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SUPREME COURT

STATE OF WISCONSIN SUPREME COURT

CASE NO. 2022AP002001-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HEATHER L. WESTRICH,

DEFENDANT-APPELLANT-PETITIONER.

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

- I. Does a defendant's right to an impartial jury require the exclusion of a victim's friend from high school in order to avoid the appearance of bias?

Westrich raised the issue in a postconviction motion that was denied by the circuit court. Westrich filed an appeal, and the court of appeals affirmed the decision of the circuit court.

STATEMENT OF CRITERIA FOR REVIEW

Westrich argued in her postconviction motion and appeal that her right to an impartial jury had been violated. At her jury trial, a prospective juror who had been high school friends with the alleged victim was not excluded from serving on the jury by the court for the appearance of objective bias. Both courts denied the motion on the grounds that there was an insufficient basis from which to conclude that the juror was actually biased in favor of the victim.

However, 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). Westrich respectfully submits that the courts' reliance on whether actual bias existed is contrary to the caselaw principle that even the appearance of bias should be avoided; actual bias is not required.

Accordingly this case is appropriate for review, as the court of appeals' decision is contrary to Wisconsin caselaw. See Wis. Stats. §809.62(1r)(a) and (d).

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. Westrich filed an appeal raising only the juror bias issue. The court of appeals denied the appeal.

ARGUMENT

This court should grant Ms. Westrich's petition for review and ultimately conclude that her right to an impartial jury required the exclusion of a friend of the victim from high school in order to avoid the appearance of bias.

A. Factual background and summary

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).

B. Argument

Both the U.S. Constitution and the Wisconsin Constitution guarantee a defendant an impartial jury. *State v. Lepsch*, 2017 WI 27, ¶21, 374 Wis. 2d 98, 892 N.W.2d 682. “To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial.” *Id.* (citation omitted). “Prospective jurors are presumed impartial, and the challenger to that presumption [here, Westrich] bears the burden of proving bias.” *State v. Louis*, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). (Court of Appeals Decision, ¶9).

The court of appeals concluded that Westrich had failed to meet the burden to show that the prospective juror should have been excluded. (Court of Appeals Decision, ¶13). The court of appeals distinguished *State v. Faucher* and *State v. Lindell* from the present case based on the extent of the factual connection between juror and victim. The court found that the facts in the present case did not rise to the same level. However, the court of appeals did not directly discuss the extent to which an appearance of bias was created by the inclusion of the juror.

It raises the question as to whether avoiding the appearance of bias is still a factor with respect to juror impartiality. At minimum, the juror’s inclusion raises an

appearance of bias. The juror had an expressed a 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. Despite the juror's belief that he would be impartial, the appearance of bias still exists.

Westrich submits that a reasonable observer would find an appearance of bias in a case in which the victim and one of the jurors were high school friends. Westrich respectfully requests that this court accept her petition in order to clarify whether avoidance of the appearance of bias with respect to juror impartiality is a vibrant principle in Wisconsin.

CONCLUSION

Ms. Westrich respectfully requests that this court, for all of the above reasons, grant review and reverse the court of appeals' decision.

Dated this 26th day of June, 2023
Respectfully submitted,
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Certification of Petition Compliance with Wis. Stats. § 809.62(2) and (4).

I hereby certify that this petition conforms to the rule contained in Wis. Stats. § 809.62(2) and (4) for a petition and appendix produced with a proportional serif font. The length of this petition is _____ words.

Electronic Filing Certification

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the petition.

Certification of Appendix Compliance with Wis. Stats.
§ 809.62(2)(f).

I hereby certify that this petition conforms to the rule contained in Wis. Stats. § 809.62(2)(f) in that it contains an appendix consisting of (in order) the decision and opinion of the court of appeals, the judgments, orders, and decisions of the circuit court necessary for an understanding of this petition, and other portions of the court record necessary for an understanding of this petition.
