SM-20 VOIR DIRE

CONTENTS

Scope

The manner in which voir dire is conducted lies within the discretion of the court and varies greatly among judges. This special material begins with a suggested script that covers introductory and other general matters. Then it identifies the topics on which voir dire questions are statutorily required and suggests additional topics that are often covered. In both instances, the actual form of the question is left to the judge. The current framework for analyzing potential juror bias is outlined. The Comment attempts to collect relevant case law.

I. Introduction

VOIR DIRE IS TO BE CONDUCTED IN OPEN COURT, ABSENT FORFEITURE OR WAIVER [1]

ASSURE THAT THE DEFENDANT AND DEFENSE COUNSEL ARE PRESENT.[2] AFTER THE CASE IS CALLED AND THE PANEL IS SWORN, PROCEED WITH THE FOLLOWING:

"All members of the jury panel, including those (back of the rail) (outside the jury box) should listen to all the questions that are directed to the panel until a jury of (12) (14) is selected."

"This is a criminal case, not a civil case, and I will read the allegations of the Information to you. An Information is nothing more than a written formal accusation against the defendant, charging the commission of one or more criminal acts. You are not to consider the Information as evidence against the defendant in any way. It does not raise any inference of guilt."

[READ OR SUMMARIZE THE INFORMATION.]

"The defendant (name) has entered a plea of not guilty to (the) (each) charge in the Information, which means the State must prove every element of the offense charged beyond a reasonable doubt."

[IDENTIFY THE PROSECUTOR, DEFENDANT, DEFENSE COUNSEL, AND ANY OTHERS AT COUNSEL TABLE. EACH PERSON SHOULD STAND WHEN INTRODUCED.]

"I will now ask you some general questions about your qualifications to sit as jurors in this case. Counsel should listen carefully to these general questions and not repeat them. Counsel may ask the jurors generally any proper questions and in addition ask proper questions of each juror as to matters specific to each juror."

"If your answer to any of my questions is 'yes,' raise your hand."

II. Juror Qualifications And Required Questions[3]

A. Juror Qualifications – § 756.02

Section 756.02[4] sets out the basic qualifications for being a juror. Although these requirements are usually covered by juror qualification forms, judges may wish to review them at the beginning of voir dire by asking the panel whether anyone:

- is not a United States citizen;
- is not currently a resident of _____ County;
- is under the age of 18;
- is unable to understand English;[5] and,
- has been convicted of a felony and has not had his or her civil rights restored.

B. Required Questions – § 805.08(1)

Subsection 805.08(1) requires that questions on certain topics be asked by the judge. An affirmative answer to questions on either of the following topics requires that the juror be excused on the basis of "statutory bias":[6]

- whether any juror is related by blood or marriage to the defendant[7] or to any attorney; and
- whether any juror has any financial interest in the case.

Because case law requires excusing jurors who are related to a state witness,[8] an additional question should be asked in every case:

- whether any juror is related to any witness for the state.

Subsection 805.08(1) also requires questions on the following topics; an affirmative answer does not require excusing the juror but does require additional inquiry:[9]

- whether any juror has expressed or formed any opinion; and
- whether any juror is aware of any bias or prejudice in the case.

C. Juror Qualification Forms; Supplemental Information; Case-Specific Questionnaires

There are several different forms containing juror information that are often referred to as "questionnaires." The Committee has concluded that there is value in using different terms to describe them because their functions are different.

1. Juror Qualification Forms – § 756.04(6)(am)

These are the forms sent out by the clerk when jurors are summoned for service. They cover the basic requirements for qualification for juror service. There is a standard form – Circuit Court Form GF-132 – available to judges through the clerk of court. Additional content varies by county.

2. Supplemental Information – § 756.04(6)(cm)

"The juror qualification form . . . may be supplemented to request other information that the court requires to manage the jury system in an efficient manner, including information that may be sought during voir dire examination." § 756.04(6)(cm)

3. Case-Specific Questionnaires

Additional questions may be submitted to potential jurors that relate to the specific case on which they might serve. Drafted by counsel, their use requires approval by the court and a cover letter explaining them. Their use is not feasible in counties where potential jurors are summoned without reference to a particular case.

Positive aspects to using questionnaires:

- they can be helpful in cases where there has been extensive pretrial publicity;
- where sensitive topics are involved, jurors may be more forthcoming than in open court;
- they can potentially save time in a case where extensive voir dire might be necessary on specific issues.

Negative aspects to using questionnaires:

- approving their use and content can take considerable court time;
- issues can be addressed more efficiently during voir dire.
- the questions may prompt jurors to try to research the case.

4. Confidentiality – § 756.04(11)(a)

All juror information forms "shall remain confidential." They shall be used only for trial and appeal; counsel and parties may not retain copies. § 756.04(11)(a).

III. Voir Dire Of An Individual Juror Out Of The Presence Of The Jury Panel

The court's discretion over the form and number of questions extends to whether prospective jurors should be questioned collectively or individually out of the presence of the other prospective jurors. State v. Koch, 144 Wis.2d 838, 847, 426 N.W.2d 586 (1988). Factors relevant to deciding whether to conduct a sequestered voir dire are:

> (1) whether the circuit court conducted a thorough initial questioning of the panel members; (2) whether the panel members were reluctant to state whether they had a preconceived notion of the defendant's guilt or innocence; and (3) whether the circuit court imposed any restrictions upon the extent of defense counsel's questioning of the panel members on voir dire.

144 Wis.2d 838, 849, citing State v. Dean, 67 Wis.2d 513, 528, 227 N.W.2d 712 (1975). Other cases dealing with requests for individual or sequestered voir dire include State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (Ct. App. 1983); State v. Herrington, 41 Wis.2d 757, 165 N.W.2d 120 (1969).

Individual voir dire is most often used in cases involving sexual assault or significant pretrial publicity. While practice varies, an example of an explanation of the process and questions to the full panel in a sexual assault case follows. [If a different potentially sensitive crime or pretrial publicity is involved, the example must be modified.]

> Jurors, at this point the court is going to ask you some general questions. I ask that you raise your hand if "yes" would be your answer to any of these questions.
>
> In this case, the court is varying from its typical practice in that we will be conducting individual voir dire of persons depending on how these particular questions are answered. Listen carefully.
>
> Has any member of the panel or any member of their family, or any friends, relatives, or co-workers, been affected by unwanted sexual conduct, whether reported or not?
>
> [Note for the record the jurors – by name or number – who have raised their hands.]
>
> Referring to the entire panel again now, have you or any family member or close friend ever been investigated for, accused of, or charged with sexual assault?

[Note for the record the jurors – by name or number – who have raised their hands.]

[Add the following if the case has generated significant publicity.

Is there anyone among you who has read or heard anything about this case?]

[Note for the record the jurors – by name or number – who have raised their hands.]

At this point the court is going to conduct an individual voir dire of those persons who raised their hand in response to the questions. The process we will follow is that the prospective juror, the attorneys, the defendant, court personnel, and any members of the general public who wish to attend will go to [a jury room] [(designate other room)] where questions will be asked of the individual juror outside the presence of the other jurors.

This will take a few minutes. Please continue to be patient. The group of jurors whose names have been called must maintain their same seating order. While we are doing this you can stand up if you need to stretch or relax. If someone needs to use the restroom let the bailiff know and the bailiff will see that you are able to do that. But the group must maintain the same seating order that you are in.

The court, court reporter, clerk, security officer, the parties and their attorneys (and the alleged victim if requested) move to another room out of the presence of the rest of the panel. Those jurors who raised their hands are then invited in one at a time escorted by a bailiff. The court begins the questioning followed by questions by the prosecutor and the defense counsel. The court rules on whether or not a juror is to be excused. When everyone has returned to the courtroom the process may have to be repeated if additional jurors are called.

IV. Suggested Topics For Voir Dire Questions[10]

A. The Purpose Of Voir Dire

The Committee suggests that the court explain to the panel that the purpose of voir dire is to assure that persons chosen to serve will be fair and impartial jurors. An example follows.

Impartiality

I would like to tell you what I mean by the term fair and impartial juror. I want you to all assume that you have heard all the evidence in this case, listened to my instructions on the law, deliberated with the other jurors, and you are thinking that the State has not proved this case beyond a reasonable doubt, you are thinking the defendant is not guilty. Is there anything in your background, your life experiences, your view of the criminal justice system, anything at all that makes you think that you would vote to find the defendant guilty anyway, even though the State had not proved him guilty?

The flip side of that question is equally important. You listened to all the evidence and my instructions and you are thinking he is guilty, the State has proved the case beyond a reasonable doubt. Is there anything in your background, life experiences, your view of the justice system that makes you feel that you would vote to find him not guilty even though the State has proved the case?

Or to put it a little more simply, are you going to decide this case based on anything other than what you hear from the witness stand and the rules of law that I instruct you on?

That is what I mean by being a fair and impartial juror. As you sit here right now without knowing much about this case, is there anyone who thinks, for any reason that they can not be a fair and impartial juror?

Bias

[It is obvious to everyone in the courtroom that Mr. _____ is (African-American) with respect to his racial background.][11] I think we all walk around realizing we are different from everyone else. Those differences might be based on race, gender, ethnicity, body size, hair color or any number of factors, but when we let those kind of differences control how we judge someone or a situation we call that bias or prejudice or discrimination.

What is very important to me and everyone involved with this case is that we end up with 12 jurors who will decide this case on the evidence you hear from the witnesses and the rules of law I instruct you on and not on any of these kinds of difference.

Now I realize what I am about to ask you is pretty difficult. I am asking you to tell me if you don't think you can be fair. That is pretty hard even in a one on one conversation let alone in front of a room full of strangers, but it is critically important. I am not going to argue with you or try to convince you to feel differently but I do need to know if you don't think you can be fair for this or any other reason.

Is there anyone who has concerns about or simply feels that they cannot be a fair juror in this case?

B. Topics For Questions

Questions on the following topics are often included in a judge's voir dire and are recommended for consideration in all cases. Other topics may be appropriate depending on the facts of the case.

1. Whether the estimated length of trial makes it impossible for anyone to serve.

2. Whether anyone has a physical or medical condition that makes it impossible to serve or makes it difficult to hear or understand the testimony.[12]

3. Whether there are any circumstances such as work schedule, medication, etc., that may make it difficult for a juror to pay attention or stay alert.[13]

4. Advise that it is alright to ask for a recess if a juror is having trouble staying alert.

5. Whether anyone knows any member of the defendant's family.

6. Whether anyone knows the defense attorney or the prosecutor or the judge.

7. Whether anyone knows the complaining witness or other witnesses who are expected to testify.

8. Whether anyone or a member of their immediate family is employed in a law enforcement capacity.[14]

9. Whether anyone would give more or less weight to the testimony of a police witness because that person is a police officer.

10. Whether anyone has heard or read anything about the case.

11. Whether anyone has expectations about the conduct of the court and counsel, the nature of the evidence that will be presented, or the law that will be applied to this case based on descriptions of criminal investigations and trials from books, movies, television programs or the media.[15]

12. Whether anyone has previously served on a jury and, if so, whether that jury reached a verdict.[16]

13. Whether anyone has been the victim of a crime.[17]

14. Whether racial bias or prejudice may affect anyone.

15. Whether anyone has a religious or philosophical belief that prohibits them from sitting in judgment on another person.

16. If the case involves an interpreter, whether anyone speaks or understands the language involved.[18]

V. Dismissal For Cause; Following Up On Affirmative Answers[19]

If a panel member indicates that an answer to a question would be "yes," further inquiry is required. In any situation, the mere fact of an affirmative response is not enough to disqualify a person from jury service. The ultimate test is whether, the affirmative response notwithstanding, the juror can decide the case fairly and impartially on the evidence that is presented in court.[20]

In a group of four cases decided on the same day, the Wisconsin Supreme Court identified and implemented a new set of three terms for classifying juror bias.[21] State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), was the lead decision. It held that the usefulness of the old terms for types of juror bias had "run full course" and that the terms "implied bias," "actual bias," and "inferred bias" should no longer be used. In their place, the following are adopted: statutory bias, subjective bias, and objective bias.

A. Statutory bias

"Statutory bias" refers to prospective jurors who are excluded from jury service under § 805.08(1):

- those related by blood or marriage to any party;
- those related by blood or marriage to any attorney appearing in the case; and
- those who have a financial interest in the case.

A person meeting one of these descriptions may not serve regardless of his or her ability to be impartial.

A prospective juror who is the brother-in-law of a state witness must be struck for cause on the basis of statutory bias. State v. Czarnecki, 231 Wis.2d 1, 604 N.W.2d 891 (Ct. App. 1999).[22]

Note: § 805.08(1) also refers to those who have expressed or formed an opinion or are aware of any bias or prejudice in the case; they are not considered to fall into the "statutory bias" class but are more accurately described as those for whom evidence of "subjective bias" exists. Faucher, supra, 227 Wis.2d 700, 717. Thus, an individual inquiry is required before they are to be dismissed.

In addition to those jurors falling within the "statutory bias" category, one other class of jurors must always be excused: jurors who are related to a state witness.[23] With these exceptions, it is improper to exclude any class of jurors without individual inquiry into ability fairly to decide the case.[24]

B. Subjective bias

"Subjective bias" refers to a prospective juror who has opinions or feelings about the case that the juror is unable or unwilling to set aside. It refers to the juror's actual state of mind and is usually revealed by a prospective juror during voir dire. Faucher, supra, 227 Wis.2d 700, 719; State v. T. Oswald, 2000 WI App 2, ¶19, 232 Wis.2d 62, 606 N.W.2d 207.[25]

The inquiry into subjective bias involves determining whether the prospective juror has expressed or indicated an opinion or a bias and, if so, whether the juror has the willingness and ability to set those feelings aside and consider the case on the evidence presented in court. As to the latter issue, courts should seek to elicit a clear expression of impartiality by asking a question like the following:

> Are you able to put your feelings or opinions aside and decide this case based solely on the evidence presented and the law as the court defines it for you?

However, "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." State v. Erickson, 227 Wis.2d 758, 776, 596 N.W.2d 749 (1999). "Magical words" are not required. State v. Jimmie R.R., 2000 WI APP 5, ¶28, 232 Wis.2d 138, 606 N.W.2d 196. Also see State v. Ferron, 219 Wis.2d 481, 579 N.W.2d 654 (1998), where a prospective juror's statement that he could "probably" set his feelings aside was not considered to be a strong enough statement.[26]

In State v. Carter, 2002 WI App 55, 250 Wis.2d 851, 641 N.W.2d 517, the court found that subjective bias was established as a matter of law where a prospective juror clearly stated that his own experience with a sexual assault in his family would influence his ability to be fair and impartial and where no follow-up questions qualified that statement. The trial court's finding that no subjective bias was shown was clearly erroneous and defense counsel provided ineffective assistance by failing to question the juror's statement or move to strike the juror. 2002 WI App 55, ¶¶13, 15.

Appellate courts reviewing these cases will look carefully at the answers to voir dire questions but evaluating the juror's sincerity also depends on the juror's conduct, demeanor, and nonverbal cues. Jimmie R.R., supra, 232 Wis.2d 138, ¶29. Thus, substantial deference will be accorded to the trial judge who can observe these qualities. The value of reliance on answers to voir dire questions is further reduced because lawyers ask leading questions and intentionally elicit contradictory answers, Jimmie R.R., supra 232 Wis.2d 138, ¶30, and sometimes present confusing and ambiguous questions. State v. Gilliam, 2000 WI App 152, ¶¶12-14, 238 Wis.2d 1, 615 N.W.2d 1.

C. Objective bias

Objective bias refers to a prospective juror whose opinions or feelings are such that a reasonable person in the juror's position could not set them aside. Objective bias may involve a direct, critical, personal connection between the individual juror and crucial evidence or a dispositive issue in the case or an intractable negative attitude toward the justice system in general. State v. J. Oswald, 2000 WI App 3 ¶8, 232 Wis.2d 103, 606 N.W.2d 238.[27]

In State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), a prospective juror had a strong opinion about the credibility of a crucial state's witness. The supreme court found that objective bias was established because the juror "could not truly set aside his strongly held belief that [the witness] would not lie" despite his apparently sincere intentions to do so. 227 Wis.2d 700, 733.[28]

In State v. Lindell, 2001 WI 108, ¶4, 245 Wis.2d 689, 629 NW.2d 223, the court held that objective juror bias was established as a matter of law where the juror knew the homicide victim as a friend of the family and business associate.

In State v.Erickson, 227 Wis.2d 758, 776, 596 N.W.2d 749 (1999), a juror in a sexual assault case had been a victim of sexual abuse as a child. But the supreme court found that objective bias was not established because the juror's connection was remote.

Objective bias may also be established if the prospective juror has a direct connection to a dispositive issue in the case, such as the defense theory, coupled with a personal belief regarding the outcome of that issue. In State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999), the supreme court held that "veteran jurors" who had rejected a breathalyzer defense in a preceding case should have been dismissed from service in a second drunk driving case involving the same defense. Veteran jurors are not to be dismissed solely on the basis of their having served as jurors in a similar case, but "these veteran jurors did exhibit bias in that reasonable jurors in their position could not set aside expressed opinions and prior knowledge relating to the veracity of breathalyzer results." 227 Wis.2d 736, 751.

A third situation where objective bias may be present is where jurors demonstrate an intractable or ingrained negative attitude towards the justice system. In State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999), the supreme court held that prospective jurors with negative experience with the justice system cannot be automatically excluded but must be excluded if their experience is recent and left them with negative feelings.

The Mendoza decision advised that trial courts should err on the side of caution when considering a request to remove a juror for cause, especially where objective bias is concerned:

> The circuit courts are . . . advised to err on the side of striking prospective jurors who appear to be biased, even if appellate courts would not reverse their determinations of impartiality. Such action will avoid the appearance of bias, and may save judicial time and resources in the long run.

Mendoza, supra, at 868 (quoting State v. Ferron, 219 Wis.2d 481, 503, 579 N.W.2d 654 (1998). This admonition was repeated in State v. Lindell, supra, ¶49. Also see State v. J. Oswald, 2000 WI App 3 ¶¶52-53, 232 Wis.2d 103, 606 N.W.2d 238, J. Nettesheim, concurring.

A different aspect of objective bias was considered in State v. Neumann, 2013 WI 58, 348 Wis.2d 455, 832 N.W.2d 560, a case involving extensive pretrial publicity. Both parents of an 11-year-old were convicted of 2nd degree reckless homicide under § 940.06 after the girl died from diabetic ketoacidosis resulting from untreated juvenile onset diabetes. The wife was tried first and convicted. The jury in trial of the father was told of the result of the mother's trial. The court stated: "We recognize that evidence of a co-defendant's guilt, under some circumstances, can be prejudicial to the defendant on trial, and in cases in other jurisdictions, convictions have been overturned on this ground. . . . Nevertheless, circumstances in the present case justified informing the jury about the mother's status." 2103 WI 58, ¶¶158, 159.

In State v. Tody, 2009 WI 31, 316 Wis.2d 689, 764 N.W.2d 737, all six members of the court who participated agreed that it was error for the trial judge to fail to strike the judge's mother from the jury panel. Three justices concluded that the circumstances showed "objective bias."[29] Three justices concluded that the judge's error was in not removing the juror or recusing himself under the trial court's inherent authority to administer justice.

In State v. Sellhausen, 2012 WI 5, 338 Wis.2d 243, 808 N.W.2d 390, the issue was whether a new trial was required where the trial judge failed to disqualify his daughter-in-law from sitting on the jury. All members of the court apparently agreed that a new trial was not required because the defense removed the juror by using a peremptory challenge and received a fair trial from an impartial jury. Justice Ziegler concurred, adopting her concurring opinion in the Tody case. Three justices joined her, meaning that the concurring opinion in Tody is now the law on this issue.

D. Remedy

The erroneous failure to excuse a juror for cause does not require retrial where the defense used a peremptory challenge to strike that juror, resulting in an impartial jury. State v. Lindell, 2001 WI 108, ¶5, 245 Wis.2d 689, 629 NW.2d 223. Lindell overruled State v. Ramos, 211 Wis.2d 12, 564 N.W.2d 328 (1997), which had required an automatic reversal when a defendant used a peremptory strike to remove a prospective juror who should have been excused for cause.[30]

VI. Peremptory Challenges

A. Number – § 972.03

In a felony case, both the state and the defendant receive 4 peremptory challenges. The number increases to 6 if the crime is punishable by life imprisonment.[31] An additional peremptory challenge is to be allowed each side if additional jurors [commonly referred to as "alternate jurors"] are selected under § 972.04(1), bringing the total to 7. The number for the defense also increases if there are multiple defendants.[32] Trial courts lack authority to allow correction of an allegedly mistaken exercise of a peremptory challenge once the jury is impaneled.[33]

B. Claim that a challenge is race- or gender-based

Peremptory challenges may not be used to exclude a prospective juror on the basis of the juror's race.[34] This rule applies even though the members of a jury panel are of a different race than the defendant.[35] The same rule applies to the exercise of peremptory challenges based on the juror's gender.[36]

In order to constitute a class for these purposes, "the group must be objectively identifiable from the rest of the community, be large enough that the general community recognizes it as an identifiable group, and its members share ethnic and cultural traditions and customs, and, perhaps most important, share discrimination because of their identity and 'differentness.'" State v. Guerra-Reyna, 201 Wis.2d 751, 756, 549 N.W.2d 779 (Ct. App. 1996). Mexican-Americans are a class entitled to equal protection of the law in connection with jury service. Id.

A claim that a peremptory challenge was improperly based on race or gender must be raised by motion before the jury is sworn or it will be considered waived.[37] Upon the defendant's timely motion, a three-step process is used to evaluate the claim:[38]

- there must be a prima facie showing that the peremptory challenge was based on race or gender;[39]
- the burden shifts to the opposing party to articulate a race- or gender-neutral explanation for striking the juror;[40] and
- the court must determine whether the objecting party has carried the burden of proving purposeful discrimination.

VII. Concluding Questions

At the end of the court-conducted voir dire, many judges review one or more of the important jury instructions with the jury. An example follows.

If you are selected as a juror, following the completion of all of the testimony and the arguments of counsel, I will instruct you on the principles of law that will govern you in your consideration of the evidence, weighing the testimony, and reaching your verdict. One of the instructions is on burden of proof and presumption of innocence. It reads as follows:

[READ WIS JI-CRIMINAL 140]

Is there anyone who believes that he or she could not follow that instruction?"

Another instruction relates to the credibility of witnesses. It reads as follows:"

[READ WIS JI-CRIMINAL 300]

Is there anyone who believes that he or she could not follow that instruction?"

VIII. Instruction After Jury is Selected[41]

HERE INSERT PRELIMINARY INSTRUCTIONS IF DESIRED. SEE, FOR EXAMPLE, WIS JI-CRIMINAL 50.

IX. Anonymous And "Numbers" Juries

Whenever a court restricts any juror information, including referring to a juror by number instead of by name, the court must make an individualized determination that the restriction of information is necessary and must take reasonable precautions to minimize any prejudicial effect to the defendant.

In State v. Britt, 203 Wis.2d 25, 553 N.W.2d 528 (Ct. App. 1996), the trial court had ruled that the jurors' names, addresses, and places of employment could not be publicly revealed in open court or on the record; however, both parties had access to all juror information via written questionnaires. This was considered to be an "anonymous jury" and its use upheld by the court of appeals because there was a strong reason to believe that the jury needed protection and reasonable precautions were taken to minimize any prejudicial effect to the defendant.

In State v. Tucker, 2003 WI 12, 259 Wis.2d 484, 657 N.W.2d 374, the trial court used only numbers to refer to the jurors, although both parties had access to all juror information, including the jurors' names. The Wisconsin Supreme Court held that this practice, termed a "numbers jury," was subject to the same requirements as those that apply to an anonymous jury[42] and found that the trial court erred in two respects. First, the trial court did not make an individualized determination that the jurors needed protection based on the specific circumstances of the case. Second, the trial court did not take adequate precautions to minimize any prejudicial effect.

A. Individualized Determination

Before a trial court restricts any juror information, the court must make an individualized determination that the facts and circumstances of the case require that the jury be protected. Among the factors that may be taken into account:

(1) the defendant's involvement in organized crime;
(2) the defendant's participation in a group with the capacity to harm jurors;
(3) the defendant's past attempts to interfere with the judicial process; and
(4) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

State v. Tucker, 2003 WI 12, ¶22 [citing United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995); United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994).]

B. Precautionary Statement

When juror information is restricted, there is a danger that the jurors will interpret the special measures as reflecting on the defendant's guilt or character. The general instruction on the presumption of innocence is not sufficient to address this issue. Therefore, "the circuit court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead of names should in no way be interpreted as a reflection of the defendant's guilt or innocence. . . A precautionary statement must not mislead a jury, but must be based on factors and influences that are relevant in a particular case." State v. Tucker, 2003 WI 12, ¶23, ¶24.[43]

While it may be necessary to tailor the precautionary statement for the facts of a particular case, the Committee offers the following as a general model:[44]

> I have decided that for the convenience of court and counsel, we will refer to jurors by numbers. This should not influence your verdict in any manner.

COMMENT

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"Control of the voir dire examination rests primarily with the trial court. . . . The trial court has broad discretion as to the form and number of questions to be asked. The exercise of this discretion and the court's restriction upon inquiries, however, are subject to 'the essential demands of fairness.'" (Citation omitted.) Hammill v. State, 89 Wis.2d 404, 408, 278 N.W.2d 821 (1979).

General standards set forth by the Wisconsin Supreme Court in a 1962 decision strike the Committee as appropriate today:

> We approve the procedure followed by the trial court in conducting the voir dire examination. This procedure is for the court to propound the questions quite generally asked of jurors in most jury trials. Under this procedure, counsel are confined to later propounding only those questions to individual jurors which cover matters not included in the questions put by the court. We deem that this greatly shortens the time required in picking a jury over that required where the court leaves the questioning entirely to counsel, but at the same time adequately protects the interests of the parties. We especially commend the step here followed of holding a preliminary conference between the court and counsel, without the hearing of the jury, for the purpose of permitting counsel to request that particular questions be propounded to the jury and permitting opposing counsel to enter objections thereto. If any requested questions are denied, or if objections are entered to questions the court proposes to ask the panel, the reporter should record the same as was done here.

Filipiak v. Plombon, 15 Wis.2d 484, 496, 113 N.W.2d 365 (1962).

Subsection 805.08(1) provides in part that questions by the parties "shall not be . . . based on hypothetical questions." (The complete statute is quoted in note 3, below.)

1. Closing voir dire to the press and public is justified only when there is a compelling need to protect the defendant's right to a fair trial. A hearing must be conducted and specific findings must be made before a closure order is entered. State ex rel. LaCrosse Tribune v. Circuit Court, 115 Wis.2d 220, 340 N.W.2d 460 (1983). Also see State ex rel. Storer v. Gorenstein, 131 Wis.2d 342, 388 N.W.2d 633 (Ct. App. 1986); Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

In two cases from the same county, the same trial judge excluded the public from voir dire, primarily because the courtroom was too small to accommodate the large jury panels and members of the public. Neither defendant objected, and the rest of the trial was open. In State v. Pinno and State v. Seaton, 2014 WI 74, 356 Wis.2d 106, 850 N.W.2d 207, the Wisconsin Supreme Court reached the following conclusions:

> ¶6 First, the Sixth Amendment right to a public trial extends to voir dire. Presley v. Georgia, 558 U.S. 209, 213 (2010). A judge's decision to "close" or limit public access to a courtroom in a criminal case requires the court to go through an analysis on the record in which

the court considers overriding interests and reasonable alternatives as set out in Waller v. Georgia, 467 U.S. 39, 45, 48 (1984). The court must make specific findings on the record to support the exclusion of the public and must narrowly tailor the closure. Id.

¶7 Second, the Sixth Amendment right to a public trial may be asserted by the defendant at any time during a trial. A defendant who fails to object to a judicial decision to close the courtroom forfeits the right to a public trial, so long as the defendant is aware that the judge has excluded the public from the courtroom. . . .

¶8 Third, the records in these cases are clear that neither Seaton nor Pinno objected to the alleged courtroom closure. . . . Therefore, Seaton and Pinno both forfeited their rights to a public trial.

Note: There is an extensive discussion of the obligations of the trial judge with respect to closing the courtroom – see ¶¶69-80.

2. The defendant has a right to be present at voir dire under § 971.04(1)(c) and the state and federal constitutions; further, this right may not be waived. State v. Harris, 229 Wis.2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999). The right to be present includes voir dire conducted in camera. State v. David J.K., 190 Wis.2d 726, 528 N.W.2d 434 (Ct. App. 1994). The exclusion of the defendant from the in camera interview of three jurors was found to be harmless error in State v. Tulley, 2001 WI App 236, 248 Wis.2d 505, 635 N.W.2d 807. However, in extreme cases, a defendant may forfeit the right to be present by engaging in disruptive behavior. Trial courts are afforded considerable discretion in dealing with these difficult situations. See, for example, State v. Haste, 175 Wis.2d 1, 500 N.W.2d 678 (Ct. App. 1993); Illinois v. Allen, 397 U.S. 337 (1970). (Also see SM-30, WAIVER AND FORFEITURE OF COUNSEL . . .)

In State v. Gribble, 2001 WI App 227, 248 Wis.2d 409, 636 N.W.2d 488, the court held that it was not error for the trial court to conduct inquiries of prospective jurors regarding possible undue hardship resulting from jury service outside the presence of the defendant and defense counsel. Questioning about possible excuse from or deferral of jury service under § 756.03 is not part of the "voir dire" within the meaning of § 971.04(1)(c). 2001 WI App 227, ¶18. However, caution should be exercised in engaging in any conversation with jurors off the record. See State v. Harris, supra.

In State v. Alexander, 2013 WI 70, 349 Wis.2d 327, 833 N.W.2d 126, the defendant was tried before a jury on a charge of 1st degree intentional homicide. During the trial, two jurors approached the bailiff to state that one juror knew a woman in the gallery and the other that he knew one of the defense witnesses. The judge held separate in-chambers discussions with each juror; the prosecutor and defense counsel were present; the defendant was not. The judge dismissed both jurors. The defendant appealed on the ground that he had a right to be present at the in-chambers discussions. The Wisconsin Supreme Court recognized that the defendant had a constitutional right to be present at his trial, but "[w]hether this right to be present at trial encompasses in-chambers meetings "admits of no categorical 'yes' or 'no' answer. A conference in chambers might well constitute part of the trial depending upon what matters are discussed or passed upon. Likewise, such a conference might not be a part of the trial in the sense of one's constitutional right to be present. . . The test for whether a defendant's presence is required at an in-chambers hearing, or at a conference in the courtroom after the judge has emptied it of spectators, is

whether his absence would deny him a fair and just hearing." ¶1 The court concluded that Alexander's constitutional and statutory rights to be present were not violated.

3. The statutory framework relating to the selection of jurors and voir dire is provided by §§ 972.01 and 805.08. Section 972.01 provides that civil rules apply:

> The summoning of jurors, the selection and qualifications of the jury, the challenge of jurors for cause and the duty of the court in charging the jury and giving instructions and discharging the jury when unable to agree shall be the same in criminal as in civil actions, except that s. 805.08(3) shall not apply.

(The excepted section, § 805.08(3), relates to the number of peremptory challenges, which is covered by § 972.03 for criminal cases.) Sections 756.001 through 756.03 address the qualifications of jurors and excuses from and deferrals of jury service. The standards for examination of jurors in civil cases are set forth in § 805.08(1):

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

4. "**756.02 Juror qualifications.** Every resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen and able to understand the English language is qualified to serve as a juror in that circuit unless that resident has been convicted of a felony and has not had his or her civil rights restored."

5. Persons who are not "able to read and understand the English language" are not qualified for jury service; the clerk shall strike their names from the list of prospective jurors. §§ 756.02 and 756.04(9). State v. Carlson, 2003 WI 40, ¶2, 261 Wis.2d 97, 661 N.W.2d 51.

6. State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999), adopted the term "statutory bias" to identify those excluded from jury service under § 805.08(1): those related by blood or marriage to any party or to any attorney appearing in the case and those who have a financial interest in the case. A person meeting one of these descriptions may not serve regardless of his or her ability to be impartial. Those who are to be excluded for "subjective bias" or "objective bias" can be identified only after a more complete inquiry. See the text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

7. Marriage does not cause the blood relatives of one spouse to become related to the blood relatives of the other spouse. Thus, it was not error to refuse to disqualify a juror whose second cousin was married to the victim's sister. State v. Noren, 125 Wis.2d 204, 211, 371 N.W.2d 381 (Ct. App. 1985).

8. "[P]rospective jurors who are related to a state witness by blood or marriage to the third degree as shown in Figure 852.03(2), Stats., must be struck from the jury on the basis of implied bias." State v. Gesch, 167 Wis.2d 660, 662, 482 N.W.2d 99 (1992). [Note: The degree of kinship table formerly found in § 852.03(2) was recreated as § 990.001(16) by 1999 Wisconsin Act 32.] Under the current juror bias jurisprudence, Gesch is apparently to be treated as a unique case where "objective bias" will always be present. State v. Faucher, 227 Wis.2d 700, 724, 596 N.W.2d 770 (1999). See the text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

A prospective juror who is the brother-in-law of a state witness must be struck for cause on the basis of statutory bias. State v. Czarnecki, 231 Wis.2d 1, 604 N.W.2d 891 (Ct. App. 1999).

9. Faucher, note 6, supra, concluded that jurors who are covered by the second set of statutorily-required questions – those who have expressed or formed an opinion and those who are aware of any bias or prejudice in the case – are not in the "statutory bias" class who must always be excluded. Rather, their affirmative answer is evidence of "subjective bias" or "objective bias" which requires further inquiry into their ability to be fair and impartial. See text at section V for a summary of the jury bias jurisprudence announced in Faucher and its companion cases.

10. The Committee does not believe that the order in which the questions are presented makes any difference, and it is expected that judges will develop a sequence that seems to them to be the most logical and convenient.

11. If the defendant's difference is not obvious, start with the second sentence.

12. A trial court's finding that a juror's physical limitations caused by a medical condition did not prevent him from sitting as a juror was affirmed in State v. Guzman, 2001 WI App 54, 241 Wis.2d 310, 624 N.W.2d 717. The constitutional right to an impartial jury requires that a defendant not be tried by a juror who cannot comprehend testimony. This right was violated where two hearing-impaired jurors did not hear some of the testimony of two child witnesses. State v. Turner, 186 Wis.2d 277, 521 N.W.2d 148 (Ct. App. 1999).

13. Asking questions like this may help to avoid problems with claims relating to alleged "sleeping jurors" that have reached the appellate courts. See, for example, State v. Novy, 2013 WI 23, 346 Wis.2d 289, 827 N.W.2d 610 and State v. Saunders, 2011 WI App 156, 338 Wis.2d 160, 807 N.W.2d 679.

14. Law enforcement officers are not per se ineligible to serve as jurors. "Absent actual proof to the contrary elicited during voir dire, there is simply no basis for concluding that law enforcement officers would not act in accordance with their sworn duty and decide a case impartially. . . ." State v. Louis, 156 Wis.2d 470, 483, 457 N.W.2d 484 (1990). Whether any individual officer should be removed for cause lies within the trial court's discretion. 156 Wis.2d 470, 479. Knowing a police officer involved in the case is not cause for dismissal if the persons say it will not impair their ability fairly to determine the evidence. State v. Zurfluh, 134 Wis.2d 436, 438, 397 N.W.2d 154 (Ct. App. 1986). ¶3

In State v. Smith, 2006 WI 74, 291 Wis.2d 569, 716 N.W.2d 482 , the Wisconsin Supreme Court held that it was not error (in a Milwaukee criminal prosecution) to refuse to strike for cause a juror who worked in the Milwaukee County DA's office in Children's Court: ". . . [T]he circuit court reasonably concluded that [the juror] was not objectively biased under the facts and circumstances as a reasonable

person in [the juror's] position could be impartial. . . . Essentially, we decline to create a per se rule that excludes potential jurors for the sole reason that they are employed by the Milwaukee County District Attorney's Office."

15. This topic was added by the Committee in response to suggestions that the so-called CSI effect be addressed. This refers to unrealistic expectations about investigative practices that jurors may have as a result of watching television shows, movies, etc. The Committee believes it is important to state the inquiry broadly enough to include expectations relating to the law and how judges and lawyers act as well as to include expectations created by books and media reports.

16. So-called veteran jurors should not be categorically excluded, even where issues in a subsequent trial are nearly identical to the initial trial. Rather, there should be an individualized analysis of each juror to determine if there is "subjective bias" or "objective bias." State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999). In Kiernan, the court applied the "objective bias" test to "veteran jurors" who, sitting in a previous case, had rejected the same breathalyzer defense that Kiernan used. The court held that the veteran jurors showed "objective bias" – reasonable jurors in their position could not set aside their opinions and prior knowledge about the accuracy of breathalyzer results.

Also see State v. Loukata, 180 Wis.2d 191, 196, 580 N.W.2d 896 (Ct. App. 1993): while "jurors who had acquitted a defendant in an unrelated case were improperly excused from the panel from which Loukata's jury panel was drawn," the defendant's right to a jury selected from a fair cross section of the community was not violated.

17. In State v. Delgado, 223 Wis.2d 270, 588 N.W.2d 1 (1999), the court reversed a conviction and ordered a new trial where a juror failed to disclose, in response to a voir dire question, that she had been the victim of a sexual assault when she was a child. The court found that the trial court's finding of no "inferred bias" was clearly erroneous. Under the court's juror bias jurisprudence, this type of case is to be analyzed under the test for "objective bias." State v. Faucher, 227 Wis.2d 700, 726-27, 596 N.W.2d 770 (1999).

Also see State v. Olson, 179 Wis.2d 715, 508 N.W.2d 616 (Ct. App. 1993), involving the same situation as that presented in Delgado.

In State v. Funk, 2011 WI 62, 335 Wis.2d 369, 799 N.W.2d 421, the defendant was convicted by a jury of two counts of sexual assault of a child. After trial, it was discovered that one of the jurors, Tanya G., had been the victim of multiple sexual assaults by a school bus driver when she was 10 and the victim of a forcible sexual assault when she was 17. Specific questions about jurors' possible history as victims were not asked during voir dire, but closely related questions were. The trial court held a postconviction hearing and concluded that Tanya G. was subjectively biased and objectively biased and ordered a new trial. The court of appeals affirmed and the supreme court reversed, summarizing its holding as follows:

> ¶2 We conclude that Tanya G. failed to respond to a material question during voir dire when Funk's attorney asked if anyone on the jury panel had previously testified in a criminal case. We also conclude that the circuit court's finding that Tanya G. was subjectively biased against Funk is unsupported by facts of record and is clearly erroneous. Finally, we conclude that the facts necessary to ground a circuit court's reasonable legal conclusion that a reasonable person in Tanya G.'s position could not be impartial were not

> developed in this case, and therefore the circuit court's conclusion that Tanya G. was objectively biased was erroneous. Accordingly, we reverse the court of appeals order and reinstate the guilty verdict and judgment of conviction.

Three justices dissented, concluding that the trial court's decision deserved greater deference and that it was supported by a reasonable interpretation of the facts.

18. See Wis JI-Criminal 60 for a suggested instruction advising jurors that they must rely on the evidence as presented through the official court interpreter. It may be advisable to obtain a juror's commitment to do so during voir dire.

19. Objection to a juror's bias is waived if no motion is made to remove the juror for cause. State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987). Defense counsel's "failure to so move is a waiver of the defendant's right to object to that person sitting on the jury. There need be no statement on the record by the defendant that he consents to each juror that is sworn in." State v. Brunette, 220 Wis.2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998).

20. Whether jurors' answers were sufficient to "rehabilitate" them was discussed in State v. Lepsch, 2017 WI 27, 374 Wis.2d 98, 892 N.W.2d 682.

21. State v. Faucher, 227 Wis.2d 700, 596 N.W.2d 770 (1999) was the lead decision. It concluded that a juror who had a strong opinion that a key witness was credible should have been dismissed for "objective bias." State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999), concluded that "veteran jurors" should not be categorically excused but that the jurors in the case showed "objective bias" because they had strong opinions about the reliability of breathalyzer test results, which was the focus of the defense in the case. State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999), reached a similar conclusion with regard to jurors with criminal records – they should not be categorically excused but may show "objective bias" when their criminal justice experience is recent and resulted in strong negative feelings about the system. In the fourth case, State v. Erickson, 227 Wis.2d 758, 596 N.W.2d 749 (1999), the court concluded that a juror's experience 40 years earlier as a victim of sexual assault did not show either subjective or objective bias.

The Faucher decision also reviewed seven previously-decided juror bias cases and classified them under the new terminology. 227 Wis.2d. 700, 721-30.

22. Czarnecki relied on State v. Gesch, see note 8, supra, which had held that a juror who was the brother of the state's police witness should be excluded on the basis of "objective bias."

23. See State v. Gesch, discussed in note 8, supra. Faucher characterized Gesch as a "unique" case apparently to be treated as one of "objective bias." 227 Wis.2d 700, 724.

24. State v. Louis, 156 Wis.2d 470, 457 N.W.2d 484 (1990): police officers; State v. Kiernan, 227 Wis.2d 736, 596 N.W.2d 760 (1999): veteran jurors; State v. Mendoza, 227 Wis.2d 838, 596 N.W.2d 736 (1999): jurors with a criminal record; and State v. Chosa, 198 Wis.2d 392, 321 N.W.2d 280 (1982): Native Americans in a case where the defendant was a Native American.

25. Subjective bias was not present where a self-employed juror said he did not want to serve, because his income would suffer and that he thought this would affect his ability to fair. "Inconvenience and inability to work during regular working hours should not, and cannot, be transferred into bias sufficient to strike a juror for cause." State v. Guzman, 2001 WI App 54, ¶17, 241 Wis.2d 310, 624 N.W.2d 717.

26. But see State v. Czarnecki, 2000 WI App 155, 237 Wis.2d 794, 615 N.W.2d 672, where subjective bias was not found to be established, despite the juror's statements that he believed police officers were generally more credible than other witnesses and that he could "probably" put that belief aside.

27. But see Oswald v. Bertrand, 374 F.3d 475 (7th Cir. 2004), where the U.S. Court of Appeals for the 7th Circuit granted relief, concluding that there was inadequate inquiry of the extent to which extensive publicity affected the jury panel's ability to be impartial. The decision emphasized the trial court's duty to undertake a diligent inquiry where there is a high probability of jury bias. Decisions of "lower federal courts" are not binding on courts in Wisconsin. State v. Lepsch, 2017 WI 27, 374 Wis.2d 98, 892 N.W.2d 682, ¶35, footnote 14.

28. But see State v. Czarnecki, 2000 WI App 155, 237 Wis.2d 794, 615 N.W.2d 672, where Faucher was distinguished on the grounds that the juror did not have a strong opinion about the credibility of the police officer witness.

29. In Tody, three justices noted three bases contributing to "objective bias": "the judge's mother has an interest in the case, namely her familial relationship with the judge, that is extraneous to the evidence on which the jury is to base its decision"; "the mother's presence may have a potential impact on the trial proceedings or the jury's deliberations"; and, "the presence of a member of the judge's immediate family on the jury seems conspicuously inconsistent with the jury's function as, in part, a check upon the power of the judge." 2009 WI 31, ¶¶38-40. Three justices concluded that "it was counterproductive to pigeonhole this case into the category of objective bias," 2009 WI 31, ¶66, but agreed that the judge erred in presiding over the case with his mother on the jury panel. They referred to SCR 60.04(4)(e) which requires a judge to recuse himself or herself when "a person within the third degree of kinship" to the judge is a party, a lawyer, has more than a de minimis interest that could be substantially affected by the proceeding or is likely to be a material witness. The rule does not specifically list being a juror as a ground for recusal, but may offer some guidance as to the nature of the relationships that might raise the issue presented in Tody.

30. The automatic reversal rule of Ramos was not required under the federal constitution. In United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000), the Court held that if a defendant elects to cure a trial court's erroneous refusal to excuse a juror for cause by exercising a peremptory challenge, "and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." Ramos was based on the deprivation of statutorily granted peremptory challenges, not on constitutional grounds. It is that decision that was overruled in Lindell.

In the opposite situation – where a juror is unnecessarily removed for cause, automatic reversal is not required. State v. Mendoza, 227 Wis.2d 838, 856-64, 596 N.W.2d 736 (1999); State v. Jimmie R.R., 2000 WI App 5, ¶25, 232 Wis.2d 138, 606 N.W.2d 196.

31. Note that a penalty of life imprisonment applies not only to Class A felonies but also to life sentences for persistent repeaters under § 939.62(2m). See State v. Erickson, 227 Wis.2d 758, 596 N.W.2d 749 (1999).

32. Section 972.03 provides in part:

> If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges.

If the crime is punishable by life imprisonment, the number increases to 12 if there are two defendants and to 18 if there are three defendants. Id.

33. State v. Nantelle, 2000 WI App 110, 235 Wis.2d 91, 612 N.W.2d 356.

34. In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court reexamined the portion of Swain v. Alabama, 380 U.S. 202 (1965), relating to the evidentiary burden a defendant must meet to show unfair use of racially-based peremptory challenges. The following new test was announced:

> . . . a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

476 U.S. 79, 96.

The Wisconsin Supreme Court applied the Batson decision in State v. Walker, 154 Wis.2d 158, 453 N.W.2d 127 (1990), reversing a conviction because the record showed "an unrebutted prima facie case of purposeful discrimination." 154 Wis.2d 158, 179. See State v. Waites, 158 Wis.2d 376, 462 N.W.2d 206 (1990), where the court found the Batson claim was waived. Also see State v. Lamon, 2003 WI 78, 262 Wis.2d 747, 664 N.W.2d 607, which did not articulate new legal principles but did provide a detailed example of reasons found to be race-neutral.

35. Powers v. Ohio, 499 U.S. 400 (1991).

36. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); State v. Joe C., 186 Wis.2d 580, 522 N.W.2d 222 (Ct. App. 1994); State v. Jagodinsky, 209 Wis.2d 577, 563 N.W.2d 188 (Ct. App. 1997).

37. State v. Jones, 218 Wis.2d 599, 581 N.W.2d 561 (Ct. App. 1998).

38. The three-part test is the one developed in Batson v. Kentucky, 476 U.S.79 (1986), for cases involving racial discrimination. It also applies to gender discrimination. State v. King, 215 Wis.2d 295, 572 N.W.2d 530 (Ct. App. 1997); State v. Jagodinsky, 209 Wis.2d 577, 563 N.W.2d 188 (Ct. App. 1997).

39. For a case finding a failure to make the required prima facie showing of race-based peremptory, see State v. Lopez, 173 Wis.2d 724, 496 N.W.2d 617 (Ct. App. 1992).

40. The party defending a claim of use of peremptories for discriminatory purposes "must offer something more than a bald, but otherwise credible, statement that other nonprohibited factors were considered. Rather, he or she must demonstrate how there is a nexus between these legitimate factors and the juror who was struck." State v. Jagodinsky, 209 Wis.2d 577, 584-85, 563 N.W.2d 188 (Ct. App. 1977).

Fears that a bilingual juror would be unable to rely exclusively on the court interpreter's version of testimony is a race-neutral ground for exercising a peremptory challenge. Hernandez v. New York, 500 U.S. 352 (1991).

The following were found to be racially neutral reasons in State v. Gregory, 2001 WI App 107, ¶12, 244 Wis.2d 65, 630 N.W.2d 711: concern about the juror's truthfulness; family members with relationship with cocaine, the substance on which the charge was based; close proximity to the alleged drug house; and, a concern that the juror's uncle could have been recently arrested for involvement with drug trafficking.

41. Whether to include preliminary instructions at this point depends on the preference of the trial judge and other factors, such as the amount of time that may pass before the trial begins. Wis JI-Criminal 50 includes recommended preliminary instructions and cautions regarding juror's use of electronic communication devices.

42. "[T]he jury in this case was not a classic 'anonymous' jury. Notwithstanding whether the jury in this case is characterized as an 'anonymous' or a 'numbers' jury, if restrictions are placed on juror identification or information, due process concerns are raised regarding a defendant's rights to an impartial jury and a presumption of innocence. Accordingly, although this case does not deal with the classic 'anonymous' jury, the reasoning in cases involving anonymous juries is beneficial to our analysis." State v. Tucker, 2003 WI 12, ¶11.

43. Tucker offered the following as illustrations of statements that have been made by courts in other jurisdictions: United States v. DeLuca, 137 F.3d 24 (1st Cir. 1998) (district court may instruct jury that their identities will be withheld to ensure that no extrajudicial information is conveyed to them); United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988) (district court may instruct jury that their anonymity is a precautionary measure to ensure that both sides get a fair trial); State v. Samonte, 928 P.2d 1 (Haw. 1996) (circuit court may instruct jury that anonymity is to protect jurors from contacts by the news media); State v. Bowles, 530 N.W.2d 521 (Minn. 1995) (circuit court may instruct jury that purpose of anonymity is to shield jurors from media harassment and undesirable publicity); State v. McKenzie, 532 N.W.2d 210 (Minn. 1995) (circuit court may instruct jury that they will remain anonymous to shield them from media harassment and ward off curiosity that might infringe on their privacy). State v. Tucker, 2003 WI 12, ¶24.

44. The model is also published as a freestanding instruction. See Wis JI-Criminal 146.