COURT OF APPEALS DECISION DATED AND FILED

December 23, 2010

A. John Voelker
Acting 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. 2010AP1429-CR **Cir. Ct. No. 2008CM838**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY A. BRANDSMA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Bradley Brandsma was convicted of misdemeanor battery at a jury trial during which the circuit court allowed the jury

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

to separate for the night after beginning deliberations, then return to the courthouse to resume deliberations the next morning. Brandsma asserts on appeal that the court erroneously exercised its discretion in allowing the jury to separate, and that the court erred in failing to grant his postconviction motion for a new trial. In that motion, Brandsma claimed that allowing jurors to separate presumptively deprived Brandsma of his constitutional right to a fair trial before an impartial jury. Because Brandsma fails to cite authority supporting these propositions, and also because this court lacks authority to announce the new presumption he seeks to establish even if he had provided authority pointing toward the need for such a rule in the Internet age, the judgment of conviction and the order denying the motion for a new trial are affirmed.

Background

¶2 Relevant facts are not in dispute. By about 2:45 p.m. during the first day of Brandsma's trial, jurors had been selected, heard the evidence, were instructed on the law by the court, considered arguments of the attorneys, and began deliberations.

¶3 As required by WIS. STAT. § 756.08(1), after they were selected, jurors took an oath or affirmation "to give a verdict according to the law and the evidence given in court."[2] The first instruction the jury received from the court included the following directions:

> It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the

[2] The record does not reflect the words spoken by the clerk in giving the oath, but there is no reason to assume from the record or the briefs of the parties on appeal that the clerk did not use the statutory language.

> law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence. *Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict.*
>
> .... You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

(Emphasis added.)

¶4 Before the jury retired to deliberate following closing arguments, the bailiff took an oath related to sequestration of the jury. The bailiff swore that he or she would "keep all jurors together in some private and convenient place until they have agreed on and rendered their verdict, are permitted to separate or are discharged by the court," pursuant to WIS. STAT. § 756.08(2).[3] Subsection 756.08(2) also provides that while the jurors were under the supervision of the bailiff, the bailiff could not "permit them to communicate with any person regarding their deliberations or the verdict that they have agreed upon, except as authorized by the court."

¶5 At about 4:45 p.m. on the first day of trial, after deliberating for a little over two hours, the court alerted the parties that, for logistical reasons involving courthouse security, the court was inclined to advise jurors that they would be excused at about 5:00 p.m. and asked to return the next day to continue deliberations.

[3] Again the record does not reflect the words used by the clerk to swear the bailiff, and again there is no reason to think that the clerk did not use the statutory language.

¶6 The State took no position on the proposal to adjourn for the day and allow jurors to go home for the night, except to suggest that the jury be admonished about prohibited conduct during separation. Defense counsel raised several objections, but only the following is relevant to this appeal:

> I just don't like the fact that [jurors] are in the midst of their debate concerning facts, et cetera. I don't want them to be released and let go to go home because they could be influenced by other parties, family members, et cetera. They could decide to, you know, what, do anything, look things up on the Internet, look names up; and for that reason, I just think I would be in opposition to that.

¶7 The court allowed jurors to continue to deliberate until 5:17 p.m., at which time the court had the bailiff bring them back into the courtroom and informed them that the court was recessing for the evening and that jurors were to return to the courthouse the next day. Jurors were to proceed directly to their deliberation room by 9:00 a.m., but without deliberating again until all jurors were present. The court then admonished the jury as follows:

> Do not discuss the matter with anyone. This would include spouses, children, significant others this evening. The decision you make tomorrow should be based solely on your 12 perceptions of what the testimony is and not what someone else might say or add to the conversation; so as I said earlier, the temptation is there to talk about this, but I ask that you not do that; and lastly, do not do any independent research on any aspects of this case or any parties or witnesses or anything else. Your decision must be based solely on the testimony that you heard here earlier today.

¶8 The next morning, the court went back on the record and announced that a verdict had been reached. The court asked the attorneys if either party had any matters to take up before the jury was brought back into the courtroom, and each responded no. The jury returned with a guilty verdict.

¶9 Following trial, Brandsma moved for a new trial on the grounds that the separation of the jury violated ***State v. Halmo***, 125 Wis. 2d 369, 371 N.W.2d 424 (Ct. App. 1985), in part because the court did not conduct a voir dire of jurors upon their return to the courthouse on the second day of trial to inquire about any improper communication or investigation that might have occurred as a result of the jury separation.[4] The court denied the motion, agreeing with the State that the court had properly exercised its discretion under applicable legal standards in temporarily allowing the jury to separate as the court did.

Discussion

¶10 Brandsma acknowledges that WIS. STAT. § 972.12, which we discuss immediately below, gives circuit courts very broad discretion regarding jury sequestration and separation. Brandsma asks this court, however, to "adopt a rule that jury separation during deliberations is *per se* reversible error or, in the alternative, maintain the rule of a rebuttable presumption of prejudice announced in ***Halmo***, albeit on constitutional grounds."

¶11 Brandsma's claim purports to require interpretation of a statute (WIS. STAT. § 972.12) as well as the application of constitutional principles to settled facts, each of which would be a question of law that we review de novo. *See* ***Theuer v. Labor & Indus. Review Comm'n***, 2001 WI 26, ¶5, 242 Wis. 2d 29, 624 N.W.2d 110 (application of law to undisputed facts); *see also* ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97 (application of constitutional principles to settled facts).

[4] Defense counsel also purported to move for a "mistrial" on the same grounds, but this would have been a tardy motion.

¶12 The current version of WIS. STAT. § 972.12 leaves jury sequestration and separation to the broadest discretion of trial courts: "The court *may* direct that the jurors sworn be kept together *or* be permitted to separate. The court may appoint an officer of the court to keep the jurors together and to prevent communication between the jurors and others." (Emphasis added.) This wording leaves no doubt that the circuit court was permitted, under the terms of § 972.12, to take the actions it did in this case.

¶13 Brandsma purports to rely on ***Halmo*** not for its holding, but only for general principles the opinion discusses. The first part of this approach makes sense, because the holding in ***Halmo*** is a dead letter. This court was called on in that case to interpret a prior version of WIS. STAT. § 972.12 that was much more restrictive than the current version.[5] ***Halmo***, 125 Wis. 2d at 370. Moreover, this court explicitly framed its analysis as entirely statutory, disavowing a constitutional dimension. ***Id.*** For these same reasons, however, it is hard to see any merit in the second part of Brandsma's approach. There is no value in citing an opinion that only interpreted a statute that has been very significantly revised since the opinion was issued.

¶14 Nevertheless, Brandsma claims that under his right to an impartial jury, guaranteed by article I, section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution, a circuit court should presume that

[5] The version of WIS. STAT. § 972.12 then in effect divided a jury's service into two parts. Subsection 972.12(1) permitted a trial court, in its discretion, to allow separation of the jury after it was sworn but before submission of the case. However, under subsec. 972.12(2), after the jury retired to deliberate, the court lost its discretion, and was required to appoint an officer of the court to keep the jury together.

any separation of a jury renders that jury impartial in light of rapidly changing modes and content of publicly available information.

¶15 Regarding these rapid changes, Brandsma cites public access via the Internet to the online records of Wisconsin circuit court proceedings, widely referred to as "CCAP" records. Brandsma points out that if a juror who was at home during the overnight separation decided to go online and type Brandsma's name into CCAP, the juror would have discovered multiple case records under his name, exposing the juror to unfairly prejudicial material.

¶16 Brandsma points to what is only the tip of a growing iceberg that no doubt *potentially* threatens every criminal defendant's elemental right to an impartial jury. Any juror with a smartphone or other personal digital assistant with access to the World Wide Web could, at any time, retrieve CCAP data from a courthouse hallway or bathroom. Or, a juror could telephone or text a friend to check CCAP from any location. For that matter, such a juror intent on violating the juror oath and clear direction from the court could also search for gossip, opinion, or official record reflected in social media or other online data that might contain favorable or unfavorable references to Brandsma, to the victim, or to witnesses called by either party. All of this clear juror misconduct could be done swiftly under the guise of "checking a phone message" or "checking a text."

¶17 However, Brandsma fails to cite authority that is even remotely on point for his constitutional claim that there is a presumption of partiality arising from a separation, or to any record facts suggesting a lack of impartiality by any juror in this case.

¶18 The sole authority Brandsma cites in support of his constitutional claim, ***State v. Alfonsi***, 33 Wis. 2d 469, 480-82, 147 N.W.2d 550 (1967), merely

observed that it would have been "the better exercise of discretion" to "isolate" the jury, apparently meaning sequester the jury throughout the course of a three-day trial of the minority floor leader of the Wisconsin State Assembly on a charge of bribery. Because of the high level of public and media interest, jurors should have been "insulated from outside influences." ***Id.*** at 482. The court reversed the conviction on other grounds, and did not purport to reverse on this ground. ***Id.*** at 484.

¶19 The court in ***Alfonsi*** cited ***Parker v. Gladden***, 385 U.S. 363 (1966), as authority for its concern, but this case also provides no support for Brandsma's argument. In ***Parker***, the United States Supreme Court was presented with a case in which a bailiff, during the course of a homicide prosecution, told various members of the jury that the defendant was a wicked fellow, that he was guilty, and that if there was anything wrong in finding him guilty the Supreme Court would catch it. ***Id.*** at 363-64. Neither ***Alfonsi*** nor ***Parker*** remotely resembles the facts of this case.

¶20 There is no suggestion by Brandsma of misconduct, extrinsic or intrinsic to the jury process, by any juror. Nor was this a case, so far as the record reveals, that attracted any sort of special community concern or media attention that might invite juror misconduct or inadvertent exposure to prejudicial publicity. Brandsma's trial attorney did not ask the court to conduct a voir dire of the jurors upon their return to the courthouse. Moreover, there is no reason to believe that such a voir dire would have either uncovered or prevented any unfair bias attributable to the separation, particularly in light of the clear and forceful direction that the circuit court gave to jurors before excusing them at the end of the first day of trial, together with the other instructions cited above.

¶21 Finally, this court may not announce new rules of constitutional interpretation that are not tethered to binding precedent. ***Cook v. Cook***, 208 Wis. 2d 166, 188-89, 560 N.W.2d 246 (1997). No one could reasonably question the fact of rapidly mushrooming sources of instant, easily accessible, and potentially prejudicial communications. Yet Brandsma has not cited authority binding on this court even implying that the federal or Wisconsin constitutions might require a court to presume a lack of impartiality arising purely from separation of a jury in light of these changing social and technological circumstances. Therefore, this court is without authority to announce and apply such a new rule for the first time here. Accordingly, the judgment of conviction is affirmed.

By the Court.—Judgment and order affirmed.

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