STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

Case No. 05-CF-381

DEFENDANT'S BRIEF REGARDING THE ADMISSIBILITY OF AND PROCEDURE FOR TAKING THE DISCHARGED JUROR'S TESTIMONY AT THE POSTCONVICTION HEARING

In his postconviction motion, Mr. Avery alleges that his constitutional and statutory rights were violated when the court: (1) discharged a deliberating juror, R.M., without conducting an on-the-record *voir dire* of the juror in the presence of the defendant and counsel; and (2) discharged the deliberating juror without a record establishing "cause" for doing so. Those errors, Mr. Avery alleges, violated his right to a jury trial as the state and federal constitutions guarantee, that is, the right to a unanimous verdict by the 12 jurors to whom the case was submitted.

Mr. Avery further alleges in his postconviction motion that removal of a deliberating juror without cause mandates his convictions be vacated. No further showing of prejudice is needed. However, Mr. Avery also alleges, in the alternative, that if prejudice must be established, he can do so through the

testimony of Juror R.M., which will show that, in fact, no cause existed for his removal. (*See* ¶18 of postconviction motion). The juror's testimony establishing prejudice – *i.e.*, that no cause existed to remove him – is also relevant to prove Mr. Avery's allegations that trial counsel were ineffective in agreeing to the court's private *voir dire* and discharge of Juror R.M. (*See* ¶¶28-31 of postconviction motion).

Responding to two questions posed by the court, Mr. Avery demonstrates below that: (1) Wis. Stat. § 906.06(2) does not apply to the testimony he seeks to elicit from R.M. because the testimony will not be used to challenge the validity of the verdict but, rather, to demonstrate that the juror was removed without cause; and (2) the manner of questioning the witness should proceed as with any other witness, by the parties with the opportunity for follow-up questions by the court.

I. BECAUSE MR. AVERY IS OFFERING JUROR R.M.'S TESTIMONY TO SHOW THE JUROR WAS DISCHARGED WITHOUT CAUSE AND NOT TO IMPEACH THE VALIDITY OF THE VERDICT, WIS. STAT. § 906.06(2) DOES NOT APPLY.

Wisconsin Stat. § 906.06(2) "governs the competency of jurors to testify in an inquiry into the validity of the verdict." ***State v. Poh***, 116 Wis. 2d 510, 517, 343 N.W.2d 108 (1984). The reach of the statute is limited by its own plain language. The statute applies only "[u]pon an inquiry into the validity of a verdict ...." The statute has no applicability where juror testimony is offered in an inquiry unrelated to the validity of the verdict, such as to show that the juror was discharged without cause.

By the statute's plain language, it limits in several ways "juror testimony as to matters relating to an inquiry into the validity of a verdict." ***State v. Williquette***, 190 Wis. 2d 677, 694, 526 N.W.2d 144 (1995). The statute reads as follows:

> **(2)** 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.

Wis. Stat. § 906.06(2). Its focus is on the verdict. In "an inquiry into the validity of a verdict", a juror may not testify as to any matter or statement occurring during deliberations. A juror may not testify as to the effect of anything upon the juror's mind or emotions "as influencing the juror to assent to or dissent from the verdict ...." A juror may not testify about his or her mental process "in connection" with his or her decision regarding the verdict.

The statute erects a barrier to juror testimony that is offered to impeach the validity of the verdict. Forbidden are attempts to show through the jurors' own statements that they rendered the verdict upon a mistaken view of the law or facts. Without such a barrier, the validity of virtually any verdict could be open to attack, and jurors would be less inclined to be frank and honest in their deliberations. ***State v. Messelt***, 185 Wis. 2d 254, 265, 518 N.W.2d 232 (1994).

Enacted in 1973, § 906.06(2) codified long-standing common law principles prohibiting inquiry into how a jury reached its verdict for purposes of

rendering the verdict invalid. Accordingly, a juror may not testify that she assented to a verdict only because of fatigue. ***Kink v. Combs***, 28 Wis. 2d 65, 78, 135 N.W.2d 789 (1965). The fact that jurors misunderstood the court's instructions cannot be shown by their statements in an attempt to impeach their verdict. ***Olson v. Williams***, 270 Wis. 57, 71, 70 N.W.2d 10 (1955). Nor can the court admit a juror's affidavit indicating that jurors based their verdict on sympathy and disregarded the evidence and instructions. ***Laedtke v. Schering Corp.***, 148 Wis. 2d 142, 144-45, 434 N.W.2d 798 (1988); *see also* ***Tanner v. United States***, 483 U.S. 107, 121-26 (1987) (applying the federal counterpart, Fed. R. Ev. 606 (b), to exclude evidence that jurors used drugs or alcohol).

Consistent with those principles, in ***Anderson v. Burnett County***, 207 Wis. 2d 587, 558 N.W.2d 636 (Ct. App. 1996), the court of appeals used § 906.06(2) as a basis for reversing the circuit court's grant of a new trial where the verdict was impeached by evidence of jurors' statements made during deliberations. Those statements included: (1) concern that the jurors' taxes would increase if, in the personal injury action, they rendered a verdict against the county; (2) an assertion that the plaintiff must be a bad daughter because her mother was not present in court; (3) criticism of the plaintiff's counsel as an "ambulance chaser"; and (4) the desire of five jurors to not disagree because they had to face each other at work. ***Id.*** at 591. The court of appeals held that the jurors were not competent to testify about these statements because the statements reflected the jurors' mental processes in arriving at a verdict and did not result from extraneous information.[1]

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[1] Under two exceptions specified in § 906.06(2), juror testimony may be used to impeach a verdict where extraneous prejudicial information was improperly brought to the jury's

Id. at 594-95. The testimony was inadmissible under § 906.06(2) because the plaintiff sought to challenge the validity of the verdict with the jurors' statements about how they reached their verdict.

These cases illustrate what is evident from the plain language of § 906.06(2): the statute generally bars juror testimony about what was said or done during deliberations where that testimony is sought for purposes of challenging the validity of the verdict. When the testimony is sought for another purpose, such as to establish the absence of cause for discharging a juror, the statute does not apply. Rather, the juror is competent to be a witness under the broad language of Wis. Stat. § 906.01, which provides that "[e]very person is competent to be a witness except ... as otherwise provided in these rules."

In determining the applicability of § 906.06(2) to a particular case, the supreme court has looked at the purpose for which the jurors' testimony is offered. In ***Messelt***, 185 Wis. 2d at 267, the court held that § 906.06(2) did not prevent jurors from testifying about what was said during deliberations "for purposes of determining whether a juror failed to reveal potentially prejudicial information during voir dire." In ***Williquette***, 190 Wis. 2d at 680, the court held that § 906.06(2) did not bar juror testimony offered to establish a clerical mistake in the jury verdict. The supreme court wrote:

> Under sec. 906.01, Stats., a juror is fully competent to testify concerning the possibility of a clerical error except as specifically proscribed in sec. 906.06(2). Consideration of sec. 906.06(2) reveals the limits of juror testimony as to matters

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attention or an outside influence was improperly brought to bear upon a juror. *See, e.g.*, ***State v. Eison***, 194 Wis. 2d 160, 174-75, 533 N.W.2d 738 (1995) (jury's experimentation with wrenches that a juror brought into jury room during deliberations); ***Manke v. Physicians Insurance Company***, 2006 WI App 50, ¶33, 289 Wis. 2d 750, 712 N.W.2d 40 (in medical malpractice case, juror brought into deliberations a dictionary definition of "negligence").

> relating to an inquiry into the validity of a verdict. Those limits simply do not include a strict proscription on the part of jurors to be competent as witnesses concerning an incorrect transcription in a jury verdict.

Id. at 694-95 (footnote omitted). The court reasoned that § 906.06(2) bars juror testimony that seeks to attack the validity of the verdict, which is the agreement reached by the jurors in their deliberations. ***Id.*** at 691-92. Correcting the written record of the verdict is not a challenge to the verdict – the jurors' agreement – and, therefore, falls outside the reach of § 906.06(2). ***Id.*** at 692.

Similarly, Mr. Avery is not offering R.M.'s testimony for the purpose of challenging the validity of the jury's verdict but, rather, to establish that R.M.'s removal from the jury was without cause. The testimony will establish prejudice arising from the court's failure, with trial counsel's acquiescence, to follow the mandated procedures before removing a deliberating juror. The prejudice being that, in fact, no cause existed to remove the juror. Testimony from R.M. that, in truth, there was no accident, that another juror suggested he try to get off the jury, and that he was feeling stressed from the deliberative process much more than from anything going on at home, has nothing to do with the validity of the verdict ultimately reached but everything to do with the validity of the decision to discharge Juror R.M. The testimony is not offered to show how the jury reached its verdict but, rather, how the court's failure to follow the proper procedure, and counsel's agreement authorizing the private *voir dire* and removal of Juror R.M., resulted in the discharge of a juror when, in fact, no cause existed for his removal.

In at least two federal cases where the defendant alleged in postconviction proceedings that a juror was removed without cause, one or more jurors testified at

a postconviction hearing regarding the circumstances of the deliberating juror's removal. ***Green v. Zant***, 738 F.2d 1529, 1532-33 (11th Cir. 1984) ("***Green II***"); ***Peek v. Kemp***, 784 F.2d 1479, 1483-84 (11th Cir. 1986). In neither case did Federal Rule 606(b) act as an impediment to the jurors' testifying. Nor should § 906.06(2), which is "virtually identical" to the federal rule. ***After Hour Welding v. Laneil Management Co.***, 108 Wis. 2d 734, 739, 324 N.W.2d 686 (1982).

In "***Green I***," ***Green v. Zant***, 715 F.2d 551, 556-57 (11th Cir. 1983), upon holding that the trial court failed to adequately investigate whether cause existed to discharge a deliberating juror, the court remanded for an evidentiary hearing to determine whether prejudice resulted from the court's failure to personally question the juror. Because evidence at the hearing, including testimony of several jurors, established the juror had been unable to continue, the court of appeals held that the defendant suffered no prejudice. ***Green II***, 738 F.2d at 1532.

Similarly, in ***Peek***, the appellate court found no prejudice where the record, which included testimony of the discharged juror in the state habeas proceeding, supported the trial court's finding that the juror was too ill to continue in deliberations. ***Peek***, 784 F.2d at 1484.[2]

Surely, if juror testimony may be admitted to establish no prejudice from the removal of a deliberating juror, juror testimony must also be admissible to

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[2] In other cases where the record made at trial did not provide cause for removing a deliberating juror, the federal courts have reversed without requiring any further showing of prejudice. *See, e.g.*, ***United States v. Curbelo***, 343 F.3d 273, 285 (4th Cir. 2003); ***United States v. Araujo***, 62 F.3d 930, 937 (7th Cir. 1995); ***United States v. Essex***, 734 F.2d 832, 845 (D.C. Cir. 1984). Under this authority, Mr. Avery need not show prejudice; he is entitled to a new trial because the record at trial failed to show cause for removing Juror R.M. However, Mr. Avery intends to present R.M.'s testimony in case this or a higher court would require a showing of prejudice.

prove prejudice. When a deliberating juror is removed without the court following the proper procedure, the prejudice inquiry does not involve the validity of the verdict reached by the remaining jurors but, instead, focuses on whether, in fact, the juror was incapable of continuing in deliberations. Thus, the rule restricting the impeachment of verdicts simply does not come into play.

In ***State v. Lehman***, 108 Wis. 2d 291, 300, 321 N.W.2d 212 (1982), the supreme court held that before discharging a deliberating juror, the circuit court must question the juror in the presence of counsel and the defendant and establish cause for the juror's removal. That procedure was not followed here. Juror R.M. was not questioned in the presence of counsel and the defendant, and the record does not establish cause for his removal. If some further showing of prejudice is required, the inquiry that should have occurred at the time of trial needs to occur now. The inquiry is into whether cause existed to remove the juror, not into the validity of the verdict. Consequently, § 906.06(2) is inapplicable.

II. THE MANNER OF QUESTIONING R.M. SHOULD PROCEED AS WITH ANY OTHER WITNESS: BY THE PARTIES WITH FOLLOW UP BY THE COURT.

The second question raised by the court at the scheduling conference is how R.M.'s testimony would be adduced at the postconviction hearing. Mr. Avery contends that the typical procedures of a postconviction motion hearing should apply. That is, since the defense is the proponent of R.M.'s testimony, the defense should question R.M. first, followed by the state's cross-examination. The court could then follow up with questions pursuant to Wis. Stat. § 906.14.

As argued above, the testimony the defense seeks to elicit from R.M. does not fall within the testimony prohibited by Wis. Stat. § 906.06(2) because the testimony will not be used to challenge the verdict, but rather, to demonstrate that R.M. was removed without cause. Because the testimony is not prohibited by Wis. Stat. § 906.06(2), there is no reason why any special procedures should be used at the postconviction hearing.

The cases discussed above show that jurors can and do testify in postverdict proceedings. Further, they testify in response to questioning by the attorneys, just as attorneys question any other witness. In ***Manke v. Physicians Insurance Company***, for example, jurors testified regarding extraneous information; a juror had brought a dictionary definition of "neglect" into the jury room. ***Manke***, 289 Wis. 2d 750 at ¶9. The opinion describes the evidentiary hearing, noting that "all twelve jurors were examined by defense counsel and cross-examined by the Mankes' counsel." ***Id.*** Likewise, in ***Messelt***, jurors testified regarding a claim of extraneous information reaching one or more of the jurors before arriving at a verdict. The opinion excerpts postconviction testimony at footnote 12, and the excerpt demonstrates that there, the attorneys examined the jurors. ***Messelt***, 185 Wis. 2d 254 at 272.

Other Wisconsin cases illustrate that attorneys examine juror witnesses at postconviction hearings. In ***State v. Searcy***, 2006 WI App 8, 288 Wis. 2d 804, 709 N.W.2d 497, a juror testified that she had doubts about her vote to convict, that she was not happy with the "whole process" and that she would never be a juror again. ***Id.*** at ¶36. She also testified about external information brought into deliberations by another juror. ***Id.*** at ¶ 37. The opinion notes that she qualified her story

somewhat on recross-examination. ***Id.*** Thus, it is apparent from the decision that this juror was subject to examination and cross-examination, presumably by the parties' attorneys.

In ***State v. Carlson***, 2003 WI 40, 261 Wis. 2d 97, 661 N.W.2d 51, a juror testified at the postconviction hearing regarding whether his English language skills were sufficient to serve as a juror. ***Id.*** at ¶¶ 14, 17. In describing the postconviction hearing, the court stated that "defense counsel and the prosecutor questioned [the juror] in English, and he was able to respond in English without the aid of an interpreter." ***Id.*** at ¶ 14.

The Supreme Court's cases relating to jurors also show that the attorneys examine the juror witnesses at the postverdict hearings. In ***Smith v. Phillips***, 455 U.S. 209 (1982), a juror bias case, Justice O'Connor stated in her concurrence that, in a case where a juror is alleged to be biased, a postconviction hearing will usually be adequate to determine whether the juror is biased. She noted that such a hearing "permits *counsel* to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his action" (emphasis added). ***Id.*** at 222. With this questioning of the juror then, the trial judge will be able to "observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case." ***Id.***

In ***Remmer v. United States***, 347 U.S. 227 (1954), the Court remanded the case to the District Court to hold a hearing "with all interested parties permitted to participate" to determine whether the fact of an FBI investigation into jury tampering prejudiced the petitioner. ***Id.*** at 230. After the remand and a hearing by the District Court, the case returned to the Court. The Court held that the District

Court had read the Court's remand order in too limited a fashion, and that "the entire picture" should have been explored. ***Remmer v. United States,*** 350 U.S. 377, 379 (1956).

> We also pointed out that the record we had before us did not reflect what in fact transpired, "or whether the incidents that may have occurred were harmful or harmless." Ibid. It was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, *made manifest the need for a full hearing.*

Id. (emphasis added).

Other federal courts have recognized that the juror witnesses will be questioned by the parties' attorneys. In ***Tinsley v. Borg***, 895 F.2d 520, 524 (9th Cir. 1990), the court observed that at the postconviction hearing, the juror who allegedly was untruthful during *voir dire* "was questioned by both the prosecution and the defense." And in ***United States v. Boney***, 68 F.3d 497 (D.C. Cir. 1995), the court of appeals stated that the district court which conducted the postconviction proceedings erred when it prohibited the defendant's attorney from questioning the juror witness. Recognizing that, at times, it would be preferable for the court to conduct the questioning, in this instance, both counsel should have been permitted to question the juror. "The proceedings are much more likely to uncover [the juror's] possible biases if the questions are not filtered through the judge, and given the specific facts of this case, it is unlikely that such an examination will compromise the confidentiality of jury deliberations." ***Id.*** at 503. The court also observed that the district court always has the ability to entertain objections at the hearing and to strike specific questions. ***Id.***

Although these cases contemplate that the attorneys will question a juror who becomes a witness (although this juror, unlike those discussed above, did not

deliberate to a verdict), counsel recognize that the court in ***After Hour Welding*** stated that the judge should ask the questions of a juror at an evidentiary hearing. ***After Hour Welding***, 108 Wis. 2d at 743. ***After Hour***, however, is significantly different from this case. In ***After Hour***, a dissenting juror in a civil case swore out an affidavit which stated that jurors, during the course of the trial, referred to one of the party's attorneys as a "Cheap Jew," remarked that the attorney's son had represented a notorious defendant, and speculated that the attorney had been involved in the suicide of a judge. It was these inflammatory remarks that the defendant corporations sought to explore at a postverdict hearing. The supreme court stated that when a trial court learns that a jury verdict may have been affected by prejudice based on race, religion, gender or national origin, the judge must be especially sensitive to such an allegation. ***Id.*** at 739-740. When this occurs, the trial court should "conduct an investigation to 'ferret out the truth.'" ***Id.*** at 740. The court went on to condemn anti-Semitism in this country, and stated that "courts should do all within their means to ensure that verdicts have not been compromised by jurors who harbor prejudice towards any minority." ***Id.***

Thus the concern in ***After Hour*** was significantly different from that here. In ***After Hour***, the court was concerned that the verdict was affected by bigotry among the jurors, and the court wanted the trial court to ferret out any bigotry in the proceedings. This concern--whether juror prejudice against a party's attorney played a role in the trial's outcome--tread perilously close to impeaching the verdict and eliciting testimony prohibited by Wis. Stat. § 906.06(2). The court was understandably cautious, therefore, in outlining a different procedure to be followed in such a case.

By contrast, this case does not present the concerns in ***After Hour***. Unlike ***After Hour***, R.M. did not deliberate to verdict. Unlike ***After Hour***, Mr. Avery does not seek to impeach the verdict with allegations of prejudice by jurors. Rather, he seeks to show that R.M. was removed from the jury without cause. Because the nature of the inquiry is so different from that in ***After Hour***, the court need not be as cautious as the supreme court was in ***After Hour***. Indeed, different considerations weigh in favor of permitting questioning by the parties.

Questioning by the attorneys is preferable to questioning solely by the court because the court will have an opportunity to observe and judge the juror's demeanor and credibility under questioning by adversary counsel, and because questioning by adversary counsel is the best way to test the juror's recollection of the facts and any biases he may have. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." ***Davis v. Alaska***, 415 U.S. 308, 316 (1974).[3] On cross-examination, the attorney may probe the witness' story to test his perceptions and memory, may impeach or discredit the witness, may seek to uncover bias or other ulterior motive. ***Id.*** All of these tools may be useful to the court to decide Mr. Avery's claim that Juror R.M. was removed without cause.

Indeed, Mr. Avery's contention that counsel should question R.M. is consistent, of course, with our adversary system of justice. "We have elected to employ an adversary system of justice in which the parties contest all issues before a court of law." ***United States v. Nixon***, 418 U.S. 683, 709 (1974). Although

[3] Indeed, in this case, counsel's position may ultimately favor the state because it means that the defense-proffered witness will be subject to cross-examination by the state as well as questioning by the court.

imperfect, the adversary system is how we find facts and determine the truth in our system of justice. And it is the best way to ascertain the facts with respect to Juror R.M.

CONCLUSION

For these reasons, Mr. Avery asks that the court conclude that Wis. Stat. § 906.06(2) does not bar R.M.'s testimony at the postconviction hearing, and that the court permit counsel to question R.M. at that hearing.

Dated this 23rd day of July, 2009.

Respectfully submitted,

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