COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2061-CR **Cir. Ct. No. 2011CF355**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD B. BLASCZYK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Gerald Blasczyk appeals a judgment of conviction, entered upon a jury verdict, for operating while intoxicated (OWI) with ten or more previous offenses, contrary to WIS. STAT. §§ 346.63(1)(a) and

346.65(2)(am)7.[1] Blasczyk advances several arguments on appeal, among them that he is entitled to a new trial because the primary witness in his defense verbally and physically confronted a juror outside the courtroom during a recess before deliberations commenced. We agree with Blasczyk that the encounter caused prejudicial extraneous information to be brought to the jury's attention. We therefore reverse and remand for a new trial on the OWI charge.

BACKGROUND

¶2 After Blasczyk was charged, the case proceeded to a jury trial. The State called Leverne Fitzgerald, who testified that while traveling home in the westbound lane, he noticed a Jeep with a trailer stopped in the eastbound lane. The Jeep, which was parked with its engine running, was angled such that the trailer obstructed about half of the westbound lane. It was dark, and even though the windows of the Jeep were slightly tinted and closed, Fitzgerald could see someone hanging over the steering wheel. The driver did not respond when Fitzgerald began yelling and banging on the windows. The Jeep's doors were locked.

¶3 Eventually the driver awoke, and Fitzgerald went to the driver's window to speak with him. At some point the driver's foot came off the brake, and the Jeep started to move toward the ditch. When the driver applied the brake and put the vehicle in park, Fitzgerald tried to grab the keys through the window.

[1] Blasczyk was also convicted of battery to law enforcement officers contrary to WIS. STAT. § 940.20(2), and disorderly conduct. Blasczyk does not challenge those convictions on appeal.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The driver put the Jeep in reverse, told Fitzgerald to leave him alone, and resumed driving eastbound.

¶4 Fitzgerald returned to his car and followed the Jeep. He lost sight of it for a short time, but saw a pair of headlights coming from behind a barn at a farm. Fitzgerald approached the barn to determine if it was the same vehicle and, concluding it was, backed out to the shoulder of the road and dialed 911. As the Jeep approached the residence, two people came out of the house.

¶5 Fitzgerald could not positively identify Blasczyk as the driver. He believed it was Blasczyk, but could not be sure. Fitzgerald stated the driver was thin, and wore a baseball hat and glasses. Fitzgerald was shown a picture of Frank Vandehei, who would later testify in Blasczyk's defense and claim to be the driver. Fitzgerald stated Vandehei was not the driver.

¶6 The owner of the farm, Paul Gardner, also testified. He was awakened by his barking dogs. Gardner eventually walked out to approach the vehicle. The driver identified himself as Blasczyk and asked Gardner to pretend he had been there all night. Gardner walked away as police arrived.

¶7 In his defense, Blasczyk presented testimony from individuals who were present at the White Birch Tap on the night in question. The evidence established that Blasczyk was present at the bar and very intoxicated. One bar employee testified he offered Blasczyk a ride home. Blasczyk declined, saying something like, '"[d]on't worry about it' or he's got it covered." Cory Bruns recalled seeing Blasczyk leave the bar that night by "crawling and holding on to two other fellows …." They carried Blasczyk to the passenger side of a vehicle

and put him in. Bruns recalled seeing Blasczyk's "rear end" through the windshield at the same time the vehicle was backing up.[2] Bruns testified he had seen the driver and, when shown a photograph of Vandehei, responded that he did not know the guy but was 95% sure Vandehei was the driver.

¶8 The defense then called Vandehei, who testified he was with Blasczyk on the night in question. Vandehei, who was dating Blasczyk's aunt and knew Blasczyk previously, did not go the White Birch Tap with Blasczyk. When Vandehei came across Blasczyk, Blasczyk was "[a]nnihilated." Vandehei and another individual helped Blasczyk to a vehicle. Vandehei then began driving toward his house, but stopped because Blasczyk had to urinate. Blasczyk, however, would not get out, and soon someone began banging on the vehicle's windows. Vandehei did not roll down the window or talk to the person. Instead, he yelled, "Hey, let's just get the hell out of here," to Blasczyk, who may have opened the Jeep's door, and took off.

¶9 Vandehei testified that Blasczyk became obnoxious and continually complained about having to urinate. Eventually, Vandehei stated he pulled into a farm "a few miles" from his home, parked the Jeep behind a barn, and started walking home. As he was leaving, Vandehei saw a squad car coming and hid in the ditch.

¶10 After the attorneys questioned Vandehei, the court asked the jury if there were any questions. Juror Gary Vander Loop responded affirmatively, then asked, "Did you hear anything else at the house when you pulled in?" Vandehei

[2] The Jeep was facing the bar. The desired inference from Bruns' testimony was that Blasczyk was not driving.

answered, "No. I got out right away." The judge then asked, "You didn't hear anything?" Vandehei answered, "No. Nothing. … I got out, walked." The court remarked that Vander Loop had a second calling as a lawyer. The court then told Vandehei to step down, but did not excuse him.

¶11 After Blasczyk's final witness, the court excused the jury for a break. The lawyers remained, as did Vandehei. The court conducted a jury instruction conference, during which Vandehei stood up, claiming he had to "use the bathroom." The court told Vandehei to remain until the end of the conference, at which time it confirmed neither of the parties had any more questions for Vandehei. Vandehei was excused, and he headed towards the parking lot where some jurors were still taking their break.

¶12 Eventually the jury returned and the case was submitted to it. Shortly after the jury began deliberating, the bailiff informed the court that two jurors had contact with a witness during the break. The court instructed the jury panel to halt their deliberations and requested that the two jurors involved in the incident be brought to the courtroom. The bailiff returned with Bruce George and Vander Loop.

¶13 George testified he went out to his car to call his wife during the break. While he was sitting in his car, Vander Loop approached and the two jurors started talking. George stated Vandehei then came up from behind Vander Loop and stood right next to him. Vandehei asked Vander Loop, "What was it about that question you asked?" George testified that Vandehei made clear he had to know what the question was about. Vander Loop started to say something but George interjected and told Vandehei, "Get out of here. We can't

talk." According to George, Vandehei then turned and walked away. George did not believe the encounter affected his ability to be fair and impartial.

¶14 Vander Loop testified he went to see George's car. He then described the verbal encounter with Vandehei:

> Mr. Vandehei is it, came over, and oh, boy. I'm trying to think what he said to me, and I said something like, "Boy, he really likes me, don't he? And he's mad at me and I didn't even do nothing to him." That's about all I can remember. "Boy, he really likes me" because he just walked right up to me and started getting all over my case.

Vander Loop agreed Vandehei might have said, "Why did you ask me that question?" but could not recall any other communication. He did not believe the encounter affected his ability to be fair and impartial. Vander Loop also stated he did not feel intimidated by Vandehei.

¶15 Blasczyk objected to Vander Loop continuing on the jury panel. He argued Vandehei's credibility was the "crux of the case," and questioned whether Vander Loop could truly remain fair and impartial. The trial court stated it would base its decision on whether George and Vander Loop "continue to be fair and impartial jurors both from a subjective standpoint as well as an objective standpoint." After considering a number of factors, including the jurors' testimony and the court's perception of their credibility, the court denied the motion to remove Vander Loop. The court—in a statement this opinion proves prophetic—acknowledged it had a "gut feeling" that the encounter would provide fodder for reversal on appeal. After a very short deliberation, the jury, which included Vander Loop and George, returned a guilty verdict.

¶16 After trial, a defense investigator interviewed Vander Loop, who gave a more complete account of the encounter with Vandehei than he initially gave in court. Vander Loop signed the following written statement:

> I served as a juror during Gerald Blasczyk's trial on May 24, 2012. During the testimony of the Native American [Vandehei] that claimed to be with Mr. Blasczyk and driving his car that night didn't say anything about a dog at the farm that night. [sic] I recalled that the officers testified that they could not get out of their squad because the land owner had a mean dog that prevented them from doing so. If the witness would've been hiding in the ditch like he said he was, the dog would've been an issue.

Vander Loop then recounted the events prior to the recess,[3] and continued:

> When the jury recessed in the afternoon, another juror … and I were standing in the parking lot. … While we were in the courthouse parking lot, one of Mr. Blasczyk's Native American witnesses approached us, tapped me in the chest and started asking me questions. I told him that I couldn't talk about the case. He was persistent in asking me questions. The Native American then invaded my personal space and I was unsure as to what he might do next. I might have put my hand on his chest to create more space between us. I told him that we weren't supposed to talk about the case with anyone and to back away. I may have raised my voice but I did not yell at him. Mr. George said we better get inside and we walked away. The encounter did not impair me in any way from being able to carry out my duties as a juror.

Blasczyk then filed a motion for a new trial. Vander Loop's written statement was admitted into evidence at a subsequent evidentiary hearing.

[3] At a subsequent evidentiary hearing, the court examined Vander Loop regarding some inaccuracies in his statement relating to the question he asked Vandehei and events subsequent to the encounter. Those inaccuracies, which Vander Loop admitted to, are not germane to this appeal.

¶17 George and Vander Loop both testified at the hearing. George generally confirmed the account of the incident he gave at trial. George stated he did not see physical contact between Vander Loop and Vandehei, but could not be sure it did not happen. Vander Loop testified Vandehei was "persistent" in his questioning and "in my face." Vander Loop believed he put his hand on Vandehei's chest "because he was really close to my face, and I said, now you just back up there, and I believe I backed him up a little bit."[4] Vander Loop stated he did not think to immediately bring the encounter to the judge's attention because "I had my mind made up on which way I was going to go with the case." The circuit court confirmed this meant Vander Loop believed Blasczyk was guilty at the time of the parking lot encounter with Vandehei.

¶18 The court denied Blasczyk's motion for a new trial. It identified Vandehei's credibility as the central issue at trial. The court stated the applicable test on an extraneous prejudicial information claim was whether there was "a reasonable possibility that the information in the juror's possession would have a prejudicial effect upon a hypothetical average juror." It specifically found Vander Loop was "exposed to extraneous information through his interaction with Mr. Vandehei in the parking lot, and Mr. Vandehei's testimony was one of the key component to Mr. Blasczyk's defense."

[4] Vander Loop appeared uncertain about what "physical contact" meant, and later stated he "might be wrong" about Vandehei tapping him on the chest. Because Vander Loop was testifying by telephone, the court declined to make any factual determinations about what occurred until Vander Loop testified in person so it could observe his demeanor. At the subsequent hearing, Vander Loop testified Vandehei had placed a finger on his chest. Vander Loop asked Vandehei to step back and placed a hand on his chest to prevent Vandehei from coming closer. Vander Loop testified he did not initially disclose this information during trial because he "didn't realize that this was all going to evolve from this."

¶19 However, the court stated it was Blasczyk's burden to "show that the extraneous information made available to the juror was prejudicial." The court essentially reviewed the trial evidence and determined that Blasczyk's witnesses were "less credible" than the State's "given their personal connection to Mr. Blasczyk and their peripheral connection to the events." The court deemed it "entirely reasonable that the interaction the two jurors had with Mr. Vandehei in the parking lot would not have impacted the already-formed belief that Mr. Vander Loop had about Mr. Vandehei's credibility." Blasczyk appeals.

DISCUSSION

¶20 On appeal, Blasczyk presents four arguments as to why the judgment of conviction for OWI should be reversed. His first argument, and the one we accept, is that he is entitled to a new trial because the key defense witness verbally and physically confronted a juror outside the courtroom prior to deliberations. Blasczyk's remaining arguments are that his trial counsel was ineffective for various reasons, and that his sentence should be modified to make him eligible for the Earned Release Program.[5] We conclude Blasczyk prevails on his claim that he is entitled to a new trial because prejudicial extraneous information was presented to the jury, so we have no need to reach his other arguments. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible ground).

¶21 Blasczyk argues the trial court's analysis of his prejudicial extraneous information claim was faulty for two reasons. First, he contends the

[5] The Earned Release Program is now known as the substance abuse program. *See* WIS. STAT. § 302.05.

court violated WIS. STAT. § 906.06(2) when it accepted Vander Loop's testimony that he already decided Vandehei was not credible at the time of their parking lot encounter. Second, Blasczyk contends the court misapplied the applicable legal standard governing his claim when it made credibility determinations on behalf of the "hypothetical" juror.

¶22 Although it is not necessary to address Blasczyk's first argument regarding WIS. STAT. § 906.06(2), *see* ***Blalock***, 150 Wis. 2d at 703, we pause briefly to clarify the statute. Subsection 906.06(2) governs the competency of a juror as a witness when an inquiry is made into the validity of a verdict. Blasczyk correctly notes that subsection precludes a juror from testifying

> 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 ….

WIS. STAT. § 906.06(2).

¶23 However, Blasczyk is incorrect that Vander Loop was incompetent under the statute to testify he had reached a decision on Vandehei's credibility before their encounter. The statute does not apply to a juror's testimony regarding "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." WIS. STAT. § 906.06(2).

¶24 We note that Blasczyk's challenge to the testimony in this case juxtaposes the usual process under WIS. STAT. § 906.06(2). Generally, when a defendant seeks to impeach a verdict under § 906.06(2), the defendant must show "(1) that the juror's testimony concerns extraneous information (rather than the

deliberative process of the jurors), (2) that the extraneous information was improperly brought to the jury's attention, and (3) that the extraneous information was potentially prejudicial." ***State v. Eison***, 194 Wis. 2d 160, 172, 533 N.W.2d 738 (1995). Here, Blasczyk, having succeeded in obtaining an evidentiary hearing on his motion, seeks to *exclude* testimony elicited during the hearing, and on which the circuit court subsequently relied. The State does not assert any of Vander Loop's testimony was incompetent.[6]

¶25 In our view, it was permissible under the statute in this case for Vander Loop to testify about the encounter. Vander Loop's testimony related to extraneous information that was not of record and not part of the general knowledge jurors are expected to possess; that is, it came "from the outside." *See* ***id.*** at 174. The information was brought to the jury's attention because Vander Loop was directly involved in an out-of-court confrontation with a witness. In criminal cases, "testimony regarding extraneous prejudicial information is admissible even if only one juror possesses the information." ***Castaneda v. Pederson***, 185 Wis. 2d 199, 211, 518 N.W.2d 246 (1994) (citing

[6] Although the State does not rely on WIS. STAT. § 906.06(2), it argues for other reasons that this court should only consider the information that existed when the trial court declined to remove Vander Loop from the jury. In essence, the State believes all the testimony introduced at the post-conviction hearing is irrelevant. It reaches this conclusion by reframing the issue; the State misconstrues Blasczyk's argument to be that the circuit court erred when it refused to remove Vander Loop from the jury panel. In reality, Blasczyk's argument is that further investigation revealed new information about the nature of the encounter between Vander Loop and Vandehei, and that information was extraneous and prejudicial. The State does not present any authority for the notion that evidence adduced during a post-conviction hearing should be disregarded when deciding a motion for a new trial based on extraneous prejudicial information. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments unsupported by references to legal authorities will not be considered). Indeed, the jury's exposure to extraneous prejudicial information may only become known after the trial is completed. *See* ***Castaneda v. Pederson***, 185 Wis. 2d 199, 207, 518 N.W.2d 246 (1994) (while interviewing dissenting jurors, defense counsel learned one juror had obtained a statistic regarding the average medical malpractice award during a recess and shared it with the jury).

State v. Messelt, 185 Wis. 2d 254, 280, 518 N.W.2d 232 (1994)). Finally, as we more fully explain below, the extraneous information was potentially prejudicial. *See* ***Eison***, 194 Wis. 2d at 175. A juror's opinion about a key witness's character based on in-person interactions with the witness outside of the courtroom raises questions about whether the juror was objectively biased. *See* ***State v. Faucher***, 227 Wis. 2d 700, 733, 596 N.W.2d 770 (1999).

¶26 Distinguishing between testimony relating to a juror's mental process and "extraneous" matters improperly brought to the jury's attention is difficult; the line can be fuzzy, to say the least. *See* ***State v. Poh***, 116 Wis. 2d 510, 518, 343 N.W.2d 108 (1984). Although the testimony arguably provided a glimpse into Vander Loop's thoughts about Vandehei, this result was largely unavoidable given that the alleged extraneous prejudicial information concerned an out of court encounter during trial with the key defense witness. The encounter was apparently prompted by, and directly related to, Vandehei's trial testimony. *See* ***id.*** at 520 ("[W]e look first at the nature of the information about which the defendant seeks the juror's testimony."). It was only natural to ask whether and how the encounter altered Vander Loop's perception of Vandehei and the testimony at the center of the dispute. Accordingly, we conclude Vander Loop was competent to give the challenged testimony under WIS. STAT. § 906.06(2), as his testimony concerned potentially prejudicial extraneous information that was improperly brought to the jury's attention. *See* ***Poh***, 116 Wis. 2d at 520.

¶27 However, we do agree with Blasczyk's second argument, that the trial court applied the incorrect standard when determining whether to grant him a new trial. A circuit court's decision to grant or deny a motion for a new trial is reviewed for an erroneous exercise of discretion. ***Eison***, 194 Wis. 2d at 171. An erroneous view of the facts or the law constitutes an erroneous exercise of

discretion. ***Id.*** A motion for a new trial on the ground of prejudicial extraneous information also requires the circuit court to make a number of underlying evidentiary, factual, and legal determinations, and we apply different standards of review to these determinations depending on their nature. ***Manke v. Physicians Ins. Co. of Wis.***, 2006 WI App 50, ¶17, 289 Wis. 2d 750, 712 N.W.2d 40.

¶28 "Once the determination is made that a juror's testimony is competent and admissible under [WIS. STAT. §] 906.06(2), the circuit court must then make a factual and a legal determination." ***Eison***, 194 Wis. 2d at 177. The circuit court must be persuaded by clear and satisfactory evidence that the juror or jurors engaged in the alleged conduct. ***Id.*** If the court makes that factual finding, it must then determine, as a matter of law, whether the extraneous information constituted prejudicial error requiring reversal of the verdict. ***Id.***

¶29 Here, the circuit court made an adequate factual determination. The State did not dispute Vander Loop's testimony, and the circuit court specifically found Vander Loop "was exposed to extraneous information through his interaction with Mr. Vandehei in the parking lot." The circuit court appears to have accepted at face value Vander Loop's assertion that the interaction involved "physical contact and raised voices." Accordingly, it appears the court determined that Blasczyk proved by clear and convincing evidence that the encounter occurred as Vander Loop described it in his written statement.

¶30 However, the court then incorrectly placed the burden of proving prejudice on Blasczyk. We follow the constitutional error test enunciated in ***Chapman v. California***, 386 U.S. 18, 24 (1967), which requires the state to "'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***Eison***, 194 Wis. 2d at 178 (quoting ***Poh***, 116 Wis. 2d at

529). The state satisfies its burden by showing there "is no reasonable possibility that the verdict of a hypothetical average jury would have been influenced by the extraneous information improperly brought to the jury's attention." ***Id.*** at 181.

¶31 With the inquiry properly focused, we conclude as a matter of law that the State has failed to meet its burden. We reach this conclusion by examining numerous factors, including the nature of the extraneous information, the circumstances under which it was brought to the jury's attention, the nature and character of the State's case and the defense, and the connection between the extraneous information and a material issue in the case. *See* ***id.*** at 179.

¶32 The extraneous information consisted of a verbal and physical encounter between Vander Loop and Vandehei outside the courtroom during a recess. The parties concede, and the circuit court found, that Vandehei was the key defense witness. Blasczyk's defense turned upon the jury's perception of Vandehei's credibility. Regardless of the strength of the State's case, it seems apparent a verbal and physical confrontation between a juror and a key defense witness, seemingly prompted by the juror's appropriate questioning of the witness during trial, would taint the average hypothetical juror's impression of the witness. The juror would likely feel intimidated, harassed, and personally attacked simply for performing his or her civic duty. A verbal and physical confrontation not only gives rise to an impermissible risk that the juror will simply disregard the witness's testimony out of personal distaste for the witness. It also carries a significant risk of distorting the juror's valid perceptions, formed during trial, of the witness's credibility, demeanor, and character.

¶33 We are aware that Vander Loop ultimately testified the encounter did not affect his opinion of Vandehei because he had already decided Vandehei's

testimony was incredible. However, the operative test asks the court to assess the effect of extraneous information on the hypothetical average juror. Objectively, even a juror whose mind is "made up" after a witness testifies may change his or her view as a result of other jurors' observations and arguments during deliberation. As a matter of law, a juror may shift his or her position while deliberation is open and up to the moment the verdict is rendered or each juror is independently polled on a guilty verdict. Subjective bias is a different inquiry, focusing on a prospective juror's state of mind; that inquiry may have been appropriate if Vander Loop answered the question differently. *See* ***Faucher***, 227 Wis. 2d at 717 (subjective bias is revealed through the words and the demeanor of the juror). But "where a circuit court must consider whether the extraneous evidence was prejudicial, its prejudicial effect is considered only from an objective bias standard." ***Id.*** at 728-29. We therefore conclude the court erred by crediting Vander Loop's testimony regarding his state of mind following the encounter.[7]

¶34 Accordingly, we conclude a juror was exposed to extraneous information during Blasczyk's trial. That information was prejudicial because it would have influenced the hypothetical average juror as a matter of law. The State has not carried its burden of showing the error did not contribute to the verdict. Consequently, we reverse and remand for a new trial.

[7] The State cites a dissenting opinion in ***State v. Funk***, 2011 WI 62, ¶73, 335 Wis. 2d 369, 799 N.W.2d 421 (Abrahamson, C.J., dissenting), for the proposition that "the objective standard encompasses the characteristics of the person whose conduct is being judged." We are not bound by a dissenting justice's view of the law. Beyond that, the State does not identify which of Vander Loop's characteristics it wishes us to consider.

By the Court.—Judgment reversed and cause remanded with directions.

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