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2022CF000363

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH II

STATE OF WISCONSIN
Plaintiff,

DA Case No.: 2022BR001645
Court Case No.: 2022CF000363

vs.

TAYLOR DENISE SCHABUSINESS
DOB: 11/23/1997
Defendant.

**STATE'S REPLY TO
DEFENDANT'S MOTION FOR
CHANGE OF VENUE/VENIRE**

For Official Use

TO: Attorney Christopher Froelich
Attorney at Law
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Green Bay WI 54301

The State of Wisconsin, by Deputy District Attorney Caleb Saunders, hereby files its response to Taylor Schabusiness' Motion for Change of Venue/Venire. (Document 123.) Schabusiness argues a fair and impartial trial cannot be had in Brown County, and asks the Court either to change the place of trial under Wis. Stat. § 971.22 or to empanel a jury from another county under Wis. Stat. § 971.225. Id.

The State cannot dispute the publicity this case has received. But a case simply garnering heightened attention does not mean that Schabusiness cannot receive a fair trial in Brown County. The coverage has involved factual reporting of court proceedings and do not involve objectionable editorializing of the kind likely to impermissibly taint a jury. Furthermore, other mechanisms exist that will ensure Schabusiness gets a fair trial. These factors obviate the need to change the venue of the trial or to select a jury panel from outside Brown County. For these reasons, and for the reasons stated in more depth below, the State respectfully requests that the Court deny Schabusiness' motion.

LEGAL STANDARD

Defendants in this state have a constitutional right to be tried by an impartial jury of the county where the offense was committed. Wis. Const. art. I, § 7. Generally, cases "shall be tried in the county where the crime was committed." Wis. Stat. § 971.19(1). If, however, a

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trial court determines that there exists such prejudice in the original county that a fair trial cannot be had, the court “shall order that the trial be held in any county where an impartial trial can be had.” Wis. Stat. § 971.22(3).

In order to change the venue of a criminal case, sufficient evidence must be before the trial court to show a “reasonable likelihood that a fair trial cannot be had.” McKissick v. State, 49 Wis. 2d 537, 545, 182 N.W.2d 282 (1971). A trial court should resolve “close calls” in favor of the defendant. Id. Whether a fair trial is possible in the original county is an issue left to the discretion of the trial court. Id. at 544–45. Trial courts are in the better position to judge the public sentiment of the county, and the decision will not be overturned absent an abuse of discretion. Hoppe v. State, 74 Wis. 2d 107, 110–11, 246 N.W.2d 122 (1976).

In lieu of changing the venue of a trial, a trial court alternatively may order that the jury pool be selected from a different county while the trial itself remains in the original county. Wis. Stat. § 971.225(2). To proceed under this statute, the trial court must find all of the following:

1. The court has decided to sequester the jurors after the commencement of the trial, as provided in § 972.12
2. There are grounds for changing the venue of the trial under § 971.22(1), and
3. The estimated costs to the county appear to be less using the procedure under [§ 971.225] than using the procedure [in § 971.22]

Wis. Stat. § 971.225(1)(a)-(c).

Under either section, the Court must first find grounds to change venue under § 971.22, so the State address that argument first.

I. Schabusiness has not shown a Reasonable Likelihood that a Fair Trial Cannot be Had in Brown County

The sole basis for which Schabusiness asserts she is unable to receive a fair and impartial trial by a Brown County jury is the pretrial publicity in the case. (Document 129.) In support of her argument, Schabusiness attached twenty-six exhibits which outline various news reports of the facts alleged in the complaint and other proceedings in this case. See (Documents 124–26, Exhibits A–Z.)

Courts consider the following factors in determining whether the amount of pretrial publicity prevents a fair trial in the county where the crime occurred:

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- (1) the inflammatory nature of the publicity;
- (2) the timing and specificity of the publicity;
- (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury;
- (4) the extent to which the jurors were familiar with the publicity;
- (5) the defendant's utilization of peremptory and for cause challenges of jurors;
- (6) the State's participation in the adverse publicity;
- (7) the severity of the offense charged; and
- (8) the nature of the verdict returned.

State v. Fonte, 2005 WI 77, ¶ 31, 281 N.W.2d 654, 698 N.W.2d 594 (citing State v. Albrecht, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994)). The State addresses each Albrecht factor in turn.

A. *The Inflammatory Nature of the Publicity*

Publicity does not equal prejudice. In fact, “objective, factual, non-editorial reporting *is not prejudicial*.” Fonte, 281 Wis. 2d 654, ¶ 32 (emphasis added). The Supreme Court has explained:

A court looking to the inflammatory nature of the publicity should be primarily concerned with the manner in which the information was presented. Uneditorialized news of an informational nature may inform possible members of a jury, but this does not necessarily make the information objectionable. News reports become objectionable when they editorialize, amount to “rabble rousing” or attempt to influence public opinion against a defendant.

Briggs v. State, 76 Wis. 2d 313, 327, 251 N.W.2d 12 (1977).

It is not enough for Schabusiness to assert—even correctly—that the “public has been made aware of this case, the charges and some of the alleged facts related to the case.” (Document 129, 4.). Rather, the relevant inquiry is whether the nature of the publicity is prejudicial to the extent that a “fair trial cannot be had.” State v. Messelt, 178 Wis. 2d 320, 326, 504 N.W.2d 362 (Ct. App. 1993). That is because “[a]n informed jury is not necessarily a prejudicial one.” Thomas v. State, 53 Wis. 2d 483, 492, 192 N.W.2d 864 (1972).

A review of appellate court decisions illustrates this point. In an infamous example, for instance, the United States Supreme Court reversed the conviction of a defendant charged with killing his wife. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). The court lamented the

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“editorial artillery” that was opened against the defendant from the outset of the case, ranging from a litany of pre-indictment editorials stating the defendant was “getting away with murder,” demands to arrest the defendant, and one-sided articles arguing Sheppard’s guilt that continued during the course of trial. Id. at 338–349. It was this “carnival atmosphere” that led the court to decide that where there is a “reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.” Id. at 358, 363.

Like this case, the circumstances analyzed by Wisconsin appellate courts are often less egregious than those in Sheppard. In Hebard, a defendant charged with five counts of first-degree murder challenged the denial of his motion to change venue. State v. Hebard, 50 Wis. 2d 408, 426, 184 N.W.2d 156 (1971), overruled on other grounds. The troublesome news accounts analyzed by the Supreme Court involved coverage of the preliminary hearing, which touched on confessions made by the defendant which were later deemed inadmissible due to the retroactive application of Miranda. Id. at 427–28. However, the court emphasized that the specifics of the inculpatory statements were not reported on, the *voir dire* was otherwise conducted with relative ease, and noted it was not necessary to excuse a member of the jury panel for having a pre-formed opinion on the defendant’s guilt or innocence. Id. at 428.

In Jones, a defendant charged with assaulting a prison guard challenged the denial of his motion to change venue. Jones v. State, 66 Wis. 2d 105, 107–08, 223 N.W.2d 889 (1974). The defendant produced nine news stories and a radio commentary concerning the acts alleged, the investigation, and the charging of the defendant. Id. at 108. The Supreme Court found the news stories were “straightforward, uneditorialized, informational articles designed for the purpose of informing the public; and even thought articles of that nature might be read by a juror, they are not of the type that would create prejudice.” Id. at 109. While some of the stories used arguably stirring descriptors to describe the alleged offense, the Supreme Court emphasized “the general tenor of these stories [was] informational only.” Id. at 110. The Supreme Court also emphasized that these news sources predated trial by four months, and the jury was selected without difficulty. Id. at 111.

In Messelt, a defendant charged with sexual assault, burglary, and false imprisonment challenged the denial of his motion to change venue. Messelt, 178 Wis. 2d at 324. The defendant asserted articles published in two publications prejudiced his right to a fair and

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impartial trial. Id. at 325. The articles detailed the state's evidence and publicized inadmissible evidence concerning the defendant's prior convictions. Id. One article was titled "Rapist Should be Behind Bars For a Long Time." Id. at 328. An article discussed the defendant serving time in prison for a parole violation. Id. at 329. Articles discussed the substance of proceedings in the case. Id. The articles were largely clustered to times pre-dating the trial by several months. Id. at 330. The trial court decided that because the articles were primarily from one publication, the jurors would be chosen from another area of the county. Id. at 326. The trial court was concerned about two areas in particular and decided it would excuse anyone with knowledge of those matters. Id. On appeal, the court of appeals concurred with the trial court that the articles were not "inflammatory." Id. at 330. To the extent the articles referenced "graphic" details of the alleged offense, that was simply information taken from the criminal complaint and evidence adduced at the preliminary hearing, and it was accurately reported. Id. The articles did not "show an intent to inflame or arouse community feeling against the defendant." Id. During *voir dire*, the trial court questioned prospective jurors about their knowledge of the case, whether they could reach an impartial verdict, and that they had no opinion on the defendant's guilt or innocence. Id. at 331. The *voir dire* process evinced great care to "weed out potentially partial or biased jurors." Id. at 332. In sum, the court of appeals found "no showing of a reasonable likelihood of community prejudice before and at the time of trial." Id. at 333.

In Albrecht, a defendant charged with homicide challenged the denial of his motion to change venue. Albrecht, 184 Wis. 2d at 291. The trial court found the pretrial publicity "straightforwardly" reported the alleged facts in the case and did not show an "intent to inflame or arouse community feeling against" the defendant. Id. at 306–07. The most recent article cited by the defendant was six months prior to his trial. Id. at 307. There was no apparent difficulty in selecting a jury, with the *voir dire* touching on the topics of exposure to pretrial publicity and whether the jurors felt they could be impartial. Id. The court of appeals concluded the trial court did not erroneously exercise its discretion in denying the motion to change venue. Id. at 308.

In Fonte, a defendant challenged the denial of his motion to change venue. Fonte, 281 Wis. 2d 654, ¶ 1. The defendant offered forty-four newspaper articles from area newspapers. Id., ¶ 31. The Supreme Court agreed the publicity was factual and non-editorial about the

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crime and the criminal proceedings. Id., ¶ 33. The court noted that while some of the coverage contained inflammatory elements such as headlines referencing the defendant's prior criminal record, the inflammatory elements were offset by the other Albrecht factors. Id. The court emphasized that any publicity was effectively cured by *voir dire* which sufficiently afforded the defendant an impartial jury. Id., ¶ 37.

While the articles Schabusiness cites are great in number, they are not great in inflammatory substance. Unlike the example in Sheppard, “where news and editorial columns were directed to demanding the prosecution and conviction of the defendant involved,” Tucker v. State, 56 Wis. 2d 728, 734, 202 N.W.2d 897 (1973), the examples Schabusiness relies upon are largely “straightforward, uneditorialized, informational articles.” Jones, 66 Wis. 2d at 109. Many of the articles simply recite allegations made in the complaint. See Messelt, 178 Wis. 2d at 330 (articles referring to “graphic” information alleged in the complaint were accurately reported and did not “show an intent to inflame or arouse community feeling against the defendant”). Not only is that information likely to be adduced at trial, it is factual reporting that is not aimed at swaying a jury member. Id. Similarly, most of the articles contain straightforward, factual, and uneditorialized accounts of various routine court proceedings that have occurred in this case. (See Documents 124–26, Exhibits A, G, H, I, J, K, L, M, N, O, R, S, T, V, X, Y and Z.) None of these articles constitute the type of “inflammatory” publicity that courts guard against.

There are two classes of exhibits which merit further attention. Schabusiness cites to a number of articles referencing a hearing that was held on February 14, 2023. (See Document 124, Exhibits B, C, D, E, and F.) While these articles admittedly reference acts of the defendant that may be viewed as prejudicial, they were acts of Schabusiness' own volition that were straightforwardly reported on by the media in attendance. The articles merely factually recite what had occurred and were not intended to “inflame or arouse community feeling against” the defendant. Albrecht, 184 Wis. 2d at 306–07. Schabusiness furthermore cites articles that contain possibly inadmissible information. Fonte, 281 Wis. 2d 654, ¶ 31 n.10; (see Documents 125, 126, Exhibits U and W.) To the extent the articles contain irrelevant information, that can be more than adequately dealt with in *voir dire*, as discussed in more depth below.

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But comparing the articles Schabusiness relies upon to the examples in Hebard, Jones, Messelt, Albrecht, and Fonte show the articles are not of the type that make them objectionable. For instance, articles that referenced inadmissible confessions of the defendant were not deemed too prejudicial, at least when adequately addressed in *voir dire*. Hebard, 50 Wis. 2d at 428. Articles referring to a sexual assault defendant's long prior record and explicitly calling the defendant a "rapist" were not unconstitutionally inflammatory. Messelt, 178 Wis. 2d at 325–28. Articles with headlines referencing the prior record of a defendant were not deemed to be objectionable. Fonte, 281 Wis. 2d 654, ¶¶ 33, 37.

Moreover, the publicity Schabusiness cites is not confined to the borders of Brown County. It is an unfortunate reality that there has been heightened interest in this case. See Hoppe, 74 Wis. 2d at 111–12 ("It is apparent that crimes of this nature would make a substantial impact upon the community and would be the subject of extensive media coverage.") There is no knowing where the Court would find a "county where an impartial trial can be had," Wis. Stat. § 971.22(3), given the breadth of attention the case received. Schabusiness' own articles illustrate this point.

Many of the news agencies Schabusiness cites cover not only Brown County but essentially the entirety of Northeast Wisconsin. The news sources from the television stations based in Green Bay also cover the counties which border Brown County. A Brown County viewer of a news agency based in Green Bay will receive the same news as viewers in Outagamie County, Oconto County, Shawano County, or any number of other counties which are in that news agency's coverage area.

Schabusiness also cites news articles from several *statewide* and *national* media sources. (See Documents 125 and 126, Exhibits Q, X, Y, and Z.) The ubiquity of the media coverage is not something likely to change simply by moving the venue from Brown County. This is not a case, for instance, where local billboards or yard signs are the prejudicial pretrial publicity. Those instances would be more targeted and confined specifically to the original county. But here the media is not confined just to Brown County.

This is at the very least a statewide, perhaps nationwide, issue that simply moving a county would not solve. The nature of the case itself and the attention it receives cannot then form the basis to move a trial from the county where it occurred. See Hebard, 50 Wis. 2d at 427 (noting a defendant cannot "insulate[] himself against prosecution wherever wire services

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carry the account of the crime”). To illustrate, news of just this motion has been reported in essentially every corner of the state: the Fox Valley¹, Milwaukee², Madison³, Wausau⁴, La Crosse⁵, and Chippewa Falls⁶. The motion has been covered both nationally⁷ and internationally⁸ as well.

In totality, a review of the exhibits attached by Schabusiness constitute uneditorialized accountings of the proceedings in the case. See Briggs, 76 Wis. 2d at 327. They are not attempts at “rabble rousing” or to influence potential jurors against Schabusiness. Id.

B. *The Timing and Specificity of the Publicity*

The timing and specificity of the publicity is relevant because “memories and passions of readers [has] time to fade.” Messelt, 178 Wis. 2d at 330. The Supreme Court recognized in 1971 that “the passage of time of itself would dilute and diminish the likely effect of the press accounts, especially so in these days of daily exposure to kaleidoscopically changing vignettes of press-reported human events, tragedies and mishaps from around an entire globe.” Hebard, 50 Wis. 2d at 427. The “kaleidoscopic” nature of media in 1971 has increased exponentially in the past fifty years, with the increased availability of news worldwide, the rise in social media, and the decreased reliance on “traditional” media.

¹ *Schabusiness’ attorney files for change of venue for homicide, mutilation case*, WFRV, <https://www.wearegreenbay.com/news/local-news/schabusiness-attorney-files-for-change-of-venue-for-homicide-mutilation-case/> (last visited Apr. 3, 2023).

² *Wisconsin dismemberment case, venue change sought*, FOX 6 MILWAUKEE, <https://www.fox6now.com/news/wisconsin-dismemberment-taylor-schabusiness-venue-change> (last visited Apr. 3, 2023).

³ *Change of venue sought for Green Bay woman in dismemberment slaying case*, WIS. ST. JOURNAL, https://madison.com/news/state-and-regional/crime-and-courts/change-of-venue-sought-for-green-bay-woman-in-dismemberment-slaying-case/article_e9a05d96-0bb1-5731-ae15-cc7d89bbf953.html (last visited Apr. 3, 2023).

⁴ *Change of venue sought for woman in dismemberment killing*, WAUSAU PILOT & REVIEW, <https://wausaupilotandreview.com/2023/04/01/change-of-venue-sought-for-woman-in-dismemberment-killing/> (last visited Apr. 3, 2023).

⁵ *Change of venue sought for woman in dismemberment killing*, LA CROSSE TRIBUNE, https://lacrossetribune.com/news/state-and-regional/wi/change-of-venue-sought-for-woman-in-dismemberment-killing/article_7c090a80-cee4-5742-b4e5-9d2c968d1b42.html (last visited Apr. 3, 2023).

⁶ *Change of venue sought for woman in dismemberment killing*, CHIPPEWA HERALD, https://chippewa.com/news/state-and-regional/change-of-venue-sought-for-woman-in-dismemberment-killing/article_6f2b09e6-1171-5442-8a96-241b20b56528.html (last visited Apr. 3, 2023).

⁷ *Change of venue sought for woman in dismemberment killing*, THE WASHINGTON POST, https://www.washingtonpost.com/national/2023/03/31/green-bay-wisconsin-dismemberment-slaying-schabusiness-thyrior/e0f535c6-d013-11ed-8907-156f0390d081_story.html (last visited Apr. 3, 2023).

⁸ *Change of venue sought for woman in dismemberment killing*, TORONTO SUN, <https://torontosun.com/news/crime/change-of-venue-sought-for-woman-in-dismemberment-killing> (last visited Apr. 3, 2023).

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Admittedly, the pretrial publicity of this case has been consistent around the filing of court documents or covering court proceedings. The State does not contest this is likely to continue as we get closer to trial. However, many of the articles relied upon by Schabusbusiness will have occurred months before the current trial date in July 2023. The trial date will be more than sixteen months after the State filed charges in this case. And, again, it is not publicity that is the concern but inflammatory publicity.

The Court may find that coverage concerning the February 14, 2023, hearing as somewhat inflammatory given those events are not admissible at trial. See, e.g., Fonte, 281 Wis. 2d 654, ¶ 31 n.10 (noting inflammatory publicity may be discussing evidence that is not admissible at trial). But those articles will have been months old by the time the case proceeds to trial. For instance, in Fonte, the articles the defendant found inflammatory about this prior record were published more than seven months before trial. Fonte, ¶ 34. The Supreme Court found the gap between these articles and trial was sufficient such that “the memories and passions of readers had time to fade.” Id. (quoting Messelt, 178 Wis. 2d at 330).

Given the relatively fact-based and uneditorialized nature of the media coverage, and the ease with which any undue media consumption or bias can be covered in *voir dire*, the timing of the media coverage should not be found to be of the type that significantly undermines Schabusbusiness’ right to a fair trial.

C. *Use of Voir Dire to Minimize Prejudice*

Changing the venue of a trial is not the only method of guaranteeing a defendant a fair trial. For instance, many of the concerns about ensuring a fair and impartial jury panel can be addressed during *voir dire*. McKissick, 49 Wis. 2d at 545. As our supreme court has recognized, a thorough *voir dire* can “solve the problems” raised by pretrial publicity and “ensure[] an impartial jury.” Fonte, 281 Wis. 2d 654, ¶¶36–37. As illustrated above, even in cases where there is a significant amount of publicity, even publicity which raises the concern of appellate courts, *voir dire* lessens the risk of an impartial jury. See supra, I.A.

Simply learning information about a case “is not cause for challenge to a prospective juror in this state,” unless the juror is biased or prejudiced as a result of that information. Tucker, 56 Wis. 2d at 735. Those biases and prejudices can adequately be addressed by the

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Court and the parties during *voir dire*, as courts and litigants do in this county and statewide on a daily basis in any number of criminal cases.

The idea that *voir dire* adequately fleshes out biases is nothing unique to motions to change venue. For instance, circuit courts are required during *voir dire* to determine if any member of the jury has “expressed or formed any opinion, or is aware of any bias or prejudice in the case.” Wis. Stat. § 805.08(1). Courts often further inquire if anyone on the jury panel has “heard or read anything about the case.” Wis. JI–Criminal SM-20, 8. In addition to strikes for cause, Schabusiness will have the ability to exercise seven peremptory challenges during *voir dire*. Wis. Stat. § 972.03. The State would furthermore also not object to special juror questionnaires seeking additional understanding of the venire’s exposure to media coverage in this case and any potential biases that exposure may have created. See Wis. Stat. § 756.04(6)(cm). This would help ensure any undue consumption of media, and more importantly a bias for or against either party, could be known before *voir dire* so as to not taint the rest of the jury panel.

In sum, the State trusts the Court and the parties can adequately and effectively ensure a fair and impartial jury is selected to try this case.

D. The State’s Participation in the Adverse Publicity

Schabusiness does not allege the State participated in or instigated any adverse publicity in this case.

E. The Severity of the Offense Charged and the Nature of the Verdict Returned

Of course, Schabusiness is charged with the most serious offense in this state, and nobody knows the jury’s verdict at this point. But the seventh and eighth Albrecht factors are “the least compelling factors.” State v. Ritchie, 2000 WI App 136, ¶ 24, 237 Wis. 2d 664, 614 N.W.2d 837. Indeed, many of the cases affirming the denial of a motion to change venue deal with homicide charges. See, e.g., Hebard, 50 Wis. 2d 408; Albrecht, 184 Wis. 2d 287. Simply being charged with a Class A felony does not automatically create a biased and impartial jury panel in the county where the crime occurred. Brown County juries regularly decide homicide cases that occurred in Brown County. Given the lack of showing on the other factors, and

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given the relative ease with which any prejudice can be cured during *voir dire*, these factors should not be determinative for the Court.

II. The Criteria in § 971.225 to Utilize an Out-of-County Jury are not Present in this Case

Schabusiness also asks the Court, in the alternative, to order the jury pool be selected from a different county. (Document 123.) One of the prerequisites to order a jury panel from another county is that the court finds the criteria to change venue exist. See Wis. Stat. § 971.225(1)(b). As argued above, see supra I., the requirements under § 971.22(1) are not met. Thus, the criteria to utilize an out-of-county jury are also not met.

If the Court determines the criteria under § 971.22(1) are met, the State's strong preference would be for the Court to follow the procedures in § 971.225 and utilize out-of-county jurors rather than moving the entire trial to another county, assuming the Court finds the other criteria in § 971.225(1) are met. The State is mindful that sequestering a jury is an extreme and relatively rare practice which will likely greatly impact the lives of the jury panel for the week of trial. The inconvenience to court staff, the parties, witnesses, the victims, and the defendant's supporters if the Court moves the location of trial is likely greater, however.⁹

CONCLUSION

The State desires Schabusiness to have a fair and impartial jury in this case. There is no doubt this case has attracted pretrial publicity more than a typical case. But justice does not require that "jurors be totally ignorant of the facts and issues involved." Briggs, 76 Wis. 2d at 330 (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

Brown County has in recent years had a number of trials with a significant amount of local, statewide, and national media attention. Some cases have been extensively reported on before trial. Some trials have been live-streamed across the globe. To date, the State is unaware of any of these cases leading to such prejudice that hindered the defendants' rights to a fair and impartial jury panel. The citizens of Brown County are more than capable of truthfully answering any inquiry the Court or counsel may have during *voir dire*, are able to

⁹ The State lacks sufficient information to argue § 971.225(1)(c) and will defer to the Court on that prong.

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set aside any prejudices or biases they may have, and are able to follow the law as instructed by the Court. Nothing Schabusiness has averred should warrant a different result here.

In sum, Schabusiness has failed to show a “reasonable likelihood that a fair trial cannot be had” in Brown County. McKissick, 49 Wis. 2d at 545. As a result, her motion to change venue, or in the alternative to change the venire, should be denied.

Respectfully submitted this 4th day of April, 2023.

Date Signed: 04/04/23

Electronically Signed By:

Caleb J Saunders

Deputy District Attorney

State Bar #: 1094077