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2022AP002001-CR

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

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

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REPLY BRIEF AND ARGUMENT OF APPELLANT

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## ARGUMENT

- I. The state applies a subjective standard to an objective question.

In its brief, the state focuses on the actual state of mind of juror V, and whether actual bias exists. The state submits: “The record shows that the relationship described by the juror in this matter bears no resemblance to the relationships described by the jurors in Faucher and Lindell.” (Respondent’s Brief, p. 9).

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).

In order to properly evaluate the question and avoid even the appearance of bias, the law in Wisconsin requires the application of an objective reasonable person standard. See State v. Lindell, 2001 WI 108, ¶38, 245 Wis.2d 689, 629 N.W.2d 223 (2001)( 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).

The state points out in its brief :

The court stated that it did not get the sense that the juror and the victim were close friends. (R. 110:9) Rather, they had been at high school together and were friendly. (R. 110:9) The court noted this was a friendly relationship from the juror's past. (R. 110:9)

Westrich submits that the court's "sense" of whether juror V and the victim were "close friends" or simply "friendly" is not the correct test of whether a defendant's due process right to a trial by a jury that avoids even the appearance of bias has been violated. The appearance of bias is not reduced, but enhanced when friends of alleged crime victims are on a jury – regardless of small town or large city. Certainly, it would not have been difficult to find one additional juror in Jefferson County who did not go to high school with the victim. In cases of objective bias such as this, it should be up to the court to dismiss the juror rather than for counsel to use a challenge.

II. Westrich was prejudiced by counsel's failure to object.

The state argues in its brief that Westrich cannot prevail on her claim because she is unable to show juror bias and therefore cannot establish the prejudice prong of an ineffective assistance of counsel claim. (Respondent's Brief, p.12).

In State v. Lepsch, 2017 WI 27, ¶27, 374 Wis. 2d 98, 892 N.W.2d 682 (2017), the Wisconsin supreme court declined to find prejudice in a juror bias case, holding "Lepsch cannot establish ineffective assistance because he cannot prove either objective or subjective bias."

However, Lepsch is not a case of juror bias involving a juror and victim who were friends from high school. This case does not involve the responses to a juror questionnaire, but a friendly relationship between juror and victim. 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).

The state concluded that Westrich cannot show bias, but did not directly address the argument on the prejudice standard. This was a case determined by testimony and credibility. The fact that a juror was also a friend of the victim undermines confidence in the outcome. At minimum, it raises the appearance of bias. Had counsel raised the objection, Westrich would not have to argue deficient and prejudicial performance in order to have the issue considered by the court. In that respect, Westrich was also prejudiced by failure to preserve the issue for appeal.

#### CONCLUSION AND REQUEST FOR RELIEF

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

Dated this 21<sup>st</sup> day of April, 2023  
Electronically signed by:  
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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 707 words.

Electronically signed by:  
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