

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2497-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2008CF397

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUSTAN C. WARREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Dustan Warren appeals a judgment convicting him of five crimes and an order denying his postconviction motion. He contends he is entitled to a new trial because the bailiff's answers to the jury foreperson's questions denied him his right to be present at all stages of the trial with legal

counsel.¹ Because we conclude that the bailiff's error was harmless beyond a reasonable doubt, we affirm the judgment and order.

BACKGROUND

¶2 Warren was charged with attempted second-degree sexual assault, aggravated battery, false imprisonment, second-degree recklessly endangering safety and bail jumping, all with hate-crime enhancers. The charges arose from an incident that occurred following a gathering at the home of the victim, Jenna O. Jenna testified that Warren attempted to sexually assault her, held her against her will, beat her and threatened her with a knife. She was ultimately rescued when Wesley Stayberg returned to her house and saw Warren “wrapped around her,” with Jenna crying and bleeding from her forehead. After a brief struggle with Warren, Stayberg left because he was on parole and was not supposed to be drinking. Stayberg called the police and then returned to the house, where he saw Warren on top of Jenna with his hands on her throat. Warren then came toward Stayberg with a knife and Stayberg again fled. Warren followed Stayberg out of the house, but turned in the opposite direction when he got outside.

¶3 Zachary Gunderson testified that he was outside the house the first time Stayberg returned. Stayberg exited two or three minutes later and the two of them went a short distance as Stayberg called the police. Stayberg then told Gunderson they had to go back because “Jenna is getting her ass whopped.”

¹ Warren also argues that his trial counsel was ineffective for failing to move for a mistrial. We need not address that issue because the State does not argue waiver. Therefore, Warren was not prejudiced by his counsel's failure to move for a mistrial.

When they entered, Gunderson saw Warren with a knife and Gunderson and Stayberg fled.

¶4 Several other witnesses testified that Warren was present at the gathering, although they had left before the assault took place. Witnesses gave the police Warren's leather jacket, baseball cap and glasses that were left at Jenna's house. Police also recovered Warren's bandana with Jenna's blood on it.

¶5 Warren did not testify and the defense called no witnesses. However, based on a statement Warren made to police that he was not at Jenna's residence, his counsel argued Warren was not present at Jenna's house and the State's witnesses conspired to testify against Warren and plant evidence. Warren did not account for his whereabouts for approximately five hours around the time of the crimes while he was walking in cold weather without a jacket.

¶6 While the jury was deliberating, the court informed the parties of a conversation between the bailiff and the jury foreperson. The foreperson indicated that the jury reached a verdict on four of the five charges and were eleven to one on the last charge. He asked the bailiff, "Do we need 12?" The bailiff responded, "Yes, you need 12, one way or the other, okay?" The foreperson then asked, "What do you do?" The bailiff responded: "You go back and deliberate and, if you can't get 12, come tell me and [I] will tell the Judge then."

DISCUSSION

¶7 A defendant has a constitutional right to be present with legal counsel when the jury is receiving instructions. *State v. Burton*, 112 Wis. 2d 560, 570, 334 N.W.2d 263 (1983). However, communication with the jury outside the defendant's presence is subject to harmless error analysis. *Id.* at 568. A defendant

is not entitled to a new trial if the error is harmless beyond a reasonable doubt. *Id.* at 570 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

¶8 The bailiff's response to the foreperson's questions was harmless beyond a reasonable doubt. His response to the question "Do we need 12?" correctly informed the foreperson that all twelve jurors needed to agree on the verdict, an instruction the court had given the jury at the close of the trial. Warren contends the bailiff should have informed the court of the foreperson's question and, if he had, the court would have instructed the jury that it would not be required to reach a verdict, but should continue deliberating to the best of its ability. However, the bailiff's answer to the second question, in which he acknowledged the possibility that the jury might not reach a unanimous verdict, is functionally equivalent.

¶9 There is no reason to believe the bailiff's answers to the foreperson's questions contributed to Warren's convictions. This is particularly true because the State presented overwhelming evidence of Warren's guilt on all five offenses. Warren identifies no reason for all of the witnesses to falsely accuse him and plant evidence. His alibi defense failed to materialize, as no witness testified that Warren was at a time and place inconsistent with the assault. In light of the overwhelming evidence of Warren's guilt and the nonprejudicial nature of the bailiff's answers to the foreperson's questions, we conclude the error was harmless beyond a reasonable doubt.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

