COURT OF APPEALS DECISION DATED AND FILED

February 26, 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. 97-2915-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER LEHMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed.*

VERGERONT, J.[1] Jennifer Lehman appeals from a judgment of conviction for operating a motor vehicle while intoxicated, fourth offense, in violation of § 346.63(1)(a), STATS. She contends on appeal that she is entitled to a

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

new trial because she was prejudiced by extraneous information improperly brought to the attention of the jurors. We conclude that Lehman is not entitled to a new trial on the grounds of impeachment of the jury verdict and we decline to exercise our power of discretionary reversal. We therefore affirm the judgment of conviction.

Lehman was arrested for OWI after Officer Jeffrey Tomlin pulled over the vehicle in which she and her companion, Thomas Brooks, were traveling. Lehman's defense at trial was that she was not driving, that Brooks was. Prior to trial, she filed a motion in limine requesting that testimony relating to her prior OWI and operating after revocation convictions be excluded; that the prosecutor not refer to prior offenses or describe this charge as a "repeat offense"; and that the jury not be shown the criminal complaint unless all references to a repeat offense and habitual traffic offender were deleted. The prosecutor had no objections to those requests.

Tomlin testified at trial that when he pulled in behind the vehicle on the side of the road, he saw from the lights of his car (it was dark) inside the vehicle. He saw a male on the passenger side. He saw the person on the driver's side move to the passenger side and the male from the passenger's side slide across that person to the driver's side. He approached the driver's side and asked the male, Brooks, why he had switched places. Brooks said he did not switch and he was the driver. Tomlin noticed the smell of intoxicants on Brooks and that Brooks appeared to be intoxicated. Tomlin said that he would like Brooks to step out of the vehicle for some field sobriety tests. Brooks then said that Lehman was the driver, not he. Lehman appeared to Tomlin to be intoxicated, was belligerent and refused to take the field sobriety tests. Tomlin arrested her for OWI and took

her to the police station. After being properly informed, she refused to have a chemical test of her breath.

In cross-examining Tomlin at trial, Lehman's counsel questioned him on the incident report he had prepared on the arrest, and moved its admission into evidence. The prosecutor had no objection, and it was received into evidence as exhibit 3.

. Brooks and Lehman testified that Lehman called Brooks from a tavern that evening to pick her up. He drove there in his car; they had some drinks; when they left, Brooks drove his car; and Lehman never drove. Brooks denied that he told Tomlin that he was driving. They both testified that when they were pulled over, Brooks was driving and Lehman was sitting on his lap, facing Brooks and having sex with him. When they were pulled over, they both testified, Lehman returned to the passenger side.

After the close of testimony, counsel discussed with the court whether to send the exhibits into the jury room. Lehman's counsel wanted references to prior offenses deleted from exhibit 3, and he wanted the final paragraph deleted, which referred to the administration of a preliminary breath test (PBT) on Lehman. The prosecutor did not object to the former, in keeping with his position on the motion in limine, but did object to the latter because it was Lehman's counsel who had moved admission of exhibit 3 into evidence. The court decided that no exhibits should go to the jury room. However, during deliberations the jury asked to see the police report. The prosecutor agreed at that time that the paragraph on the PBT could be deleted, and both attorneys agreed to delete a reference to "second offense" and another reference to records from South

Dakota showing two prior OWI offenses. The court left it up to the two attorneys to delete those portions agreed upon.

The jury returned a guilty verdict on February 20, 1997. On March 10, 1997, Lehman moved for a new trial on the ground that the jury saw extraneous and prejudicial information. Accompanying the motion was her counsel's affidavit in which he averred that when he reviewed the court file on February 28, 1997, he discovered that the reference in exhibit 3 to second offense was overlooked and not deleted from the copy of the report that was given to the jury. He explained that he had been under the impression that, after the appropriate portions of the exhibit had been deleted, there would be a final review of the exhibit, but instead it went to the jury room without a final review.

At the hearing, the court described the process of deleting portions of exhibit 3 in this way. The judge and the two attorneys were at the copy machine and, after the attorneys had made the deletions and copied the exhibit, they handed it to the judge and the judge handed it to the bailiff. The court stated:

> As far as the record goes, it is still a mistake of the Court by not getting---the Court should have looked it over; we all should have looked it over more closely, I suppose, and we would have seen that reference in there, but it wasn't objected to.

The court stated that it would assume the jury saw the reference and was aware that it was a second offense.[2] It also stated: "… I think, technically, the district attorney is right, that it would not be extraneous because it is in the

[2] Actually Lehman was charged and convicted of OWI fourth offense, but the reference to the two South Dakota offenses was deleted before the exhibit went into the jury room. The court in this comment is referring to the impression it assumed the jurors had from the exhibit they were given.

record, but I don't think that is at all what is meant by the cases, that it was extraneous to the jury. It wasn't supposed to be there." The court determined that "there's [no] question that it would have prejudicial effects." Finally, the court concluded that, although the reference to a second offense went to credibility, there was sufficient evidence in the record to support the jury's verdict such that the error of the undeleted reference did not warrant a new trial.

On appeal, Lehman renews her argument that she is entitled to a new trial because the jury considered extraneous and prejudicial information. Although she recognizes that the information that the jury received was not due to any juror conduct or action, she suggests that the same analysis is applicable. She bases her position on § 906.6(2), STATS., which 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.

The State argues that the jurors should not be permitted to testify because the requirements of § 906.06(2), STATS., have not been met. In the alternative, the State argues, if this court finds that the criteria of the statute are met, we should remand to the trial court for a determination whether the jury was even aware of the undeleted reference.

Before addressing the parties' arguments on § 906.06(2), STATS., we place this statute in its proper framework. Section 906.06(2) is part of the analysis that trial courts are to use when considering a request to overturn a jury verdict and grant a new trial because of juror conduct. *See* ***Castaneda v. Pederson***, 185 Wis.2d 199, 208, 518 N.W.2d 246, 249-50 (1994). To promote verdict finality and maintain the integrity of the jury as a decision-making body, jurors cannot testify regarding statements made during deliberations and cannot testify regarding the deliberative process that took place in reaching a verdict. *See* § 906.06(2), STATS.; ***State v. Shillcutt***, 119 Wis.2d 788, 793-94, 350 N.W.2d 686, 689 (1984).

Section 906.06(2), STATS., however, provides an exception to this rule, allowing jurors to testify "on the question [of] whether extraneous prejudicial information was improperly brought to the jury's attention." ***Id.*** The party seeking to impeach the verdict has the burden of proving that a juror's testimony is admissible by establishing: (1) that the juror's testimony concerns extraneous information (rather than the deliberative processes 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. ***State v. Poh***, 116 Wis.2d 510, 520, 343 N.W.2d 108, 114 (1984).

Once the determination is made that a juror's testimony is competent and admissible under § 906.06(2), STATS., the trial court must then make a factual determination. The court must be persuaded by clear and satisfactory evidence that one or more jurors engaged in the alleged conduct. ***Castaneda***, 185 Wis.2d at 211, 518 N.W.2d at 251. If the court makes that finding, it must then determine, as a matter of law, whether the extraneous information constituted prejudicial error requiring reversal of the verdict. ***Id.*** at 210-11, 518 N.W.2d at 251. If the threshold requirement for juror testimony under § 906.06(2) is unmet, the court

does not proceed to these second and third steps in the analysis. *See* ***Shillcutt***, 119 Wis.2d at 793, 350 N.W.2d at 689.

As the parties and the trial court have each implicitly or explicitly recognized, this case does not present the typical request for impeachment of a jury verdict and does not fit into the above analysis.[3] There is no claim that a juror did anything improper. The information that Lehman claims was extraneous was not introduced into the jury room through the act of any juror, but through the inadvertence of the attorneys.[4] Moreover, it was information that was already part of the record, since the entire exhibit 3 was admitted into evidence at Lehman's request, without any portion deleted.

The purpose of § 906.06(2), STATS., is to determine when jurors may testify about their deliberations in order that a trial court may determine

[3] The evidence Lehman relied on in her motion was the affidavit of her counsel concerning his inspection of the record. In addition, Lehman's counsel at the hearing stated to the court that he accidentally had a conversation with one of the jurors. However, just as he was beginning to describe that conversation, the court interrupted, stating: "I don't believe this is a proper representation to the Court, unless the juror is going to be brought to the Court." After Lehman's counsel explained that the point of his motion was to have the court inquire of the jurors what information they had, the court responded that it was known that the jurors had exhibit 3 before them, and that it was for the court to determine whether it was prejudicial; the jurors could not be questioned about that. Because the court decided to assume that the jurors saw the undeleted reference in exhibit 3, the court decided that the jurors' testimony was unnecessary and that it should proceed to decide whether that information was extraneous, whether it was prejudicial, and whether the verdict should be set aside.

[4] Lehman characterizes the error as "court error," apparently because the trial court acknowledged that it made a mistake in not reviewing the exhibit over before it went into the jury room. We have quoted the court's comments on this point in the body of the opinion. In the same sentence, the court states that the attorneys should also have examined the exhibit. The court's reference to its mistake, and its willingness to share in the responsibility, is generous. We do not consider that there was any "court error." The trial court made no erroneous ruling, and did not perform the acts of deleting and copying. We do not see how the court is responsible for the inadvertent error of counsel in carrying out their agreement about what should be deleted, even if the agreement could be said to be required by the court's prior ruling on the motion in limine.

which jurors had access to the allegedly extraneous and improperly acquired information. We are uncertain why Lehman thinks § 906.06(2) is applicable, since she is not arguing on appeal that the trial court should take juror testimony to determine whether a new trial is warranted. Rather, she argues that, based on her counsel's affidavit and the court's assumption that the jurors saw the undeleted reference, she is entitled to a new trial. Framed in this way, resolution of the request for a new trial does not require juror testimony at all, but only a prejudice analysis, which is essentially what the trial court did.

Even if we assume for purposes of argument that § 906.06(2), STATS., is an appropriate starting point for determining whether Lehman is entitled to a new trial, we conclude that she has not met the requirements of the statute. The first requirement is that the information be extraneous and the second is that it be improperly brought to the jurors' attention. *See* ***Castaneda*** at 185 Wis.2d at 209-10, 518 N.W.2d at 250. We consider these two requirements together because in this case they are intertwined. Since the facts as to the nature of the information alleged to be extraneous and the manner in which it came into the hands of the jurors is undisputed, the question of whether the information is extraneous and improperly brought to the jurors' attention is a question of law, which we review de novo. *See* ***Tahtinen v. MSI Ins. Co.***, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985).

Extraneous information under § 906.06(2), STATS., is information "coming from the outside." ***Shillcutt***, 119 Wis.2d at 794-95, 350 N.W.2d at 690. It is information that is not of record and is not part of the general knowledge we expect jurors to possess. ***State v. Eison***, 194 Wis.2d 160, 174, 533 N.W.2d 738, 743-44 (1995). Examples of information that our supreme court has held to be extraneous are: a wrench brought into the juror room, ***id.***; information on a

defendant's prior convictions obtained from a juror's co-worker, ***State v. Messelt***, 185 Wis.2d 254, 281, 518 N.W.2d 232, 243 (1994); statistics on malpractice awards obtained from a juror's independent research, ***Castaneda***, 185 Wis.2d at 215, 518 N.W.2d at 252-53. Information is improperly brought to the attention of jurors when a juror brings information not in the record into the juror room, *see* ***Castaneda***, 185 Wis.2d at 209, 518 N.W.2d at 250, or where persons other than jurors bring information to the attention of the jurors from outside sources. *See* ***Poh***, 116 Wis.2d at 522, 343 N.W.2d at 115 (referring to court officials and newspaper articles).

The challenged information in this case was admitted into evidence as exhibit 3 and was therefore part of the record. This is not within the definition of "extraneous" as developed in the case law, and Lehman has pointed to no case which arguably supports the position that the reference to the second offense in exhibit 3 was extraneous information under § 906.06(2), STATS. Similarly, the inadvertent failure of attorneys to delete this reference is not improper conduct on the part of any juror or of any third party. We are unwilling to equate the inadvertence of the attorneys with improper conduct under § 906.06(2) in the absence of some authority for doing so, and Lehman has presented us with none. We therefore conclude that no juror is competent to testify under § 906.06(2). To the extent that either § 906.06(2), or some analogy to it, is the basis on which Lehman seeks a new trial, she is not entitled to one. And to the extent Lehman is contending that the trial court improperly declined to take the testimony of the jurors under § 906.06(2), we hold that was the correct result, although we do so for different reasons than those relied on by the trial court.

Because impeachment of the verdict based on extraneous information may not have been the most appropriate basis for a motion for a new

trial, we have considered whether we should exercise our discretionary powers under § 759.35, STATS.[5]

Under § 752.35, STATS., we may grant a discretionary reversal if we find either that the real controversy has not been fully tried or if it is probable that justice has been miscarried and we conclude that there is a substantial probability of a different result on retrial. *See* ***State v. Wyss***, 124 Wis.2d 681, 734-742, 370 N.W.2d 745, 770-774 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 492, 506, 451 N.W.2d 752, 757 (1990).

There are two circumstances in which the real controversy has not been fully tried: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue in the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried. ***State v. Johnson***, 149 Wis.2d 418, 429, 439 N.W.2d 122, 126 (1989), *conf'd on reconsideration*, 153 Wis.2d 121, 449 N.W.2d 845 (1990). Neither is present in this case. The real controversy was whether Lehman was driving, and that was fully tried. There was no evidence erroneously excluded.

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[5] Section 752.35, STATS., provides:

> Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

And, assuming for purposes of argument that the undeleted reference to this charge as a second offense was "evidence not properly admitted," we conclude that it did not so cloud a crucial issue that it prevented the real controversy from being tried. Lehman argues that it may have affected the jury's assessment of her credibility, in that jurors may have believed that since she drove drunk once, she did so this time, and is therefore lying when she testified she did not drive. We address that argument more fully in subsequent paragraphs. For now, the significant point is that even if Lehman's contention is true, we do not consider that this prevented the real controversy—whether she was driving—from being tried.

Reversal in the interests of justice requires that we conclude that there is a substantial probability that retrial with the reference to a prior offense deleted would produce a different result. We observe at the outset that there was no reference made during opening or closing argument or by any witnesses or attorney during the trial to a prior offense. Therefore, the question is whether the existence of one reference to this charge as a "second offense" in the police report, which went into the jury room, would have influenced the jury, such that without that reference there is a substantial probability that the jury would have reached a different result. After considering all the evidence presented to the jury, we are not persuaded that there is a substantial probability that the result would be different.

Officer Tomlin's testimony that he observed the two persons in the car switching positions, and the male moving from the passenger seat to the driver's seat, was clear and unequivocal, as was his testimony that Brooks stated that Lehman was driving. There is no evidence indicating a motive for him to choose Lehman rather than Brooks as the driver, other than the observations and

statements he testified to. And his testimony—in particular Brooks' statement to him that Lehman was driving—cannot be explained by a misunderstanding or misperception on the part of Tomlin. On the other hand, Lehman's and Brooks' testimony of having sex while Brooks was driving is so unusual that it reasonably raises questions of plausibility and credibility, even without Tomlin's testimony. And Lehman's desire to be acquitted, Brooks' friendship with her, and the absence of a risk to Brooks in admitting at this point in time that he was driving, provide a motive for fabricating their account.

Lehman argues that the embarrassment of testifying to such an incident vouches for its credibility. Lehman also argues that, since she called Brooks to come to pick her up, it makes no sense that she was driving his car. However, both of these points can be explained in other ways, and neither explains away or diminishes in force the testimony of Officer Tomlin. The desire to be acquitted could outweigh embarrassment. And, since it was undisputed that Brooks drank after he arrived at the tavern and was under the influence of intoxicants when Officer Tomlin stopped the vehicle, there is a reasonable explanation for Lehman driving.

In short, even if the jury did consider the reference to a second offense, and did weigh that as a negative in assessing Lehman's credibility, in the absence of that reference there would still be reasons to question the credibility of Lehman and Brooks; and, there would still be Tomlin's solid testimony supporting guilt. We are therefore not persuaded that it is substantially probable that jurors would believe Lehman and Brooks, rather than Tomlin, if that reference were not in the exhibit.

Since we decline to exercise our discretionary power of reversal, and since we conclude that Lehman is not entitled to a new trial based on impeachment of the verdict, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.