

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017 AP 000860 CR
Fond du Lac County Circuit Court Case Nos. 20165T000153

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRAD L. CONGER,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND IN FOND DU LAC COUNTY, THE
HONORABLE GARY R. SHARPE, JUDGE, PRESIDING

THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT BRAD L. CONGER

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ARGUMENT

The State contends nothing in the *voir dire* proceedings suggested that juror S.B. was either subjectively or objectively biased. (Brief of Plaintiff-Respondent page 9). What the State failed to address, is Juror S.B.'s own testimony, indicating she was reluctant to consider any argument other than the test result is the test result. Juror S.B. specifically testified that if the test went to the right place then "there isn't much you can do to fight the alcohol." (R39:44/Reply App.1) The defendant's entire theory of defense was the alcohol concentration at the time of the test did not reflect the alcohol concentration at the time of the driving. (R39:204,245/Reply App2-3). This was similar to the argument made by defense and rejected by veteran Juror S.B. one week earlier. Juror S.B.'s statement confirms her unwillingness to consider any argument that the alcohol level at the time of driving could have been lower than the alcohol level at the time of the test. Her expressed view was that the test is the test, and there is not much you could do to fight it. Contrary to the State's contention, her statements clearly reveal her bias.

Additionally, the state takes issue with the defendant's characterization of the defense made in this case and the older case that veteran Juror S.B. sat on one week prior. In both cases, the defense raised the issue that the state was required to establish the alcohol concentration at the time of driving. Thus, in both cases, defense argued that the test result at the time of testing did not reflect the alcohol concentration at the time of the driving. Clearly, in both cases, the defense was challenging the State's burden of establishing that the defendant was over the legal limit at the time of driving. In both cases, the defense argued that despite a test result showing a result at a time subsequent to the driving, the state failed to prove beyond a reasonable doubt that the defendant was impaired at the time of driving. The State is attempting to divert attention from the real issue – that Juror S.B. was biased, in as much as she was unwilling to consider any argument other than the test is the test.

Finally, the State contends that *State v. Lepsch*, 2017 WI 27, 374 Wis.2d 98, 892 N.W.2d 682, stands for the proposition that a harmless error analysis applies in this case. Contrary to the State's contention, *Lepsch* did not apply the harmless error analysis to the court's refusal to strike a juror for cause. *Lepsch* employed the harmless error analysis to the deprivation to be

present during voir dire. *Id.* at ¶45. The court ruled that the right to be present during voir dire was subject to the harmless error analysis. *Id.*

However, a different analysis should be employed when a biased juror is empaneled. A juror can be removed in one of two ways, for cause or by use of preemptory challenge. The harmless error analysis is used where a defendant uses a preemptory challenge to correct a trial court's error in refusing to strike said juror for cause. *see State v. Mendoza*, 227 Wis.2d 838, 596 N.W.2d 736 (2001) and *State v. Sellhausen*, 2012 WI 5, 338 Wis.2d 286, 809 N.W.2d 14. The inquiry is whether the empaneled jury was fair and impartial.

However, here, the defense moved to strike Juror S.B. for cause, the court denied the defendant's motion, and Juror S.B. remained on the jury (the defense did not use a preemptory challenge to remove Juror S.B.).

A defendant has the right to have an impartial jury decide his fate. See U.S. Const. amends. VI and XIV and Wis. Const. art. I, §7. "To be impartial, a juror must be indifferent and capable of basing her verdict upon the evidence developed at trial." *State v. Faucher*, 227 Wis.2d 700, 715, 596 N.W.2d 770 (1999). Clearly, allowing a partial juror to remain on the jury,

violates the defendant's rights under both the United States and Wisconsin Constitutions. Allowing a biased juror to remain on the jury is a defect affecting the framework of the trial process. Thus, contrary to the State's contention, the harmless error analysis does not apply.

CONCLUSION

Because Juror S.B. was subjectively and objectively biased, the trial court should have granted Mr. Conger's motion to strike Juror S.B. for cause. Thus, the trial court erred in failing to strike Juror S.B. The Court should reverse the Judgment of Conviction and remand for a new trial.

Dated this 15th day of September, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 11 pages. The word count is 1837.

Dated this 15th day of September, 2017.

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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 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 15th day of September, 2017.

Respectfully submitted,

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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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 15th day of September, 2017.

Respectfully submitted,

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APPENDIX