STATE OF WISCONSIN

SUPREME COURT

STATE OF WISCONSIN,
Plaintiff-Respondent-Cross Petitioner,

v.

Robert Daris Spencer,
Defendant-Appellant-Petitioner.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

Appeal No. 2018AP000942CR

Circuit Court Case No. 2014CF005088 (Milwaukee Co.)

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2. Was the defendant's Constitutional Right to Due Process and Equal Protection violated when the trial court considered the race of the defendant and of trial participants when overruling the defendant's objection to the juror's dismissal, and if so, was that violation harmless?

3. Did the trial court erroneously exercise its discretion in dismissing the juror, and if so, was the error harmless?

4. Did the defendant forfeit his claims that the trial court erred by dismissing the juror?

STATEMENT ON NECESSITY OF ORAL ARGUMENT & PUBLICATION OF OPINION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

The defendant was convicted in Milwaukee County Circuit Court of one count of felony murder by causing the

death of Mr. T. M., while committing an armed robbery as party to a crime contrary to secs.943.32(2), 939.05 and 940.03 Wis. Stats. T.M. was an alleged accomplice of the defendant's. The defendant was also convicted of one count of possession of a firearm by a felon, contrary to secs. 941.29(2)(a) and 939.50(3)(g) Wis. Stats.

Following his conviction, the defendant timely filed a notice of appeal and a postconviction motion. The postconviction motion alleged that the defendant was denied his Sixth Amendment right to counsel when the trial court interviewed a juror out of counsel's presence after the close of testimony. It also alleged that trial counsel was ineffective for failing to object to hearsay testimony that bore on the causation element of felony murder. The postconviction motion was denied without a hearing. The defendant appealed.

On appeal, the defendant, in addition to the Sixth Amendment and ineffective assistance issues referenced above, claimed that the dismissal of the juror over the defendant's trial objection was an erroneous exercise of discretion and as was a violation of his rights to due process and equal protection.

In a 2-1 decision, the court of appeals found that any violation of the defendant's right to counsel was harmless.

It also found in a 2-1 decision that the defendant had forfeited his right to claim the court erred when deciding to dismiss the juror. The defendant's Petition for Review on these issues was granted.

The court of appeals also determined that the defendant should have been granted a **Machner** hearing on his ineffective assistance claim. The State's Petition for Review on this issue was granted.

STATEMENT OF FACTS

The trial began on June 22, 2015 with jury selection. On June 23, prior to testimony, pretrial motions were addressed. One of the issues raised by the defense was that the jury panel was unconstitutionally unfair because the panel of 35 only included 2 African Americans. The defense alleged that the practice of using driver's licenses to summon jurors resulted in an unconstitutional racial composition of the jury panel, and as such was a violation of **Swain v. Alabama**, 380 U.S. 202 (1965). The trial court ruled that it had not been proven that Milwaukee County's procedures systemically excluded African-Americans from jury service. (R.179:22-32).

After pretrial matters had been addressed, the State argued to the jury and presented its theory of the case. The State argued that T.M. was killed over a debt and a

disagreement over the debt between the defendant and Mr. R. S. The State told the jury that R.S. was outside a residence where he had a car towed when he was approached by Mr. Spencer and T. M., who was described as a friend of both Mr. Spencer and R.S. The State argued that the defendant grabbed R.S. with a firearm in his hand and went through his pockets, taking money and a cell phone. (R.179:48,49). The State stated that R.S. broke free and ran away, and that Mr. Spencer then shot at him. (R.179:49).

The State informed the jury that it would hear that there was a second person with a firearm shooting from a window to protect R.S. The State alleged that T.M., Mr. Spencer's alleged accomplice, was shot during the exchange of shots. (R.179:49). To that end the prosecutor stated: "... you will hear that there is a second person with a firearm that day. They are going to be right in front of the residence shooting from a window. And they are going to return fire. They are going to protect R.S. They are going to be shooting at the defendant." (R.179:49).

It was on the basis of the above argument that the State claimed that the death of T.M. was caused by the alleged armed robbery.

Defense counsel's theory of defense was in essence that the jury would not be able to determine who did what beyond a reasonable doubt. (R.179:58).

In the evidentiary portion of the trial, an important witness for the State was Mr. Lerone Towns, a truck driver. Mr. Towns testified that the night of the incident he picked up a vehicle at Sherman and Lloyd in Milwaukee. (R.181:124). The call for the tow came in under the name Mr. Green. (R.181:129). He testified that he made arrangements with R.S. to tow the car to 23rd and Townsend (R.181:125). When he arrived at the drop off site, he talked to R.S. about transactional details (R.181:131,132). He testified that R.S. indicated he needed to get money for the payment and went to the door of the residence. Mr. Towns was obtaining information off the vehicle when he heard a commotion at the door. (R.181:133). He saw two men standing in front of R.S. Their backs were to Mr. Townes. (P.134). He never saw their faces. (R.181:136). The men started "scuffling". (R.181:137). At one point a lighter skinned man pulled out a handgun. (R.181:137). He reached into R.S.'s pockets. (R.181:139) After a short scuffle, the man with the handgun dragged R.S. across the street. (R.181:139). They were then out of his sight. (R.181:141) He heard gunfire. (R181:142). R.S. then ran past Mr.

Townes. (R.181:143) When the gunfire stopped, Mr. Towns got back in his truck and left. (R.181:144). The car he was towing was still on his flatbed. (R.181:145). He called his dispatcher and told him what happened. (R.181:144). While driving back to the shop he received a call from R.S. telling him another location for dropping off the vehicle. (R.181:145). When he dropped the vehicle off, R.S. showed up with a man identified as Mr. Green. (R.181:150). Mr. Townes was later contacted by police but was unable to identify the two alleged robbers. (R. 181:148).

The State's key identification witness was R.S. himself. He indicated that he knew T.M. since kindergarten. He identified Mr. Spencer as a person he knew as D or D Dog (R.182:23), and that he knew Mr. Spencer for a couple of months. He also identified Mr. Errion Green-Brown as a friend. (R.182:24). R.S. identified the residence at 23rd and Townsend as being a residence of his. (R.182:25). He indicated that Errion resided there also, as did Mr. Danny McKinney. (R.182:27).

Regarding the events of Sept. 8, 2014, he indicated that Errion's sister was using one of "the" cars when an axle broke. R.S. went to the location where the car had broken down and met with a tow truck. He had the car towed to 23rd and Townsend. (R.182:28).

R.S. indicated that when the tow truck arrived he went in the house to use the bathroom. (R.182:30). He indicated that at one point he was approached by two males. He testified that he recognized T.M. as one of the two males but he did not recognize the other. (R.182:31).

R.S. indicated that the lighter skinned of the two people who approached him had a gun in his hand. The individual reached into R.S.'s pockets and took a couple of dollars and a phone. (R.182:32,33). He reiterated that he did not know who it was. (R.182:34).

R.S. further testified that he saw a minivan and thought that he was going to be put in the van. (R.182:36). He broke away and heard shots being fired. (R.182:37). He did not know who fired the shots. (R.182:37). He testified that he was later told that "Danny" fired from the residence to protect him. (R.182:37,38). He testified that he got in his car and drove off. (R.182:38).

In short, R.S. denied that Mr. Spencer was involved in the incident.

R.S. was declared an adverse witness and was questioned extensively by the State regarding statements he made to detectives prior to trial wherein he allegedly identified the defendant as the person with T.M. (R.182:46). Nevertheless, R.S. insisted that Mr. Spencer

was not the individual involved. (R.182:50). At one point R.S. indicated that, "(t)hey threatened me if I didn't cooperate; they would lock me up and charge me with the crime." (R.182:32).

On cross-examination by defense counsel, R.S. testified that he was arrested shortly after the incident in the middle of the night and questioned for about an hour. (R.182:56). He indicated that he was subsequently interviewed a number of times, and that he was throwing up during interviews. (R.182:57). He testified that he was sick when he was arrested. (R.182:59).

R.S. indicated that when he was interviewed he was trying to give answers he thought would please the police. (R.182:62). He testified that when he was questioned by the police they repeatedly asked him if he had a gun. (R.182:64). He indicated that he was told by police that he would be charged. (R.182:65). He was afraid of being charged with what Mr. Spencer was charged with. (R.182:65,66). He indicated that when he talked to the police he thought that if he helped the police he would not "end up where Mr. Spencer is." (R.182:71). He indicated that Mr. Spencer did not take any money from his pocket but that he thought the police were saying that if he didn't give up Mr. Spencer he would be charged. (R.182:73).

R.S. also testified that at one point he was questioned by detectives who were seeking information about Mr. Errion Green-Brown. (R.182:.60,61). He indicated he gave a different name for Mr. Green-Brown because he didn't want to get him in trouble. (R.182:64).

The defendant alleged in his postconviction motion that police reports indicated that Danny McKinney refused to be interviewed by the police.(R.147:7).

After the completion of testimony on June 25th, the case was adjourned to the 26th.

On June 26th, the day began with a conference which the trial transcript indicates began at 8:59 a.m. After the conference, a recess was taken. The transcript indicates that the recess lasted 45 minutes. (R.184:19). When the court reconvened, the court stated that it had been half an hour or forty five minutes since it earlier went off the record. The court indicated that it had gone off the record because it had been advised that a juror was not feeling well. The court told the attorneys that it had the bailiff take the juror into chambers to give her a quiet place to rest, to see if she would feel better. (R.184:19). The court then stated:

> She is not well enough to proceed. And when I asked her about 15, 20 minutes ago if she thought she would feel well enough to proceed in

> any particular length of time, her answer was very tentative and she said unlikely basically and she didn't know how long she would be before she could participate. She is, if you want to know the details, queasy, light headed, just unwell generally.
>
> I did inquire. She said she's been having some health issues as of late and believes that these are – her words – "the reminisce" of some health issues that have been going on I think last week (sic).
>
> I conferred with the attorneys. We met in the back. I advised the attorneys going along what was the cause for the delay and what was being done to assist the juror and we agreed to wait and we've now waited a significant period of time. And I have to be mindful that we have the remaining 12 sitting back in the jury room waiting to move forward.
>
> I understand the significance of this for both sides, frankly. This is the only African-American juror on the panel. But I am not prepared to put her health at risk by having her continue to go to deliberations when she is so unwell. After we met, the defense asked a question for purposes of the record which I do not find inappropriate. I did ask – I inquired along the lines of the concern the defense had. I asked the juror if her stress or not being well enough to proceed had anything to do with her service as a juror or with the behavior of any of the other jurors. Her response to me was "Oh, no. This has nothing to do with the trial." So I'm satisfied with that response. I've made my record. (R. 184:20,21).

Over objection, the juror was excused. Additional facts shall be provided in the pertinent argument sections below.

ARGUMENT

I. THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN THE TRIAL COURT HELD AN EX PARTE MEETING WITH A JUROR AND A HARMLESS

ERROR ANALYSIS WAS NOT APPROPRIATE.

An accused has a right to be represented by counsel at all critical stages of a trial. The right to have counsel present is guaranteed by Article I, Section 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. See **State v. Anderson**, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d ¶67, and **State v. Alexander**, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126, ¶29.

A defendant's Sixth Amendment right to counsel has been described as the right "... to have counsel at every stage where he or she needs aid in dealing with legal problems." **State v. Koller**, 2001 WI APP 253, 248 Wis. 2d 259, ¶62.

This Court has previously stated that :"(o)rdinarily, the absence of counsel at a critical stage of a proceeding is not subject to harmless error analysis." **Anderson**, at ¶74.

A. The Trial Court's Conference With the Juror Violated the Defendant's Right to Counsel at a Critical Stage in the Proceedings.

When the court met with the juror in chambers, the meeting constituted a critical stage. Identifying the

meeting as a critical stage is consistent with prior case law and with the definition of a critical stage.

Regarding prior case law, the constitutional right to be assisted by counsel has been addressed in a number of contexts involving trial court communication with jurors. For example, the right applies whenever a court communicates with deliberating jurors. See **Anderson**, ¶¶43 & 69; **State v. Burton**, 112 Wis. 2d560, 565, 334 N.W.2d 263 (1983); **State v. Koller**, 2001 WI App 253, ¶62, 248 Wis. 2d 259, 635 N.W.2d 838.

Alexander, cited above, addressed a defendant's right to be present himself when a trial court interviewed jurors in chambers during the trial. The lead opinion in **Alexander** indicated that Alexander did not have a constitutional right to be present himself at the discussions in chambers with the jurors. The court stated, "(a)ll the Constitution requires is the presence of defense counsel." **Alexander** at ¶29. Because defense counsel was present, Alexander's Sixth Amendment rights were not violated.

Regarding the need for counsel's presence during the conference between the trial court and the juror in this case, it is significant that at the outset of the trial the defendant challenged the jury pool on the basis that it lacked sufficient numbers of African-Americans. His

objection was denied and the jury was chosen. The juror dismissed in this case, juror #2, was the only African-American on the jury.

It was reasonable for Mr. Spencer to desire a diverse jury. The benefits of a diverse jury have been articulated by Justice Thurgood Marshall in the U.S. Supreme Court ruling, **Peters v. Kiff**, 407 U.S. 493, 503 (1972). He stated: "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."

Given the importance to the defendant of having a diverse jury, the benefit of having counsel present at the time the juror was questioned is evident. At that stage of a proceeding, a juror can only be dismissed for cause. That is a legal determination to be made by a court. If counsel had been present, counsel could have thoroughly explored whether the nature of the juror's illness rose to the level of cause for dismissal, or whether her discomfort might have warranted a request for a continuance for a few hours, if appropriate, or even a day. Counsel also could have thoroughly investigated whether the fact the juror was the lone African-American on the panel contributed to her

discomfort. This is a concern counsel raised with the court. (R.184:22,23).

In short, there were legal issues to be addressed where trial counsel could have acted on behalf of her client, thus making the ex parte meeting a critical stage in the proceedings.

Because the defendant was denied counsel at a critical stage of the proceeding, and after the close of evidence in the case, the denial of counsel, consistent with the general rule recognized in **Anderson**, should not be determined to be harmless error.

B. Under These Facts the Violation of the Defendant's Right to Counsel Should be Deemed Structural Error.

The majority of the court of appeals found the presumed error herein to be harmless because it believed the defendant had received what he was entitled to, namely a fair and impartial jury, and the communication could not be said to have influenced the jury's verdict. **Majority Op.**, at ¶21.

The majority cited **State v. Mendoza**, 227 Wis. 2d 838 (1999) for the proposition that a defendant is entitled to a fair and impartial jury, and that his rights go to those who serve, not those who were excused. (R.157:12). The majority observed that Spencer failed to argue that

anything in the record indicated that the remaining jurors were biased or partial. **Majority Op.**, at ¶21.

We disagree with the majority in the court of appeals. We believe a harmless error analysis was not appropriate; rather, the denial of the defendant's right to counsel should be treated as structural error.

The United States Supreme Court has identified that the purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of structural error is that it affects the framework within which a trial proceeds, rather than being simply an error in the trial process itself. For that reason, a structural error defies analysis by harmless error standards. **Weaver v. Massachuseets**, 137 S. Ct. 1899, 1907 (2017) citing **Arizona v. Fulminante**, 499 U.S.279, 309 (1991).

The Supreme Court in **Weaver** identified three broad rationales for deeming errors structural. Those rationales include the importance of the interest being protected, whether the error is simply too hard to measure, and whether the error would result in fundamental unfairness. **Weaver** at 1908.

The **Weaver** court noted that the categories of structural error are not rigid, and that more than one of the rationales may be part of an explanation for why an error is deemed to be structural. **Weaver** at 1908.

This court has recently made similar observations regarding the nature of structural error. This court has observed that structural errors are errors that may affect a trial in an unquantifiable way, are errors that defy analysis by harmless error standards, and that, because of the nature of the error, it is difficult to determine how the error affected that trial. **In re S.M.H.**, 2019 WI 14, 385 Wis. 2d 418, 922 N.W.2d 807, at ¶15.

This court has also cited **Weaver** for the proposition that the purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." **In re S.M.H.**, at ¶15.

A determination in this case that the error complained of is not subject to harmless error analysis is consistent with the above reasoning. This is because the denial of Mr. Spencer's right to counsel was not part of the presentation of the case to the jury, the error is not quantifiable, the error defies analysis by harmless-error standards and it is also difficult, if not impossible, to determine how the

error affected the outcome of the trial. Furthermore, application of the structural error doctrine will ensure an insistence on the basic constitutional guarantee of a defendant's right to counsel.

United States v. Gonzalez Lopez, 548 U.S. 140, is an example of a case where the error complained of was not subject to harmless error analysis because of the difficulty of determining how the error affected the trial. In **Gonzalez Lopez**, the trial court refused to permit a defendant to be represented by his counsel of choice in violation of the Sixth Amendment. Justice Scalia, writing for a 5–4 majority, determined that such an error must be treated as structural (and thus not subject to review for harmlessness) because of the difficulty in assessing how alternate counsel might have performed. He stated that "(h)armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." **Id** 149,150.

In our case, any attempt to discern what would have happened if counsel had been present at the questioning of the juror is speculative. The court's description of the juror's basically feeling "unwell" and needing to lie down with the symptoms being "reminisce" of something she had been dealing with in the past is vague. If anything, the

court's description of the juror's health indicates that the juror had been handling the situation, and might very well have been able to continue if given some more time. As we mentioned previously, perhaps counsel could have explored the possibility of an adjournment for a few hours or a day. However, given the state of the record regarding the health problems the juror was experiencing, there is no way of knowing what might have occurred had counsel been present during the juror's questioning.

Furthermore, the result of the conference between the court and the juror was not inconsequential. The only African-American on the panel was dismissed. Our jury system expects each juror to bring their individual perspectives and background to the jury room. Individual jurors will evaluate evidence differently. There is no way to recreate how the dismissed juror would have approached deliberations.

Additionally, the dismissal of the juror affected the framework of the trial. The jurors that hear testimony are certainly part of the framework of the trial. Excusing a juror after the completion of testimony alters that framework.

Moreover, the error defies analysis by typical harmless error rules. The typical harmless error analysis

puts the burden on the recipient of the error, in this situation the State, to show harmlessness. By determining that the error was harmless in the absence of the defendant demonstrating that the ultimate jury was biased, the majority below has impermissibly shifted the burden to the defendant to show prejudice as a result of the constitutional violation, rather than requiring the State to establish the absence of prejudice. This is wrong as a matter of law and is substantively wrong, because the court's finding assumes that, after the receipt of evidence, jurors are fungible, thereby assuming as well that the loss of the perspective of the only African-American on the panel was of no consequence.

Concerns with the perceived fungibility of jurors, the difficulty of evaluating error and the shifting of the burden of establishing harmless error, were recognized in **Hinton v. United States**, 979 A.2d 663, 682 (D.C. 2009) a case that addressed a court's erroneous dismissal of a sitting juror.

In **Hinton**, the trial court was found to have erroneously exercised its discretion when it removed a sitting juror on the fifth day of trial. **Hinton** did not involve constitutional error. Nevertheless, after

determining that the trial court erred, the appellate court addressed whether the defendant had to show prejudice.

The court rejected the argument that the defendant had to show prejudice. The court determined that, consistent with typical harmless error analysis, the burden was on the State to show that the error was harmless. The court felt that this was in line with normal practice in criminal cases.

The court also rejected the analogy drawn by the government to situations that occur during voir dire, where the trial court erroneously rejects a juror, as was the case in **Mendoza**, the case relied on by the court of appeals in our case. In such cases, a defendant would need to show that the jurors that sat were biased. When addressing the argument that Hinton would have to show that the jury that convicted him was biased, the court stated:

> In support of a specific-prejudice requirement, the government argues that a mid-trial decision to replace an empaneled juror with an alternate is analogous to a decision to excuse a prospective juror in pretrial voir dire. We assumed the aptness of that comparison in *(Nathaniel) Thomas*. But on closer examination, we think the two situations are not analogous. Voir dire "serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."] Peremptory challenges, in turn, are themselves "auxiliary" in nature; they are granted "to help secure the constitutional guarantee of trial by an impartial jury." Thus, what is ultimately at

> stake for the defendant when a juror is erroneously excused for cause in voir dire is the defendant's Sixth Amendment right to an impartial jury. Ordinarily, the erroneous excusal of a prospective juror for cause can have no adverse effect on the impartiality of the chosen jury or the defendant's rights, for it "cannot cause the seating of a biased juror." All the empaneled jurors, having been "vetted for cause ... [are], by definition, fair and impartial." Since a defendant generally "has no right to have any particular person sit on the jury" so long as the defendant's Sixth Amendment right to an impartial jury is preserved, it makes sense that a defendant complaining on appeal of the erroneous excusal for cause of a *prospective* juror should have to show prejudice — specifically, as we said in *Tate*, that as a result of the error, an empaneled juror "failed to conscientiously apply the law and find the facts." In effect, the burden of persuasion with respect to prejudice, normally on the government, is shifted to the appellant because the record of the voir dire shows affirmatively that the error was "cured" by the selection of an impartial juror.
>
> But that is not necessarily so with respect to erroneous mid-trial removals of empaneled jurors. Once they start hearing and considering the evidence, individual jurors may evaluate it differently, and they may no longer be viewed as fungible merely because they have passed muster in voir dire.

Hinton at 689, 690.

The **Hinton** court's observation that jurors are not fungible after they have heard the evidence is an especially appropriate observation in the context of this case where the dismissed juror was the only African-American on the panel.

We believe the above arguments demonstrate the appropriateness of deeming the error that occurred here structural. We recognized below, however, that there are cases where a trial court engaged in ex parte communications with jurors and those communications were evaluated for harmlessness. See **Anderson** at ¶76. Two such cases referenced by the court in **Anderson** were cited by the State to the trial court and court of appeals and referenced by the court of appeals in its decision. Those were **State v. Koller** 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838 and **State v. Bjerkaas**, 163 Wis. 2d 949, (Ct. App. 1991). The cases are distinguishable on their facts. Both cases involved the court answering questions posed by the jury.

In **Koller**, during deliberations, the jury sent a note to the court indicating that it wanted to see a doctor's report and a nurse's testimony. The court told the jury through a bailiff that the items were not available. Error was assumed but held harmless because the doctor's report was not in evidence and the nurse's testimony was consistent with their having been an assault.

In **Bjerkaas**, the jury sent a note asking whether entrapment was an issue to be considered. The court wrote "no" on the note and sent it back to the jury room. The

parties agreed that "constitutional error" had occurred, however, it was determined to have been harmless because it had already been determined that an entrapment instruction was not required. It was a legally appropriate response and therefore not prejudicial. **Bjerkaas** at 958, 959.

The above fact situations have expressly been identified as exceptions to the rule that the absence of counsel is not subject to harmless error analysis. A case such as ours, where the violations of the defendant's rights resulted in the dismissal of a juror, are qualitatively different than cases where a court answers questions posed by a jury. A judge's instructions regarding the law or other communications with a jury can be reviewed for accuracy. No such analysis can be performed here.

As pointed out above, to obtain redress for the violation of his constitutional right, the defendant was apparently expected to show that the remaining jurors were not impartial. As noted by the dissent below, this analysis conflates two constitutional rights; the defendant's constitutional right to counsel's presence at the court's conference with the juror and his right to an impartial jury. Those are independent rights, both worthy of vindication; however, the test for harmless error employed by the court of appeals is only concerned with a

defendant's right to an impartial jury. Therefore, in this case, for Mr. Spencer to obtain redress for a violation of his constitutional right to representation, he must show a violation of another constitutional right, i.e. his constitutional right to an impartial jury. Such an approach to harmless error does not ensure insistence in the future that a defendant's right to counsel will be scrupulously observed in this type of situation.

The defendant respectfully asserts that this should not have happened. In this case not only did the meeting take place, it was done without the benefit of a transcribed record. Case law makes plain that trial courts should not have ex parte communications with sitting jurors. By finding structural error, this court can "ensure insistence" in the future on the basic, constitutional guarantee that counsel be present whenever a court meets with a sitting juror.

II. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION WAS VIOLATED WHEN THE TRIAL COURT CONSIDERED THE RACE OF THE DEFENDANT AND OF TRIAL PARTICIPANTS WHEN DENYING THE DEFENDANT'S OBJECTION TO A JUROR'S DISMISSAL.

In response to defense counsel's objection to the juror's dismissal and motion for mistrial the trial court stated:

> What I will say for the record is that had this fact pattern been different than what it is, that we may be having a very different discussion. This is not a case where there is an identification that actually took place, No.1. And No. 2, this is not – there is not an issue here in terms of any cross-ratio (sic) identification or a crime allegedly committed by a person of one race upon the victim of another race, however you want to slice it. What I think is appropriate to note for the record is that obviously the defendant is African-American given the arguments that have been made, although I don't know that we specifically said that. The defendant is African-American. Detective Graham as he sits here in the courtroom and has sat here in the courtroom throughout the trial is an African-American man. We've heard from Mr. Gary Moore who is a witness, also an African-American man; Anita Cathey, African-American woman; Ms. Davis who gave the offer of proof but did not testify, African-American woman; Kiara Gaines, African-American woman; Lerone Towns, an African-American man; (R.S.), an African-American man; Quintessa Gaines, an African-American woman. These citizens have all testified, and I think it's important to note their race for the record as one as the defense has raised the issue. Sometimes records unfortunately are silent because everybody assumes that they're all sitting in the trial court. So I will add those facts to the record as the court has observed them through the course of the trial. *And as I indicated, if we had individuals of other races involved as witnesses in this case, we may be having a different conversation.* But we don't so I decline to speculate. And thank you, both of you. Your arguments are noted. Your *objection* is noted. Your *motion for mistrial* is noted and denied. (R.184:26)

Additionally, in its decision denying the defendant's postconviction motion the court wrote: "(a)fter trial counsel objected to the removal of the only African-

American jury member and moved for a mistrial, the court set forth its reasons why it was denying the motion, noting in its reasons that many of the witnesses for the State were African-American as well." (R.163:8).

It is clear from the above that the trial court felt it was relevant to the dismissal of the juror that many of the trial participants were African-American. We assert that such an analysis is improper and contrary to law.

We have not found a case that directly addresses or holds that a court may not consider the race of trial participants when determining whether to discharge a juror; however, criminal defendants are entitled to equal protection of the law, and equal protection principles do not allow race-based decision making in the administration of justice. For example, it has been held that: "(a) defendant's race or nationality may play no adverse role *in the administration of justice*, (including at sentencing)." **United States v Leung**, 40 F.3d 577 at 586 (citing **United States v. Edwardo-Franco**, 885 F.2d 1002, 1005-06 (2d Cir. 1989); **United States v. Borrero-Isaza**, 887 F.2d 1349, 1355-56 (9th Cir. 1989)).

It has also been observed that "(s)ince the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice", **Hill v. Texas**, 316 U.S. 400, 406

(1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," **Avery v. Georgia**, 345 U.S. 559, 562 (1953); see also **Alexander v. Louisiana**, 405 U.S. 625, 632 (1972).

Additionally, it has been observed that competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See **Thiel v. Southern Pacific Co.**, 328 U.S. 217, 223 -224 (1946). A person's race simply "is unrelated to his fitness as a juror." **Id.**, at 227 (Frankfurter, J., dissenting).

Also, in **Vasquez v. Hillery**, 474 U.S. 254,106 S. Ct. 617, 88 L. Ed 2d 598, the United States Supreme Court determined that discrimination on the basis of race in the selection of grand jurors strikes at the fundamental values of the judicial system and society as a whole, and the criminal defendant's right to equal protection of the laws had been denied when he was indicted by a grand jury from which members of a racial group purposefully had been excluded.

Our contention that the trial court should not have considered the race of the participants when considering whether to dismiss the juror is consistent with this

Court's reasoning in **State v. Harris**, 2010 WI 79, 326 Wis. 2d 685. In that case, the defendant argued that he was entitled to resentencing because the circuit court at sentencing made comments such as calling the mother of his children his "baby momma." The court of appeals had determined that the circuit court's comments would have suggested to a reasonable observer that the sentencing court improperly relied on race or gender when imposing sentence.

This Court overturned the court of appeals because the defendant had not shown that the trial court *actually* considered race at sentencing. The State had argued that "... a reasonable observer's perception of the court's comments is not indicative of whether the court improperly relied on race or gender." **Harris** at ¶2. This court agreed, stating; "(w)e conclude that Harris has not met his burden of proving by clear and convincing evidence that the circuit court actually relied on race or gender." **Harris** at ¶67.

In our case, unlike in **Harris**, it is clear that the trial court actually took the race of trial participants into account when determining whether to discharge the juror. It stated so at the time, and reiterated its consideration of the race of the trial participants in its

decision on the defendant's postconviction motion. It was constitutional error to do so.

For all the reasons identified in the previous section of this brief, we also believe this constitutional error should be deemed structural. Additionally, in **Vasquez**, cited above, the error was found to be structural error. Moreover this Court, in **S.M.H.** at p. 429, fn. 9, stated that structural errors include "the right to a jury selected without reference to race".

In this case, the ultimate jury was selected with a reference to race. The defendant's conviction should be overturned.

III. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT DISMISSED THE JUROR.

The defendant argued on appeal that, regardless of any constitutional violation, he was entitled to a new trial because the trial court erroneously exercised its discretion when it dismissed the juror.

The proper exercise of discretion is not synonymous with decision-making. It contemplates a process of reasoning. **State v. Gallion**, 2004 WI 42, 270 Wis. 2d 535, ¶3.

An erroneous exercise of discretion occurs when the circuit court does not consider the facts of record under

the relevant law *or does not reason its way to a rational conclusion*. **State v. Davis**, 2001 WI 136, ¶ 28, 248 Wis. 2d 986, 637 N.W.2d 62.

The discretion that must be exercised by a trial court when considering whether to excuse a sitting juror has been described in **State v. Lehman**, 108 Wis. 2d 291, 321 N.W.2d 212, 300. The **Lehman** court stated:

> When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. The juror potentially subject to the discharge should not be present during counsel's arguments on the discharge. The circuit court's efforts depend on the circumstances of the case. The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.
>
> The term discretion contemplates a process of reasoning. The process depends on facts that are of record or that are reasonably derived by inference from the record. Discretion must in fact be exercised by the circuit court, and the circuit court must set forth on the record the basis for its exercise of discretion. Adherence to this practice facilitates the decision-making process of the circuit court in the first instance and aids appellate review.

Lehman at 300,301.

As the above cited law makes clear, when questioning a juror a trial court is directed to make careful inquiry and to attempt to avoid discharging the juror. Also, the questioning should be in the presence of counsel and the defendant. Additionally, discretion must in fact be exercised, and must reflect a process of reasoning that leads to a rational conclusion. Application of these considerations shows that the trial court erroneously exercised its discretion when dismissing the juror.

In this case the questioning of the juror was not done in the presence of counsel or the defendant. The record gives us very little information regarding the extent, duration, or severity of the juror's health issue and, as such, the record does not reflect that the inquiry was carefully done with an eye toward retaining the juror. These factors alone indicate that the court erroneously exercised its discretion. Significantly however, the court also erroneously exercised its discretion when it considered the race of the trial participants when determining the appropriateness of discharging the juror.

The trial court's comments at the time defense counsel objected, along with its written decision on the postconviction motion, show that the fact that the vast majority of trial participants were African-American

somehow justified, in the court's mind, excusing the sole African-American on the jury. This thought process does not reflect a reasoning process leading to a rational conclusion. It is hard to understand what the link is between the fact that the trial participants were African-American and the determination to dismiss the only African-American on the jury. Taking the court's statements at face value, we are left to wonder whether the juror would have been retained if the trial participants were not African-American, or whether the juror would have been retained if she were not African-American, and why any of that mattered.

We submit that the fact that many of the trial participants were African-American does not justify the discharge of the only African-American on the jury. The race of trial participants has nothing to do with a juror's qualifications and is clearly unrelated to whether a juror is fit to sit as a juror. The race of trial participants should not play a role in a court's decision whether to discharge a juror from further service. That the court took the race of the trial participants into account when making its decision indicates that the court did not reason its way to a rational conclusion.

IV. THE DEFENDANT DID NOT FORFEIT HIS CHALLENGES TO THE COURT'S DECISION TO DISMISS THE JUROR.

Whether a claim is forfeited or adequately preserved for appeal is a question of law this court reviews de novo. **State v. Corey J.G.**, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998).

An objection or motion is sufficient to preserve an issue for appeal if it apprises the court of the specific grounds upon which it is based. See **Holmes v. State**, 76 Wis. 2d 259, 271, 251 N.W.2d 56 (1977). When the basis for the objection is obvious, however, "the specific ground of objection is not important." **Champlain v. State**, 53 Wis. 2d 751, 758, 193 N.W. 2d 868 (1972). "To be sufficiently specific, an objection must reasonably advise the court of the basis for the objection." **State v. Peters**, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).

The majority in the court of appeals held that the defendant forfeited his right to object to the trial court's decision to dismiss the juror by failing to object at trial and by failing to raise the issue in his postconviction motion. The dissent disagreed. We respectfully assert that the defendant did not forfeit his right to raise the issues on appeal.

When looked at in context, it is apparent that the defendant did not forfeit his objection. After the court stated what happened when the court met with the juror, the court stated:

> Mr. Huebner, I'll hear from you if there's a request or anything further that you'd like to put on the record. At this point *I will tell you I have resolved that we will go forward with the 12*. I understand that each of you—one of you might have motions to bring and I'll allow you to state your positions *succinctly* for the record but I'll ask you to be succinct. (R.184:21).

From the above we know that before hearing argument, the court had already "resolved" to discharge the juror. For all we know from this record, the juror may have already left the courthouse.

We also know from the above that the court knew, apparently from an off the record discussion, that one of the parties, obviously the defense, objected to the release of the juror.

After the court stated that it had resolved to release the juror, the following exchange took place:

> MR. HEUBNER: First of all, I would just say I agree with everything the court said as to the recitation of what the court had told us prior to this. I would simply indicate, Your Honor, that I do agree that based on health issues that she should be struck for cause. I think it would be very –
>
> THE COURT: She's excused is what we're going to say.

MR. HUEBNER: The only reason I was going to say "for cause" is because I do know that the statutes do say that alternates can only be picked at random. So we can't designate her as an alternate per statute but we can excuse her for a good reason.

THE COURT: For cause.

MR. HUEBNER: Yeah, for cause. And the only reason I'm saying that is because that is allowed. So I agree with the Court's resolution or determination.

THE COURT: All right. Ms. Shellow, I'll allow you to make your record.

MS. SHELLOW: Succinctly.

THE COURT: Turn the microphone on though, please.

MS. SHELLOW: At the outset of this trial when the panel was impaneled and after the composition of the potential jurors was revealed, I expressed to the court concern about the underrepresentation of minorities at that point in the room. The following morning I brought a **Swain** challenge based on the pool of people that is from the Department of Transportation's photo ID and state ID records and that it underrepresented African-Americans. The court denied the challenge, ruling that I had not met my burden of proof.

We're now in a situation where we have no African-American jurors. And in a trial where the defendant is African-American, I inquired specifically of – I believe she was Juror No. 2.

THE COURT: Yes

MS. SHELLOW: -- whether or not she would be able to handle the pressure if she were the only African-American juror. I believe what these events demonstrate is not that the juror was not –

THE COURT: That the juror was what?

MS. SHELLOW: The juror was in any way dishonest with any of us or herself but that there are – that our bodies are under lots of pressure from lots of things and that this is not unpredictable. I'm moving for a mistrial. I understand the Court is going to deny it but I have to move for a mistrial to protect the record.

> THE COURT: Yes.
> MS. SHELLOW: I'm *also* renewing my challenge under **Swain**. (R.184:22,23,24).

As can be seen from the above, after moving for a mistrial, counsel indicated that she was *also* renewing her **Swain** challenge. She then requested permission to supplement her previous **Swain** arguments with additional materials. Counsel's request was denied.

In context, the only fair reading of the record indicates that defense counsel objected to the discharge of the juror for health reasons, noting that stress under these circumstances was understandable, and *also* renewed her **Swain** challenge. It is in this context that the court went on to explain further that the court's already stated decision to remove the juror was appropriate because of the racial characteristics of the trial participants.

When the court commented on the racial characteristics of the trial participants, it had already pronounced its ruling, and had instructed counsel to be succinct in her argument. At the time defense counsel argued, counsel had no way of knowing the additional thought process that contributed to the court's decision to discharge the juror.

In short, the trial court informed the parties that it was discharging the juror, the parties were told to argue their positions succinctly, and then, after the time for

argument had passed, the court expanded on its reasons for making its already identified decision. There was no way counsel could have anticipated that the trial court would include the racial make-up of the trial participants in its explanation of why the juror was removed for cause.

It is clear from the record that trial counsel objected to the discharge of the juror, and that counsel felt the health reasons given were insufficient for discharging the only African-American on the panel. In response to the objection, the trial court expanded on its reasoning, and commented on the race of the trial participants to justify its ruling. The record is clear that nothing counsel said was going to get that juror back on the panel.

Because of the above, this was not a new issue requiring a postconviction motion under sec 809.30(2)(h) stats. This is a direct appeal of the trial court's determination to dismiss the juror for cause, which was objected to and which objection was noted, and commented on, by the court.

V. THE FORFEITURE RULE SHOULD NOT BE APPLIED.

In some cases, a court may choose to ignore the forfeiture rule and reach the merits of a claim. The forfeiture rule is a rule of judicial

administration, not a mandate. See, e.g., **State v. Ndina**, 2001 WI 21, ¶38, 315 Wis. 2d 653, 761 N.W.2d 612. (reaching the merits of a claim where "both parties failed to make objections in a timely manner"). The forfeiture rule should not be applied where its application would not further its purpose—the fair, efficient, and orderly administration of justice. **State v. Coffee**, 2020 WI 1, 389 Wis. 2d 627, 937 N.W.2d 579.

The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. **Ndina** at ¶30.

We believe the record we have referenced above makes it plain that the purpose of the forfeiture rule would not be furthered by its application here. Trial counsel had no notice prior to arguing that the court's rationale was dubious. Counsel could not have "diligently prepared" for the court's comments. There has been no "sandbagging" by

the defense. We believe rather that by addressing these issues this court would then further the fair, efficient and orderly administration of justice.

VI. THE DISMISSAL OF THE JUROR WAS NOT SHOWN TO CONSTITUTE HARMLESS ERROR.

If a harmless error analysis is to be conducted, the question is, in a case with these facts, how should it be conducted? We believe we have shown that evaluating error in terms of the partiality of the remaining jurors would be improper. We further believe that the removal of the only African-American on the jury in itself constitutes harm. As we stated previously, the defendant was concerned with the lack of African-Americans on the panel from the outset. A **Swain** challenge was litigated. Only one African-American was chosen to sit as a juror. Nevertheless, that lone African-American was discharged. Under these circumstances, we believe that constitutes harm.

If this court believes a more "standard" approach to harmless error should prevail, we believe the approach of the District of Columbia Court of Appeals is helpful.

In the **Hinton** case we cited previously, the court recognized that, consistent with standard harmless error analysis, the prosecution would have the burden of showing an absence of prejudice. **Hinton** at 690. The court went on

to note that the government would rarely be able to show a lack of prejudice. It stated however: "(i)n many cases, where twelve impartial jurors have voted unanimously to find the defendant guilty beyond a reasonable doubt, we might be persuaded that the erroneously removed thirteenth juror would not have viewed the evidence differently. Thus, for example, we would suppose that if the government's case is strong and there is no apparent reason in the record to think the erroneously removed juror would have dissented, a reviewing court could be satisfied that the juror substitution had no substantial influence on the outcome." **Hinton** at 692.

In **Hobbs v. United States**, 18 A.3d 796(D.C. 2011), the District of Columbia Court of Appeals again considered a case where a sitting juror was erroneously discharged after the evidence had been presented. The court applied **Hinton** and found that the State's evidence was not overwhelming. The defendant's conviction was reversed.

In **Hobbs** the court addressed an argument that the evidence in that homicide case was overwhelming. The court stated:

> The government's evidence in this case, though clearly strong enough to support a jury verdict of guilty, is not overwhelming. There was no eyewitness testimony establishing that appellant had shot the victim. A witness

> testified, however, that she heard a man suggest to appellant that all it would take to kill decedent would be one shot to the back of the head, and the decedent was killed in that manner some two hours later. Other evidence implicating Hobbs was testimony that Hobbs had admitted killing Teeter. One witness, appellant's younger brother, Elijah Turner, testified before the grand jury that Hobbs admitted the killing, but he testified at trial that he had fabricated his entire grand jury testimony. A second witness who testified about Hobbs's admission was appellant's step-father, Anthony Hardy, a convicted felon and confessed drug addict who originally testified before the grand jury that Hobbs did not admit the killing but later changed his story. ... We cannot find the error was harmless.

Hobbs at 801.

In our case, although the trial court believed that the proper test for evaluating harm for the improper removal of a juror was whether the defendant received a fair trial before an unbiased jury, it also found that there was overwhelming evidence of the defendant's guilt when it denied, without a hearing, the defendant's postconviction claim that counsel was ineffective for not objecting to inadmissible hearsay. (R.163:5,6).

We strongly disagree that the evidence in this case can be categorized as "overwhelming". In holding that there was overwhelming evidence of the defendant's guilt, the trial court referred to various pieces of testimony placing the defendant at the scene. In its decision, the court noted that Q. G., T.M.'s sister, told the jury that R.S.

called her after the incident and said D. Dog robbed him. The court also noted that Tiffany Davis, a friend of T.M.'s, said that she spoke to T.M. on the evening of the incident and that he told her he was at the location where the robbery occurred with D. Dog. The court noted that a fingerprint was found on the vehicle parked near the body and that inside the car was a citation issued to the defendant and a receipt in his name. The court noted that K. G., T.M.'s sister, testified that she had dinner with T.M. and D. Dog and that they left together around 6:30 or 7:00 in the tan van that was found at the scene. The court also referenced a detective's testimony regarding the pretrial statements of R.S. (R.163:5,6).

The above facts are far from overwhelming evidence of guilt. In its discussion of the evidence the court omitted the fact that other identifiers were also found at the scene. Besides Mr. Spencer's fingerprints, testimony indicated that there was an envelope in the glove box of the van addressed to Justin Gray and a Department of Transportation mailing to him as well (R.181:45); the plates on the van were listed to Justin Gray (R.181:58); fingerprints on the van were attributed to Justin Gray (R.181:73,74), a Mr. Jarquise Cunningham (R.181:74)and a Ms. Nakia Olgen (R.181:73); a DNA profile from a fruit

punch bottle recovered at the scene matched the profile of Mr. Errion Green-Brown (R.182:11), who was an individual R.S. admitted he lied to protect when being interviewed by the police. (R.182:64).

Furthermore, the trial court erred significantly when it relied in its decision on the testimony of Tiffany Davis. In its decision the court noted that Ms. Davis talked to T.M. "... and that he told her he was at the location where the robbery occurred with D-Dog." (R.163:5). This was the only "testimony" corroborating the pretrial statements of R.S. that placed "D Dog" at the scene. *Tiffany Davis however did not testify at trial. She only testified at a suppression hearing. She never appeared in front of the jury. Her testimony was not evidence.* See (R.180:95).

In this case the only eye-witness besides R.S. was the tow truck driver, Mr. Townes. Despite his presence throughout the alleged robbery, he did not identify Mr. Spencer.

Crucially, the State's case relied primarily on the credibility of R.S.'s pretrial statements to the police, however; not only did R.S. recant those statements, he gave reasons for doing so. He testified that when he was interviewed he gave answers he thought would please the

police.(R.182:62). (As indicated above, R.S. had pending charges of first degree intentional homicide and felon in possession.) He indicated that the police repeatedly asked him if he had a gun and that they indicated he would be charged (R.182:64,65). He indicated he was afraid of being charged with what Mr. Spencer was charged with and that if he helped the police he would not end up where Mr. Spencer was (R. 182:65,66,71). He also testified that he lied to protect Errion Green-Brown (R.182:64).

In this case, as in **Hobbs**, there was no eyewitness testimony establishing how T.M. was killed. In this case there were no admissions by the defendant, as there were in **Hobbs**, although there was, as in **Hobbs**, the recantation at trial of earlier incriminating statements.

In this case the recantation was by the alleged victim, who, like the witnesses who recanted in **Hobbs**, was a convicted felon. R.S. had pending charges of attempted first degree intentional homicide and possession of a firearm by a felon. (R.177:10). R.S. also had two prior convictions for robbery and battery. (R.177:18).

In short, the State's case relied on the testimony of an admitted liar and felon who recanted under oath. This is hardly overwhelming evidence of guilt. The United States Supreme Court has recognized that changes in a witness'

story can be fatal to credibility. See **Kyles v. Whitley**, 514 U.S. 419, 444 (1995).

The evidence in this case was far from overwhelming, and the defendant is entitled to the reversal of his conviction.

CONCLUSION

For the reasons stated herein the defendant respectfully requests that his judgments of conviction be vacated.

Dated:_____, 2021

Respectfully submitted,

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CERTIFICATION

I certify that the foregoing brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 45 pages long.

Respectfully submitted,

GRAU LAW OFFICE

_____

John J. Grau

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 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. § 809.19(12).

I further certify that the electronic brief is identical to the printed form of the brief filed with the Court.

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

Dated:_____, 2021

GRAU LAW OFFICE

_____
John J. Grau

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