COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1540-CR **Cir. Ct. No. 00CF005239**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA T. HOWARD,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Joshua T. Howard appeals, following a jury trial, from a judgment convicting him of one count of first-degree sexual assault of a child, one count of second-degree sexual assault of a child, eight counts of child enticement (prostitution), as a party to the crimes, and eight counts of soliciting a child for prostitution, as a party to the crimes. He also appeals from the order

denying his request for postconviction relief. Howard contends that the circuit court erred in concluding that his claim of jury misconduct did not warrant a new trial. We affirm.

I. BACKGROUND

¶2 In October 2000, Howard was charged with nineteen crimes stemming from a six-week period in November and December 1999, during which he and his friend, Matthew Steffes, had sexual intercourse with two juvenile girls and caused them to commit acts of prostitution. In June 2001, Howard and Steffes were tried in a consolidated six-day trial. The jury convicted Howard of all but one of the crimes charged in the information.

¶3 Prior to sentencing, Howard moved for a new trial based on juror misconduct. Howard alleged that internet information was discussed in the jury room. Further, during the evidentiary hearing on his claim, the parties also learned that the jurors had used a dictionary during deliberations. Consequently, the jurors were questioned about this as well.

¶4 Juror Jeffrey Shibilski, who submitted affidavits supporting Howard's motion, testified that, during a lunch break at some point prior to deliberations, Juror Brian Tragash told him that he had "looked up" the defendants' ages on the internet and had remarked, "These are bad guys, but I don't want to go into that." Shibilski maintained that this information was repeated in the jury room and, further, that the remark was linked to Howard's criminal history.

¶5 Questioned about this allegation, Juror Tragash denied gaining any information other than the ages and dates of birth of the defendants from the

internet. Tragash also denied calling the defendants "bad guys." The jurors who recalled the internet reference testified that the only information Tragash provided about the defendants was their ages and/or dates of birth.

¶6 Questioned concerning the dictionary definitions, Juror Randall Schultz acknowledged that he had looked up the words, "reasonable" and "doubt," in a pocket dictionary, and had shared the dictionary definitions with other jurors during deliberations. He also stated that the definitions were "about" the same as those that the court had read to the jury. Three other jurors, Anthony Papke, Philip Ryan, and Tragash recalled someone using a dictionary, but were not in agreement about which words were defined or who defined them. Papke stated that a dictionary was used to define "reasonable doubt."[1] Tragash said a dictionary was used to define "reasonable doubt" and "enticement," and that it was used "before" the jury asked the court for a dictionary.[2] Another juror, Michael Hansing, testified that he only recalled the conversation regarding the jury's request for a dictionary from the trial court. No other jurors recalled a dictionary being used during deliberations.

II. DISCUSSION

¶7 Howard argues that the postconviction court erred in denying his motion for a new trial. He maintains that the jury's exposure to internet information and dictionary definitions was prejudicial. We disagree.

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[1] Juror Papke stated that the jury "asked the Court to send back a dictionary[, which the court denied.]" The record, however, reveals nothing about this request.

[2] During the colloquy, the court asked Tragash if "enticement" had also been looked up in the dictionary; Tragash indicated that he believed it had been. On appeal, however, Howard only discusses the jury's use of the dictionary as it related to defining "reasonable doubt."

¶8 Extraneous information is information that is not of record and is not part of a juror's general knowledge. ***Castaneda v. Pederson***, 185 Wis. 2d 199, 209, 518 N.W.2d 246 (1994). The methodology for determining whether to overturn a verdict and grant a new trial because of juror misconduct is well established. ***Id.*** at 208. "The court must first determine whether the jurors are competent to testify in an inquiry into the validity of the verdict, an evidentiary issue governed by [WIS. STAT. §] 906.06(2)." ***Id.*** (footnote omitted).

¶9 Under WIS. STAT. § 906.06(2) (2001-02),[3] 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.[4] ***State v. Eison***, 194 Wis. 2d 160, 172, 533 N.W.2d 738 (1995). After the trial court determines whether the party satisfies the initial

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[4] WISCONSIN STAT. § 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.

burden under § 906.06(2), it determines whether one or more of the jurors engaged in the alleged conduct and whether the conduct was prejudicial. ***Eison***, 194 Wis. 2d at 172-73.

¶10 If the defendant meets the threshold burden of showing juror competency to testify under WIS. STAT. § 906.06(2), the trial court must conduct two additional analyses to decide if a new trial is warranted. ***State v. Broomfield***, 223 Wis. 2d 465, 479, 589 N.W.2d 225 (1999). First, the trial court must make the "factual determination whether 'one or more jurors made or heard the statements [in question] or engaged in the conduct alleged.'" ***State v. Wulff***, 200 Wis. 2d 318, 328, 546 N.W.2d 522 (Ct. App. 1996) (quoted source omitted), *rev'd on other grounds*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997). The defendant must prove the facts by clear, satisfactory, and convincing evidence. ***Id.***

¶11 If the defendant shows that the alleged statements were made or the alleged conduct occurred, the trial court must determine whether the extraneous information produced prejudice requiring reversal of the verdict. ***Broomfield***, 223 Wis. 2d at 479. The prejudicial effect of extraneous information "is considered only from an objective bias standard." ***State v. Faucher***, 227 Wis. 2d 700, 729, 596 N.W.2d 770 (1999). Hence, the focus is "on whether there is a reasonable possibility that the [extraneous] information … would have a prejudicial effect upon a hypothetical average juror." ***Broomfield***, 223 Wis. 2d at 480. To avoid a new trial, the State must establish that the error did not contribute to the verdict. ***Eison***, 194 Wis. 2d at 178.

A. "Bad Guys"

¶12 Howard contends that the circuit court erred in concluding that he failed to provide clear, satisfactory, and convincing evidence that Juror Tragash

actually discovered the defendants' criminal records and made the "bad guys" remark in connection to that information.[5] We disagree.

¶13 At the postconviction hearing, the circuit court posed essentially the same question to each juror: "[D]id any other information not part of the evidence that you heard in court come to your attention via any other juror or any other person during the course of the trial?" Howard contends that the court should have asked jurors specifically if they heard any "bad guys" remark linked to information that the defendants had criminal records. As the State aptly observes, however, the circuit court's question "effectively encompassed this possibility." The court was not required to be more specific.

¶14 All the jurors testified at the hearing. Only Juror Shibilski claimed Juror Tragash had made the "bad guys" remark, and made it in the context of learning about the defendants' criminal histories on the internet. Some other jurors remembered the comment about the defendants' ages but, as the circuit court observed, that information was part of the trial evidence. In fact, no juror, other than Shibilski, testified that he or she heard information that was not part of the evidence. Thus, the State argues:

> [A]lthough the court did not expressly say it disbelieved juror Shibilski, it did determine that Howard had not met

[5] Although the exact Internet information was not introduced at the evidentiary hearing, the State does not object to our consideration of the website page contained in Howard's appendix. That printout, from the Circuit Court Automation Program, does not specify any criminal convictions—it merely lists case captions and their status; i.e., whether a case is open or closed.

Generally, this court will not consider information not part of the appellate record. *See* ***Wurtz v. Fleischman*****,** 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (appellate court may not make factual findings or consider matters not contained in record). Here we need not do so because, as we will explain, Howard failed to meet his burden of proof.

> his burden of showing … that juror Tragash discovered the defendants' criminal histories…. Moreover, even assuming [Tragash had made that remark,] Howard has not convincingly linked the "bad guys" remark to information about the defendants' criminal histories.

The State is correct.

¶15 Juror Tragash stated that the website he examined "listed the case," with the name and age of the defendant, and that he "didn't go any further than that." Juror Steven Wurhmann said Juror Tragash told him that he found the cases and it had the ages of the two defendants. Wurhmann said Tragash said nothing else about the internet search. Based on this evidence, the circuit court reasonably determined that Howard failed to show by clear, satisfactory, and convincing evidence that Tragash either had discovered the defendants' criminal histories or had made the "bad guys" remark in that context.

B. Dictionary Definitions

¶16 Howard also contends that the circuit court erred in denying his motion to vacate the verdicts based on the jury's use of a dictionary. In response, the State concedes that the jurors' testimony was admissible under WIS. STAT. § 906.06(2), and that the information was extraneous and improperly brought to the jury's attention. The State argues, however, that "because the actual dictionary definitions of 'reasonable' and 'doubt' that juror Schultz read in the jury room were never introduced into evidence, Howard has not met his initial burden of showing that such information was 'potentially prejudicial' to him." The State is correct.

¶17 In his reply brief, Howard, citing ***State v. Ott***, 111 Wis. 2d 691, 331 N.W.2d 629 (Ct. App. 1983), maintains "it is unnecessary to know the exact

dictionary definitions used by the jury [to establish potential prejudice]." Without establishing at least some significant inconsistency between a dictionary definition and a jury-instruction definition, however, Howard cannot establish prejudice.

¶18 ***Ott*** is significantly distinguishable. There, the jurors used a dictionary definition of "depraved" when deliberating on whether the defendant was guilty of "injury by conduct regardless of life while using a dangerous weapon." ***Id.*** at 691, 693. Vacating the conviction, we reasoned that the dictionary definitions of "depraved" were "sufficiently broader than the technical meaning embodied in the [jury] instruction." ***Id.*** at 696. Here, however, the record offers no basis for any such conclusion.

¶19 In the instant case, the court presented the standard jury instruction:

> The term reasonable doubt means a doubt based upon reason and common sense. It is a doubt for which a reason can be given arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.
>
> A reasonable doubt is not a doubt based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of making a decision.

The record does not establish what definitions Juror Schultz presented. Thus, instead of relying on any specific definition improperly presented to the jurors, Howard offers various dictionary definitions of "reasonable" and "doubt." None of them, however, is inconsistent with the jury instructions.

¶20 Therefore, given that, presumably, standard dictionary definitions of "reasonable" and "doubt" are similar, and given that the ones Howard presented are consistent with the jury instructions, we can only conclude, on this record, that what Juror Schultz offered could not have prejudiced a hypothetical average juror. *See, e.g.*, ***State v. Dreher***, 695 A.2d 672, 702 (N.J. Super. Ct. App. Div. 1997) (harmless error for judge to give dictionary definition of "reasonable" because the definition does not lessen the State's burden of proof), *overruled on other grounds by* ***State v. Brown***, 784 A.2d 1244 (N.J. 2001). Thus, Howard has not established any prejudice because no reasonable possibility exists that the dictionary definitions, whatever they were,[6] would have misled a hypothetical average juror.

¶21 Accordingly, we conclude that although certain aspects of the juror conduct were improper, Howard has failed to establish the basis for a new trial.

By the Court.——Judgment and order affirmed.

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[6] Howard's appended definitions define "reasonable" to mean: "being in accordance with reason … not extreme or excessive … having the faculty of reason … possessing sound judgment." In addition, he offered the definition of "doubt" as: "uncertainty of belief or opinion that often interferes with decision-making … a lack of confidence … an inclination not to believe or accept."

Courts addressing this issue have found similar conduct harmless because, as one court has articulated:

> The definition provided by the dictionary was fairly innocuous and referred essentially to the "use of reason." The dictionary meaning did not conflict with the legal concept of "reasonable doubt," as explained in the instructions, and did not contradict any other aspect of the jury's instructions. The dictionary definition was also compatible with the common meaning of the word.

State v. Tinius, 527 N.W.2d 414, 415 (Iowa Ct. App. 1994) (where dictionary defined "reasonable" as "to use the faculty of reason to discover or formulate by the use of reason").

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