**STATE OF WISCONSIN**

**COURT OF APPEALS**

**DISTRICT IV**

**Appeal No. 2010 AP001429 CR**
**Circuit Court Case No. 2008CM838**

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**BRADLEY M. BRANDSMA,**

**Defendant-Appellant.**

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

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# BRIEF OF PLAINTIFF-RESPONDENT

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**Respectfully Submitted,**

**STATE OF WISCONSIN,**
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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## STATUTES CITED

Page



## CASES CITED

**STATE OF WISCONSIN**

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**Appeal No. 2010 AP001429 CR**
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## POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument or publication is not requested.

## ARGUMENT

### I. THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO SEPARATE DURING DELIBERATION

#### A. Introduction

The Defendant-Appellant, Bradley Brandsma (herein after Brandsma) was convicted of misdemeanor battery following jury trial.

(32:4-5; A-App. 16-17.) After the jury had deliberated for approximately two hours and forty five minutes, the trial court chose to send the jury home and return in the morning to continue deliberating because of "courthouse security issues and so forth" and originally wanted to send the jury home at 5:00 p.m. (31:151; A-App. 3.) After an objection by defense counsel based on three reasons[1], the judge allowed the jury to deliberate until 5:15 p.m. (31:152-154; A-App.3-6.) The judge called the jury back in at 5:15 p.m. and gave them a full admonition not to do any outside research or talk to anyone about the case. (31:157-158; A-App.9-10.)

The next day, the trial court reconvened after the jury had returned and come to a verdict. No *voir dire* was done by the trial court and no such *voir dire* was requested by defense counsel. Upon the reading of the guilty verdict, defense counsel requested that the jury be polled and the judge did conduct a polling of the juror members. (32:4-5; A-App. 16-17.) The defense counsel did not object to the lack of a *voir dire* of the jury members. (32:4-7; A-App. 16-19.)

Brandsma argues that this court should either adopt a *per se* rule that allowing a jury to separate during deliberation is reversible error or should

[1] Defense counsel objected to the jury being sent home for three reasons (1) "Because they could be influenced by other parties, family members, et cetera. They could decide to, you know, what, do anything, look things up on the internet, look names up." (2) Brandsma was an inmate in the Dodge County Jail and there were concerns about him being released on time from Huber. (3) Defense counsel's wife was having surgery the next morning and he was her transportation and had planned on staying with her and transporting her home.

create a rule of a rebuttable presumption of prejudice based on the reasoning in ***State v. Halmo***, 125 Wis.2d 369, 371 N.W. 2d 424 (Ct. App. 1985). (Brandsma's Brief, 6).

B. The trial court properly exercised its discretion under Wis. Stat. § 972.12 in allowing the jury to separate during the deliberation.

Brandsma contends that his due process rights to a fair and impartial jury have been violated as a result of the trial judge not conducting a *voir dire* of the jury upon their return on the second day of the trial. (Brandsma's Brief, 2) That raises the question as to what process was not followed. The Wisconsin legislature has provided the process by statute and therefore, this court need not get to any constitutional analysis.

As Brandsma concedes, the version of Wis. Stat. § 972.12 that existed at the time that ***Halmo*** was decided is different from the version that existed at the time of the underlying trial in this matter. (Brandsma's Brief, 2-3). The version of the statute in effect at the time of ***Halmo*** made a clear distinction of giving a trial court discretion to allow separation of a jury prior to deliberation.

> (1) The jurors sworn may, at any time ***before the submission of the case, in the discretion of the court, be permitted 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.

Wis. Stat. § 972.12(1) (1985-86). (*emphasis added*) The legislature made another specific distinction in that no such separation was allowed in cases where the crime was punishable by life imprisonment.

The legislature has changed this statute not once but twice. As Brandsma alludes to, the legislature adopted the current language while maintaining the distinction for life imprisonment cases in the 1987-88 version. (Brandsma's Brief, 3).

> (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.

The legislature again changed the statute in the (1991-92) version, which was the same as the version in effect at the time of this case. In it, the legislature altered it to further give the trial court discretion by removing the prohibition of the separation of juries for any reason in a life imprisonment case. Therefore, the statute in its entirety read at the time of this matter,

> 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.

Wis. Stat. §972.12 (2008-2009) (*emphasis added*).

Brandsma asks this court to extend the reasoning of the ***Halmo*** court even though the statute itself is completely different. However, just as the

court in ***Halmo*** found that it need not decide the matter on constitutional grounds, the question before this court need not go further than the statute.

The wording of Wis. Stat. § 972.12 is clear and unambiguous. It clearly places the discretion of allowing juries to separate squarely with the trial court. While Brandsma wants this court to make a jump to finding a constitutional violation based on the reasoning of the ***Halmo*** court, the court in ***Halmo*** itself provided guidance. In its footnote to the conclusion that the trial court violated the statute when it allowed the jury to separate during it's deliberations, the court noted:

> We acknowledge that it is often expensive and perhaps inconvenient to sequester a jury in a criminal misdemeanor or traffic case. The statute however, makes no distinctions as to types of crimes and when to sequester the jury. It simply instructs that an officer of the court shall keep the jury together. ***It is for the legislature and not this court to make such distinctions.***

***Halmo***, 125 Wis.2d at 371-372 (FN3) (emphasis added). The legislature did make such a distinction by its amendments to Wis. Stat. § 972.12. The legislature moved from only allowing a trial court discretion before deliberation with no discretion in life sentence cases all the way to giving the trial court full discretion to allow a jury to separate at any stage once sworn in any case. Given this pattern of change of the statute after the Court of Appeals made it clear that such a distinction was within the purview of the legislature, there can be no argument that the statute is ambiguous.

If a statute is unambiguous, "judicial rules of construction are not used; thus, [the court] must arrive at the legislature's intent by giving the language its ordinary and clear meaning." ***Tesker v. Town of Saukville,*** 208 Wis. 2d 600, 606, 561 N.W.2d 338, Wis.App.,1997 (*citing* ***State ex rel. Milwaukee County v. Wisconsin Council on Criminal Justice***, 73 Wis. 2d 237, 241, 243 N.W. 2d 485, 487 (1976)).

Just as the court in ***Halmo*** found it was unnecessary to decide that case on constitutional reasons, the clear language of this statute makes it unnecessary to do so here. The legislature has given the trial court discretion in allowing juries to separate at any time during a trial once they are sworn. This is not limited to deliberations but rather at any stage of the proceedings.

The trial court properly exercised his discretion. As in all cases where an appellant is challenging the trial court's exercise of discretion, the court's standard of review is whether the trial court erroneously exercised its discretion. *See* ***State v. Krueger***, 119 Wis.2d 327, 336, 351 N.W.2d 738 (Ct.App.1984). The judge placed on the record his concern regarding the "courthouse security issues and so forth" and after hearing the objection of defense counsel, made the decision to wait for half an hour before sending the jury home. (31:152-154; A-App.3-6.) The statute allows the trial court this ability and thus, there was no error.

C. The jury is presumed to follow the instructions given to it and these instructions defeat any presumption of prejudice.

Even if this court wishes to extend the ***Halmo*** rebuttable presumption of prejudice to this case, the trial court's admonitions of the jury defeat any such presumption. This case is distinguishable from ***Halmo*** in a very important way. While like ***Halmo***, the trial court here did not conduct a *voir dire* of the jury upon their return the next morning, the admonition provided before the jury was sent home is vital.

In ***Halmo***, after an off the record telephone conversation between the judge, defense counsel, assistant district attorney and bailiff, the trial court on its own instructed the bailiff to send the jury home. The trial court did not admonish the jury in any way before the separation and no *voir dire* was conducted upon their return. *See* ***Halmo***, 125 Wis. 2d at 370-371. Here, the trial court conducted a thorough admonition with the jury. When releasing the jurors at 5:45 p.m., the judge instructed the jury members not to speak to anyone about the case including spouses, children or significant others, not do any "independent research on any aspects of this case or any parties or witnesses or anything else" and to wait until all 12 jury members were back together the next day. (31:157; A-App.9.)

Brandsma argues that the "oft repeated rule" of "we presume that the jury follows the instructions given to it" only applies to deliberations relative to the legal standards or jury instructions given to it rather than

juror conduct and makes a point that no Wisconsin case supporting the presumption as applied to juror conduct. (Brandsma's Brief, 5) Brandsma cuts too fine of a point on this issue. While it is true that some of the cases he cites for this proposition include jury instructions given regarding aspects of the law, *i.e.* s*ee* ***State v. Traux***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989), there will be many times when the trial court must admonish a jury to take a specific action. For example, in ***State v. Hagan***, 181 Wis.2d 934, 947-948, 512 N.W.2d 180 (Ct. App. 1994), the court reiterated the rule when a trial court admonished the jury to disregard remarks made by a prosecutor in opening and closing remarks it had ruled improper. This is not simply following some legal standard or instruction. Instructions or admonitions like this require a juror to take a specific action, i.e. not taking that statement into consideration when he or she is deciding the case. The same can be said for a trial court's admonition to not speak to anyone else or do any independent research. Juries are assumed to follow those directions, not just legal guidance in deciding an issue of law.

The trial court's admonition given prior to the jury leaving for the night was only enforced by the admonition given as part of the standard jury instructions prior to closing arguments.

> Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict.

(31:122; R-App. 1) Even if the rule that juries are assumed to follow a trial court's instructions given them only applies to jury instructions, the trial court in this case so instructed the jury.

D. There is no legal basis to require a *voir dire* or create a *per se* rule of prejudice.

Brandsma provides no legal basis for requiring a trial court to conduct a *voir dire* of a jury if they are allowed to separate. Using the reasoning from ***Halmo***, Brandsma asks this court to require such a *voir dire* for juries in deliberation. (Brandsma's Brief, 3-6) However, as Wis. Stat. § 972.12 no longer makes a distinction between juries deliberating and simply "sworn", would this then also require a trial court to make a *voir dire* any time a jury is allowed to separate during a multiple day trial? The statute itself does not require any such action and Brandsma cites to no case law for the proposition as well.

In support of his proposition that the court adopt a *per se* rule against separation during deliberation, Brandsma cites to cases in Alaska and the 7th Circuit. The Alaskan case, ***Kimoktoak v. State***, 578 P.2d 594 (Alaska 1978), involved a specific statute that required juries to be kept together. ***Id*** at 595 (citing Alaska Criminal Rule 27(e)(2)). Any such statute is lacking in this case.

The assertion that the 7th Circuit has adopted the *per se* rule without reliance on statute or code is incorrect. The court in ***United States. v.***

***Arciniega***, 574 F.2d 931 (7th Cir.1978)*cert. denied*, overruled the holdings cited, ***United States v. Panczko***, 353 F.2d 676 (7th Cir.1965)*cert. denied*, and ***United States v. D'Antonio***, 342 F.2d 667 (7th Cir.1965)*cert. denied*. In doing so, the court stated:

> We discern that the holdings of ***D'Antonio*** and ***Panczko*** have served to curtail the district court's traditional exercise of discretion in managing juries. We overrule ***D'Antonio*** and ***Panczko*** to the extent that those decisions remove from the district judge's discretion the decision to allow a jury to separate. We now hold that the decision to allow a jury to separate rests within the sound discretion of the district court, and that for separation to constitute reversible error there must be an objection supported by specific reasons against separation and a showing that the defendant was actually prejudiced by reason of the separation.
>
> In so holding, we are in accord with the views expressed by Judge Swygert in his dissent in ***D'Antonio***, supra, 342 F.2d at 671-672, and with the position of virtually every circuit which has addressed the issue. ***United States v. Sullivan***, 414 F.2d 714 (9th Cir. 1969); ***United States v. Menna***, 451 F.2d 982 (9th Cir. 1971); ***United States v. Breland***, 376 F.2d 721 (2nd Cir. 1967); ***Cardarella v. United States***, 375 F.2d 222 (8th Cir. 1967); ***Hines v. United States***, 365 F.2d 649 (10th Cir. 1966).

***Arciniega*** at 933.

***Arciniega*** was a case that involved separation of a jury due to a bomb threat. No admonition was given before they were separated but the trial court did conduct a *voir dire* upon reconvening the next day. However, it shows the discretion to the separation of juries should squarely sit with the trial court. The trial court properly exercised this discretion by placing its reason on the record and properly admonishing the jury.

## CONCLUSION

For the above stated reasons the State of Wisconsin requests that the court find that there was no abuse of error in allowing the jury to separate during deliberations and affirm the circuit court's verdict.

Respectfully Submitted this 15th of October, 2010.

State of Wisconsin

By _____

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.18(8)(b) and (c) for a document produced with a proportional serif font. The length of this entire document is 2469 words.

Dated this 15th day of October, 2010.

By: _____

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**CERTIFICATE OF COMPLIANCE**
**WITH WIS. STAT. § 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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 15th day of October, 2010.

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