17, 23; *Erickson,* 227 Wis. 2d at 776-77.

Objective bias occurs if a reasonable juror in the prospective juror's position objectively could not judge the case in a fair and impartial manner. *Mendoza,* 227 Wis. 2d at 850. This test assumes that the prospective juror has formed an opinion or has some knowledge of the case. The question then becomes whether a reasonable person in the

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¶[11] For example, as this Court observed in *Jimmie R. R.:*

> Judge Carlson was in a far better position than we are to evaluate Daniel K.'s conduct, demeanor, tone of voice and other nonverbal cues as the judge considered the ultimate question whether Daniel K. had exhibited any subjective bias. This evaluation is very much like a fact finder's assessment of a witness's credibility. That is why the supreme court has placed this determination under the "clearly erroneous" standard of appellate review. Giving due deference to the better position of Judge Carlson, we conclude that the judge's decision to retain Daniel K. as a juror in the face of Jimmie's challenge was not clearly erroneous.

State v. Jimmie R.R., 2000 WI App 5, ¶ 29, 232 Wis. 2d 138, 606 N.W.2d 196.

prospective juror's position could set that opinion or that knowledge aside and decide the case in a fair and impartial manner. *Id.* The issue of objective bias presents a mixed question of fact and law; this court gives weight to the circuit court's factual determinations on objective bias and should not reverse unless, as a matter of law, a reasonable judge could not have reached such a conclusion. *Id.; Kiernan,* 227 Wis. 2d at 745.

C. This court should give no deference to Judge Grady's decision.

Judge Grady did not preside over voir dire. Judge Triggiano did. Judge Grady did not see or hear Juror No. 10 when she answered questions by counsel and the court at voir dire. Both Judge Triggiano and Attorney Meetz did. Judge Triggiano struck several prospective jurors for cause, but saw no need to strike Juror No. 10. Attorney Meetz exercised peremptory strikes against five other prospective jurors, but saw no need to strike Juror No. 10. Why? Because Attorney Meetz believed Aragon's assurance, based on his observations of her demeanor and the sincerity of her answers, that she would follow the law. Meetz believed that Aragon would be a "good juror for our case" because she would follow the law and make an honest effort to be "one hundred percent" impartial, while candidly admitting she did "not know" whether she could do so. These inherently fact-bound and subjective decisions certainly cannot be second-guessed by this court and should not have been second-guessed by Judge Grady who was not there. Deference was owed to Judge Triggiano's implicit finding of no subjective or objective bias when she did not *sua sponte* strike Juror No. 10 after hearing her answers and observing her demeanor. *See Erickson,* 227 Wis. 2d at 776-77. Deference was also owed to Attorney Meetz's strategic decision not to exercise a peremptory strike against Juror No. 10 after hearing her answers and observing her demeanor.

The only way this Court may affirm Judge Grady's order for a new trial is to hold as a matter of law that a reviewing judge, be it another circuit court judge on postconviction review or an appellate judge, is free to second-guess both trial counsel's and the trial judge's decisions to leave a prospective juror who is not statutorily biased on the final panel of twelve without having heard or observed that juror. This would far exceed the highly deferential scope of review delineated above. This Court should do what Judge Grady did not do: (1) defer to Judge Triggiano's implicit and not clearly erroneous determinations that Juror No. 10 was not subjectively or objectively biased such that she had to be removed for cause; and (2) defer to Attorney Meetz's assessment of her answers and her demeanor, which caused him to believe Juror No. 10 when she assured him she would follow the law despite her domestic harassment experience.

Judge Grady committed several errors. He made no finding that Juror No. 10 was either subjectively or objectively biased. That threshold determination was necessary before Judge Grady could hold that Tobatto did not receive a fair trial by an impartial jury. The record evidence manifestly supports the contrary finding of fact. Aragon assured counsel and the court that she would follow the law and try to be "one hundred percent" objective.

1. Tobatto failed to prove deficient performance.

a. Tobatto failed to prove Juror No. 10 was objectively biased.

It is incumbent on the party challenging the particular prospective juror "to make an individualized showing that the particular juror is objectively biased." *Kiernan,* 227 Wis. 2d at 749 (footnote omitted). Tobatto failed to make that showing at the postconviction hearing.

Judge Grady seemed to conclude without any factual basis that Juror No. 10 was biased and, so, should have been struck by Judge Triggiano for cause with or without a request by defense counsel to strike her. That is, indeed,

what Tobatto argued in the alternative to his ineffective assistance challenge in his postconviction motion: "At a minimum, *the court should have stricken jurors 10 and 21* who questioned their ability to be fair." (32:12) (emphasis added);

> [T]here was no attempt *by the court* to inquire into the bias exhibited by jurors 21 or 10 to establish a record of support for the claim that jurors 21 and 10 were able to cast aside their opinion and render a verdict based on the evidence presented in court. The failure [of the court] to conduct any inquiry resulted in the seating of a biased juror and Mr. Tobatto was denied a fair trial."

(32:13) (emphasis added).

Judge Grady skirted the threshold issue whether his colleague (Judge Triggiano) erred (68:6) "[T]his Court does not feel that it is appropriate or that color [sic] ripe enough for me to decide, which is, Judge Triggiano properly acted in the trial"; (68:9) "I am not going there."). Instead, Judge Grady put all the blame on Attorney Meetz, finding him guilty of "incompetence" for not peremptorily striking Juror No. 10 or for not moving to have Judge Triggiano strike her for cause.

That, however, is tantamount to a determination that Judge Triggiano also erred in not *sua sponte* striking Juror No. 10 for cause. After all, if Juror No. 10's bias should have been obvious to any minimally competent defense attorney, then it should have been equally obvious to Judge Triggiano who should have protected Tobatto's right to an impartial jury by *sua sponte* striking Aragon for cause. If no reasonable defense attorney would have left her on the jury, then no reasonable judge would have done so either. *See Faucher,* 227 Wis. 2d at 720-21. *See also State v. Sellhausen,* 2012 WI 5, ¶ 29, 338 Wis. 2d 286, 809 N.W.2d 14; *State v. Tody,* 2009 WI 31, ¶ 32, 316 Wis. 2d 689, 764 N.W.2d 737; *State v. Ferron,* 219 Wis. 2d 481, 503, 579 N.W.2d 654 (1998) (circuit courts should err on the side of striking prospective jurors who appear to be biased to avoid the appearance of bias, and to save judicial time and resources); *Kiernan,*

227 Wis. 2d at 749 n.9 (while circuit judges may remove jurors to avoid the appearance of bias, they are "obligated" to strike for cause "only those jurors who are indeed biased."); *Sellhausen,* 338 Wis. 2d 286, ¶¶ 72-78 (Ziegler, J., concurring); *Tody,* 316 Wis. 2d 689, ¶ 61 (Ziegler, J., concurring) (circuit judges should "use their sound discretion and inherent authority to avoid such situations where the recipe for disaster is right before their eyes"). Tobatto failed to prove, and more importantly Judge Grady failed to hold, that Judge Triggiano erred in not ruling that Juror No. 10 was biased. *Faucher,* 227 Wis. 2d at 720-21.

Judge Grady's second-guessing of Judge Triggiano's inaction strayed far outside the narrow bounds of review. *Kiernan,* 227 Wis. 2d at 745. There was no basis to strike Juror No. 10 for cause just because her ex-boyfriend had threatened her, she was uncertain whether she could be "one hundred percent" impartial, but she would follow the law. *See State v. Lindell,* 2001 WI 108, ¶ 40, 245 Wis. 2d 689, 629 N.W.2d 223 ("We note in passing that this court has been very hesitant to find that a category of persons is per se biased"); *Kiernan,* 227 Wis. 2d at 748-49.

In *Erickson,* 227 Wis. 2d 764, the jury found Erickson guilty of child enticement. A prospective juror was not objectively or subjectively biased merely because she had been a child sexual assault victim and

answered "I think so" when asked whether she could be fair and impartial despite that experience. *Id.* at 776-77.[12]

"[A] prospective juror who has been victimized by the same kind of crime charged in the instant case may nonetheless qualify as a juror if the juror otherwise passes muster under the objective bias test." *Jimmie R. R.,* 232 Wis. 2d 138, ¶ 35. In *Jimmie R. R.,* this Court held that, in a sexual assault trial, a prospective juror was not objectively biased merely because his wife had been a sexual assault victim. *Id.* ¶¶ 31-36. In *State v. Olson,* 179 Wis. 2d 715, 720-21, 508 N.W.2d 616 (Ct. App. 1993), this Court held that, in a trial for sexual assault of a teenage stepdaughter, the fact that a juror was also the victim of sexual assault as a teenager did not render her objectively biased as a matter of law. Her failure to disclose that fact during voir dire, "should not give rise to an irrebuttable presumption of bias or prejudice. The issue is better addressed on a case-by-case basis and resolved through consideration of all of the surrounding facts and circumstances." *Id.*

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[12] The court's analysis is especially pertinent here:

> 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 at 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.
>
> ¶ 44 However, a circuit court can. This circuit court concluded that Juror L spoke of her assault without emotion and free of stress. We can find no reason to question either the circuit court's detailed findings on this matter or its conclusion that Juror L could be a fair and impartial juror.

State v. Erickson, 227 Wis. 2d 758, 776-77, 596 N.W.2d 749 (1999).

Similarly, in *Funk,* 335 Wis. 2d 369, our supreme court held that the trial court erred in ordering a new trial when a juror did not reveal during voir dire in a child sexual assault trial that she had been sexually assaulted both as a child and as a teenager because the court's findings were not sufficient to support its conclusion that she was subjectively or objectively biased. *Id.* at ¶¶ 29-63. The juror's failure to reveal this information during voir dire did not render her biased per se. *Id.* at ¶ 40.

In *State v. Louis*, 156 Wis. 2d 470, 473, 478-80, 483-84, 457 N.W.2d 484 (1990), two members of the Milwaukee Police Department were held not as a matter of law to be ineligible to serve as jurors at a trial where officers from that same department testified as prosecution witnesses. *See also Faucher*, 227 Wis. 2d at 722 (in discussing *Louis*, the court held that the two police officers "were not objectively biased by mere virtue that they were employed as law enforcement officers and worked in the same department with the state's witness").

In *Mendoza*, 227 Wis. 2d at 851-52, the supreme court held that the trial court erred when it struck four prospective jurors for cause for no reason other than that they had criminal convictions. *Compare Lindell,* 245 Wis. 2d 689 ¶¶ 41-50 (trial court erred in denying a defense motion to strike a prospective juror for cause as objectively biased after the juror revealed that she and her family were close friends with the homicide victim and had a business relationship with him, the friendship and business relationship spanned decades, she also knew the victim's girlfriend who would testify at trial, she attended the victim's visitation or funeral, she discussed the case with her mother who said the crime was "hard" on her, the crime was gruesome, she would see disturbing evidence of the brutal murder, and she became emotional when answering questions during voir dire despite stating that she could remain fair and impartial); *Faucher,* 227 Wis. 2d at 732-33 (a prospective juror who was a next door neighbor to the state's main witness (and only eyewitness to the sexual assault) was objectively biased when he said during voir dire

that the witness was a person "of integrity" and "I know she wouldn't lie"); *Kiernan,* 227 Wis. 2d at 740-41, 750-51 (five prospective jurors were objectively biased because they served on another jury two days earlier that returned a guilty verdict in a case involving the same charge, the same defense attorney, and the same defense theory that they had rejected two days earlier – "It was a carbon copy of the earlier case." *Id.* at 740).

b. Tobatto failed to prove subjective bias.

A prospective juror need not give "unequivocal assurances" of her ability to set aside her experience as a victim and render an impartial verdict. *Oswald,* 232 Wis. 2d 103, ¶ 19, (citing *Kiernan,* 227 Wis. 2d at 750 n.10). The trial court is in the best position to determine whether equivocal responses such as "probably" or "I'll try" are sincere. *Id.* "There 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.* at ¶ 6, (quoting *Ferron,* 219 Wis. 2d at 501).

> It is not just the juror's words that are important. The manner in which the juror says the words and the body language he or she exhibits while answering speak volumes—volumes that are not transmitted to a reviewing court via the cold record. Our inability to review demeanor and thus assess sincerity is precisely why we leave the determination of subjective bias to the circuit court. *See Erickson*, 227 Wis. 2d at 776, 596 N.W.2d at 759 (noting appellate court's inability to assess whether the juror's "I think so" was stated with earnestness or timidity). Thus, when reviewing a circuit court's decision on subjective bias, we do not focus on particular, isolated words the juror used. Rather, we look at the record as a whole, using a very deferential lens, to determine if it supports the circuit court's conclusion.

Id.

"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." *Kiernan,* 227 Wis. 2d at 746 (citation omitted).

Judge Grady did not look through a deferential lens here. Instead, he looked through the lens that gave him 20-20 hindsight. Attorney Meetz and Judge Triggiano were in a far superior position to assess the sincerity of Juror No. 10's assurance, based on her tone of voice and demeanor, that she would follow the law but was not "one hundred percent" sure that she could completely set that experience aside. Again, the law only requires a sincere effort to remain impartial, not a "one hundred percent" guarantee of impartiality.[13]

In holding that Attorney Meetz was guilty of "incompetence," Judge Grady second-guessed a debatable strategic decision made by defense counsel in the moment. Judge Grady found that counsel was wrong to credit Juror No. 10's assurance that she would follow the law. Judge Grady essentially found without any factual basis that Aragon's background, demeanor, body language and tone of voice – all on display at voir dire - were not enough to cause a reasonably competent defense attorney to credit her responses to the court's general questions of the entire panel, and to the prosecutor's specific questions of her, that she would sincerely try to be impartial and would follow the law. Again, Judge Grady strayed far outside the narrow bounds of review set by both *Strickland* in general, and the cases regarding review of a subjective/objective bias

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[13] 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.

State v. Ferron, 219 Wis. 2d 481, 507, 579 N.W.2d. 654 (1998) (Geske, J., dissenting). *See Lindell,* 245 Wis. 2d 689, ¶101.

determination in particular, when he ordered a new trial without any threshold finding that Juror No. 10 was biased. *See Funk,* 335 Wis. 2d 369, ¶ 48 (In reversing a circuit court's order for new trial based upon a juror's failure to reveal at voir dire that she had been a sexual assault victim, the supreme court held there was an insufficient factual basis for the trial court's finding of bias, noting that the lower court found bias even though it also found to be credible the juror's assertion that she was impartial at trial, and it "did not make any findings about her demeanor that indicated subjective bias.").

Judge Grady found that Attorney Meetz was incompetent for not asking follow-up questions in response to what could be described as Aragon's somewhat equivocal assurance that she would try to be impartial ("I don't know if I can be one hundred percent objective") and would follow the law. As should now be clear from the above discussion, counsel may reasonably decide to leave a juror on the panel despite an equivocal assurance that she will "try" to be fair and impartial. *Oswald,* 232 Wis. 2d 103, ¶ 6; *Erickson,* 227 Wis. 2d at 776. In any event, it is anyone's guess what those follow-up questions and Aragon's answers to those questions would have been. Tobatto presented no proof to that effect at the postconviction hearing. He did not call Aragon as a witness to ask those follow-up questions he believes Meetz should have asked. It behooved Tobatto to do so because he bore the burden of proving that a biased juror in fact sat in judgment of him.

In any event, the undisputed facts would not change no matter how many more questions might have been asked in hindsight: Aragon had no opinion as to Tobatto's guilt or innocence. She had no prior knowledge of this case. She did not know any of the witnesses. Aragon had no connection with the prosecution, the victim or with anyone else involved in this case. She denied any bias against Tobatto or in favor of the state. Aragon assured the court she carried no bias against either party and assured everyone when the prosecutor specifically asked that she would follow the law.

She was threatened by her ex-boyfriend, but was not the victim of domestic violence[14] as were several other jurors who were struck by defense counsel and the court.[15] *See*

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[14] In his postconviction hearing brief, Tobatto falsely insisted that Juror No. 10 was the victim of domestic "violence." (47:7) (contending that Meetz "did not ask Juror 10 any questions about her experience as a victim of domestic violence"). He argued further:

> Trial counsel knew that having victims of domestic violence on the jury would be prejudicial to Mr. Tobatto. As such he knew it was in Mr. Tobatto's best interest to remove all jurors who were victims of domestic violence. Despite this he concluding [sic] that the juror who said that she could not be fair because she had being [sic] a victim of domestic violence, was a good juror.

(*id.*). Again, Juror No. 10 said only that her boyfriend *threatened* her; he did not assault her.

[15] Juror No. 9 was the victim of domestic violence by her ex-husband, but said he was found not guilty (61:27-28, 48). Juror No. 23 pressed charges against a student who threatened to kill "a bunch of faculty members." The case was dismissed, according to Juror No. 23, because the district attorney determined "he [the student] was drunk and it wasn't a big deal." This result caused Juror No. 23 to be "[p]retty ticked off at [Milwaukee County District Attorney] Chisholm" (61:28). Juror No. 11 was the victim of a sexual assault that "constantly haunt[s]" her (61:51-52). Juror No. 11 said she also got a restraining order against her own mother (61:64-65). She was struck by Judge Triggiano for cause without objection (61:72). Juror No. 18 was assaulted by her ex-husband of twenty years and she obtained a ten-year restraining order against him that was still in effect (61:52, 65-66). Juror No. 21 said she and her children had been constantly harassed by her ex-husband, a Milwaukee police officer, during a two-year divorce process and this caused her to "basically have no faith in the court system," describing it as "like a good old boys club" (61:53). Attorney Meetz exercised a peremptory strike against Juror No. 21 after Judge Triggiano denied his request to strike her for cause (61:72-73). Juror No. 27 complained about constant harassment by his son's mother and said he believes the system is "screwed up" because of the way the court handled his custody dispute with his son's mother (61:56-57). Juror No. 28 reported that "[a]fter the placement of my son, my ex came over and tore up my car," and problems are off and on, still occurring "[e]very once in awhile" (61:58).

Lindell, 245 Wis. 2d 689, ¶ 36; *Faucher,* 227 Wis. 2d at 717-18.[16]

Judge Grady seemed to also find that Attorney Meetz somehow overlooked Juror No. 10 when it came time to exercising peremptory strikes. That finding of fact is clearly erroneous because Attorney Meetz specifically recalled Juror No. 10, even to the point of remembering where she sat and how attentive she was at trial. He specifically recalled from voir dire that Aragon was a graduate student whose background, answers and demeanor gave him confidence that she would be fair and impartial. He correctly recalled also that Aragon said she would follow the law and he believed her (67:13-18). *That* is why Meetz strategically decided not to strike Aragon despite her domestic harassment experience with her ex-boyfriend. It was manifestly not due to oversight or, as Judge Grady erroneously found, "incompetence."

Judge Grady was also apparently of a mind that there was no significant difference between Juror No. 10, who Meetz left on the jury, and Juror No. 21, who Meetz struck. That finding of fact is clearly wrong. Juror No. 21 described in detail the constant abuse heaped on her and her children by her ex-husband, a Milwaukee police officer, over a two year divorce process that caused Juror No. 21 to lose all faith in the judicial system, referring to it as a "like good old boys club" (61:53). The difference between the domestic abuse experiences of Jurors No. 10 and 21 was like night and day. The same is true of the other domestic abuse victims that Meetz peremptorily struck instead of Juror No. 10. Their

[16] Also, Attorney Meetz *did ask* follow-up questions of Juror No. 10. Meetz asked about her use of Facebook (the state charged Tobatto with stalking his victim including on Facebook). Juror No. 10 answered that she uses Facebook "for work and social reasons" (61:60), and that her ex-boyfriend apparently harassed her on Facebook (61:64). Meetz asked follow-up questions of the entire panel, obviously including Juror No. 10, not only about their use of Facebook and text messaging (61:59-62, 63-64), but also about relationship breakups and reconciliations (61:62-63), and about restraining orders that any of them had obtained (61:64-66).

experiences were far worse and the likely impact on their ability to be fair and impartial far greater, a reasonable defense attorney such as Meetz could decide. *See* n.15, above. This was also true of Juror No. 24, whom Meetz allowed to remain on the jury. *See* n.8, above.

Judge Grady found as fact that Meetz's decision to leave Juror No. 10 on the jury was not a strategic decision. Of course it was. His finding to the contrary was clearly wrong unless it was coupled with a finding that Attorney Meetz's sworn testimony that he strategically decided against striking Juror No. 10 was incredible. Judge Grady did not find that Meetz's testimony was incredible. One may agree or disagree with whether it was a *good* strategic decision to keep Juror No. 10 on the panel, but it was a strategic decision nonetheless that cannot normally be second-guessed no matter how much one in hindsight might question it. *Strickland,* 466 U.S. at 690; *McAfee,* 589 F.3d at 356.

2. Tobatto failed to prove prejudice.

Tobatto bore the burden of proving that a biased juror sat on his jury. *State v. Traylor,* 170 Wis. 2d 393, 400-401, 489 N.W.2d 626 (Ct. App. 1992).

Judge Grady could only speculate as to whether Juror No. 10 was biased against Tobatto. His decision is conclusory and unsupported by any facts (69:4-6). Judge Grady had to do more than speculate before overturning this conviction. *E.g., Balliette,* 336 Wis. 2d 358, ¶¶ 24, 63, 70. There is no prejudice if the final panel chosen did not include any juror who was biased against Tobatto. *State v. Koller,* 2001 WI App 253, ¶ 14, 248 Wis. 2d 259, 635 N.W.2d 838; *Lindell,* 245 Wis. 2d 689, ¶¶ 51-53, 131. Again, Judge Grady made no finding that Juror No. 10 was in fact either subjectively or objectively biased against Tobatto. He could only speculate that Juror No. 10 might have been biased. Judge Grady could not, however, leap to the determination of actual prejudice without making the threshold finding that, in all

reasonable probability, Juror No. 10 was in fact biased against Tobatto. *See Koller,* 248 Wis. 2d 259, ¶ 11 ("Koller tacitly concedes that the record does not support a finding that any of the jurors who sat on his case were biased").

There is, in fact, no reasonable probability that Aragon was biased against Tobatto because she assured the court at the beginning of voir dire that she carried no biases or prejudices into this case and would follow the court's instructions. Aragon then assured everyone in response to the prosecutor's questions of her individually that she would follow the law despite candidly admitting that her experience made Aragon unsure that she could be "one hundred percent" impartial. *Compare State v. Carter,* 2002 WI App 55, ¶¶ 3, 8, 15, 250 Wis. 2d 851, 641 N.W.2d 517 (in a sexual assault trial, a prospective juror said he would be biased against the defendant because his brother-in-law had been sexually assaulted and when asked whether that would influence his ability to be fair and impartial, the juror unequivocally answered, "yes," but defense counsel did not strike him. *Id.* ¶ 3. Trial counsel was ineffective for not removing this unequivocally subjectively biased juror from the panel. *Id.* ¶¶ 8, 15).

"The prejudice issue here is whether [Tobatto's] counsel's performance resulted in the seating of a biased juror; not whether a differently composed jury would have acquitted him." *Koller,* 248 Wis. 2d 259, ¶ 14.

> Accordingly, at the postconviction stage Koller needed to show that if his trial counsel had asked more or better questions, those questions would have resulted in the discovery of bias on the part of at least one of the jurors who actually decided his case. He might have done this by calling suspect jurors as witnesses at his postconviction hearing and asking them the questions he now claims his trial counsel should have asked. There is nothing unusual about this sort of retroactive determination of juror bias. *E.g., State v. Delgado,* 223 Wis. 2d 270, 588 N.W.2d 1 (1999) (postconviction hearing conducted to determine whether juror who gave an erroneous answer during *voir dire* was actually biased). However, Koller made no such

> showing, and his assertion of possible juror bias is mere speculation. *See State v. Erickson,* 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation is insufficient to satisfy the prejudice prong of *Strickland*).

Id. ¶ 15. *See Funk,* 335 Wis. 2d 369, ¶¶ 15-18 (the juror in question was called at the postconviction hearing to explain why she did not reveal her status as a sexual assault victim during voir dire).

Tobatto presented no such evidence at the postconviction hearing. He did not prove that Juror No. 10 was objectively or subjectively biased, and Judge Grady made no finding that she was. Because Tobatto failed to prove prejudice, this Court must reverse even if in hindsight it, like Judge Grady, disagrees with Attorney Meetz's strategy. Even if, as Judge Grady found, trial counsel was guilty of "incompetence," Tobatto still received a fair trial by an impartial jury in all reasonable probability. Judge Grady's conclusion to the contrary is not supported by facts or the law and, therefore, cannot stand.

CONCLUSION

Therefore, the plaintiff-appellant, State of Wisconsin, respectfully requests that the circuit court's order granting Tobatto a new trial be REVERSED.

Dated at Madison, Wisconsin this 27th day of April, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,758 words.

Dated this 27th day of April, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 27th day of April, 2015.

_____
Daniel J. O'Brien
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of April, 2015.

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