

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 24, 1997

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

NOTICE

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

No. 96-0217-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LYLE A. GREENDEER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Lyle Greendeer appeals from a judgment convicting him on one count of first-degree sexual assault of a child. The issue is whether Greendeer is entitled to a new trial on the grounds that jurors received prejudicial, extraneous information during deliberations. We conclude that he is not, and therefore affirm.

The State tried Greendeer on three counts of first-degree sexual assault of a child. After some two hours of deliberation, members of the jury told the bailiff that they were deadlocked and asked him what the consequences were. The bailiff said something like “well, you can’t be deadlocked yet, it’s too early,” or “[you have not] been in there that long and [you will] have to work at it.” Two jurors believed that he advised that a deadlocked jury was not allowed. Most jurors either could not recall the conversation or were not aware of it. In any event, the jury returned a verdict convicting on one count and acquitting on the remaining two.

On Greendeer’s subsequent motion under § 906.06(2), STATS., the court heard testimony from the jurors and the bailiff and concluded that the bailiff’s response to the jurors’ question was improper.¹ The court denied relief from the verdict, however, concluding that Greendeer failed to show by clear, satisfactory and convincing evidence that the bailiff’s comments would have prejudiced a hypothetical average jury. That ruling is the subject of this appeal.

Section 906.06(2), STATS., allows a party to question jurors, on a challenge to the validity of a verdict, concerning extraneous prejudicial information improperly brought to the jury’s attention. Jurors may not testify, however, as to the effect of that or other information on the deliberations. *Id.* Consequently, the test for prejudice, and ultimately reversal, is whether the extraneous information would prejudice a hypothetical average jury. *State v. Eison*, 194 Wis.2d 160, 177, 533 N.W.2d 738, 745 (1995). The burden in that regard is on the State to prove beyond a reasonable doubt that it would not. *Id.* at

¹ The bailiff made other remarks to the jury that were also deemed improper. On appeal, Greendeer does not predicate error on those additional comments.

178, 533 N.W.2d at 745. Because that is a question of law we decide independently, *id.*, it makes no difference that the trial court erroneously placed the burden on Greendeer to prove prejudice.

We are satisfied beyond a reasonable doubt that the bailiff's comments would not have prejudiced a hypothetical average jury. The trial court found that the bailiff's comments were accurate in the sense that he said nothing more than what the trial court would have told the jury under similar circumstances, that being, to continue deliberations. Additionally, the determination of what the bailiff actually said is a question of credibility. This court will not substitute its judgment for that of the trial court on issues of credibility. *Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977).

Additionally, the acquittal on two counts creates no inference of a prejudicially induced compromise verdict because the State's case was substantially stronger on the count resulting in conviction. In reviewing for prejudice, we consider the nature of the extraneous information, the circumstances under which it was brought to the jury's attention, the nature and character of the evidence and the connection between the extraneous information and the issues in the case. *Eison*, 194 Wis.2d at 179, 533 N.W.2d at 745. Applying those factors, the State's burden was met.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

