STATE OF WISCONSIN

SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

ROBERT DARIS SPENCER,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

Appeal No. 2018AP942

Circuit Court Case No. 2014CF5088 (Milwaukee Co.)

APPEALED FROM A JUDGMENT OF CONVICTION AND SENTENCE AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN PRESIDING.

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I. THE CONFERENCE WITH THE JUROR WAS A CRITICAL STAGE.

The State's critical stage argument discusses a number of cases with varying fact situations, almost all of which found that a court's communication with a jury constituted a critical stage. The State recognizes that **Tulley**, **Koller**, **Mills**, **Anderson**, and **Bjerkaas** involved critical stages.

The cases cited by the State where critical stages were not found, are nothing like our case.

In **Gagnon**, a juror was concerned that Gagnon was sketching him during the trial. The trial judge had a court reporter and Gagnon's attorney come into chambers where the juror was questioned in counsel's presence.

In **Gribble**, the trial court, prior to the case being called, informed the parties that it intended to finish the process of taking requests from prospective jurors to be excused due to hardship. It was determined that the court performed administrative functions pursuant to Wis. Stat. 756.03, prior to voir dire. Those administrative functions, by statute, could have been carried out by the clerk of court. Because of the administrative nature of the acts, the questioning of the prospective jurors did not involve a critical stage.

Schmidt involved an oral offer of proof in chambers with defense counsel present.

The above cases do not support a finding that an ex parte communication between the court and a juror after the close of evidence is not a critical stage in the proceedings.

The remainder of the State's argument seems to be that the fact that the communication was ex parte is unimportant because counsel had some input into what was asked of the juror; because counsel's presence may have impeded the court's information gathering function and intimidated the juror; because we can rely on the court to be an accurate reporter of what took place; and, because counsel was able to object after the court announced its decision. None of these arguments are persuasive.

The fact that defense counsel objected to the juror's dismissal and moved for a mistrial after the court announced its decision only demonstrates the importance to the defendant of retaining the juror on the panel. The fact that the objection and the motion were unsuccessful, if anything, underscores the importance of counsel's presence.

Whether the court was a reliable messenger has nothing to do with the defendant's right to have counsel present as an advocate. Furthermore, the lack of a record demonstrates why we must do more than rely on the court as messenger. There is no transcript of what occurred. The court's recital of what occurred is sparse and vague. The court may have been a reliable

messenger, but it also may have forgotten something or inadvertently missed something important. We will never know.

Regarding defense counsel's ability to advocate for her client, the record shows the court indicated that "it advised" the attorneys of the cause of the delay and what was being done. The court indicated that it asked a question of the juror "along the lines of the concern the defense had" of whether her stress or not being well enough to proceed had anything to do with her service as a juror, or the behavior of the other jurors. Asking a question "along the lines" of a concern of the defense does not amount to zealous advocacy on a client's behalf. It was the defendant's right, and counsel's obligation, to be present during a discussion that might lead to the juror's dismissal.

The State's argument that counsel's presence may have been intimidating is also not persuasive. It is more than a stretch to compare what happened here to an out of court meeting between a presentence writer and a convicted defendant prior to sentencing. In the middle of a trial, the last thing defense counsel wants to do is upset or intimidate a juror. The fear that defense counsel would inhibit, rather than enhance, fact finding in a situation like this is unfounded.

Courts have commented on the importance of counsel's presence when jurors are interviewed. In **Anderson**, during deliberations, the jury wanted to rehear certain testimony. The

court denied the request. On appeal, the court's actions were determined to have constituted prejudicial error because "... defense counsel *might have* been able to persuade the circuit court to grant the jury's request or to phrase its response in different, more understandable terms had counsel been included in the circuit court's decision." **Anderson** at ¶100.

In our case, being present at the time information was gathered *might have* been beneficial. For example, counsel could have explored the history of the illness and how long the juror might need to recover, or at least to proceed. Defense counsel's presence *might have* been helpful in attempting to see to it that the juror was retained on the jury. Therefore, it was counsel's *presence* at that interview that was required.

The State also dismisses our reference to **State v. Alexander**, 2013 WI 70, arguing that the court did not examine the question posed herein. In **Alexander**, during the trial, two jurors at separate times approached the bailiff to discuss a potential bias issue. To resolve the matter, the judge held separate in-chambers discussions with both jurors. Both of Alexander's attorneys were present for those discussions. Alexander raised a 6th Amendment challenge because he was not present. Significant to the court's determination was the fact that his attorneys were present. The court recognized that there were times when a fair trial did not necessitate the presence of

a *defendant* when the court interviews jurors during a trial. It is in that context that the court in **Alexander** stated:

> That is why our better-reasoned case law provides that whether a defendant must be present when a court meets with members of the jury "admits of no categorical 'yes' or 'no' answer. ... All that is required when the court communicates with members of the jury is that the defendant's *attorney* be present." (Emphasis by the court.) ¶25.

This court reiterated the point later in the opinion stating: "(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. **Alexander** at ¶30.

II. THE DENIAL OF COUNSEL SHOULD NOT BE EVALUATED FOR HARMLESS ERROR.

We argued that in the context of this case a harmless error analysis should not be used. We discussed the difficulty of employing a harmless error analysis when dealing with the dismissal of the juror after the close of evidence, and the factors identified by this court to be considered. The State does not directly address our arguments.

We read the State's argument to say that structural error should not be found because it is rarely used; because prior cases involving trial court communications with jurors have applied harmless error; because counsel's participation was sufficient, thereby rendering the discussions with the juror "innocuous"; and, because the error is "quantifiable."

We recognize that finding structural error may be rare; however, counsel's participation was insufficient; precedent does not require the application of harmless error here; and, the error is not quantifiable.

It cannot be said that counsel's participation was sufficient. Any attempt to discern what would have happened if counsel had been present at the questioning of the juror is speculative. There is no way of knowing what might have occurred had counsel been present.

In spite of the above, we acknowledged below that this court indicated in **Anderson** that a harmless error analysis may apply to certain violations of the Sixth Amendment right to counsel. **Anderson** at ¶76. Cases cited by the State in support of a harmless error analysis included **Anderson**, **Koller**, **Bjerkaas**, **Burton**, and **Tulley**. The cases are distinguishable.

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**, 163 Wis. 2d 949, 958, 959.

In **Koller**, during deliberations, the jury sent a note indicating it wanted to see a doctor's report and a nurse's testimony. The court told the jury the items were not available. Error was assumed, but held to be harmless because the report was not in evidence, and the nurse's testimony was consistent with an assault. **Koller**, 248 Wis. 2d 259, ¶¶65,66.

In **Burton**, the defendant argued that the trial judge's entry into the jury room to check on the status of the jury's deliberations was improper. The judge was accompanied by a court reporter and the substance of the comments mostly concerned dinner arrangements. **Burton**, 112 Wis. 2d 560,571.

In **Tulley**, the court interviewed jurors on the venire alone. The court determined that, because the prospective jurors with whom the court spoke in camera were not on the jury, the State had shown harmless error. **Tulley**, 248 Wis. 2d 505,¶11.

The above fact situations are 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, is different than a case where the accuracy of the judge's communication can be evaluated, or where a straightforward evaluation of prejudice can be conducted. Precedent, therefore, does not require a harmless error analysis.

Finally, for reasons argued in our brief, we do not believe the error is quantifiable. Jurors are not fungible.

III. THE ERROR WAS NOT HARMLESS

In its brief to this court, the State recognizes that it is the State's burden to establish harmless error. However, when assessing the case for harmless error, the State turns around and places the burden back on the defendant.

The State begins its analysis by attempting to divorce the court's ex parte meeting from the result of that meeting, i.e. the juror's dismissal. It does so to argue that Spencer cannot show that his counsel's presence would have resulted in the retention of the juror. By arguing this way, the State is placing the burden of proof on the defendant. It does this because it knows that, from this record, it cannot show that the juror would *not* have been retained had counsel been present.

The State goes on to argue that the evidence was overwhelming. When doing so it references ballistic evidence that there was a shootout with two shooters, one from the kitchen window of R.S.'s residence, implying that he was shot by someone in the house. There was no direct evidence, however, of shots being fired from the house. In fact, testimony at trial indicated that the police went looking for evidence in the home to establish that someone was firing from the kitchen. The testimony indicated that they found nothing (R.180.82).

Furthermore, the State's reliance on casings and pictures of the scene ignores testimony that it could not be determined from the location of the casings when the shots were fired or where anyone was when they were fired. (R.180:46).

The State also argues that a van found at the scene belonged to Spencer, thereby placing him at the scene. That evidence proves nothing. T.M.'s sister testified that Spencer had loaned the van to T.M., and that it was the vehicle T.M was using.(R.181:83,84). It would be expected, therefore, that the van would be at the scene.

The State also relies heavily on testimony that R.S. told one of T.M.'s sisters that Spencer was involved. R.S. denied that, and testified that Q.G., one of T.M's sisters, *told him* that it was Spencer who was involved (R.182:48,51,77). This is entirely plausible given the testimony of T.M.'s sisters.

T.M.'s sister, K.G., testified that she was with T.M. and Spencer about 6:30 or 7:00 the evening of the shooting. (R.181:82,83). The State submitted testimony that the shooting occurred at 11:27 p.m. Sept. 8, 2014.(R.181:103). Q.G., a different sister, testified that K.G. was her sister. It seems that Q.G. had talked to K.G., and later called R.S. Q.G. testified that she called R.S. because he hadn't reached out to any of them. He "eventually" called her back. (R.183.5,6). It seems likely then that Q.G. had talked to K.G. and had been told

that T.M. was with Spencer that day. K.G. undoubtedly would have discussed that with R.S. when they talked. That would explain why R.S. would tell police that it was Spencer who was involved.

R.S. also denied telling other people that Spencer was involved the day of the robbery. (R.184:44,45,51).

The evidence is far from overwhelming.

IV. THERE HAS BEEN NO FORFEITURE.

The State begins its forfeiture argument by alleging that Spencer moved for a mistrial "based on a concern that the jury would not be fair and impartial without an African-American juror." (The State's cite for the quotation is to the court of appeals' decision. It is the court's characterization of the events, not Spencer's.) The State is arguing that Spencer never objected to the court's dismissal of the juror for cause, and therefore forfeited his right to appeal.

There is no doubt that Spencer wanted a racially diverse jury, and had a concern with the racial diversity of the jury pool for the trial. At the time for argument regarding the dismissal of the juror, however, Spencer objected to the dismissal of *that* juror. The court understood that. He was not only renewing a **Swain** challenge. We have not appealed the court's **Swain** determination.

The fact that counsel emphasized the affect of the court's decision when arguing that there would be no African-American on

the jury should not be twisted into an argument that counsel did not object to the court's dismissal of the juror for cause. Counsel could not argue the cause issue on the merits because counsel had no opportunity to see the juror, or hear what the juror had to say. Counsel had no transcript to review. What could counsel argue? Counsel had no firsthand knowledge of the juror's health. Counsel therefore pointed out the affect of the juror's dismissal.

Nevertheless, the court's decision on the defendant's postconviction motion leaves no doubt that the court's comments regarding the racial makeup of the trial participants were made in the context of Mr. Spencer's objection to the dismissal of the juror for health reasons. When finding that the discussion with the juror regarding her health issue was not a critical stage, the court wrote the following in its decision on the defendant's postconviction motion:

> The court cannot find that the juror's health issue which arose in this case prior to closing arguments constituted a critical stage in the proceedings in which the defendant needed assistance with a legal problem and where counsel's presence was essential. The jury was not yet deliberating and an alternate juror was available. This is also not a situation where the absence of counsel during the court's query of the juror cast so much doubt on the fairness of the trial that, as a matter of law, (it could) never be considered harmless. (citations omitted) As the court indicated previously, it is speculation to conclude that counsel's presence for purposes of asking the juror questions or getting a better handle on her health issue would have resulted in her remaining on the jury. The defendant cannot establish that he was prejudiced by counsel's failure to object. After 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.163:7,8).

(The reference above to counsel's "failure to object" was the result of the court's misunderstanding that the defendant's postconviction motion alleged ineffective assistance of counsel for not objecting to the court's meeting with the juror. There was no such allegation.)

It is plain that the court took the race of trial participants into account when dismissing the juror. What prompted the court to say what it said is immaterial.

That the court reiterated its thinking in its written decision is significant. The court denied the defendant's postconviction motion without a hearing. There was no chance afforded to object. The defendant appropriately appealed from that decision (R.164). He has not forfeited his objection to the court's decision to dismiss the juror.

IV. THERE WAS A CONSTITUTIONAL VIOLATION

To the extent the State argues that the Equal Protection Clause does not apply, it obviously does. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race..., **Batson v. Kentucky**, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 , 90 L. ed. 2d 69, 80.

V.THERE ARE NO APPLICABLE ALTERNATIVE GROUNDS

The State's alternative grounds argument relies on a faulty premise. Spencer has appealed because of a violation of his right to counsel, and because the court's decision making evinced an erroneous exercise of discretion and violated his constitutional rights. He has not appealed on the basis that he was tried by an all white jury. The impartiality of the remaining jurors is not an issue. And as we have argued previously, jurors should not be viewed as fungible.

VI. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION

The State argues that the record in this case establishes that the trial court properly exercised its discretion. For the reasons argued in our brief in chief, and this reply, it is evident that the court's exercise of discretion fell far short of the requirements of **Lehman.**

Dated: _____, 2021.

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CERTIFICATION

I certify that this 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 13 pages long.

Dated: _____, 2021.

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CERTIFICATE 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 this electronic brief is identical to the printed form of the brief filed as of this date.

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.

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