

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2004

Cornelia G. Clark
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. 02-3384-CR

Cir. Ct. No. 00-CF-1991

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FELICIANO T. DOUGLAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Feliciano Douglas appeals a judgment of conviction and an order denying his motion for postconviction relief. The issue is whether he is entitled to a new trial because extraneous information was introduced into jury deliberations. We affirm.

¶2 Douglas was convicted of two counts of second-degree sexual assault by use of force. After trial, Douglas moved for a new trial on the ground that one of the jurors, who was a sheriff's deputy and jail staff member, had told other jurors that Douglas was being held in the jail, on other charges, at the time of the trial. After an evidentiary hearing, the court found that Douglas had not sufficiently proven that this information was given to the jurors, and denied the motion.

¶3 The parties agree that under the applicable legal standards Douglas must establish by clear, satisfactory, and convincing evidence that a juror made or heard potentially extraneous statements. *State v. Broomfield*, 223 Wis. 2d 465, 479, 589 N.W.2d 225 (1999). If Douglas does so, the court makes the legal determination of whether the extraneous information constitutes prejudicial error requiring reversal of the verdict. *Id.* The former is a question of fact that we review under the "clearly erroneous" test, and the latter is a question of law. *Id.* at 480.

¶4 At the evidentiary hearing, one juror testified that the sheriff's deputy juror, Amanda Hornung, had told her that Douglas was already in jail, and another juror testified that Hornung had told her Douglas was in jail for something else. The other jurors testified, but none said that Hornung had told them this information. Deputy Hornung testified and denied knowing Douglas or telling anyone that Douglas was being held in jail on another matter. The circuit court concluded that the testimony of Deputy Hornung and the majority of the jurors was more credible and, therefore, Douglas had not met his burden of proving that the extraneous information was conveyed to the other jurors.

¶5 On appeal, Douglas makes some very reasonable arguments why a court could have made a different credibility determination. However, it is well established that credibility determinations are for the circuit court. *See, e.g., State v. Pote*, 2003 WI App 31, ¶17, 260 Wis. 2d 426, 659 N.W.2d 82. Therefore, we accept the court's finding.

¶6 Furthermore, even if we were to conclude that Hornung did convey this information to other jurors, we are satisfied that it would not have been prejudicial. The test is whether there is a reasonable possibility that the extraneous information would have had a prejudicial effect upon a hypothetical average juror. *Broomfield*, 223 Wis. 2d at 480. Douglas argues that the law already presumes that it is prejudicial for jurors to know that defendants are in jail on other charges, which is why such evidence is not admissible at trial. However, we do not regard it as likely that the jurors in this case would have been more inclined to convict Douglas on this ground because they did not know the other reason why Douglas was in jail. In addition, as the State points out, the jury was more specifically aware of other prejudicial acts by Douglas that are not challenged on appeal. These include Douglas's statement to the victim that he was "a drug dealer" and the victim's observation that Douglas appeared to be in possession of cocaine.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

