STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP002124 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD LEO MATHEWSON,

Defendant-Appellant.

On notice of appeal from a judgment
entered in the Brown County Circuit Court,
the Honorable Beau G. Liegeois, presiding

REPLY BRIEF

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ARGUMENT

I. Juror Hilscher's voir dire responses demonstrated bias, and the circuit court's finding to the contrary was clearly erroneous.

As Mathewson explained in his opening brief, Juror Hilscher indicated in open voir dire that she felt she was biased or prejudiced about the case. Questioned persistently and repeatedly, she never once told the Court she could set aside any bias and decide the case fairly. She never said she "probably" could, or even that "maybe" she could. She only said she could try. App. 13-14.

Juror Hilscher's inability to give even an equivocal assurance that she could be fair should have kept her off the jury. Even under the deferential standard of review on which the state relies so heavily, Resp. 15-16, seating a juror who admits bias and then cannot say even that she might be able to set it aside is clearly erroneous.

The state offers two arguments in support of the circuit court's ruling. Neither has merit.

First, the state argues that the circuit court's observations of Hilscher's demeanor justify its decision to allow her on the jury. Resp. 10-11. As Mathewson has already pointed out, while demeanor can give important context to a juror's words, here the words are plain: Hilscher never said she could be unbiased. App. 16. That she spoke calmly doesn't alter the

meaning of what she said (or of what she did not). Still less does the fact that Hilscher understood the contours of a trial and a juror's proper role supply what was missing: some assurance that she could fulfill that role in this case.

The state's second tack is to cite cases in which, it says, our appellate courts have affirmed the seating of jurors under similar circumstances. At best, what the state has found is examples of jurors who gave *equivocal* assurances of impartiality. It can't point to a single case like this one, where the juror admitted bias and could offer no assurance of any kind.

In *State v. Oswald*, 2000 WI App 3, 232 Wis. 2d 103, 117, 606 N.W.2d 238, Rebecca B. gave an equivocal assurance: "probably, yeah." Resp. 11. In the same case, Patti H. said only that she believed one of the two Oswalds—not necessarily James—was guilty, and she said she knew she "would have to" set aside preconceptions. *Id.* at 118-19. Crucially, Patti H. *never* indicated any inability to be impartial: the state itself argued (and this Court agreed) that there was "absolutely nothing in [the] record to indicate that [she] had a preconceived opinion of guilt, much less that she would be unable to put any such opinion aside." *Id.* at 119.

Turning to Paul A. (who was discussed in Mathewson's opening brief at 15-16), the state suggests that the *Oswald* Court must not have considered the entirety of his voir dire because it did

not *recite* the entirety of that voir dire in its opinion. Resp. 14-15.

This is not a tenable argument. Plainly Paul A. did not give only one answer in his extensive individual voir dire. This Court's discussion simply focused on the answer that Oswald argued showed bias. The Court said as much: "when reviewing a circuit court's decision on subjective bias, we do not focus on particular, isolated words the juror used." *Oswald*, 232 Wis. 2d at 103. It thus cannot be, as the state claims, that the court considered only a single answer given by Paul A., and that the rest of his voir dire "did not … play any role in this Court's analysis." Resp. 14. And the rest of that voir dire, as already noted, included his unequivocal assurance that he could decide the case only on the evidence. (App. 15).

Looking further afield, the state offers *State v. Gutierrez*, 2020 WI 52, ¶11, 391 Wis. 2d 799, 943 N.W.2d 870, in which the juror at issue again only expressed *uncertainty* about her ability to be impartial. In that case, the juror was not questioned further beyond this statement, and the supreme court said it could not "speculate as to how [the juror] would answer unasked questions." *Id.*, ¶42. The difference between that case and this one is obvious: Hilscher indicated she believed she harbored bias and, under extensive questioning, never made even an uncertain claim that she could set it aside.

The state finally points to an unpublished case, *State v. Conger*, No. 2017AP860-CR, 2017 WL 4708098, ¶15 (Wis. Ct. App. Oct. 18, 2017). *Conger* is even further removed from the issue here: the juror there said she could "certainly" follow the court's instructions and that her experience on a prior jury "wouldn't affect" her decision. *Id.* Once again, this is just what was missing here: Hilscher did not once say, even with hedges or equivocations, that she could set aside the bias she perceived in herself. It was error to refuse to strike her.

CONCLUSION

Because the circuit court erred in permitting a biased juror to sit on the jury, Richard Mathewson respectfully requests that this Court reverse his conviction and sentence and remand for a new trial.

Dated this 8th day of June, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 849 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit 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 or 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 the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of June, 2023.

Signed:
Electronically signed by
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