

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 10, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 97-2408-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIE F. HANNAH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS S. WILLIAMS, Judge. *Judgment affirmed; order reversed and cause remanded.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Willie F. Hannah appeals from a judgment of conviction of battery by an inmate and from an order denying his postconviction motion for a new trial. We conclude that Hannah is entitled to an evidentiary hearing on his motion alleging that the jury was exposed to extraneous

information during deliberations. Therefore, we reverse the order denying Hannah's postconviction motion and remand for further proceedings.

Hannah was alleged to have assaulted a prison guard at the Oshkosh Correctional Institution. During trial three videotapes were marked as exhibits. The first tape showed an incident where inmates surrounded a van in the prison yard around the time that Hannah allegedly assaulted the prison guard. The second tape showed six inmates assaulting another inmate. The third tape was a copy of the two other tapes. The jury was shown tidbits of the videotapes, five to seven minutes at most.

None of the videotapes were sent to the jury. During deliberations, the jury asked to see the third videotape, the combination of tapes one and two. Without consulting either party, the tape was sent to the jury. The jury was not monitored in viewing the tape.

Before sentencing, Hannah moved for a new trial alleging that the jury had been exposed to extraneous information. Hannah's motion was supported by an affidavit of one juror which indicated that the jury viewed more of the videotape than had been played at trial. The trial court denied Hannah's motion without an evidentiary hearing. Hannah filed a postconviction motion alleging that because the trial court did not consult counsel before sending the tape to the jury, Hannah was denied his constitutional right to be present, through counsel, at a critical stage of trial. He also alleged that trial counsel was ineffective for not earlier asserting that the jury should only be permitted to see that portion of the videotapes shown during trial.

The dispositive issue in this appeal is whether the jury was exposed to prejudicial extraneous information under § 906.06(2), STATS. The analysis to

be conducted under § 906.06 embraces both claims made in Hannah's postconviction motion.

Extraneous information improperly brought before a jury jeopardizes a defendant's constitutional right to trial by an impartial jury, right to counsel and right to confrontation. The risk stems from the possibility that a defendant's conviction rests on information not part of the evidence offered in the courtroom under the rules of evidence and under the supervision of the court. Section 906.06(2)[, STATS.,] seeks to protect a defendant's interest in a fair trial while at the same time protecting the finality of verdicts and the integrity of a jury.

*State v. Eison*, 194 Wis.2d 160, 173-74, 533 N.W.2d 738, 743 (1995).

The trial court exercises its discretion in resolving a motion for a new trial and we look to whether there has been a proper exercise of discretion. *See id.* at 171, 533 N.W.2d at 742. A motion for a new trial based on extraneous information before the jury requires the trial court to decide underlying issues of both fact and law. *See id.* An erroneous view of the facts or the law constitutes an erroneous exercise of discretion. *See id.*

A three-step procedure must be utilized to determine whether a party is entitled to a new trial on the grounds that jurors were prejudiced by extraneous information.

Initially, the party seeking to impeach the verdict must demonstrate that a juror's testimony is admissible under sec. 906.06(2)[, STATS.,] 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. After the circuit court determines whether the party has satisfied sec. 906.06(2), it determines whether one or more jurors engaged in the alleged conduct and whether the error was prejudicial.

*Eison*, 194 Wis.2d at 172-73, 533 N.W.2d at 743 (citations omitted).

We first consider the evidentiary issue governed by § 906.06(2), STATS. See *Eison*, 194 Wis.2d at 173, 533 N.W.2d at 743. The juror's affidavit submitted in support of Hannah's motion pertained only to a claim that extraneous information was before that jury and did not delve into matters of jury deliberations.

The trial court found that viewing the entire videotape was not viewing extraneous information because the whole videotape was marked as an exhibit and no limitations were placed on it. The entire videotape was not placed before the jury during the trial when a record of the proceeding was made. Extraneous information is information that is not of record. See *id.* at 175, 533 N.W.2d at 744. See also *State v. Yang*, 196 Wis.2d 359, 367, 538 N.W.2d 817, 820 (Ct. App. 1995) (information not testified to at trial was extraneous). The entire content of the videotape was not of record and was extraneous. The trial court erroneously exercised its discretion in terminating its analysis under § 906.06(2), STATS., upon the conclusion that the jury was not exposed to extraneous information.

We turn to whether the extraneous information was improperly presented to the jury. The trial court acknowledged that it broke "long habit" by sending the videotape to the jury without consulting the parties. The trial court implied that because neither party had earlier expressed any opposition to the entire content of the videotape, the extraneous information was not improperly brought before the jury. We reject any notion that Hannah had earlier made any concession that the entire videotape could be shown to the jury. At trial, Hannah

objected to the third tape as lacking authenticity and being cumulative. The issue of showing the entire videotape to the jury was never litigated. As the jury went to deliberate, Hannah's attorney agreed with the prosecutor's statement that none of the videotapes should go to the jury unless the jury requested them. Implicit was counsel's belief that he would be contacted should any jury requests be made. Hannah's attorney told court personnel where he could be contacted should any jury questions arise. Hannah had not waived any potential objection to allowing the jury to view the entire videotape. Extraneous information was improperly presented to the jury.

The trial court was next required to consider whether the extraneous information was potentially prejudicial. In addressing Hannah's claim of ineffective assistance of counsel, the trial court commented that the extra videotape could not have had any impact on the jury's verdict. However, the trial court did not conduct an evidentiary hearing with respect to that portion of the videotape which had not been shown to the jury during trial. In fact, the trial court acknowledged that it had not seen the balance of the videotape. The trial court needed to be clear about what the jury had seen outside the scope of the record made at trial. Without an evidentiary hearing, there was no meaningful determination of whether the extra footage was germane to the jury's decision making. Not only was the evidentiary hearing necessary to determine the threshold admissibility of the videotape under § 906.06(2), STATS., but it would also bear on the final step in the analysis of whether, as a matter of law, the extraneous information constitutes prejudicial error requiring reversal of the verdict "because there is a reasonable possibility that the [information] would have had a prejudicial effect upon a hypothetical average jury." *Eison*, 194 Wis.2d at 177, 533 N.W.2d at 745.

We acknowledge that “[b]ecause jurors are incompetent to testify with respect to their mental deliberations, direct evidence with respect to the effect of bias, prejudice, or other misconduct will seldom be admissible” and prejudice to the moving party will usually be a question of law. *State v. Poh*, 116 Wis.2d 510, 523, 343 N.W.2d 108, 116 (1984). However, that legal question cannot be determined without findings of fact about the content and character of the extraneous information viewed by the jury. We remand the case to the trial court to conduct the necessary evidentiary hearing on Hannah’s motion for a new trial.

As to Hannah’s claim of ineffective assistance of trial counsel, we have already stated that “We reject any notion that Hannah had earlier made any concession that the entire videotape could be shown to the jury.” *See supra* at 5. From this it logically follows that counsel was not ineffective for failing to further assure that any review of the videotape by the jury should be limited to only that portion admitted into evidence. We therefore reject Hannah’s claim of ineffective assistance of trial counsel.

However, as to Hannah’s claim that the jury was exposed to extraneous information not received at the trial, we reverse the trial court’s summary rejection of this motion without a hearing. We remand for a hearing as to whether the extraneous material on the videotape was prejudicial to Hannah. If so, the court shall vacate the judgment of conviction and grant Hannah a new trial. If not, the court shall confirm the judgment of conviction.<sup>1</sup>

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<sup>1</sup> Hannah also claims that he is entitled to a new trial in the interests of justice. However, this claim is premised upon the assumption that the extraneous material on the videotape was prejudicial to him. Until that determination is made, we cannot answer that question. Hannah is free to renew this claim before the trial court on remand.

*By the Court.*—Judgment affirmed; order reversed and cause remanded.

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

