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CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

State of Wisconsin,

Plaintiff-Respondent,

v.

Bradley A. Brandsma

Defendant-Appellant.

Appeal No.
2010AP001429 CR

Circuit Court Case No.
2008CM000838

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

Appeal from the Circuit Court of Sauk County,
The Honorable James Evenson, Presiding

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STATEMENT OF THE ISSUE PRESENTED

The sole issue in this case is whether the trial court violated the Defendant's right to a fair trial and an impartial jury and thus committed reversible error by allowing the jury to separate during deliberations overnight and over the Defendant's objections.

STANDARD OF REVIEW

The application of constitutional principles to a particular case is a question of constitutional fact. *State v. Pallone*, 2000 WI 77, ¶26, 236 Wis. 2d 162, 613 N.W.2d 568. The reviewing court accepts the circuit court's findings of fact unless they are clearly erroneous. *Id.*, ¶27. The application of constitutional principles to those facts is a question of law that is reviewed de novo. *Id.*

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case requires the resolution of case law in the face of a changed statute and is of statewide importance in determining trial practice concerning jury deliberations. The Appellant is therefore requesting publication of this Court's decision. While the Appellant believes this brief fully presents and meets the issues on appeal, the Appellant would nonetheless welcome the opportunity for oral argument if this Court desires it.

STATEMENT OF THE CASE

Bradley Brandsma, the Defendant, was convicted of misdemeanor battery in violation of Wis. Stat. § 940.19(1) after a jury trial. (R.32:4-5; A-App. 16-17.) After the jury had deliberated for approximately two hours and forty five minutes, the trial court allowed the jury to separate overnight. (R. 31:156-158; A-App. 8-10.) The separation of the jury was allowed over the repeated objections of defense counsel and instead of defense counsel's request that an *Allen* instruction be given (R. 31: 152-154, 156; A-App. 4-6, 8.) The trial court admonished the jury not to converse with others regarding the case, and not to do any independent research regarding the case. (R. 31: 157; A-App. 9.) The trial court instructed the jury members to report directly to the jury room to resume deliberations the following day. (R. 31: 157; A-App. 9.) The jury members did report to the jury room the next morning, and no *voir dire* occurred after their return to ensure that improper communications or research had not taken place. (R. 42:9; A-App. 33.) The jury shortly thereafter delivered a verdict of guilty. (R. 32:3-4; A-App. 15-16.)

The Defendant filed a motion for post-conviction relief, requesting a mistrial or new trial on the grounds that the jury should not have been allowed to separate. (R. 36; A-App. 21-24.) A motion hearing was held, and the trial court denied the motion for a new trial, finding that allowing the jury to separate was a proper exercise of discretion. (R. 42: 8-9; A-App. 32-33.) Bradley Brandsma appeals. (R. 38.)

ARGUMENT

THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY BY PERMITTING THE JURY TO SEPARATE OVERNIGHT DURING DELIBERATIONS AND OVER THE OBJECTION OF THE DEFENDANT.

A criminal defendant is guaranteed the right to a trial by an impartial jury by Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution, as well as principles of due process. *State v. Louis,* 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). To have a fair trial, a jury must be insulated from outside influences. *State v. Alfonsi,* 33 Wis. 2d 469, 482, 147 N.W.2d 550 (1967). Where the jury is allowed to separate after it has started its deliberations, the possibility of outside influences upon the jury's verdict is obviously enhanced. *State v. Halmo*, 125 Wis.2d 369, 373, 371 N.W. 2d 424 (Ct. App. 1985). Jury "*deliberations and pronouncements must be kept pure, and untainted not only from all improper influences but from the appearance thereof.*" *Id,* citing *Surma v. State,* 260 Wis. 510, 512, 51 N.W.2d 47 (1952) (emphasis in the originals).

In *State v. Halmo*, the Wisconsin Court of Appeals held that allowing the jury to separate during deliberations created a presumption of prejudice. The court in *Halmo* avoided deciding the case on constitutional grounds since there was a statute permitting sworn jurors to separate during trial in some cases but prohibiting jury separation during deliberation. *Halmo*, footnote 5. Since the

decision in *Halmo*, that statute has been twice revised, and no longer distinguishes between jurors sworn and jurors deliberating. *Compare* Wis. Stat. § 972.12 (1985-86)[1] *with* Wis. Stat. § 972.12 (1987-88)[2] *with* Wis. Stat. § 972.12 (1991-92).[3] The statute in its current incarnation affords the trial court discretion in allowing a jury to separate or requiring them to remain together. *See* Wis. Stat. § 972.12 (2008-09)(identical to footnote 3, below).

While the court in *Halmo* based its ruling on the statute, the court's *reasoning* was not based on the existence of a statute, but rather recognized that the statute itself was aimed at the right to a fair trial and an impartial jury. *Halmo* at 372. While not universal,[4] some jurisdictions have adopted a *per se* rule against jury separation during deliberations, mandating reversal without even affording a chance for the presumption to be rebutted. *Kimoktoak v. State,* 578 P.2d 594, 596 (Alaska 1978). The 7th Circuit has adopted the *per se* rule without reliance on statute or code. *United States v. Panczko,* 353 F.2d 676 (7th Cir.1965), *cert. denied*; *United States v. D'Antonio,* 342 F.2d 667 (7th Cir.1965). The *Halmo*

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[1] (1) The jurors sworn may, at any time before the submission of the case, in the discretion of the court, be permited to separate or be kept in charge of a proper officer, except in trials for crimes punishable by life imprisonment, where the jurors shall be kept together as provided in sub. (2) after they have been sworn.

(2) When the jury retires to consider its verdict, an officer of the court shall be appointed to keep them together and to prevent communication between the jurors and others.

[2] (1) Except as provided in sub. (2), the court may direct that the jurors sworn be kept together or be permitted to separate. The court may appoint an officer of the court to keep the jurors together and to prevent communication between the jurors and others.

(2) In trials for crimes punishable by life imprisonment, the court shall appoint an officer of the court to keep the jurors together as provided in sub. (1) after the jurors have been sworn.

[3] The court may direct that the jurors sworn be kept together or be permitted to separate. The court may appoint an officer of the court to keep the jurors together and to prevent communication between the jurors and others.

[4] See 34 ALR 1115 for an exhaustive outline of different jurisdictions' treatments of the topic.

court's reasoning, and the rule it articulates, is thus justified and necessary even in the absence of a statute in order to preserve the constitutional right to a fair trial by an impartial jury. This is even more true now than it was when *Halmo* was announced, given the existence and accessibility of CCAP.

The court in *Halmo* found that a presumption of prejudice applied when a deliberating jury was allowed to separate. That presumption arose because of the jury's vulnerability to outside influences. Despite a trial court's admonitions, the temptation to CCAP a defendant is likely to be great, and the result is likely to be prejudicial. It is, in effect, exposing the jury to all offenses that a defendant has been charged with.[5] If in 1985, before the internet was accessible to the common public, threats to jury integrity were an issue which required a presumption of prejudice, so much more now in 2010 when a defendant's criminal history is at the fingertips of anyone with a computer. Over 78% of Wisconsin's approximately 5.7 million people have access to the internet in their homes.[6] That is over 4.4 million people. CCAP receives up to 5 million hits a day.[7] If Wisconsin's juries are representative of Wisconsinites overall, 9 out of 12 jurors go home to internet access.

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[5] A CCAP search for Bradley Brandsma at the time of the trial would have resulted in over 20 different case records.

[6] Thad Nation, *Wisconsin broadband internet access continues to grow*, GazetteXtra.com, February 23, 2010, available online at http://gazettextra.com/news/2010/feb/23/wisconsin-broadband-internet-access-continues-grow/ .

[7] Todd Richmond, *Doyle addresses CCAP legislation*, Wisconsin Law Journal, February 15, 2010, available online at http://www.wislawjournal.com/article.cfm/2010/02/15/Doyle-addresses-CCAP-legislation . This number is up from the 2.3 million hits per day in 2005 (the number reported in The Third Branch, Vol. 13, No. 1 Winter 2005 issue at 5) and 511,000 in 2003 (the number reported in The Third Branch, Vol. 11, No. 1, Winter 2003 at 5).

The State argued at the hearing on the motion for postconviction relief (and the judge found) that the presumption that a jury follows a judge's instructions defeats the presumption of prejudice which attaches when a jury is allowed to separate. (R. 42: 5-6, 9; A-App. 29-30, 33.) The oft repeated rule "we presume that the jury follows the instructions given to it" applies, however, to jury deliberations relative to the legal standards ("jury instructions" as in WI JI--Criminal) given it, not juror conduct. *See generally State v. Truax,* 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989); *State v. Deer,* 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985); *Johnson v. Pearson Agri-Systems, Inc.,* 119 Wis. 2d 766, 776, 350 N.W.2d 127 (1984) (all asserting the presumption that a "jury follows the instructions given to it" regarding only jury instructions, not jury conduct). *But see State v. Hagen,* 181 Wis.2d 934, 948, 512 N.W.2d 180 (1994) (Related not to jury instructions themselves, but the judge's instructions to disregard improper attorney comments). Undersigned counsel has found no Wisconsin case supporting the presumption as applied to jury conduct. In fact, *State v. Deer* itself, while announcing the presumption of jury compliance with jury instructions, delineated the ways in which juror conduct does not comply with court instructions.

As the court in *Halmo* noted, if the presumption of prejudice can be overcome at all then both an admonition before separation and a *voir dire* upon return would be required. *Halmo* at 374. In this case, while there was an admonition, there was no *voir dire*.

CONCLUSION

In the absence of a statute prohibiting jury separation during deliberations, this Court should adopt a rule that jury separation during deliberations is *per se* reversible error or, in the alternative, maintain the rule of a rebuttable presumption of prejudice announced in *Halmo*, albeit on constitutional grounds. This Court should in any event find that reversible error occurred in this case and afford the Bradley Brandsma a new trial.

Respectfully submitted on this 13th day of September, 2010.

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FORM AND LENGTH CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief, including the statement of the case, the argument, and the conclusion and excluding other content, is 1,567 words.

The text of the electronic copy of this brief is identical to the text of the paper copy.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of September, 2010.

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