

**FILED**  
**03-13-2023**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

2022AP002001-CR

WISCONSIN COURT OF APPEALS  
DISTRICT IV  
APPEAL FROM THE CIRCUIT COURT  
OF JEFFERSON COUNTY  
HONORABLE ROBERT F. DEHRING JR.

---

STATE OF WISCONSIN,  
PLAINTIFF-RESPONDENT,  
V.  
HEATHER L. WESTRICH,  
DEFENDANT-APPELLANT.

---

BRIEF AND ARGUMENT OF APPELLANT

---

Michael J. Herbert  
Wisconsin State Bar No. 1059100  
P.O. Box 4  
Sun Prairie, Wisconsin 53590  
(608) 217-7988  
Attorney for Heather Westrich

ORAL ARGUMENT NOT REQUESTED

## TABLE OF CONTENTS

Table of Authorities Cited.....	3
Issue Presented for Review.....	4
Statement of Reasons on Oral Argument and Publication.....	4
Statement of the Case.....	4
Statement of Facts.....	5
Appellant’s Issue on Appeal.....	7
Whether the circuit court erroneously exercised its discretion in denying Westrich’s motion for postconviction relief by finding no objective juror bias in case where alleged victim and jury foreperson are friends from high school.	
A. Summary of the Argument.....	7
B. Standard of Review.....	7
C. Relevant Law.....	8
D. Argument.....	8
1. <u>Objective bias</u> .....	9
2. <u>Waiver issue</u> .....	14

Conclusion to Brief and Argument.....17

Certification of Brief Compliance with Wis. Stats. §  
809.19(8)(b) and (c).....18

Certification of Appendix Compliance with  
Wis. Stats. § 809.19(2).....18

Appendix  
Document A..... Motion for Postconviction Relief  
Document B.....Postconviction Motion Hearing  
Transcript

TABLE OF AUTHORITIES CITED

State v. Allen, 2004 WI 106, 274 Wis.2d 568, 682  
N.W.2d 433 (2004)..... 14,16

State v. Erickson, 227 Wis. 2d 758, 596 N.W.2d 749  
(1999).....8,13

State v. Faucher, 227 Wis. 2d 700, 596 N.W.2d 770  
(1999). ....8,11

State v. Lindell, 2001 WI 108, 245 Wis.2d 689, 629  
N.W.2d 223 (2001)..... 11

### ISSUE PRESENTED FOR REVIEW

Whether the circuit court erroneously exercised its discretion in denying Westrich's motion for postconviction relief by finding no objective juror bias in case where alleged victim and jury foreperson are friends from high school.

Ms. Westrich raised the issue in circuit court by filing a motion for postconviction relief. The circuit court scheduled a motion hearing, and at its conclusion, denied the motion. A timely filed Notice of Appeal followed.

### STATEMENT OF REASONS FOR ORAL ARGUMENT AND PUBLICATION

Ms. Westrich does not request oral argument, but does recommend that the opinion be published in order to clarify the published caselaw on this issue.

### STATEMENT OF THE CASE

On December 23, 2020, a criminal complaint was filed in Jefferson County case 20CM445. The complaint charged Heather Westrich with two counts of misdemeanor battery and one count of disorderly

conduct. Ms. Westrich was convicted of all three counts at the conclusion of a one day jury trial. She was placed on probation for a period of two years, and required to serve thirty days in the Jefferson County jail as a condition of probation.

Westrich filed a motion for postconviction relief, arguing for a new trial. The motion alleged that the court had improperly admitted out of court statements at the trial. The motion also alleged that the circuit court had erred by failing to exclude a juror for objective bias. The court denied the motion after a hearing.

#### STATEMENT OF FACTS

According to the criminal complaint, on December 21, 2020 at approximately 8:15 am, City of Lake Mills Police Officer Terry J. Adams was dispatched to a residence on the 400 block of O'Neil Street in the City of Lake Mills, Jefferson County, WI in response to a report of a domestic incident. (DOC 2:2).

After speaking with the named defendant, Heather L. Westrich, and Victim 1, who are sisters, both of whom admitted being in an altercation and each of whom blamed the other, Officer Adams spoke with Witness 1, and Victim 2. (DOC 2:2).

Witness 1 told Officer Adams that Witness 1 had been sitting on a chair in Victim 1's room when the defendant came downstairs, yelled at Victim 1, and started to push Victim 1. The defendant and Victim 1 grappled, calling each other names like "bitch" and "cunt" and the defendant pushed Victim 1 onto Victim 1's bed, got on top of Victim 1, and began to hit Victim 1 in the face. Witness 1 went on to say that Victim 2 then came into the room, and pulled the defendant off of Victim 1. (DOC 2:2).

Officer Adams spoke with Victim 2, who told him that upon hearing the defendant and Victim 1 swearing and yelling, Victim 2 came out of her own room, and saw the defendant, who is her mother, on top of Victim 1, and pulled the defendant off of Victim 1. Victim 2 stated that after getting the defendant off of Victim 1, as they were walking away the defendant slapped Victim 2 on the right side of Victim 2's face, where Officer Adams was able to observe a red mark. (DOC 2:2).

Victims 1 & 2 both indicated that they did not give the defendant permission to strike them, and that being struck by the defendant caused them pain. (DOC 2:2).

## APPELLANT'S ISSUE ON APPEAL

Whether the circuit court erroneously exercised its discretion in denying Westrich's motion for postconviction relief by finding no objective juror bias in case where alleged victim and jury foreperson are friends from high school.

### A. Summary of the Argument

During voir dire in this one day jury trial case, a prospective juror advised the court that he had been friends with the alleged victim in high school. The court conducted a minor inquiry and did not exclude the prospective juror for bias. The defense did not use one of its challenges, and that juror ended up as jury foreperson.

In a case whose outcome largely turned on the jury's assessment of witness credibility, Heather Westrich was convicted of battery and disorderly conduct against an alleged victim who counted the jury foreperson as a friend.

Ms. Westrich accordingly argues that her due process right to an impartial jury was violated by the trial court's failure to exclude the juror in question pursuant to Wis. Stat. § 805.08(1).

### B. Standard of Review

The decision of whether a prospective juror is biased and should be struck from the panel for cause is a

matter largely left to the circuit court's discretion. State v. Erickson, 227 Wis. 2d 758, ¶39, 596 N.W.2d 749 (1999). As a result, on review we will uphold the discretion of the circuit court unless it is shown to be an erroneous exercise of discretion. State v. Erickson, 227 Wis. 2d 758, ¶39, 596 N.W.2d 749 (1999).

### C. Relevant Law

A criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution, as well as principles of due process. State v. Faucher, 227 Wis. 2d 700, ¶24, 596 N.W.2d 770 (1999).

Wis. Stat. § 805.08(1) requires the circuit court to examine on oath each person who is called as a juror to discover if he or she "has expressed or formed any opinion or is aware of any bias or prejudice in the case" and directs that "[I]f a juror is not indifferent in the case, the juror shall be excused." State v. Faucher, 227 Wis. 2d 700, ¶24, 596 N.W.2d 770 (1999).

### D. Argument

Heather Westrich respectfully submits that her due process right to receive a fair trial by a panel of impartial jurors, guaranteed by the Sixth and Fourteenth



Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution, was denied by the court's failure to exclude the juror for bias pursuant to Wis. Stat. § 805.08(1).

1. Objective bias

During voir dire, this exchange occurred involving prospective juror V (DOC 86:20-22):

THE COURT: Thank you. Is there anyone that is related by blood or marriage or has a close personal or business relationship with any of the State's witnesses? Mr. V?

POTENTIAL JUROR V: I just -- we were friends back in the day.

THE COURT: You and who?

POTENTIAL JUROR V: Me and [CQ's first name].

THE COURT: You and [CQ's first name] were friends back in the day?

POTENTIAL JUROR V: Yep.

THE COURT: Okay.

POTENTIAL JUROR V: She was a grade ahead of me in high school.

THE COURT: Okay. You knew her from high school?

POTENTIAL JUROR V: Yep.

THE COURT: Did you have any sort of friendship or acquaintanceship?

POTENTIAL JUROR V: Just friends.

THE COURT: Okay. Because of this relationship, do you feel that you'll be unable to be fair to one side or the other in this trial?

POTENTIAL JUROR V: I'm just letting you know.

THE COURT: To put it another way, will you be able to put your relationship aside and decide the case fairly and impartially upon the evidence and based solely upon that evidence and under the Court's instructions as to the law render a just and true verdict?

POTENTIAL JUROR V: Yes.

Westrich respectfully submits that the outcome of the jury trial in this case was based on the jury's assessment of the credibility of the witnesses, particularly CQ, the primary alleged victim in the case. The jury's determination of whether any crime at all occurred largely turned on CQ's recounting of the incident along with the out of court statements by a reluctant witness. One could review the transcript and reasonably conclude that CQ's demeanor on the witness stand in front of the jury raised some questions about what really happened. One could further conclude that a friendly voice on the jury would have been helpful.

Indeed, juror V ended up on the jury as the foreperson. The fact that the jury foreperson and the alleged victim were old friends from a small town high school puts the indifference of the juror in question,

raising (at minimum) the appearance of bias. That the jury's assessment of the credibility of the testimony of the alleged victim witness was likely the determining factor in the outcome of the case undermines the confidence in that outcome.

The postconviction court highlighted the fact that prospective juror V expressed his ability to be impartial. Aside from juror V's subjective lack of objectivity, the postconviction court arguably applied the wrong standard - the focus of the inquiry into objective bias is not upon the individual prospective juror's state of mind, but rather upon whether the reasonable person in the individual prospective juror's position could be impartial. See State v. Lindell, 2001 WI 108, ¶38, 245 Wis.2d 689, 629 N.W.2d 223 (2001).

A trial court need not find actual bias in order to exclude a juror under the statute. See State v. Faucher, 227 Wis. 2d 700, ¶24, 596 N.W.2d 770 (1999)(even the appearance of bias should be avoided); see also State v. Lindell, 2001 WI 108, ¶49, 245 Wis.2d 689, 629 N.W.2d 223 (2001)(we caution and encourage the circuit courts to strike prospective jurors for cause when the circuit courts 'reasonably suspect' that juror bias exists).

The court stated at the hearing:

And, again, I was there at the trial. The response from the juror was like, well, you know, "I knew the witness back in the day; friendly in high school." I didn't get any sense that they were close friends. I got the sense from the statements that it was like, "Oh, yeah. I had so-and-so in chemistry class and we were friendly." The questioning didn't get beyond that. I think the word "friend" might have been used, but it differed from one of the cases you cited, where you had -- say the witness was named "Donald." And the juror was like, "Oh, yeah. I knew Donny. Donny's a great guy," and this and that. We didn't have any of that here. It was the tenor of, "Yeah, I knew the witness long ago in high school and we were friendly there." (DOC 110:9; Appendix Document B:9).

The present case presents one major similarity with Lindell – a prospective juror (in this case V) describing the victim (in this case CQ) as a friend while referring to her by first name. The friendship went back to high school, and the postconviction court's basis for suggesting it was based simply on a shared class together and nothing more is both unclear and arguably unfounded.

It is further unclear where the line for objective juror bias is to be drawn if the court is going to attempt to distinguish between "friends" "old friends" and "close friends" without making further inquiry itself, or simply excluding the prospective juror in order to avoid

the appearance of bias. Here, the postconviction court's explanation of its somewhat hands-off approach to trials in which victims and jurors are old high school friends is, respectfully, unpersuasive.

Neither the court nor the state has argued that excluding prospective jurors for possible objective bias each time it presents itself, such as when juror and alleged victim are old high school friends, would somehow not be practical in a small town when such a bias is even more likely to occur.

It is likely that a reasonable person in juror V's position would be inclined to favor and find credible the testimony of an old self-described friend from high school. At minimum, juror V's inclusion raises an appearance of bias. Juror V had an expressed longstanding history of friendship with the victim, and could not reasonably be considered indifferent as a juror, pursuant to Wis. Stat. § 805.08(1), in a case in which his self-described friend from high school was an alleged victim of battery.

The trial court's failure to exclude juror V for objective bias is contrary to Westrich's due process right to an impartial jury, and the postconviction court erroneously exercised discretion in denying Westrich's motion for postconviction relief. State v. Erickson, 227 Wis. 2d 758, ¶39, 596 N.W.2d 749 (1999).

## 2. Waiver issue

Trial counsel did not object to the court's failure to exclude the juror for cause. As a result, the issue was not preserved for appeal.

The two components of a claim of ineffective assistance of counsel are a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. State v. Allen, 2004 WI 106, ¶26, 274 Wis.2d 568, 682 N.W.2d 433 (2004). An attorney's performance is deficient if the attorney made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. State v. Allen, 2004 WI 106, ¶26, 274 Wis.2d 568, 682 N.W.2d 433 (2004).

The defendant must also show the performance was prejudicial, which is defined as a reasonable probability that, but for counsel's error, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Allen, 2004 WI 106, ¶26, 274 Wis.2d 568, 682 N.W.2d 433 (2004).

The defendant submits that trial counsel provided deficient performance in not making a proper appellate record and preserving the issue for appellate review by objecting to the court's decision not to exclude the juror.

Further, the defendant was prejudiced by the deficiency because the impartiality of the jury is in question, undermining confidence in the outcome of the jury trial,; the issue is now off the table unless a reviewing court finds IAC.

During the postconviction hearing, the circuit court concluded that there had been no prejudice to Westrich:

Saying that there's no way of knowing is another way of saying there's no evidence of it, and I don't think I would have any authority to drag Mr. [V] back in here to ask him questions about that. I think all the questions were asked in voir dire. You know, I made a record of "What exactly is this relationship?" The tenor of it was "Well, I'm just letting you know." Like, it sounded like "In the interest of full disclosure, I should let you know that I knew this witness and I considered her a friend in the day or a long time ago or in the distant past." So, you know, in considering that, I don't think that there's any way of finding that Ms. Westrich was prejudiced here, at least not on this record. I am always interested in making a complete record for the Court of Appeals. (DOC 110:15-16; Appendix Document B:15-16).

The circuit court continued:

In other words, I wouldn't want this sent back to me because the Court of Appeals said, "You should have made a better record with a Machner Hearing on Attorney Luchsinger's trial strategy when he chose to do nothing about what may have been a friendly juror for one of the State's

witnesses." But I just can't find, I don't think, under any circumstances that based on the evidence in this record or lack of evidence is that there was something untoward going on. After all, at the end of the day, I asked the juror straight-up whether he could be fair, and he responded, "Yes," and there was no challenge to that or further questioning. So with that, I'll deny the Defendant's Motion for Postconviction Relief. (DOC 110:16-17; Appendix Document B:16-17).

Ms. Westrich would submit that the circuit court applied a test for prejudice which requires an actual demonstration of harm. However, under the ineffective assistance of counsel standard, prejudice is defined as “a reasonable probability that, but for counsel's error, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome.” State v. Allen, 2004 WI 106, ¶26, 274 Wis.2d 568, 682 N.W.2d 433 (2004).

Knowing that the foreperson of the jury and alleged victim are old high school friends in a small town, in the context of this case, undermines confidence in the outcome even if we don't know exactly what transpired during jury deliberations. We can certainly conclude that a reasonable prospective juror in this position would not be indifferent to the case as required



under the statute. Given that conclusion, the confidence in the objectivity of the outcome is undermined to the extent that it violates due process.

Regarding the deficient performance aspect, the court in essence made a finding that the lack of objection by trial counsel was strategic. Perhaps. But the strategy waived an important issue for appeal. An objection for the record would not have altered trial strategy, but it would have preserved the issue for appellate review without the necessity of additional legal arguments.

Ms. Westrich would respectfully submit that it is unnecessary for a remand for a Machner hearing. This court can determine both the prejudice and deficiency aspects of the ineffective assistance of counsel issue and accordingly whether the juror bias issue was waived/forfeited based on the current record. Ms. Westrich respectfully argues that counsel's ineffectiveness should not result in waiver or forfeiture of the issue on appeal for the reasons set forth.

#### CONCLUSION TO BRIEF AND ARGUMENT

Heather Westrich respectfully requests that this court reverse the denial of her motion for postconviction relief, vacate the judgment of conviction, and order a new trial in this case.

Dated this 12<sup>th</sup> day of March, 2023.  
Electronically signed by: Michael J. Herbert  
Wisconsin State Bar No. 1059100  
P.O. Box 4  
Sun Prairie, Wisconsin 53590  
(608) 217-7988  
Attorney for Heather Westrich  
michaeljherbert@hotmail.com

Certification of Brief Compliance with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2911 words.

Electronically signed by:  
Attorney Michael J. Herbert  
Wisconsin State Bar No. 1059100

Appendix Certifications

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. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the 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 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 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 juveniles and parents of juveniles, with a notation that the portion of the record has been so reproduced as to preserved confidentiality and with appropriate references to the record.

Electronically signed by:  
Attorney Michael J. Herbert  
Wisconsin State Bar No. 1059100