STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I/IV

Case No. 2017AP1184-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARWAN MAHAJNI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION, AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, AND AN ORDER DENYING A MOTION FOR RECONSIDERATION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN AND JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

The State reframes the issue.

A jury convicted Defendant-Appellant Marwan Mahajni of one count of kidnapping and one count of second-degree sexual assault. The jury acquitted Mahajni of three additional counts of second-degree sexual assault. After sentencing, Mahajni moved for a new trial on his claim that extraneous information prejudiced the jurors. Specifically, he claimed that during deliberations a bailiff informed the jury that it could not be a hung jury. The circuit court denied his motion without a hearing, and it also denied his subsequent motion for reconsideration without a hearing.

Is Mahajni entitled to an evidentiary hearing on his motion for a new trial?

The circuit court held: No.

This Court should affirm.

INTRODUCTION

This Court should affirm the postconviction court's decision that denied Mahajni's motion for a new trial without holding an evidentiary hearing. The record conclusively demonstrates that Mahajni is not entitled to relief. He has failed to meet his burden of proving that jurors were potentially prejudiced by extraneous information. As the circuit court correctly determined, "[n]one 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." (R. 101:4–5.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case can be resolved by applying well-established legal principles to the facts of the case.

STATEMENT OF THE CASE

The complaint, trial, verdict, and sentence

Mahajni was charged with one count of kidnapping (Count 1) and four counts of second-degree sexual assault (Counts 2 through 5). (R. 1.) According to the complaint, Mahajni forced the victim, VJN, on a bed in his residence and confined her by physically holding her down. (R. 1:1–2.) Mahajni prevented VJN from leaving the bedroom "all for the purpose of forcing her to engage in multiple sex acts with him without her consent, thereby holding her to service, and causing her injury in the form of bruising, redness, scratches, bite marks and significant pain." (R. 1:1–2.) Mahajni pled not guilty and proceeded to trial.

At trial, VJN testified that on the evening immediately before the assaults, she met Mahajni and spent most of the evening out with him at various restaurants and bars. (R. 122:62, 67–68.) She and Mahajni then went to his residence to watch a movie the next morning around 1:00 a.m. (R. 122:69.) At some point after she had arrived at his residence, Mahajni called her into his bedroom, telling her that he just wanted to show her something. (R. 122:72.) Upon entering Mahajni's bedroom, VJN saw that Mahajni was wearing only his underwear. (R. 122:74.) After "wrestling" around for a bit, VJN told Mahajni that she wanted to go watch the movie, and she started walking back to the living room. (R. 122:75–76.) Mahajni grabbed her arm, threw her on the bed, and then "pinned" her to the bed. (R. 122:77–78.) Mahajni struck her across the face, yelled at her and called her names, spat in her

face, and repeatedly hit her on her head. (R. 122:80–81.) He then forced VJN to repeatedly have various forms of sexual contact, including putting his penis in her mouth (R. 122:94), and putting his mouth on her vagina (R. 122:96, 97). Mahajni eventually fell asleep, VJN escaped, and she drove herself to the police department to report the assaults. (R. 122:107; 123:6.)

At the conclusion of the trial, the trial court instructed the jury on unanimity: "This is a criminal, not civil case, therefore before the jury may return a verdict which may legally be received, that verdict must be reached unanimously as to each count. In a criminal case all 12 jurors must agree in order to arrive at a verdict on each count." (R. 126:131.)

The jury ultimately convicted Mahajni of Counts 1 and 2 and acquitted him of Counts 3, 4, and 5. (R. 32.) After the verdict, the trial court asked each individual juror, "[i]s each verdict, as I've just read it, your verdict as to each count, and the answer yes means yes, they are." (R. 127:5.) Every juror answered, "Yes." (R. 127:5–6.)

The court ultimately sentenced Mahajni to 30 years of initial confinement and 20 years of extended supervision. (R. 73.)

The postconviction motion and affidavit

Mahajni moved for postconviction relief. (R. 96.) He argued that he was entitled to a new trial based on extraneous information being brought into the jury room. (R. 96:2.) Mahajni alleged that four of the jurors reported to a private investigator 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 on guilty or not guilty. (R. 96:2.) Two of the jurors stated to the investigator that they stayed to speak with the trial judge after the verdict was read and that it was at that time they realized they could have been a hung jury. (R. 96:2.) Finally, one of the jurors stated to the investigator

that, had the jury known that they could have been a hung jury, "things would have turned out differently." (R. 96:2.)

In support of his motion, Mahajni submitted an affidavit, not of any jurors, but of the investigator he hired. (R. 96:6–7.) In the affidavit, investigator Sarah Decorah provided that she spoke to jurors Michael Levy, Felicia Givens, Devonshra Thurman, and Jason Hoaglan. (R. 96:6–7.) Decorah reported:

> 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.
>
> 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.
>
> 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. [S]he 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.
>
> 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.)

The postconviction court's decision

After briefs were submitted by both parties, the circuit court denied Mahajni's motion without holding a hearing. (R. 101.) The court found Mahajni's motion "misleading or, at best, inartfully worded" when he argued that the bailiff's statement that the jury could not be hung was "not the law." (R. 101:3.) The court noted that jurors "are not instructed that they may be a hung jury because that is not a legally receivable verdict." (R. 101:3.)

The court agreed with the State that Mahajni did not demonstrate that extraneous information was brought before the jurors. (R. 101:4.) It determined that Decorah's "affidavit is fatally lacking in critical information." (R. 101:4.) Specifically, "[n]one 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." (R. 101:4–5.) Rather, the court determined, "[t]he jurors' statements, made approximately three years after the trial, show that they have vague or uncertain recollections about these important details." (R. 101:5.)

The court recognized that, while the jurors could not be expected to be able to name the bailiff three years after trial, the affidavit did not provide any physical descriptions of the bailiff. (R. 101:5.) Additionally, Mahajni did not provide any documentation identifying which bailiff or bailiffs were working on the dates the jury deliberated. (R. 101:5.) The court determined that "[w]ithout affidavits from the jurors to know precisely what was said and without knowing the identity of the bailiff in question, [Mahajni's] motion rests on

nothing more than hearsay, which is insufficient for purposes of a hearing." (R. 101:5.)

The court next determined that "[e]ven assuming that the bailiff told the jurors that they could not be hung, or said something that left them with that impression," Mahajni failed to prove that he was prejudiced. (R. 101:5.) The court noted that the jury found Mahajni guilty on Counts 1 and 2 and not guilty on the remaining counts. (R. 101:5.) The court explained:

> 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 bailiff's statement affected their verdict on those counts.

(R. 101:5.)

For example, although Juror Givens stated that after speaking with the trial judge the "jurors commented that if they had known [that they could be hung or deadlocked], things would have turned out differently," the court noted that Juror Givens did "not explain *how* things would have turned out differently nor state that *she* would have reached a different verdict." (R. 101:5–6.)

Therefore, for the above reasons, the court found that Mahajni did not meet "his burden of showing that the jury's verdict was prejudiced by extraneous information for purposes of taking testimony from jurors at a hearing." (R. 101:6.) The court denied Mahajni's motion for a new trial. (R. 101:6.)

Mahajni's motion for reconsideration

Mahajni moved for reconsideration. (R. 102.) This time, Mahajni offered affidavits of two jurors: Givens and Thurman. (R. 102:4–5.) Givens provided in her affidavit that: (1) the bailiff told the jury it "could not be a hung jury," and (2) "if we jurors had known that we could be hung, we would have hung on the two guilty verdicts." (R. 102:4.) Thurman provided in her affidavit that the *foreperson* informed the jury that the bailiff told the foreperson the jury was "not allowed to be hung." (R. 102:5.) Mahajni argued that because the jury "received extraneous information from the bailiff and based on Ms. Givens' statement that information led specifically to the jury's guilty verdicts on counts one and two, Mr. Mahajni was prejudiced." (R. 102:2.)

Mahajni also provided a document with his reconsideration motion that identified two bailiffs who were assigned to the trial judge's court on March 7, 2014, and March 10, 2014.[1] (R. 102:6.) According to Mahajni's motion, "[i]n a separate statements [sic] made by one of the jurors, they described the bailiff as an Asian male." (R. 102:2.) Mahajni did not identify this juror. (R. 102:2.) Further, neither Thurman nor Givens claimed in their affidavits that the bailiff was an Asian male, and neither identified the bailiff in their affidavits. (R. 102:4–6.)

The circuit court denied Mahajni's reconsideration motion without a hearing. (R. 103.) The court found that Thurman's affidavit offered "nothing substantially different than what was related by the investigator in [Mahajni's] prior motion and does not cause the court to reconsider its decision in this matter." (R. 103:1.)

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[1] Jury deliberations commenced on March 7, 2014, and the jury reached its verdicts on March 10, 2014. (R. 126; 127.)

Givens' affidavit, similarly, also did not cause the court to reach a different conclusion. (R. 103:2.) The court determined that "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." (R. 103:2.) And, "[f]or 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." (R. 103:2.)

With respect to the document identifying two bailiffs who were assigned to the trial court, the postconviction court recognized that "[i]t is still unknown which bailiff allegedly instructed the jury that they could not be hung, although [Mahajni] states in his motion that one of the jurors (whom he does not identify) described the bailiff as an Asian male." (R. 103:2.) The court determined that the bailiffs' names "do not cure the other deficiencies in [Mahajni's] motion as explained in the court's prior decision." (R. 103:2.) Specifically, Mahajni still did not 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." (R. 103:2 (citing R. 101:4–5).) The court concluded that Mahajni's "motion for a new trial remains conclusory and insufficient to warrant relief." (R. 103:2.)

Mahajni appeals.

STANDARD OF REVIEW

Mahajni challenges the circuit court's decision denying his motion for a new trial. "A circuit court invokes its discretion in resolving a defendant's motion for a new trial. An appellate court will not overturn the circuit court's decision unless the circuit court erroneously exercised its

discretion." *State v. Eison*, 194 Wis. 2d 160, 171, 533 N.W.2d 738 (1995). "When a motion for a new trial is based on extraneous information improperly brought to the attention of the jury, the circuit court must . . . decide underlying issues of both fact and law." *Id.* "A circuit court's erroneous view of the facts or the law constitutes an erroneous exercise of discretion." *Id.* Appellate courts "will affirm a circuit court's decision when the record shows that the circuit court looked to and considered the facts of the case and arrived at a conclusion consistent with applicable law." *Id.* A defendant does not automatically receive an evidentiary hearing simply by arguing he is entitled to a new trial. If the motion fails to allege sufficient facts, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may, in the exercise of its discretion, deny the motion without a hearing. *See Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972); *see also State v. Bentley*, 201 Wis. 2d 303, 313–14, 548 N.W.2d 50 (1996). This Court reviews a discretionary decision to grant or deny a hearing under the erroneous exercise of discretion standard. *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668.

ARGUMENT

The circuit court properly exercised its discretion when it denied Mahajni's motion for a new trial without an evidentiary hearing where the record conclusively demonstrates that Mahajni is not entitled to relief on his claim that jurors were potentially prejudiced by extraneous information.

A. Legal principles

To be entitled to an evidentiary hearing on a postconviction motion, the moving party must present detailed, nonconclusory facts establishing who, what, when,

where, why, and how an error justifies a new trial. *State v. Allen,* 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433.

Wisconsin Stat. § 906.06(2) "establishes a general prohibition against the use of juror testimony to impeach a verdict." *State v. Messelt*, 185 Wis. 2d 254, 274, 518 N.W.2d 232 (1994). The statue does provide, however, two limited exceptions to the rule against juror testimony. Specifically, it provides that "[u]pon an inquiry into the validity of a verdict . . . 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." Wis. Stat. § 906.06(2).

The party seeking to impeach the verdict must demonstrate that a juror's testimony is admissible by establishing (1) that the juror's testimony concerns extraneous information (rather than the deliberative process of the jurors), (2) that the extraneous information was improperly brought to the jury's attention, and (3) that the extraneous information was potentially prejudicial. *Eison*, 194 Wis. 2d at 172.

"'Extraneous information' is information that is not of record and is not part of the general knowledge we expect jurors to possess. . . . [It], in contrast with the commonly known facts and experiences we expect jurors to rely on in reaching their verdict, comes 'from the outside.'" *Eison*, 194 Wis. 2d at 174 (citations omitted). "[In] order to fall within the exception of Wis. Stat. § 906.06(2), [extraneous information] must also be potentially prejudicial." *State v. Broomfield*, 223 Wis. 2d 465, 478, 589 N.W.2d 225 (1999). "The level of prejudice required for purposes of determining competency under § 906.06(2) is necessarily lower than prejudice needed to successfully impeach a verdict." *Id.* "Information may be potentially prejudicial if it conceivably relates to a central issue of the trial." *Id.*

If a court determines that testimony is competent under Wis. Stat. § 906.06(2), it then conducts two additional analyses before deciding whether a new trial is warranted. "First, the trial court must determine by clear, satisfactory and convincing evidence that the juror made or heard the statements or engaged in the conduct alleged." *Messelt*, 185 Wis. 2d at 281. "Only if the evidence is clear, satisfactory and convincing must the court then make the legal determination of whether the extraneous information constitutes prejudicial error requiring reversal of the verdict." *Id.*

B. The circuit court properly exercised its discretion in denying Mahajni's motion for a new trial without an evidentiary hearing because he fails to show that the testimony would be admissible under Wis. Stat. § 906.06(2) and *Eison*.

The circuit court appropriately exercised its discretion when it denied Mahajni's postconviction motion for a new trial without a hearing. To review that decision, this Court should apply Wis. Stat. § 906.06(2) and the *Eison* elements.

1. The jurors' testimony would concern extraneous information.

The State conceded to the circuit court that the first *Eison* element of admissibility under Wis. Stat. § 906.06(2) was met; namely, that any testimony would concern extraneous information. (R. 98:5.) The State does not change its position on appeal. The purported information was not part of the trial record, and it came "from the outside." *See Eison*, 194 Wis. 2d at 174.

2. The extraneous information was not improperly brought before the jury.

Mahajni cannot, however, meet the second and third *Eison* elements in determining admissibility. First, Mahajni cannot show that extraneous information was brought before the jury. *Eison*, 194 Wis. 2d at 172.

Decorah's affidavit, which is riddled with hearsay, is insufficient to establish this element. Decorah's affidavit does not contain any of the following information: (1) the bailiff's name who allegedly made the "hung jury" statement, (2) a physical description of the bailiff, (3) the names of the jurors who heard the statement, (4) at what point during the deliberations the statement was made, (5) where the jurors were when it was made, (6) what prompted the statement, and (7) how many jurors heard the statement. The lack of specifics in Decorah's affidavit dooms Mahajni's motion for postconviction relief. *See Allen*, 274 Wis. 2d 568, ¶ 23.

Granted, the jurors' affidavits submitted with Mahajni's reconsideration motion provide more information, but not with respect to the second *Eison* element. (R. 102:4–5.) Their affidavits still do not identify or describe the bailiff, nor do they provide at what point during the deliberations the statement was made, where the jurors were when it was made, or what prompted the statement from the unidentified bailiff. The affidavits do not specifically state the sequence of the statement in the conversation, and they give no clue as to what caused the bailiff to say what he did.

Further, contrary to Givens' affidavit and Mahajni's argument on appeal, *Thurman's* affidavit provides that the *foreperson* told the jury that they could not "be hung," not the bailiff. (R. 102:5.) Therefore, as the postconviction court correctly determined in its order denying reconsideration, the affidavits *still* do not contain "precisely what was said, when

it was said, who it was said to or where the jury was when the statement was allegedly made." (R. 103:2.) Mahajni has failed to provide sufficient facts to entitle him to an evidentiary hearing on his motion for a new trial. *See Allen*, 274 Wis. 2d 568, ¶ 23.

In sum, Mahajni fails to meet the second *Eison* element because his motion for a new trial, motion for reconsideration, and the supporting affidavits do not sufficiently allege that extraneous information was improperly brought before the jury.

3. Mahajni fails to show that the extraneous information was potentially prejudicial.

Mahajni's motion, Decorah's affidavit, and the jurors' affidavits are not sufficient to justify a hearing because they identify nothing potentially prejudicial. In other words, regardless of when and how the jurors allegedly acquired the extraneous information, Mahajni was not prejudiced, so he cannot satisfy the third *Eison* element. *See Eison*, 194 Wis. 2d at 172.

But Mahajni argues he was prejudiced because Givens provided in her affidavit that "things would have turned out differently." (Mahajni's Br. 14.) And, Givens also provided, "[i]n my opinion, if we jurors had known that we could be hung, we would have hung on the two guilty verdicts." (*Id.*, citing R. 102:4.) But the circuit court correctly found that "Givens cannot speak to what was going through the minds of the other jurors when they reached their verdict on counts one and two." (R. 103:2.) "[T]herefore, 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." (R. 103:2.)[2] Rather, Givens' statement is "vastly conclusory, insufficient and does not raise a veritable issue of fact." *Id*.

Importantly, the court also correctly found that "[f]or her own part, Givens does not explain *how* that information affected *her* verdict." (R. 103:2.) And a postconviction hearing is for *presenting* evidence, not discovery. To receive an evidentiary hearing, Mahajni was required to provide "adequate, specific allegations" in his postconviction motion. *State v. Balliette*, 2011 WI 79, ¶ 78, 336 Wis. 2d 358, 805 N.W.2d 334. It was Mahajni's responsibility to come forward with evidence. Not one juror has provided an affidavit with any description or identification of the bailiff. Not one juror has provided an affidavit describing when or how the bailiff's extraneous information was provided. Finally, not one juror has indicated that he or she would have voted "not guilty" on the guilty verdicts had they known they could have been a hung jury. Absent an affidavit to that effect, Mahajni cannot show the results would have been different – or that he was prejudiced. Givens can only speak for herself, and she did not state that she would have voted for acquittal. Therefore, Mahajni simply has not done "enough to show that a new trial was required." *Id.* ¶ 79.

There is also no potential prejudice because the jurors —including Givens and Thurman—were polled after they reached their verdicts. The trial court asked each individual juror, "[i]s each verdict, as I've just read it, your verdict as to each count, and the answer yes means yes, they are." (R. 127:5.) Every juror, Givens and Thurman included, answered, "Yes." (R. 127:5–6.) While Mahajni attempts to minimize the effect of the polling (Mahajni's Br. 14), the fact remains that

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[2] Givens does *not* state in her affidavit that if *she* had known that the jury could be hung, that *she* would have "hung on the two guilty verdicts." (R. 102:4.)

there is no evidence in the record that any juror dissented or that the verdict was not unanimous.

In sum, Mahajni has failed in his motions and in his affidavits to provide evidence that establishes that the jurors' testimony would be admissible under Wis. Stat. § 906.06(2). The trial court's decision to deny Mahajni a hearing was correct because the record conclusively demonstrates that he is not entitled to relief. Should this Court disagree with the State, the proper remedy would be to remand for an evidentiary hearing.

CONCLUSION

This Court should affirm the judgment of conviction, the order denying Mahajni's motion for a new trial, and the order denying Mahajni's motion for reconsideration.

Dated this 26th day of September, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,087 words.

Dated this 26th day of September, 2018.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

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. § 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 26th day of September, 2018.

_____
SARA LYNN SHAEFFER
Assistant Attorney General