STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY STATE OF WISCONSIN FILED

AUG 19 2009

CLERK OF CIRCUIT COURT

DEFENDANT'S REPLY BRIEF REGARDING THE DISCHARGED JUROR'S TESTIMONY AT THE POSTCONVICTION HEARING

INTRODUCTION

At the scheduling conference on July 9, 2009, the court asked the parties to address two issues in pre-hearing briefs as follows: (1) the admissibility of the juror's testimony in light of Wis. Stat. § 906.06(2); and (2) whether questioning of the juror at the postconviction hearing should be done by the parties or the court.

On the second question, the parties are in agreement. If Juror R.M. is permitted to testify, questioning should proceed as with any other witness, by the parties. As the party offering this witness, the defense would question first, followed by the state. (*See* State's brief at 2).

Regarding the first question, the state concedes that the proposed testimony described in six of the eight paragraphs that make up the defendant's offer of proof does not run afoul of § 906.06(2). (State's brief at 5). The parties' dispute regarding whether § 906.06(2) bars Juror R.M.'s testimony is now focused only on testimony described in paragraphs three and five of the offer of proof. As shown

below, that testimony falls outside the statute's reach, just as does the testimony in the other six paragraphs, because none of it is offered for the prohibited purpose of impeaching the jury's verdict.

The state has briefed two additional issues. It asserts that the juror's testimony is irrelevant and should be excluded on that basis. The state also argues waiver. As to the latter, Mr. Avery's postconviction motion presented several avenues under which his claims should be reached even if deemed waived, including ineffective assistance of counsel. (*See* ¶¶24-31 of postconviction motion). For now, Mr. Avery will simply rely on those arguments, particularly because the state's waiver argument seems far removed from the two issues the court asked to have briefed and would be more appropriate for the post-hearing briefing anticipated by the court. Because the former claim, that the juror's testimony is irrelevant, is more closely related to the evidentiary issue identified by the court, it warrants a response at this stage and, indeed, Mr. Avery will begin there.

I. JUROR R.M.'S TESTIMONY IS RELEVANT TO SHOW BOTH THAT, IN FACT, NO CAUSE EXISTED FOR HIS REMOVAL AND THAT COUNSEL PERFORMED DEFICIENTLY BY AGREEING TO THE JUROR'S REMOVAL WITHOUT A PROPER *VOIR DIRE*.

The state is correct that for a portion of Mr. Avery's claims the juror's testimony is irrelevant. Mr. Avery has alleged that the court's removal of Juror R.M. without an on-the-record *voir dire* establishing cause and without the presence of Mr. Avery and his counsel is structural error requiring reversal of his convictions. (¶17 of postconviction motion). If this or a higher court agrees and the claim is reached on a theory other than ineffective assistance of counsel, the juror's testimony would be irrelevant. However, Mr. Avery has also alleged that the court's failure to follow the mandated procedure before discharging the juror

was prejudicial. In addition, he has alleged that trial counsel performed deficiently with respect to the juror's removal. As to both claims – prejudice and counsel's performance – the juror's testimony is relevant.

Some courts have held that where the trial court has removed a deliberating juror without a record establishing cause for removal, reversal is required without any further showing of prejudice. ***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. Patterson***, 26 F.3d 1127, 1129 (D.C. Cir. 1994); ***United States v. Essex***, 734 F.2d 832, 845 (D.C. Cir. 1984). Other courts have required a showing of prejudice, which is satisfied by evidence establishing that the juror was capable of continuing with deliberations and, therefore, no cause in fact existed for his or her removal. ***Green v. Zant***, 715 F.2d 551, 556-57 (11th Cir. 1983) ("***Green I***"); ***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). Indeed, in ***Green I***, the appellate court remanded for an evidentiary hearing to determine, including through the juror's testimony, whether cause existed to excuse the juror.

Should this or a higher court determine that the erroneous removal of a deliberating juror is not structural error, Mr. Avery carries the burden of proving prejudice. On that question, Juror R.M.'s testimony is highly relevant. In ***Green II*** and ***Kemp***, the appellate courts concluded, based upon postconviction testimony, that the jurors were incapable of continuing. Consequently, the defendant suffered no prejudice because, despite the inadequate record made at the time of trial, cause in fact existed to discharge the juror. ***Green II***, 738 F.2d at 1532; ***Peek***, 784 F.2d at 1484. Here, Mr. Avery also claims that an inadequate record was made before the juror's removal. If a showing of prejudice is required, an inquiry of the sort that should have been made at the time of trial must be made now. Juror R.M.'s testimony about why he was seeking to be removed, his

emotional state at the time, the cause for his distress, if any, and his family situation is relevant to determining whether, in fact, cause existed to discharge him.

Similarly, R.M.'s testimony is relevant to establish that trial counsel performed deficiently by agreeing to the removal of Juror R.M. without an on-the-record *voir dire* in their presence. Counsel should have insisted on being present with their client during the *voir dire* of R.M. And counsel should not have agreed to R.M.'s removal without a careful inquiry contemplated by ***State v. Lehman***, 108 Wis. 2d 291, 300, 321 N.W.2d 212 (1982). Those decisions constituted deficient performance.*

When a defendant alleges the deprivation of the right to the effective assistance of counsel, the defendant "must *show* that counsel's performance was deficient." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (emphasis added). A defendant typically *shows* the alleged deficiency through evidence presented at the postconviction hearing. No doubt this court has presided over numerous postconviction hearings where postconviction counsel is expected to show the court specifically how trial counsel was deficient.

Thus, for example, postconviction counsel in ***State v. Felton***, 110 Wis. 2d 485, 329 N.W.2d 161 (1983), called a psychologist to testify at the postconviction hearing who had also been a witness at the trial. At the postconviction hearing, the psychologist testified as to the ways in which her trial testimony would have been different had she had more information about the legal underpinnings of the defense case. ***Id.*** at 496-497. The psychologist would have opined, for example, that had she understood the idea of "not guilty by reason of mental disease or defect," she could have testified that the defendant did not have the "substantial

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* Moreover, those decisions precipitated the subsequent decision to substitute the alternate juror, which Mr. Avery also alleges was deficient. (¶29 of postconviction motion).

capacity to appreciate the wrongfulness of her acts" and that the defendant was "unable to conform her conduct to the requirements of the law." ***Id.*** at 497. In other words, postconviction counsel demonstrated what the expert witness would have testified to absent trial counsel's deficient performance.

In order for this court to decide whether Mr. Avery was deprived of his constitutional right to the effective assistance of counsel, it must have the facts before it that are necessary to that determination. Just as the court must have the testimony of trial counsel, ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), it must have the testimony of Juror R.M.

The state quotes authority for the proposition that the defendant must overcome a presumption that counsels' decision might be considered sound trial strategy. (State's brief at 4). Juror R.M.'s testimony is relevant to rebut that presumption. Mr. Avery intends to show that counsels' decisions were *not* sound trial strategy. To do that, he must present evidence establishing what counsel would likely have learned through a proper *voir dire*. The best evidence for that is Juror R.M.'s testimony. ***State v. Reynolds***, 2005 WI App 222, ¶11, 287 Wis. 2d 653, 705 N.W.2d 900 (the determination of facts is ordinarily determined based on live testimony).

A trial attorney's choices are made based upon facts and the law. If that trial attorney does not have full knowledge of facts, say through a lack of investigation, that attorney's performance may be deficient. Or, if the attorney does not have full knowledge of the law, the attorney's performance may be deficient. The only way to determine that deficiency is through an exploration of the facts and the law relevant to those facts. For this reason, Juror R.M.'s testimony is as relevant as that of trial counsel in this case.

Finally, the state faults R.M. for not being completely candid with the court on the night of his removal. (State's brief at 3). That argument misses the point. Mr. Avery's claim arises from the failure of the court and parties to follow the procedure mandated by ***Lehman*** when a deliberating juror seeks to be excused. Because a proper inquiry was not made before R.M.'s removal, issues concerning counsel's performance and whether cause actually existed must now be resolved. On both issues, the juror's testimony is relevant.

II. ALL OF JUROR R.M.'S PROPOSED TESTIMONY AS SET FORTH IN THE OFFER OF PROOF FALLS OUTSIDE THE REACH OF § 906.06(2).

Without citing any authority to support its claim, the state contends that Juror R.M.'s testimony is barred by § 906.06(2) because it is "an indirect attack on the validity of the verdict reached by the presiding jurors who rendered it." (State's brief at 5). The court should reject this claim.

As demonstrated in Mr. Avery's opening brief, the statute by its plain language is limited to juror testimony offered to show how the jury arrived at its verdict for the purpose of challenging the validity of the verdict. Juror R.M.'s testimony is not offered to show how he or the other jurors arrived at a verdict. Indeed, R.M. did not deliberate to a verdict. His testimony is offered to show how he arrived at his request to be removed. What the defense is challenging is the validity of his discharge. His testimony is outside the reach of § 906.06(2).

Although cited in Mr. Avery's brief, the state does not address ***State v. Messelt***, 185 Wis. 2d 254, 267, 518 N.W.2d 232 (1994), in which the supreme court examined the purpose for which juror testimony was offered in order to determine whether it was barred by § 906.06(2). There, the jurors' testimony was offered at a postconviction hearing for purposes of establishing whether the jurors failed to reveal potentially prejudicial information during *voir dire*. The supreme

court rejected the court of appeals' conclusion that this testimony was barred by § 906.06(2). ***Id.***

Although the proper time to determine whether a juror is impartial is generally during *voir dire*, when it is alleged that a juror did not give complete or truthful answers on *voir dire*, § 906.06(2) does not bar the juror's postconviction testimony for purposes of determining whether the juror was biased. ***Id.*** at 267-68. The same reasoning applies here. Although cause for discharging a deliberating juror should be established before the juror's removal, when the proper inquiry was not conducted, § 906.06(2) does not bar the juror's postconviction testimony for purposes of determining whether cause existed for his removal.

As noted above, the parties' dispute about the admissibility of R.M.'s testimony under § 906.06(2) has narrowed to two paragraphs of the offer of proof, which provide as follows:

> 3. After the first day of deliberations, R.M. went to dinner at a restaurant with the other jurors. At dinner, R.M. expressed to another juror, C.W., that the process was stressful and weighing on him. Indeed, R.M. was feeling frustrated because some other jurors, especially C.W., appeared close-minded during deliberations. In response to R.M.'s comment about the stress of the trial and deliberations, C.W. told R.M. that if he couldn't handle it, he should tell them and get off the jury. R.M. felt intimidated by C.W. and believed that C.W. wanted him off the jury. In the initial vote taken that first day, C.W. was among a minority voting guilty, and R.M. was with those voting not guilty.
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> 5. R.M. returned to his motel room after the phone conversation with his wife. R.M. felt frustrated and discouraged, but his mood was attributable more to what was occurring on the jury than at home. In particular, R.M. was upset about his exchange with Juror C.W.

All of this information would have been properly considered by the court in determining whether there was cause to discharge the deliberating juror, had it been elicited before R.M.'s removal. Likewise, all of this information is admissible at the postconviction hearing for purposes of assessing the propriety of the juror's discharge.

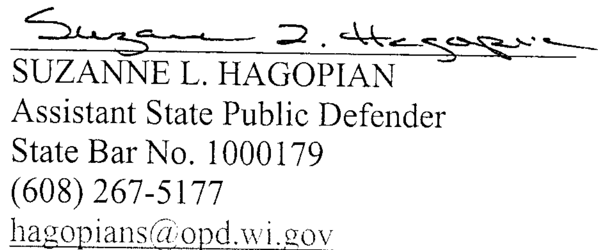
When discharging R.M., the court expressly considered the juror's mood, noting that he sounded depressed and seemed distraught. (Court memo, March 16, 2007, p. 2). Based upon information conveyed in a phone call, the court believed R.M.'s mood was due to a family emergency, that is, a stepdaughter's accident and a failing marriage. (*Id.*). The above testimony provides an alternate, more accurate explanation for R.M.'s mood. He was frustrated by the deliberative process and upset by what he perceived as an intimidating exchange with another juror. All of that testimony is not only admissible but highly compelling because, as argued in the postconviction motion (¶18), removal of a juror is improper if there is any reasonable possibility that its impetus was a problem among jurors due to their differing views of the merits of the case. *See, e.g.*, ***United States v. Symington***, 195 F.3d 1080, 1085-87 (9th Cir. 1999). Accordingly, testimony about the preliminary vote, at least to the extent it showed the two jurors held differing views of the merits of the case, is admissible when assessing whether there was cause to discharge R.M. All of the proposed testimony in paragraphs three and five, like the proposed testimony set forth in the other paragraphs, is offered to show why R.M. was seeking to be excused and why, in fact, no cause existed for his removal. The testimony is not barred by § 906.06(2).

CONCLUSION

Mr. Avery requests that the court conclude that all of R.M.'s proposed testimony as set forth in the offer of proof is relevant, not barred by § 906.06(2) and, therefore, admissible at the postconviction hearing. Further, the court should permit the parties to question R.M. at the hearing. Should the court rule that all or some of R.M.'s testimony is inadmissible, Mr. Avery would ask to present at the hearing an offer of proof by questioning R.M., given that the question and answer format is preferred by the appellate courts. *See* ***Milenkovic v. State***, 86 Wis. 2d 272, 285, n.10, 272 N.W.2d 320 (Ct. App. 1978).

Dated this 19th day of August, 2009.

Respectfully submitted,



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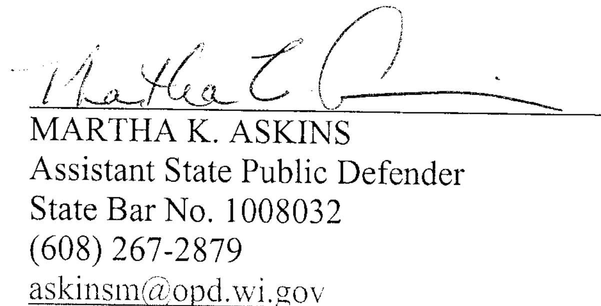

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Defendant's reply Brief
Regarding Testimony At The
Postconviction Hearing

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