**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 16, 2009**

**David R. Schanker**
**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. 2008AP2308-CR** **Cir. Ct. No. 2006CF5567**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SAMMIE L. SMITH,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Sammie L. Smith appeals a judgment entered after a jury found him guilty of three counts of felony murder. *See* WIS. STAT. § 940.03. Smith claims that the trial court erred when it denied his motion for a mistrial

because the jury was exposed to allegedly extraneous prejudicial information. We affirm.

I.

¶2 Smith was charged with three counts of first-degree intentional homicide, as a party to the crime, for the shooting deaths of Betty Jones and her sons, Christopher and Dexter Durant, on October 10, 2006. According to testimony from Smith's trial, the police found the three victims lying face down on the living room floor of Betty Jones's house. Betty Jones was shot in the head and Christopher Durant was shot in the chest. Dexter Durant was shot in the head and his hands were tied with a video-game controller cord.

¶3 According to police testimony, the living room and upstairs of the house had been ransacked. The police also found three .45 caliber casings from a semi-automatic gun in the living room and a nearby stairwell. An analyst from the state crime laboratory testified that the casings as well as bullet fragments from the victims were from the same gun, most likely a .45 caliber Glock semi-automatic handgun.

¶4 The day after the homicides, the police went to a suspected drug house in the area. According to one of the officers, when the police got to the house, Marlon Brisco jumped out a window and tried to run away. Brisco told the police that he and Smith were involved in the homicides at Betty Jones's house. The police also found in Brisco's possession a bracelet, necklace, and two rings belonging to Betty Jones.

¶5 Detective Tom Casper testified that he interviewed Smith. Smith told Casper that he went to a house with Brisco, Justin Jones, and Antione

Crittenden at approximately 10:30 a.m. on October 10 to rob the occupants of money and drugs. According to Smith, Crittenden kicked down the back door and the men ran into the living room where Smith saw two men, one with a bald head and one with braids, and one woman. According to Smith, the victims were told to lie on their stomachs on the living room floor, and Brisco and Crittenden demanded money and drugs. Smith admitted that he tied up the man with braids. He used a cable cord to tie his legs and a video-game controller cord to tie the man's hands.

¶6 Smith told Casper that he searched an entertainment center, a coffee table in the living room, and an upstairs room for money and drugs. According to Smith, after he came back downstairs into the living room he saw Crittenden shoot the bald man and the woman in the head with a black semi-automatic pistol. Smith told Casper that he was in the kitchen when he heard Crittenden shoot the man with braids. According to Smith, he and the other men then ran out the back door and down the alley.

¶7 Casper testified that during the interview he asked Smith open-ended questions because he

> want[ed] details that only [Smith] would know such as this was going to be a robbery, the right number of victims in the house, knowing their sexes, knowing that one was bald, one had braids, and there was a female, knew they were laid down in the living room, that that's were they were shot, he knew their wounds. He admitted to tying them up, and most importantly knew the two specific types of ligatures that were used. I want[ed] details that only the person I'm talking to would know.

Casper told the jury that this was significant because "[t]he information of how this crime happened and the fact that one victim was tied up [was not] released to

anybody. That's not released to the media. It's not told to the reporters in any briefings. Besides the investigators nobody knows that."

¶8 Smith did not testify. In his defense, his mother and sister testified that on October 9, 2006, he came home between 9:30 and 9:45 p.m. and stayed there for the rest of the night. On cross-examination, Smith's mother and sister admitted that Smith and Crittenden would often spend the night at Smith's aunt's house, which was across the street from Betty Jones's house.

¶9 The trial court instructed the jury on first-degree intentional homicide and the lesser-included offense of felony murder. It also told the jury to apply the law contained in the court's instructions: "It's your duty to follow all these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdicts on the law I give you in these instructions." The jury found Smith guilty of three counts of felony murder during the course of an armed robbery, as a party to the crime.

¶10 After Smith's trial, the prosecutor told the trial court that he had learned through the wife of another assistant district attorney that a juror on Smith's case "may have looked on the internet for some of the law in the case." The trial court held two hearings, at which five jurors from Smith's trial testified.[1]

¶11 The transcripts of the hearings use only the first names of the jurors; so will we. At the first hearing, Juror Melanie testified that during deliberations, one of the jurors stood up and said that she had "looked up … the definition" of

[1] Three of the five jurors testified under oath; two did not. Smith's lawyer did not object that two of the jurors were not placed under oath.

first-degree intentional homicide on an "official Wisconsin web site." Juror Melanie told the court, however, that the juror did not give any of the definitions she may have found, bring any paperwork into the jury room, or share her research with anyone. Juror Melanie testified that the other jurors ignored the juror who had done the research, and all of the jurors, including the juror who had done the research, agreed that they had to decide the case solely on the judge's instructions.

¶12 At the second hearing, the juror who had done the research, Juror Carol, admitted that on the night she was selected to be a member of the jury she went to a "Milwaukee County court systems" website and looked up the definition of first-degree intentional homicide. She told the court that she read a page with "four different levels" of homicide and "then … left the web site."[2] According to Juror Carol, she and the other jurors used only the judge's instructions to make their decision. They never used any of her research during deliberations and she never told the other jurors that what she looked up was "in any way different from what the Judge instructed."

¶13 Juror Cindy also testified at the second hearing. She told the trial court that during deliberations one of the jurors said that she had "looked at procedure," but did not explain what she meant. According to Juror Cindy, no one brought any outside information or paperwork into the jury room, and the jurors made their decision based on the written instructions from the judge.

[2] At the beginning of the trial, the judge instructed the jurors "not to do any independent investigation on your own like … bringing up names on [the Consolidated Court Automation Programs website] or anything of that nature." Juror Carol claimed that she did not "know that meant looking at a definition of a word…. I didn't look at how to do things. I only looked up the definition."

¶14 At the second hearing, Juror JoAnne testified that one of the jurors told them that she "had been on the Internet looking up the law [for first-degree intentional homicide] and she gave a description what she believed the law would be and what she thought the penalty would be." Juror Joanne told the court that the other jurors "cut off' that juror and told her that they needed to follow the law given by the judge. According to Juror Joanne, that juror did not bring any documents into the jury room and "spent probably the most time of anybody there pouring over" the trial court's instructions.

¶15 Juror Darcy testified at the second hearing that one of the jurors said that she had looked up the law on a court website. According to Juror Darcy, that juror, however, never tried to argue that law and did not bring any outside documents into the jury room. Juror Darcy told the trial court that the jurors decided the case based on the trial court's written instructions and considered "only what the Judge said": "I don't think anything outside was -- had any influence on any of us. I do think the instructions that were put in front of us were the final check off and deciding factor."

¶16 At the close of the testimony, Smith moved for a mistrial based on juror misconduct. The trial court denied the motion, concluding that there was no reasonable possibility that Juror Carol's conduct had any prejudicial effect on a hypothetical average jury:

> And even though that one juror may have [researched what] she called some procedural issues, I don't think it came to the level of a reasonable possibility that would have any prejudicial affect [*sic*] on any hypothetical average jury. And it appears that based upon what was said in chambers by those jurors, they followed the instructions of the court, nothing but those instructions. They were given those instructions during the course of their deliberations.

*See* ***State v. Broomfield***, 223 Wis. 2d 465, 480, 589 N.W.2d 225, 231 (1999) (test for prejudice is whether there is a reasonable possibility the extraneous information would have had a prejudicial effect on a hypothetical average juror).

II.

¶17 ***Castaneda v. Pederson***, 185 Wis. 2d 199, 208, 518 N.W.2d 246, 249 (1994), sets out what must be proved before a court may overturn a verdict and grant a new trial because of alleged juror misconduct. "The court must first determine whether the jurors are competent to testify in an inquiry into validity of the verdict, an evidentiary issue governed by [WIS. STAT. RULE] 906.06(2)."[3] ***Castaneda***, 185 Wis. 2d at 208, 518 N.W.2d at 249–250. If the party seeking to

[3] WISCONSIN STAT. RULE 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.

Under RULE 906.06(2), the party seeking to impeach the verdict must demonstrate that a juror's testimony is admissible by establishing that: (1) the juror's testimony concerns extraneous information (rather than the deliberative process of the jurors); (2) the extraneous information was improperly brought to the jury's attention; and (3) the extraneous information was potentially prejudicial. ***State v. Eison***, 194 Wis. 2d 160, 172, 533 N.W.2d 738, 743 (1995); *cf.* ***State v. Messelt***, 185 Wis. 2d 254, 280, 518 N.W.2d 232, 243 (1994) ("trial court[ has] the discretion to investigate allegations that extraneous prejudicial information affected the verdict irrespective of whether a juror communicated that information to even one other juror").

impeach the jury's verdict satisfies the initial burden under RULE 906.06(2), the issue turns to whether one or more of the jurors engaged in the conduct alleged and, if so, whether the error was prejudicial. ***State v. Eison***, 194 Wis. 2d 160, 172–173, 533 N.W.2d 738, 743 (1995).

¶18 Neither party disputes on appeal that the jurors were competent under WIS. STAT. RULE 906.06(2) to testify or that Juror Carol's research on "four different levels" of homicide and the "penalty" for first-degree intentional homicide was "extraneous" information. Accordingly, we focus our analysis on whether there was a reasonable possibility that Juror Carol's conduct was prejudicial.

¶19 As we have seen, the test for prejudice is whether there is a reasonable possibility the extraneous information would have had a prejudicial effect on a hypothetical average juror. ***Broomfield***, 223 Wis. 2d at 480, 589 N.W.2d at 231. This is a question of law that we review without deference to the trial court. ***Ibid.***

> To determine the possibility of prejudice we consider factors such as the nature of the extraneous information, the circumstances under which it was brought to the jury's attention, the nature and character of the state's case and the defense presented at trial, and the connection between the extraneous information and a material issue in the case.

***Eison***, 194 Wis. 2d at 179, 533 N.W.2d at 745.

¶20 Smith claims that he was prejudiced by Juror Carol's conduct because: (1) her research "apparently conflicted" with the instructions on first-degree intentional homicide and felony murder; and (2) given her violation of the

trial court's initial instruction not to do any independent research, there is no "guarantee" that she followed the "instructions on other matters." We disagree.

¶21 First, Smith does not show what definitions or penalties Juror Carol found through her research, let alone explain how any of those definitions or penalties conflicted with the trial court's instructions. *Cf.* ***State v. Ott***, 111 Wis. 2d 691, 696, 331 N.W.2d 629, 631 (Ct. App. 1983) (juror use of dictionary definition of "depraved" found prejudicial because it was "sufficiently broader than the technical meaning embodied in the instruction" on causing injury by conduct regardless of life). Second, and significantly, Smith has not shown that Juror Carol actually told the other jurors the definitions or the penalties she may have found. Indeed, as we have seen, when Juror Carol began to relate what she may have found, the other jurors "cut [her] off" and told her that they needed to follow the trial court's jury instructions. Several jurors, including Juror Carol, agreed that they followed the trial court's jury instructions and did not consider any outside information in reaching the verdicts. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989) (jury presumed to follow instructions). Thus, applying this Record to a hypothetical average jury, there is no reasonable possibility that Juror Carol's research would have affected that jury. This is especially true given the strength of the State's case. *See* ***Eison***, 194 Wis. 2d at 179, 533 N.W.2d at 745 ("[T]he nature and character of the state's case and the defense presented at trial" is a factor that can be considered in determining whether a defendant claiming juror misconduct has suffered prejudice.). Accordingly, the trial court properly denied Smith's motion for a mistrial.

*By the Court*.—Judgment affirmed.

Publication in the official reports is not recommended.