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OF WISCONSIN**

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
CASE NO. 2017AP1184 CR**

**STATE OF WISCONSIN,
Plaintiff-Respondent,**

V.

**MARWAN MAHAJNI,
Defendant-Appellant.**

**ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING DEFENDANT-APPELLANT'S
MOTION FOR POST-CONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY,
THE HONORABLE THOMAS DUGAN AND
JEFFREY WAGNER, PRESIDING**

**BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT**

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**STATE OF WISCONSIN
COURT OF APPEALS
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CASE NO. 20176AP1184 CR**

**STATE OF WISCONSIN,
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Defendant-Appellant.**

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THE HONORABLE TIMOTHY DUGAN AND
JEFFREY WAGNER, PRESIDING**

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE ISSUES

1. Did the trial court judge erroneously exercise his discretion by denying the defendant's Motion for a new trial?

Denied by the post-conviction judge.

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

The defendant-appellant believes that the briefs filed by the parties to this appeal will adequately develop the issues

involved. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

On March 3, 2014, the defendant, Marwan Mahajni, appeared before that branch of the circuit court for Milwaukee County presided over by the Honorable Timothy Dugan for a trial by jury. On March 7, 2014, the jury returned verdicts of guilty as to one count of Kidnapping and one count of Second Degree Sexual Assault.

On June 13, 2014 the defendant, Marwan Mahajni, again appeared before that branch of the circuit court for Milwaukee County presided over by the Honorable Timothy Dugan for sentencing. The court imposed a bifurcated sentence of 15 years initial confinement in the State Prison System and 10 years extended supervision in connection with each of the counts, and directed that the sentences imposed run consecutive to each other.

Mr. Mahajni is currently incarcerated at the Waupun Correctional Institution in Waupun, Wisconsin. He brought a motion for post-conviction relief pursuant to **Wisconsin State Statute** section 809.30(2)(h) (R. 96-1-7; A. App. 106-112), seeking a new trial on the grounds that the jury had been exposed to extraneous information during the course of its deliberations. This motion was denied, without a hearing, by a Decision and Order of the Court, the Honorable Jeffrey A. Wagner, presiding, dated May 12, 2017. (R. 101-1-6; A. App. 113-118) This appeal followed.

PRE-APPEAL PROCEEDINGS

A. Post-Conviction Motions

On April 7, 2014, the defendant, who was at that time represented by Attorney Kristian K. Lindo, brought a presentencing Motion for a New Trial. (R. 35-1-5; A. App. 101-105) The basis for the Motion was that Bridget Stewart, one of the jurors in the defendant's trial, asked the assigned court bailiff if a "hung jury" was permitted. According to the presentence motion, the bailiff informed the jury that a hung jury was not permissible, and that the jury had to return a unanimous verdict of either guilty or not guilty. The Motion in question did not contain an affidavit from Ms. Stewart.

On February 27, 2017, the defendant, who was at that time represented by Attorney Angela Kachleski, brought a post-conviction, post-sentencing motion. (R. 96-1-7; A. App. 106-112) That motion alleged that during deliberations, one of the jurors asked a bailiff if they could be a hung jury and the bailiff told them they had to all agree to be guilty or not guilty. Two of the jurors stated that they stayed to speak with Judge Dugan after the verdict was read and it was at that time they realized they could have been a hung jury. Although the 2017 motion did not include any affidavits by any members of the jury, it included an affidavit by Sarah Decorah, an investigator hired on behalf of the defendant. As pertinent to this case, Ms. Decorah's affidavit stated as follows:

3. I spoke with Juror Michael Levy. He told me that he had a “vague recollection of being informed the jury had to all agree on guilty or not guilty.” Mr. Levy told me he was under the impression they were not allowed to be hung. Mr. Levy recalled that when the jury was walking into the jury room, a juror asked the bailiff and the bailiff told them they all had to agree on guilty or not guilty.

4. I spoke with Juror Felicia Givens. She stated that she is pretty certain the bailiff told them they had to be guilty or not guilty. After the trial concluded, the judge spoke to the jurors and told them they could have been hung or deadlocked. Ms. Givens stated that jurors commented that if they had known that, things would have turned out differently.

5. I spoke with Juror Devonshra Thurman. She stated that during deliberations, she and others brought up whether or not they could be hung on some counts, she said that the foreperson informed them that the bailiff said no, they all had to agree on guilty or not guilty and they were not allowed to be hung. She stated that she did stay behind and spoke to the judge at the conclusion of the trial and that is when she found out that they were allowed to be hung.

6. I spoke with Juror Jason Hoaglan. He stated that he did recall the bailiff answering questions of the jurors during deliberations. One of the jurors asked the bailiff whether or not they all had to agree on the verdict. The bailiff told them something to the effect that they had to come up with a decision and that they all had to agree on a decision. The bailiff also told them that they all had to agree on guilty or not guilty.

(R. 96-6-7; A. App. 111-112)

B. The post-conviction court's decision

The record shows the following decision by the post-conviction court with regard to the 2017 post-conviction motion:

As a first matter, the defendant's motion is misleading or, at best, inartfully worded when he argues that the bailiffs statement that the jury could not be hung was "not the law." That argument suggests that a "hung jury" is a verdict that a jury may reach. A hung jury is not a verdict. It is the result of a jury that is so irreconcilably divided in opinion that they cannot agree upon any verdict by the required unanimity. While jurors are instructed that their verdict must be unanimous, they are not instructed that they may be a hung jury because that is not a legally receivable verdict. If the jurors are so irreconcilably divided in opinion that they are unable to all agree on a verdict, the remedy is for the court to declare a mistrial, allowing the State the option of retrying the case before another jury.

(R. 101-3; A. App. 115)

* * *

The defendant seeks to impeach the jury's verdict in this case on the basis that a bailiff essentially instructed them that they could not be a hung jury. Section 906.06(2), Stats., provides that "the party seeking to impeach the verdict has the burden to prove that the juror's testimony concerns extraneous information, that the extraneous information was improperly brought to the jury's attention, and that the extraneous information was potentially prejudicial." *State v. Eison*, 194 Wis. 2d 160, 172 (1995). In this instance, the court agrees with the State that the defendant has not sufficiently demonstrated that extraneous information was brought before the jurors.

First, the defendant relies upon the affidavit of a private investigator and not the individual jurors. The investigator's affidavit about what the jurors told her concerning their recollections about what an unidentified bailiff told other unnamed jurors relies upon layers of hearsay and is unacceptable as evidence. Counsel for the defendant purports to justify her use of the investigator's affidavit at footnote two of her motion: "This case has an unusual background. There was information from some of the jurors that they felt harassed by trial counsel, Attorney Kovac after the jury trial. Because of this, counsel is submitting the sworn statement of Investigator Decorah regarding the statements of the jurors made to her. Each of the jurors will testify should hearing be granted." Counsel does not identify which jurors reported being harassed by Attorney Kovac. The court is not persuaded that allegations by jurors of harassment by Attorney Kovac occurring around the time of the trial provide a justification for postconviction counsel's decision to rely on the hearsay affidavit of the investigator. It is the defendant's burden to show that extraneous information was presented to the jurors, and the affidavit of the investigator does not cut the mustard.

Furthermore, the State is correct that the affidavit is fatally lacking in critical information. None of the jurors identify the bailiff in question or explain precisely what was said, when it was said, who it was said to or where the jury was when the statement was allegedly made. The jurors' statements, made approximately three years after the trial, show that they have vague or uncertain recollections about these important details. While the jurors cannot reasonably be expected to be able to identify the bailiff by name three years after the trial, they do not provide any physical descriptors for purposes of identifying the bailiff (e.g. gender, race, hair color, hair

length, approximate height, weight and age, etc.). Moreover, the defendant has provided documentation from the Sheriffs Department or from Judge Dugan, who is now an appellate judge, identifying which bailiff(s) were assigned to Judge Dugan's court on the dates the jury was deliberating the case. Without affidavits from the jurors to know precisely what was said and without knowing the identity of the bailiff in question, the defendant's motion rests on nothing more than hearsay, which is insufficient for purposes of a hearing.

Even assuming that the bailiff told the jurors that they could not be hung, or said something that left them with that impression, the defendant has not demonstrated that he was prejudiced. The jury found the defendant guilty on counts one and two and not guilty on counts no three, four and five. If the jurors believed that they had to all agree on guilty or not guilty, it did not prejudice the defendant as to the counts that resulted in an acquittal. To the contrary, it worked to the defendant's benefit because jeopardy attached to those counts, whereas if the jury had been "hung," the court would have declared a mistrial and he could have been retried on those counts.

With respect to the counts of conviction, none of the jurors who spoke to the investigator stated that the bailiffs statement affected their verdict on those counts. Although Juror Givens stated that after speaking with Judge Dugan, after the verdicts were read, that "jurors commented that if they had known [that they could be hung or deadlocked], things would have turned out differently," she does not explain how things would have turned out differently nor state that she would have reached a different verdict. The court polled each juror about the verdicts and each juror confirmed that the verdicts presented were their verdicts. (Tr. 3/10/14, pp. 4-5). The court confirmed that the verdicts were

unanimous. (Id.). The court finds the defendant has not met his burden of showing that the jury's verdict was prejudiced by extraneous information for purposes of taking testimony from jurors at a hearing, and therefore, the court denies the defendant's motion for a new trial on this basis.

(R.101-4-6; A. App. 116-118)

On June 1, 2017, Attorney Kachleski filed a Motion for Reconsideration of the above denial. (R. 102-1-6; A. App. 119-124) That Motion was denied, again without a hearing, by a Decision and Order dated June 6, 2017. In denying the Motion for Reconsideration, the court notes:

In its prior decision, the court found that the defendant had not demonstrated that the jury's verdict on the counts of conviction in this case (counts one and two) was prejudiced by extraneous information because none of the jurors who spoke to the investigator stated that their verdict on those counts would have been different if they had not been told that they could not be a hung jury. Givens' Affidavit does not cause the court to reach a different conclusion. Givens cannot speak to what was going through the minds of the other jurors when they reached their verdict on counts one and two, and therefore, she is not qualified to give an opinion that their verdict on those counts would have been different if they had not been informed that they could not be a hung jury. For her own part, Givens does not explain how that information affected her verdict. Her attempt to speak for the entire jury panel is vastly conclusory, insufficient and does not raise a veritable issue of fact.

The defendant has also provided the court with documentation identifying the bailiffs who were assigned to Judge Dugan's court on March 7, 2014 and March 10, 2014. It is still unknown

which bailiff allegedly instructed the jury that they could not be hung, although the defendant states in his motion that one of the jurors (whom he does not identify) described the bailiff as an Asian male. (Defendant's motion to reconsider at p. 2). In any event, the names of the bailiffs do not cure the other deficiencies in the defendant's motion as explained in the court's prior decision. The defendant still has not explained "precisely what was said, when it was said, who it was said to or where the jury was when the statement was allegedly made." (See Decision and Order dated May 12, 2017 at pp. 4-5). His motion for a new trial remains conclusory and insufficient to warrant relief. (R. 103-1-2; A. App. 125-126)

ARGUMENT

1. The trial court judge erroneously exercised his discretion by denying the defendant's Motion for a new trial.

A. Extraneous Information – Standard of review

Extraneous information is information, other than the general wisdom that a juror is expected to possess, that a juror obtains from a non-evidentiary source. A juror who consciously brings non-evidentiary objects to show the other jurors improperly brings extraneous information before the jury. **State v. Eison**, 188 Wis. 2d 298, 525 N.W.2d 91 (Ct. App. 1994).

Under **State v. Messelt**, 185 Wis. 2d 255, 282, 518 N.W.2d 232, 243 (1994), a defendant in a criminal case must "prove by clear, satisfactory and convincing evidence that there

is a reasonable possibility that the extraneous information would prejudice a hypothetical average jury."

To be entitled to an evidentiary hearing on a postconviction motion claiming misconduct involving a jury, a defendant must show both that the evidence is competent and therefore admissible, and that the facts, if found to be true, would require a new trial. See **State v. Marhal**, 172 Wis.2d 491, 497-98, 493 N.W.2d 758, 761-62 (Ct. App. 1992). In addition, to be entitled to a new trial because of unauthorized communications between a bailiff or other officer of the state and the jury, a defendant must show that he or she was probably prejudiced by the contact. See **State v. Dix**, 86 Wis.2d 474, 491, 273 N.W.2d 250, 258, cert. denied, 444 U.S. 898 (1979).

A circuit court's decision to grant or deny a motion for a new trial is reviewed for an erroneous exercise of discretion. **Eison**, 194 Wis. 2d at 171. An erroneous view of the facts or the law constitutes an erroneous exercise of discretion. **Id.** A motion for a new trial on the ground of prejudicial extraneous information also requires the circuit court to make a number of underlying evidentiary, factual, and legal determinations, and we apply different standards of review to these determinations depending on their nature. **Manke v. Physicians Ins. Co. of Wis.**, 2006 WI App 50, ¶17, 289 Wis. 2d 750, 712 N.W.2d 40.

"Once the determination is made that a juror's testimony is competent and admissible under [WIS. STAT. §] 906.06(2), the circuit court must then make a factual and a legal determination." **Eison**, 194 Wis. 2d at 177. The circuit court must be persuaded by clear and satisfactory evidence that the

juror or jurors engaged in the alleged conduct. **Id.** If the court makes that factual finding, it must then determine, as a matter of law, whether the extraneous information constituted prejudicial error requiring reversal of the verdict. **Id.**

The state is required to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." **Eison**, 194 Wis. 2d at 178. The state satisfies its burden by showing there "is no reasonable possibility that the verdict of a hypothetical average jury would have been influenced by the extraneous information improperly brought to the jury's attention." **Id.** at 181.

B. The Post-Conviction Judge erroneously exercised his discretion

Wisconsin Stat. § 906.06(2) governs what a juror may testify to regarding the deliberations of the jury panel of which the juror was a member. It provides as follows:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror

concerning a matter about which the juror would be precluded from testifying be received.

Wisconsin Stat. § 906.06(2) "prohibit[s] a juror's testimony as to statements made during deliberations and as to the deliberative processes of the jurors but allowing a juror's testimony on occurrences and events outside the record which may indicate improper extraneous influences on the jury." **State v. Poh**, 116 Wis. 2d 510, 517-18 343 N.W.2d 108 (1984). As the supreme court has explained:

To demonstrate that a juror is competent to testify under [§] 906.06(2), the party seeking to impeach the verdict has the burden to prove that the juror's testimony concerns extraneous information (rather than the deliberative processes of the jurors), that the extraneous information was improperly brought to the jury's attention, and that the extraneous information was potentially prejudicial. **Id.** at 520.

It is abundantly clear in this case that the information that was received by the jury as to their options during deliberations was extraneous. That is, it was neither received as a result of testimony nor a part of the instructions from the court. It is equally clear that it was inaccurate. That is, although the post-conviction court is correct that a "hung jury" is not a receivable verdict, it is, nonetheless, an option that the jury has. It is a conclusion that they are allowed, as part of deliberations, to reach – that they are unable to reach a verdict.

Nor is the court's focus on "precisely what was said, when it was said, who it was said to or where the jury was when the statement was allegedly made", the defendant asserts, a correct statement of the defendant's burden in such matters.

The affidavits submitted in the court below adequately, if not “precisely”, identify what was said: the jurors were inaccurately informed that they did not have an option that every jury actually has. They were inaccurately informed that they were *required* to reach a verdict. They were inaccurately informed that the verdict had to be unanimous.

Moreover, the affidavits adequately, if not “precisely”, identified the source of the inaccurate and extraneous information. That information, they agree, came from a figure of authority – a court bailiff.

The post-conviction court’s focus on the inability of the jurors to identify the bailiff is, the defendant asserts, misplaced. The affidavits submitted in the court below agreed as to the necessary particulars. The information came from a bailiff. The information came from a bailiff assigned to that court. The information came from a bailiff who interacted with them during their deliberations. The information, from this bailiff who was assigned to that court and who interacted with them during their deliberations and who took it upon himself to inform them as to their options as jurors instead of, as would have been proper, telling them to ask their questions of the judge himself, was inaccurate. The factors on which the court focused -- gender, race, hair color, hair length, approximate height, weight and age – are, the defendant asserts, simply not relevant in this context. The affidavits submitted in the court below all agreed as to the one piece of information that was actually relevant to this issue: that the information in question

came from a bailiff assigned to that court who interacted with them during their deliberations.

With regard to question of prejudice, the affidavit submitted as to Juror Givens, which indicates that “jurors commented that if they had known [that they could be hung or deadlocked], things would have turned out differently,” adequately if not “precisely” establishes the prejudice necessary to support the defendant’s motion. In the first instance, it is clear that the comments relayed by Juror Givens were comments to which she was a witness. They were comments that were made after the verdicts had been read. They were comments that were made, post-verdict, after the jurors had become aware that the information that came from a bailiff assigned to that court who interacted with them during their deliberations was inaccurate. It cannot seriously be argued that Juror Givens was “attempting to speak for the whole jury.” Instead, she was simply relaying statements that she had heard from other jurors.

Nor is the alleged unanimity of the jurors at the time that the verdict was read a deciding factor. At the time that the verdict was read; at the time that the jury was polled; jurors were still under the inaccurate impression that they were *required* to reach a verdict, and that the verdict that they were required to reach had to be unanimous. It should come as no surprise, then, that the jurors expressed unanimity during the polling process.

Finally, the post-conviction court’s decision improperly required the defendant to prove that he was, in fact, prejudiced

by the extraneous information. That is not a correct statement of the defendant's burden. Rather, "the party seeking to impeach the verdict has the burden to prove that the juror's testimony concerns extraneous information (rather than the deliberative processes of the jurors), that the extraneous information was improperly brought to the jury's attention, and that the extraneous information was *potentially* prejudicial." **Poh**, at 520 [Emphasis added]

Juror Givens affidavit clearly states that "if [the] jurors had known that [they] could be hung, we would have hung on the two guilty verdicts." It is clear from any reasonable reading of this affidavit and these words that the jurors' deliberations were affected by the extraneous information that came from a bailiff assigned to that court who interacted with them during their deliberations. It is reasonable to conclude that juror Givens' belief that the jury would have hung on the two guilty verdicts comes not from attempting to read the minds of her fellow jurors but from her own conviction that she would have continued to vote for acquittal on those charges had she not believed that she had to give in in the interests of unanimity. To this extent, then, the defendant adequately demonstrated the potential for prejudice that was necessary to call the verdicts into question.

The defendant is entitled to a new trial.

CONCLUSION

For all of the above reasons the defendant-appellant requests that this court enter an order reversing the defendant's

conviction in the above case and granting the defendant's motion for a new trial by jury.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a proportionally spaced font. The length of the brief is 3,786 words.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of

an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT: § (RULE) 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 23rd day of July, 2018.

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