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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I/IV
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**

REPLY BRIEF OF DEFENDANT-APPELLANT

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

**ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING DEFENDANT-APPELLANT'S
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REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

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

As noted in the defendant-appellant's brief-in-chief, 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. **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).

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.

The record of proceedings in the post-conviction court, although not a model of clarity, is sufficient for purposes of the defendant's motion. There was information that was received by the jurors during their deliberations. The information that was received by the jury as to their options during deliberations was extraneous, in that it was neither received as a result of testimony nor a part of the instructions from the court. It was inaccurate: a "hung jury" may not be, as the post-conviction court noted, a receivable verdict. It is, however, a conclusion that jurors are allowed, as part of deliberations, to reach – that they are unable to reach a verdict.

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.

To focus, as the post-conviction court did and the State does, on the inability of the jurors to identify the bailiff is to misstate the defendant's burden. The affidavits submitted in the court below agreed that the information came from a bailiff assigned to the 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 gender, race, hair color, hair length, approximate height, weight and age of the bailiff, though perhaps relevant to potential disciplinary proceedings against the bailiff, are 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 by Juror Givens indicates that “jurors commented that if they had known [that they could be hung or deadlocked], things would have turned out differently.” This affidavit adequately establishes that degree of prejudice necessary to support the defendant’s motion. 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, by 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 is not, as the post-conviction court would have it, that Juror Givens was “attempting to speak for the whole jury.” What she was, instead, doing was simply relaying statements that she had heard from other jurors. This is something which she, as a witness to those statements, clearly possessed the competency to do.

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 that the defendant was required to prove that he was, in fact, prejudiced by the extraneous information was in error. 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." **State v. Poh**, 116 Wis. 2d 510, 520, 343 N.W.2d 108 [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. The defendant has, therefore, adequately demonstrated the potential for prejudice 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 1,372 words.

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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 16th day of November, 2018.

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