

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

OCTOBER 8, 1996

NOTICE

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(1), STATS.

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

No. 96-1459-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT JOHN KOTZ,

Defendant-Respondent.

APPEAL from an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed in part; reversed in part and cause remanded.*

CANE, P.J. The State appeals the trial court's order declaring a mistrial after a jury found Robert Kotz guilty of disorderly conduct, possession of marijuana and possession of drug paraphernalia. The State contends that the jury's post-verdict remarks to the trial court at an informal discussion do not constitute a competent evidentiary basis supporting a grant of mistrial. It also contends that the extraneous information submitted to the jury related only to the disorderly conduct offense and could not have prejudiced the jury as to the charges of possession of marijuana and possession of drug paraphernalia. The order granting a mistrial as to the disorderly conduct charge is affirmed, but the remaining portion of the order granting a mistrial as to the possession of marijuana and possession of drug paraphernalia is reversed.

The facts are undisputed. The police responded to a call from the Village Inn's bartender who had reported that Kotz had become disorderly and refused to leave the bar. The police arrested Kotz at the bar and after searching him, found in his possession a bag of marijuana and a brass "one-hit" pipe. The State charged Kotz with disorderly conduct based on his disruptions in the bar and also possession of marijuana and drug paraphernalia based on the items seized after the arrest. The matter was tried to a jury, which found Kotz guilty of the three charges.

After the jury returned a verdict finding Kotz guilty of the three offenses, the trial judge met informally with the jurors to answer any questions they may have had regarding the jury process. The attorneys for the State and Kotz were not present at this discussion. When one of the jurors asked the judge why they had not received evidence or testimony about Kotz's conduct after the arrest, it was discovered that the arresting officer's handwritten and typed copy of the incident report had been inadvertently submitted to the jury when it deliberated the verdict. This extraneous information referred to Kotz's actions, language and attitude outside the bar after his arrest. The judge and attorneys had gone to great lengths to keep this information from the jury as it was not relevant to Kotz's disorderly conduct offense alleged to have occurred inside the bar before the police arrived.

Seven days later, the trial court convened a hearing on its own and advised the parties of its discussion with the jurors after the trial. After relating its discussions with the jurors, the trial court inquired whether defense counsel had any motions. Defense counsel moved for mistrial as well as for permission to withdraw, reasoning that the information apparently had been inadvertently submitted to the jury through one of his exhibits. The trial court ordered a mistrial as to all of the charges when concluding that it would be speculative to determine how the jury used the extraneous information in the formulation of its verdict.

A motion for mistrial is addressed to trial court discretion and there is a strong policy against interference with that discretion. *See State v. Tuttle*, 21 Wis.2d 147, 149-51, 124 N.W.2d 9, 11 (1963). The State first argues that there is not a competent evidentiary basis for granting the mistrial. It reasons that the record consists merely of the trial court's reiteration of portions of its conversations with the jurors during the post-verdict meeting and that this is not competent evidence. The State correctly points out that the proper

procedure to determine whether extraneous information was submitted to the jury and its effect on the jury is outlined in *After Hour Welding v. Laneil Mgmt. Co.*, 108 Wis.2d 734, 742-44, 324 N.W.2d 686, 691-92 (1982). The State argues that the trial court should have questioned the jurors on the record to establish a competent evidentiary basis for specific findings regarding the prejudicial effect of any such information while exercising great care to prevent questions concerning the thought processes of the jurors.

Although the trial court's process of gathering this information is unorthodox, there is no dispute that the information concerning Kotz's conduct outside the bar with the police was not to be presented to the jury. In fact, the trial court went to great lengths to keep this extraneous information from the jury. Unfortunately, it is undisputed this information did go to the jury inadvertently during its deliberation on the verdict. Therefore, this court is satisfied from the record that there was competent evidence to establish that extraneous information was improperly submitted to the jury during its deliberations.

The prejudicial effect of this extraneous information is a question of law, and the trial court's determination is not accorded deferential review by the appellate courts. *After Hour Welding*, 108 Wis.2d at 741, 324 N.W.2d at 690-91. Here, the State does not challenge the trial court's conclusion that the extraneous information prejudiced the jury with regard to the disorderly conduct charge. However, it strenuously argues that there is no basis to conclude that this information influenced the jury's verdict as to the possession of marijuana and drug paraphernalia charges.

In *State v. Eison*, 194 Wis.2d 160, 179, 533 N.W.2d 738, 745 (1995), the supreme court stated:

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.

At issue in this case are the following statements contained in an exhibit submitted to the jury on defense counsel's motion:

Kotz was very loud and verbally abusive during the transport. The transport was taped with my Lanier mini cassette recorder and will be available upon request ... Kotz was brought into a receiving cell, from my squad, due to his uncooperative behavior.

... Kotz became verbally abusive and would not listen to me.

The State's case consisted of the bartender's testimony regarding Kotz's conduct in the bar; the arresting officer's testimony regarding Kotz's arrest and subsequent discovery and handling of the marijuana and drug paraphernalia; and the crime lab analyst regarding the testing of the marijuana. The defense testimony consisted of Kotz's two brothers regarding Kotz's conduct in the bar prior to the arrest. Kotz did not testify. Thus, the evidence regarding Kotz's possession of marijuana and drug paraphernalia was uncontroverted.

This court agrees with the State that although the jury's awareness of Kotz's post-arrest conduct may have influenced its verdict on the disorderly conduct charge, there is no logical or legal connection between the extraneous information and the possession charges. In *Eison*, 194 Wis.2d at 178, 533 N.W.2d at 745, the supreme court held that the standard to overturn a verdict under these circumstances is whether as a matter of law there is a reasonable possibility that the extraneous information would prejudice a hypothetical average jury. Here, there is no basis in the record to reasonably conclude that the jury's awareness of Kotz's post-arrest conduct would prejudice a hypothetical jury in its verdicts on the possession of marijuana and drug paraphernalia charges.

Therefore, the trial court's order is affirmed as to granting a mistrial on the disorderly conduct charge. However, the order granting a mistrial on the possession of marijuana and drug paraphernalia is reversed and the matter remanded to the trial court for sentencing.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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