COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1758-CR **Cir. Ct. No. 2012CF254**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WADE M. RICHEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 STARK, J. Wade Richey appeals a judgment convicting him of one count of reckless driving causing great bodily harm and one count of homicide by operation of a vehicle with a detectable amount of a restricted controlled substance. Richey argues the circuit court erred by excluding his medical records

from the date of the accident from evidence. He also argues the court's postverdict, presentencing discussion with the jury was plain error.

¶2 Assuming, without deciding, that the circuit court erred by excluding Richey's medical records, we conclude any error was harmless. We also conclude the court's postverdict, presentencing discussion with the jurors was not plain error. We therefore affirm the judgment of conviction.

BACKGROUND

¶3 On July 13, 2012, Richey was driving his 1996 Ford Bronco in Barron County when he lost control of the vehicle and crashed into a ditch. Two minors, J.R.R. and T.A.S., were riding in the back cargo area of the Bronco, which did not have seats or seatbelts. Both passengers were seriously injured in the collision, and T.A.S. died from his injuries.

¶4 At the accident scene, state trooper Aaron Prohovnik asked Richey to perform field sobriety tests. Richey performed the tests satisfactorily, and Prohovnik did not observe any signs of impairment. Richey subsequently consented to an evidentiary blood test, and his blood was drawn at a local hospital.[1] At trial, an analyst from the Wisconsin State Laboratory of Hygiene

[1] *See* WIS. STAT. § 343.305(3)(ar)2. (A law enforcement officer may ask a person to provide a blood, breath, or urine sample if the person "is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that the person violated any state or local traffic law[.]").

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

testified Richey's blood sample tested positive for methamphetamine, at a concentration of 110 nanograms per milliliter.

¶5 Richey was ultimately charged with one count of reckless driving causing great bodily harm and one count of homicide by operation of a vehicle with a detectable amount of a restricted controlled substance. A three-day jury trial was held in February 2014. At trial, the State's theory was that Richey had methamphetamine in his system at the time of the accident, was driving at a high rate of speed, and improperly allowed his two minor passengers to ride in the back cargo area of the vehicle without seats or seatbelts. The State also contended the vehicle was poorly maintained and Richey knew, or should have known, that it had brake problems.

¶6 Conversely, the defense maintained that Richey had not used any methamphetamine before the accident, and the blood test result was a false positive caused by an over-the-counter cold medication. In addition, Richey denied speeding or driving erratically. He also asserted he did not know his vehicle had brake problems until he attempted to brake at an intersection just before the accident occurred. He further testified he attempted a variety of maneuvers to slow or stop his vehicle, including driving it into the ditch.

¶7 Before trial, Richey had filed a notice of intent to offer his emergency room records from the date of the accident into evidence, pursuant to WIS. STAT. § 908.03(6m)(b). In the records, the emergency room physician reported that Richey "states he was belted and his seatbelt didn't work. He states the brakes didn't work, so he put the vehicle into the ditch to try and stop it."

¶8 When defense counsel attempted to question Richey at trial about his statements to the emergency room physician, as outlined in the medical records,

the State objected on hearsay grounds. The circuit court sustained the objection, reasoning that WIS. STAT. § 908.03(6m) "allow[ed] the records to come in but [did not] allow hearsay testimony within the records to be admissible." Thus, in order for Richey's statements to the emergency room physician to be admissible, the court ruled that Richey needed to show they fell within another exception to the hearsay rule. The court explained that, by prefiling the emergency room records, Richey simply "eliminat[ed] the need for a records custodian to come in and authenticate them … nothing more."

¶9 The jury ultimately returned guilty verdicts on both counts. The jury was polled, and each juror indicated his or her agreement with the verdicts. After accepting the jury's verdicts, the circuit court stated:

> Ladies and gentlemen of the jury, I want to thank you very much for your service. I know this has been very difficult. It's been a very emotional case for everyone involved. I know that you've rendered your decisions in a conscientious and thoughtful manner. I will meet with you shortly back in the jury deliberation room.

Neither party objected to the court meeting with the jury outside the parties' presence.

¶10 Nearly two months later, the circuit court received a letter from Diane Fisk, one of the jurors in Richey's case. The letter stated, in relevant part:

> Thank you for offering us, the Jurors[,] the opportunity to share our thoughts and/or concerns with you prior to the sentencing date. My intent in writing this letter is to express why I feel this young man is being unfairly charged on the Count 1 charge: Homicide by vehicle use – Controlled Substance.
>
> My concern in this case is the part that states "Controlled Substance." I do not understand how the prosecution could possibly be allowed to make this the target area to hang the Homicide charge when there was absolutely no impairment

> whatsoever. If there was impairment then yes absolutely. But as Trooper Prohovnik and the other officer on the scene testified, there was no impairment found while conducting the field sobriety test. I also question another area, why was his blood drawn later if there was no impairment at the accident site? Is this standard procedure?
>
> I understand the prosecution[']s job is to search out cause and justice for the victim and their family and I fully respect that. I also feel the prosecution had sound evidence and should hold the defendant accountable for his criminal negligence in driving the minors unbelted. What I did not feel was at all fair to the defendant and his case was the way question #3 in the Count 1 charge was stated: "Did the defendant have methamphetamine in his system[?]" That was clearly written to be a "yes" or "no" answer. This, I felt[,] was railroading the Jurors into the answer the prosecution wanted. I felt in doing this, it left no room or regard for the fact that a). The trace amount of methamphetamine found in his system[] could have quite possibly been a false-positive test result of some over the counter medication. b). Regardless of the actual test result[']s origin, it caused absolutely no impairment and therefore should have been completely irrelevant to this case. These points are what the jurors solely deliberated on trying to find a way around the guilty verdict.
>
> I sincerely hope you will take these concerns into consideration when sentencing this young man. I do not know Mr. Richey or his family, but I do know an injustice when I see it.

¶11 The court forwarded Fisk's letter to the State and defense counsel prior to sentencing. Thereafter, Richey moved for a mistrial or, in the alternative, for "a new polling of the jury and for recusal of the trial court." (Capitalization omitted.) Richey asserted Fisk's letter "[left] a cloud of suspicion over the entire process. Was her verdict truly guilty?" Richey also argued that, by giving the jurors the opportunity to share their thoughts prior to sentencing, the circuit court "re-opened polling[.]" Finally, Richey asserted the court's postverdict communication with the jurors was plain error.

¶12 The circuit court denied Richey's motion at the beginning of the sentencing hearing. The court observed that Richey was aware the court planned to meet with the jurors after the verdicts were entered, but he did not object to that procedure. The court then summarized its conversation with the jurors as follows:

- The court "thanked [the jurors] for their service and assured them that [it] would have respectfully received whatever verdicts they entered because they were done so conscientiously[.]"
- Some of the jurors wanted to know what would happen next, and the court told them a presentence investigation would be completed and Richey would be sentenced in thirty to sixty days.
- One of the jurors asked whether they could attend the sentencing hearing, and the court answered that they were free to do so because Richey's sentencing would not be a closed proceeding.
- One of the jurors, possibly Fisk, then asked "if they could submit something to the Court on behalf of the defendant at the time of sentencing or prior to sentencing." The court responded that it "would receive information that would be relevant from any party with regards to sentencing[,]" and it would "convey that to counsel and we would then have a discussion as to whether or not that would be an item that would be properly considerable by the Court at the time of sentencing."

¶13 The court emphasized that none of the jurors, including Fisk, "made any comments to the Court in the jury deliberation room following the jury trial about what should be done with Mr. Richey, what type of sentence should be imposed upon him." The court denied engaging in any ex parte communications with the jury. The court further stated Richey was not prejudiced by Fisk's letter. Finally, the court observed there was no allegation that extraneous information was before the jury, so there was no basis to "go in and delve into what took part in their deliberations."

¶14 Richey now appeals, arguing: (1) the circuit court erred by excluding his emergency room medical records; and (2) the court's postverdict discussion with the jurors was plain error. We address these arguments in turn.

DISCUSSION

I. Emergency room medical records

¶15 On appeal, Richey first argues the circuit court erred by excluding his emergency room medical records, including all statements referenced therein, from evidence. Richey relies on WIS. STAT. § 908.03(6m), which provides that "patient health care records" are not excluded by the hearsay rule.[2]

¶16 Assuming, without deciding, that the circuit court erroneously excluded the emergency room records, we conclude any error was harmless. The erroneous exclusion of testimony is subject to the harmless error rule. *See* WIS. STAT. § 901.03(1). An erroneous evidentiary ruling is harmless "if there is no reasonable possibility that the error contributed to the conviction." ***State v. Everett***, 231 Wis. 2d 616, 631, 605 N.W.2d 633 (Ct. App. 1999). A reasonable possibility is a probability sufficient to undermine confidence in the outcome of the proceedings. ***Id.*** The State bears the burden of proving that an error was harmless. ***State v. Jackson***, 2014 WI 4, ¶86, 352 Wis. 2d 249, 841 N.W.2d 791.

¶17 Richey argues exclusion of the emergency room records contributed to his conviction in several ways. First, he asserts his statements to the emergency

[2] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Hearsay is inadmissible, unless an exception applies. WIS. STAT. § 908.02.

room physician that his seatbelt came off during the accident, that his vehicle's brakes failed shortly before the accident, and that he attempted to stop the vehicle by driving it into a ditch showed that his trial testimony about the accident was consistent with statements he made on the accident date. However, we agree with the State that Richey's statements to the emergency room physician about the accident were cumulative of other evidence introduced at trial.

¶18 For instance, Shane Jilek, a Barron County sheriff's deputy, testified he spoke to Richey at the accident scene, and Richey "advised that he wasn't able to stop for the intersection, that the brakes did not work, and that he figured going in the ditch would slow the vehicle down[.]" Richey also told Jilek he first noticed his brakes were not working when he was near a certain barn, which Jilek later determined was about 255 feet from the intersection where the accident occurred. Richey further stated to Jilek that he had been wearing a seatbelt, but it came off during the accident.

¶19 Jilek also testified that he interviewed Richey a second time the day after the accident. During that conversation, Richey again stated he was unable to brake for the intersection where the accident occurred, so he drove into the ditch. He also stated he was not aware of any problems with his brakes before the accident. In addition, he reiterated that his seatbelt "fl[ew] off" after his vehicle went into the ditch.

¶20 Sheriff's deputy Ryan Hulback similarly testified that he interviewed Richey at the accident scene, and Richey reported that he first discovered his brakes were defective just before the accident. Richey also told Hulback he "attempted to put the vehicle into reverse, tried putting the vehicle in neutral and pressing the gas and also tried to shut the vehicle off, all in an attempt to slow or

stop the vehicle." Again, Richey asserted he had been wearing a seatbelt, but it came off during the accident.

¶21 Jilek's and Hulback's testimony sufficiently demonstrated that Richey's description of the accident at trial was consistent with statements he made immediately following the accident. As a result, similar statements from the emergency room records would have been cumulative, and there is no reasonable possibility they would have affected the jury's verdict.[3]

¶22 Richey next argues exclusion of the emergency room records prejudiced him because the records did not indicate that he exhibited any signs of impairment. Although the State did not need to prove impairment in order to obtain a conviction on the homicide count,[4] Richey argues evidence of a lack of impairment was relevant to his affirmative defense that T.A.S.'s death "would have occurred even if [Richey] had been exercising due care and had not had a detectable amount of [methamphetamine] in [his] blood." *See* WIS JI—CRIMINAL 1187 (2011); *see also* WIS. STAT. § 940.09(2)(a).

¶23 We reject Richey's argument for two reasons. First, other evidence was introduced at trial that Richey showed no signs of impairment following the accident. Prohovnik testified Richey satisfactorily performed field sobriety tests at the accident scene, and Prohovnik did not notice any signs of impairment.

[3] Richey also asserts, in a one-sentence argument, that the emergency room records "corroborate his testimony that he refused further treatment in the ER because there was only one doctor present in the ER bouncing between the three rooms." However, Richey does not explain why either his decision to refuse medical treatment or his reason for doing so was relevant to the charged offenses. We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[4] *See* WIS. STAT. § 940.09(1)(am).

Hulback similarly testified Richey did not appear to be under the influence of an intoxicant. Accordingly, introducing the emergency room records to show a lack of impairment would not have added anything to Richey's defense.

¶24 Second, the State did not challenge Richey's affirmative defense on the theory that he was impaired at the time of the accident. Instead, the State argued Richey was not exercising due care when the accident occurred. Any evidence in the emergency room records regarding a lack of impairment was therefore irrelevant to the disputed issue presented by Richey's affirmative defense. Thus, it is not reasonably probable the jury would have accepted the affirmative defense and acquitted Richey had the records been admitted.

¶25 Richey next argues the emergency room records may have prompted the jury to conclude the blood test result indicating the presence of methamphetamine was a false positive. However, aside from failing to note signs of impairment, nothing in the emergency room records suggested that the test result was a false positive. As discussed above, there was other evidence at trial that Richey was not impaired at the time of the accident, and the State did not argue he was impaired. As a result, the records neither enhanced nor detracted from the expert witnesses' testimony regarding the test result. For these reasons, it is not reasonably probable admission of the records would have caused the jury to conclude the blood test result was a false positive.

¶26 Finally, Richey asserts he was prejudiced by exclusion of the emergency room records because the presentence investigation report contained references to Richey using methamphetamine, which he denied. Richey argues, "Had the medical records been admitted and had defense counsel been able to use them in his argument to the court as part of the sentencing, the lack of any signs of

meth usage could have strengthened and corroborated [Richey's] denial and countered the prejudicial references to his purported meth usage." However, the rules of evidence do not apply at sentencing. *See* WIS. STAT. § 911.01(4)(c). Thus, Richey could have used the emergency room records at sentencing, despite their exclusion at trial. Once again, we therefore agree with the State that exclusion of the records was harmless error.

II. Postverdict discussion with the jury

¶27 Richey next argues the circuit court committed plain error by meeting with the jury after accepting its verdicts. "The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object." ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. Plain error is error so fundamental that a new trial or other relief must be granted despite the lack of an objection. ***Id.*** However, the error must be obvious and substantial, and courts should use the plain error doctrine sparingly. ***Id.*** "If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." ***Id.***, ¶23.

¶28 We reject Richey's plain error argument for several reasons. First, Richey cites no Wisconsin law or rule indicating that it is improper for a judge to meet with a jury after receiving its verdict. In fact, as the State notes, WIS JI—CRIMINAL 525A (2010), "Instruction After Verdict Received—Alternative Form," includes the sentence, "If any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room." This instruction appears to contemplate the possibility of a judge meeting with jurors after receiving their verdict.

¶29 Second, the Wisconsin cases Richey does cite are distinguishable. Richey cites several cases for the proposition that a court should not accept a jury's verdict if a juror's comments during polling suggest that he or she disagrees with the verdict. *See* ***Rothbauer v. State***, 22 Wis. 446 [*468], 448-49 [*469-70] (1868); ***State v. Austin***, 6 Wis. 203 [*205], 204-06 [*207-08] (1858); ***State v. Dukes***, 2007 WI App 175, ¶¶35-44, 303 Wis. 2d 208, 736 N.W.2d 515. However, in this case, neither Fisk nor any of the other jurors expressed disagreement with the verdicts during polling. The court did not receive Fisk's letter until nearly two months after it accepted the verdicts. Moreover, while Richey asserts the court "continued or re-opened polling" by giving jurors the opportunity to submit information prior to Richey's sentencing, he presents no legal authority in support of that assertion. By the time the court met with the jury, the jury had concluded its deliberations, rendered its verdicts, and been polled in court. The mere fact that the court told the jurors they, like any other citizens, could submit information they believed was relevant to Richey's sentencing does not constitute a continuation or reopening of polling.[5]

[5] Richey also cites ***State v. Cartagena***, 140 Wis. 2d 59, 61, 409 N.W.2d 386 (Ct. App. 1987), where the circuit court allowed the parties to question the jury following polling, and one juror dissented during that questioning. In ***Cartagena***, we held that the circuit court should have made a finding that the juror's answer during polling was ambiguous or ambivalent before it allowed the parties to question the jury. ***Id.*** at 62. However, having allowed questioning without first making such a finding, the court "was bound by the results of that questioning." ***Id.*** at 63.

Similarly, Richey argues that, having invited the jurors to submit their thoughts regarding sentencing, the circuit court in this case was bound by the information it received, which indicated at least one juror had misgivings about Richey's conviction on the homicide count. However, in ***Cartagena,*** the juror dissented before the circuit court accepted the jury's verdict. Here, Fisk did not express any concern about Richey's conviction until nearly two months after the jury's verdict was accepted. ***Cartagena*** is therefore inapt.

¶30 The two cases Richey cites from other jurisdictions are also distinguishable. In ***Harris v. United States***, 738 A.2d 269, 276 (D.C. 1999), the defendant sought resentencing due to a postverdict discussion between the judge and the jury. During that discussion, the judge asked the jurors to clarify what they meant when they asked him what should be done "if a juror won't follow the law." ***Id.*** at 277 n.11. In response, the jurors informed the judge that "from the beginning of deliberations, one juror had declared to the others that under no circumstances would he ever return a verdict of first-degree murder, which effectively had left the jury with the choice of being hung or returning some other type of a verdict." ***Id.*** at 276-77. Given these options, and because the jurors did not want the defendant to be released, they compromised and convicted him of the lesser-included offense of second-degree murder. ***Id.*** at 277.

¶31 On appeal, the defendant argued the trial court erred by conversing with the jurors outside his presence, and he further asserted he was prejudiced by the error because it caused the court to increase his sentence. The appellate court agreed that the trial court erred by meeting with the jury outside the defendant's presence, but it concluded the defendant was not prejudiced by the error because it did not affect the trial court's sentencing decision.[6] ***Id.*** at 279-80.

¶32 Unlike ***Harris***, here, there was no exchange of information between the judge and jury during their postverdict discussion. In addition, in ***Harris***, there was apparently no comparable statute to WIS. STAT. § 906.06(2), which, as

[6] In this case, Richey does not argue that the circuit court's discussion with the jury prejudiced him because it affected the court's sentencing decision. Moreover, any such claim would fail because Fisk's letter actually suggested the court should impose a lenient sentence, based on Fisk's perception that Richey was unfairly convicted.

discussed below, bars us from granting Richey a new trial based on Fisk's letter. Moreover, in ***Harris***, the judge invited the jury's revelation by asking what they meant when they asked what should be done if a juror refused to follow the law. Here, the circuit court simply indicated in response to a juror's question that the jurors, like any other citizens, were free to submit information relevant to Richey's sentencing. Contrary to Richey's assertion, the court did not invite the jurors to share their concerns about the verdict.

¶33 The second foreign case Richey cites—***People v. Lu***, 2012 WL 385598 (Mich. Ct. App. 2012)—is also distinguishable. In ***Lu***, the trial judge learned that the jury may have inadvertently been shown video footage of the defendant being shackled in preparation for transport from the courtroom. ***Id.*** at *1, *7. After receiving the jury's verdict, the trial judge met with the jurors outside the defendant's presence. ***Id.*** at *1. During that discussion, the judge asked the jurors about what they saw on the video, and "[t]hey all told [him] it didn't make a difference" to their verdict. ***Id.*** The judge relayed this information to the parties, and the defendant moved for a new trial. ***Id.*** at *1-*2. The court denied his motion, without an evidentiary hearing. ***Id.*** at *2.

¶34 The Michigan Court of Appeals reversed the defendant's conviction and remanded for a new trial. ***Id.*** at *8. The court reasoned that it was the defendant's burden to show he was prejudiced when the jury observed him being shackled, but

> [o]nce the judge questioned the jurors without counsel or a court reporter present and concluded that defendant had sustained no prejudice, the opportunity for a subsequent, meaningful evidentiary hearing concerning prejudice was lost. It is impossible at this stage to assess the duration of the jury's view of the shackling, or whether the subject of the shackling arose during the deliberations. Under these

> circumstances, we are hard pressed to place on defendant the burden of affirmatively demonstrating prejudice.

Id. at *5. The court further stated, "Given these unique circumstances in an obviously close case, defendant's presence at an evidentiary hearing may have yielded information directly bearing on whether the shackling influenced the verdict." ***Id.*** at *8. In addition, the court relied on a Michigan court rule, which prohibited judges from communicating with jurors "pertaining to the case" without notifying the parties and permitting them to be present, and which further required that communications between judges and jurors be "made part of the record." ***Id.*** at *7.

¶35 ***Lu*** is distinguishable for some of the same reasons that distinguish ***Harris***. As in ***Harris***, and unlike this case, the judge and jurors in ***Lu*** engaged in a substantive conversation about the case during their postverdict discussion. Further, unlike the circuit court in this case, the judge in ***Lu*** invited the jury's comments by asking about their observation of the defendant being shackled. In addition, there is no indication a statute comparable to WIS. STAT. § 906.06(2) was applicable in ***Lu***.

¶36 ***Lu*** is also distinguishable for two additional reasons. First, the defendant in ***Lu*** argued that, by meeting with the jurors outside his presence, the court violated his Sixth Amendment right to be present during all critical stages of his trial. ***Lu***, 2012 WL 385598 at *5. Here, Richey does not raise any Sixth Amendment argument. Second, the ***Lu*** court relied on a Michigan court rule that specifically prohibited judges from communicating with jurors without first notifying the parties and permitting them to be present. ***Id.*** at *7. Richey does not cite any comparable Wisconsin rule.

¶37 We also reject Richey's plain error argument for a third reason. While the circuit court's meeting with the jurors might constitute plain error if it qualified as a prohibited ex parte communication, we agree with the State that it did not. The term "ex parte" is defined as "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest[.]" BLACK'S LAW DICTIONARY 697 (10th ed. 2014). An "ex parte communication" is "[a] communication between counsel and the court when opposing counsel is not present." ***Id.*** at 337. Here, the judge's meeting with the jury was not instigated by either party, nor was its purpose to benefit one party over the other. The court announced its intention to meet with the jury in open court, and neither party objected or expressed a desire to be present during the meeting. The postverdict communication was between the court and the jury and was not a communication with one attorney or party in the absence of the other. Thus, the discussion did not fall within the definition of an ex parte communication and did not constitute plain error on that basis.

¶38 For the foregoing reasons, we reject Richey's argument that the circuit court's postverdict, presentencing discussion with the jury was plain error.[7] Nonetheless, even if the discussion was plain error, we would conclude the error was harmless. Richey asserts he is entitled to a new trial because Fisk's letter shows that she had a reasonable doubt about his guilt on the homicide count, which calls the validity of the verdict into question. However, neither the circuit

[7] Although we determine the circuit court's postverdict, presentencing discussion with the jury was not plain error, we recommend that trial judges use care when engaging in this type of practice. Consideration should be given to holding such discussions in the presence of counsel and on the record. Substantive discussions about the basis for the jury's decision, the validity of the verdict, and judicial considerations at sentencing are discouraged.

court nor this court can properly consider Fisk's letter in order to grant Richey a new trial. WISCONSIN STAT. § 906.06(2) provides:

> INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. 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.*

(Emphasis added.) Nothing in Fisk's letter suggests that any extraneous information was brought to the jury's attention during deliberations. As a result, § 906.06(2) prohibits us from considering Fisk's letter.[8] In the absence of Fisk's letter, there is no evidence the court's discussion with the jury prejudiced Richey. Accordingly, the error, if any, was harmless.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[8] In his reply brief, Richey argues WIS. STAT. § 906.06(2) is inapplicable because "Richey is not the one who sought to examine Juror Fisk or raise this issue. The issue was raised/invited by the judge[.]" We disagree. Richey moved for a mistrial based on Fisk's letter, and he has now appealed his conviction in reliance on her letter, seeking a new trial. Under these circumstances, Richey is clearly inquiring into the validity of the jury's verdict, and, accordingly, § 906.06(2) prohibits us from considering Fisk's letter.