COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP853-CR **Cir. Ct. No. 2007CF244**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN G. TETTING, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. John Tetting, Jr. appeals a judgment of conviction for second-degree intentional homicide, party to a crime, contrary to WIS. STAT.

§§ 940.05(1) and 939.05 (2007-08),[1] and an order denying his motion for postconviction relief. Tetting contends the circuit court erred in: (1) instructing the jury on second-degree intentional homicide; (2) failing to provide a more specific answer to a question from the jury during deliberations; (3) denying his postconviction motion for a new trial on the ground that the jury was presented with prejudicial improper extraneous information. Tetting also asks this court to order a new trial in the interest of justice. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Tetting was charged with two counts of first-degree intentional homicide, as party to a crime, in violation of WIS. STAT. §§ 940.01 and 939.05 (2007-08) following the shooting deaths of Joshua Alderman and Tabitha Nealy in March 2007. The undisputed evidence is that on the night of the shootings, Tetting drove David Turner to a location where Turner planned to meet Alderman. While Tetting remained in the car he had driven, Turner got into the backseat of the vehicle occupied by Alderman and Nealy and shot them both. Turner testified that after he shot Alderman and Nealy, he told Tetting to check and see if Alderman and Nealy were dead. Turner testified that Tetting told him that Nealy was "moving," and Turner shot her again, killing her. Tetting testified that Turner had a history of violent behavior and that after Turner shot Nealy the final time, Turner made threats toward Tetting and Tetting's family.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 At the close of the evidence, the circuit court instructed the jury, over defense counsel's objection, on second-degree intentional homicide as a lesser included offense of first-degree intentional homicide with the mitigating factor of coercion. *See* WIS. STAT. §§ 940.01(2)(d),[2] 939.45(1) and 939.46(1); *see also* WIS JI—CRIMINAL 1015.

¶4 During the jury's deliberations, the jury submitted to the circuit court the following question: "[I]s covering up a crime considered aiding and abetting in a crime if it is due to coercion?" In answer, the circuit court wrote the jury a note instructing the jury to review the court's instruction on second-degree intentional homicide as a lesser included offense, *see* WIS JI—CRIMINAL 1015, and the court's instruction on aiding and abetting. *See* WIS JI—CRIMINAL 405.

¶5 The jury found Tetting not guilty of first- or second-degree intentional homicide as to Alderman. As to Nealy, the jury found Tetting not guilty of first-degree intentional homicide but guilty of the lesser included offense of second-degree intentional homicide.

¶6 Tetting filed a postconviction motion seeking to vacate the judgment of conviction and a new trial on the basis that his constitutional right to an

[2] WISCONSIN STAT. § 940.01 provides:

> (1) OFFENSES. (a) Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.
>
> ….
>
> (2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> ….
>
> (d) *Coercion; necessity*. Death was caused in the exercise of a privilege under s. 939.45(1).

impartial jury was violated because the jury was exposed to prejudicial improper extraneous information. Following an evidentiary hearing, where each of the twelve jurors was questioned, the court denied Tetting's motion. Tetting appeals. Additional facts are discussed below as necessary.

DISCUSSION

¶7 Tetting contends the circuit court erred in: (1) instructing the jury on the lesser-included offense of second-degree intentional homicide; (2) failing to provide a more specific answer to a question from the jury during deliberations; and (3) denying his motion for a new trial on the ground that the jury was exposed to prejudicial improper extraneous information. Tetting also asks that this court order a new trial in the interest of justice. We address each contention in turn below.

A. Instructing the Jury on the Lesser-Included Offense of Second-Degree Intentional Homicide

¶8 Tetting contends the circuit court erred by instructing the jury on the lesser-included offense of second-degree intentional homicide, with coercion as the mitigating factor. *See* WIS. STAT. §§ 940.01(2)(d), 939.45(1), and 939.46(1). Coercion is an affirmative defense that acts as a privilege to reduce what would otherwise be first-degree intentional homicide to second-degree intentional homicide. *See* ***id***.

¶9 We generally afford a circuit court broad discretion when instructing a jury. ***State v. Borrell***, 167 Wis. 2d 749, 779, 482 N.W.2d 883 (1992). However, whether the evidence presented at trial supports the giving of a lesser-included offense instruction to the jury is a question of law, which this court reviews de novo. ***Id.*** "The submission of a lesser-included offense instruction is proper

only when there exists reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***Id.***

¶10 In order to prove that a defendant was coerced, the State must show that the defendant: (1) was threatened by a person other than the defendant's coconspirator; and (2) reasonably believed that his or her act was the only means of preventing imminent death or great bodily harm to the defendant or another. *See* WIS. STAT. § 939.46(1). Evidence that one's colleague in a crime is a dangerous or frightening person is insufficient, alone, to demonstrate that coercion existed. *See* ***id***.

¶11 Tetting argues that there was no evidence that Tetting was coerced to aid and abet in the actual killings of Alderman and Nealy and, therefore, the jury should not have been instructed on second-degree intentional homicide. Tetting argues that "[t]he only evidence of coercion was after the fact." The evidence of coercion to which Tetting refers was testimony by both Tetting and Turner that after Alderman and Nealy were killed, Turner told Tetting that he, or someone on his behalf, would kill Tetting and members of Tetting's family if Tetting said anything about the murders of Alderman and Nealy. Both Turner and Tetting testified that after Turner made this threat, Tetting helped Turner dispose of evidence. However, as explained next, there was evidence that Turner effectively threatened Tetting and others in Turner's illegal drug enterprise on an ongoing basis and this evidence supplied a basis for the jury to conclude that Tetting was acting, during the entire episode, under threat by Turner.

¶12 As pointed out by the State, Turner testified at trial that he was the head of a drug dealing business, that Tetting acted as Turner's "enforcer," and that Alderman ranked "[r]ight below" Turner in the organization. Turner testified that

he wanted people who worked under him to be afraid of him, that he had made threatening comments to people in his drug business "[a]ll the time" about killing or seriously harming them, and that except for two individuals who did not include Tetting, Turner had threatened everyone who was involved in his drug business. Turner testified that he is a "naturally aggressive person," that he has a temper and is "always mad," and that "once in a while it will just go too far and then I can't control [my temper] no more."

¶13 Turner testified that on the night of the homicides, Tetting drove him to meet Alderman at a prearranged location. Turner testified that he got into the rear seat of Alderman's vehicle and fired three shots at Alderman and Nealy, striking Alderman once and Nealy twice. Turner testified that after shooting Alderman and Nealy, he directed Tetting, who had remained in the other vehicle during the shootings, to see if Alderman was still alive, using his gun "as a pointer." Turner testified that Tetting informed him that Alderman was dead but that Nealy was still alive. Turner testified that after Tetting informed him that Nealy was still alive, Turner shot Nealy a third time, killing her.

¶14 Turner testified that after the final shot, he changed into clean clothes. Turner testified that he held onto the gun while changing his clothes and that Tetting "kept staring at it" and asked Turner how many bullets were still chambered. Turner testified that he told Tetting that the gun was still loaded and that Tetting appeared "[n]ervous" and "scared" of "the gun and of [Turner]."

¶15 Viewing the evidence in its totality, which includes evidence of Turner's prior threats of harm and volatile temper, we conclude that a reasonable fact-finder could determine that Tetting was threatened by Turner and that it was reasonable for Tetting to believe that checking on Alderman and Nealy and

informing Turner that Nealy was still alive was the only means of preventing imminent death or great bodily harm to himself or members of his family. Accordingly, we conclude that the circuit court did not err when it instructed the jury on the lesser-included offense of second-degree intentional homicide with the mitigating factor of coercion.

B. Circuit Court's Response to a Question from the Jury

¶16 Tetting contends the circuit court erred in the manner by which the court responded to a question from the jury during deliberations. The circuit court has wide discretion in instructing the jury, ***State v. Foster***, 191 Wis. 2d 14, 26, 528 N.W.2d 22 (Ct. App. 1995), and we will reverse a conviction based upon a court's instruction of the jury, when, taken as a whole, the instructions "communicated an incorrect statement of the law or otherwise probably misled the jury." ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). These same principles apply when a circuit court responds to questions from the jury during deliberations. *See* ***State v. Simplot***, 180 Wis. 2d 383, 404, 509 N.W.2d 338 (Ct. App. 1993). "Just as the initial jury instructions are within the [circuit] court's discretion, so, too, is the 'necessity for, the extent of, and the form of re-instruction' in response to requests or questions from the jury." ***Id.*** (quoted source omitted). When a question is received from the jury, the court is to "'respond … with sufficient specificity to clarify the jury's problem.'" ***Id.*** at 405 (quoted source omitted).

¶17 During deliberations, the jury submitted the following question to the circuit court: "[I]s covering up a crime considered aiding and abetting in a crime if it is due to coercion." At a hearing on how the question should be answered, the State argued that the jury's "question can't be answered" and that

the jury should be told to rely upon the previously given jury instructions. Tetting's trial counsel argued that the jury's question should be answered in the negative. The court agreed with the State and stated that the court would "write [the jury] a note, and … indicate, [the jury would] need to review" WIS JI—CRIMINAL 405, which instructs on aiding and abetting, and WIS JI—CRIMINAL 1015, which instructs on second-degree intentional homicide with the mitigating factor of coercion.

¶18 The circuit court had instructed the jury on WIS JI—CRIMINAL 405 as follows: "[a] person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either assists the person who commits the crime or is ready and willing to assist the person who commits the crime [who] knows of the willingness to assist." The court instructed the jury on WIS JI—CRIMINAL 1015 as follows:

> Coercion is an issue in this case. As applied to this case, coercion may reduce a charge of first[-]degree intentional homicide to second[-]degree intentional homicide. The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting under the effect of coercion. The law allows the defendant to act under the effect of coercion only if a threat of another person causes the defendant to believe that his act was the only means of preventing imminent death or great bodily harm to himself, and which pressure caused him to act as he did.

¶19 Although Tetting argues that it was error to give WIS JI—CRIMINAL 1015 as to coercion at all, Tetting does not argue that WIS JI—CRIMINAL 405 and 1015 are not legally sound. He argues, however, that telling the jury to reread the court's jury instructions was not sufficient to clarify the jury's problem. Tetting argues that the jury's question shows that the jury "correctly focused on the fact

that [Tetting's] actions came after [] Turner pulled the trigger, but they were mistaken in their belief that this could make him guilty of aiding and abetting the murders." Tetting argues that the circuit court should have "clarif[ied] the law for the jury" by explaining to the jury that Tetting "could not have aided and abetted the crime if all of his actions came after the murders had already been committed." We are not persuaded.

¶20 First, the jury instructions do correctly lay out the applicable law and do, when carefully read, answer the jury's question. Giving further guidance to the jury ran the risk of confusing the jury. The question posed seemingly addresses a possible crime not charged. Thus, the correct answer would have been "yes, it can be depending on the charge, but …." But what? It would have been difficult to explain further without intruding on deliberations. We are not persuaded that any answer suggested by Tetting is better, much less required, under the circumstances.

¶21 Second, we are confident that the jury here did not misunderstand the instructions. The jury found Tetting not guilty of second-degree murder for the death of Alderman, but guilty of second-degree murder for the death of Nealy, who was fatally shot by Turner after Tetting reported to Turner that Nealy was still alive after Turner initially shot Nealy. We agree with the State that the fact that the jury reached different verdicts demonstrates that the jury did not misunderstand the legal principles underlying the charges of second-degree intentional homicide. The actions Tetting undertook after both killings were relevant to the prosecution of *both* Alderman's and Nealy's deaths, and if the jury had believed that Tetting was guilty of aiding Turner by helping Turner cover up the killings after they left the scene of the crimes, the jury would have found Turner guilty on both counts. The logical conclusion is that the jury distinguished

between the two killings based on Tetting's behavior before Turner fired the final shot at Nealy. Accordingly, we conclude that the jury did not erroneously exercise its discretion in the manner in which it responded to the jury's question.

C. New Trial Based on Prejudicial Extraneous Information Reaching the Jury

¶22 Tetting contends that the circuit court erred in denying his motion to set aside the jury's verdict and order a new trial based on the ground that the jury panel was prejudiced by extraneous information that was improperly brought before the panel.

¶23 A circuit court's decision to grant or deny a defendant's motion for a new trial based on extraneous information improperly brought to the attention of the jury is discretionary. ***State v. Elson***, 194 Wis. 2d 160, 171, 533 N.W.2d 738 (1995). The circuit court's decision will be upheld "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

¶24 When a motion for new trial depends upon the testimony of a juror, as it does here, the circuit court must first determine whether the juror is competent to testify under WIS. STAT. § 906.06(2). ***Manke v. Physicians Ins. Co. of Wis., Inc.***, 2006 WI App 50, ¶18, 289 Wis. 2d 750, 712 N.W.2d 40. *See also* ***State v. Poh***, 116 Wis. 2d 510, 516-17, 343 N.W.2d 108 (1984); and ***After Hour Welding, Inc. v. Laneil Mgmt. Co.***, 108 Wis. 2d 734, 738, 324 N.W.2d 686 (1982). After determining whether testimony is competent, the circuit court must undertake two additional inquiries. First, the court must "determine by clear, satisfactory and convincing evidence that the juror made or heard the [improper extraneous information] or engaged in the conduct alleged." ***State v. Messelt***, 185

Wis. 2d 254, 281, 518 N.W.2d 232 (1994). If the court determines that the evidence is clear, satisfactory and convincing that the juror did, the court must then "make the legal determination of whether the extraneous information constitutes prejudicial error requiring reversal of the verdict." ***Id.*** The court's finding that the evidence was or was not clear as to what was said in the presence of the jury will be affirmed unless clearly erroneous. ***Id.*** at 282. However, we review de novo the question of whether the moving party was prejudiced. *See* ***id.*** at 281.

¶25 Tetting contends that the circuit court erred in its determination of what evidence the jurors were competent to testify to under WIS. STAT. § 906.06(2) at the evidentiary hearing on Tetting's motion for new trial. Tetting also contends the court erred in concluding that the alleged extraneous information was not heard by the jury, and that, even if it was, the information was not prejudicial.

1. Preliminary Showing of Competency as to Anecdotes about Two Crimes, Alleged Statements about Tetting Being a Bad Guy from a Big City, and an Alleged Alternative Definition of Reasonable Doubt

¶26 WISCONSIN STAT. § 906.06(2) governs what a juror may testify to regarding the deliberations of the jury panel of which the juror was a member. It provides as follows:

> 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. (Emphasis added.)

¶27 WISCONSIN STAT. § 906.06(2) "prohibit[s] a juror's testimony as to statements made during deliberations and as to the deliberative processes of the jurors but allowing a juror's testimony on occurrences and events outside the record which may indicate improper extraneous influences on the jury." ***Poh***, 116 Wis. 2d at 517-18. Our supreme court has explained:

> To demonstrate that a juror is competent to testify under [§] 906.06(2), the party seeking to impeach the verdict has the burden to prove that the juror's testimony concerns extraneous information (rather than the deliberative processes of the jurors), that the extraneous information was improperly brought to the jury's attention, and that the extraneous information was potentially prejudicial.

Id. at 520. Whether information is "extraneous" within the meaning of § 906.06(2) presents a question of law, which we review de novo. *See* ***Manke***, 289 Wis. 2d 750, ¶27.

¶28 Our supreme court "has defined 'extraneous information' as 'knowledge coming from the outside.'" ***Id.***, ¶29 (quoting ***State v. Shillcutt***, 119 Wis. 2d 788, 794, 350 N.W.2d 686 (1984)). It is "information that is neither of record nor in the general knowledge and accumulated life experiences we expect jurors to possess." ***Id.***

¶29 Prior to the two-day evidentiary hearing on Tetting's motion for a new trial, the circuit court held a hearing to determine what, if any, limitations should be imposed on the testimony of jurors regarding whether extraneous prejudicial information was improperly brought to the jurors' attention.

¶30 Tetting asserts that the circuit court erred in concluding that jurors were not competent to testify regarding two anecdotes discussed by jurors J.F. and J.B. during deliberations as to two crimes in which a defendant was convicted of a criminal offense as a party to the crime. Jurors T.H. and C.G. averred that J.F. told the jury panel about a friend who was supposedly convicted of murder after a man J.F.'s friend was traveling with killed someone while the two men were traveling together. Jurors T.H. and C.G. also averred that J.B. told the jury panel of a crime in which two defendants were convicted of murder after one of the defendants shot and killed a store clerk during a robbery committed by both defendants.

¶31 Tetting asserts that the party-to-the-crime anecdotes constitute "extraneous information" because the events relayed were not directly experienced by the jurors and, therefore, are not part of the jurors' accumulated life experiences, and because the anecdotes are not part of the general knowledge we expect a juror to have.

¶32 Tetting does not develop an argument applying relevant legal authority to the facts at hand to explain why knowledge of someone who has committed a crime is not the type of general knowledge we expect jurors to possess. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown,*** 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (we need not address undeveloped arguments). Irrespective, we conclude that it is a type of information that jurors can be expected to have. Jurors are selected from a cross-section of the community, and as such, some jurors can be expected to have family, friends, or acquaintances who have been convicted of criminal offenses. Accordingly, we reject this argument.

¶33 Tetting next argues that the circuit court erred in concluding that jurors were not competent to testify in greater detail about statements by a juror that Tetting is "a bad guy" and "he's from the big city," which Tetting asserts "potentially could be interpreted as racial bias." Tetting's argument in this regard lacks citation to the record, fails to apply relevant legal authority, and is otherwise undeveloped, and we therefore need not address the argument. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (regarding citations to the record); and ***Associates Fin. Servs. Co. of Wis., Inc.,*** 258 Wis. 2d 915, ¶4 n.3 (regarding undeveloped arguments). However, even if we were to address Tetting's argument, we would conclude that the circuit court did not err in concluding that jurors were not competent to testify as to those statements.

¶34 Our supreme court has stated that "[w]henever it comes to a [circuit] court's attention that a jury verdict may have been the result of any form of prejudice based on race … [the court] should … conduct an investigation to 'ferret out the truth.'" ***After Hour Welding, Inc.***, 108 Wis. 2d at 739 (quoted source omitted). Nothing about "bad guy" or "the big city" is race specific and it is pure speculation that the juror was using these words as code evincing racial prejudice. That is to say, even if the circuit court had concluded that the evidence was admissible, it would not have amounted to evidence of racial bias sufficient to warrant a new trial.

¶35 Tetting next asserts that the court erred in determining that the jurors were not competent to testify regarding juror J.B.'s alleged utilization of his own definition of the term "reasonable" in "reasonable doubt" and his alleged efforts to persuade jurors to disregard the jury instruction's definition of "reasonable" and instead adopt his definition of the term. The circuit court determined that this did

not constitute extraneous information, but instead fell under the classification of the specific mental process of a juror who is reading and interpreting a jury instruction. The court explained that "a jury will naturally have his or her own interpretation of what the jury instruction means, and [] will discuss its meaning with the other jurors who may or may not agree."

¶36 Tetting complains that by restricting testimony as to this information, "the evidence [at the evidentiary hearing] was too narrowly focused and the court was without the full picture." However, Tetting does not persuade us that such testimony, even if more detailed, might concern extraneous information, rather than the deliberative process of the jurors as determined by the circuit court.[3]

2. Whether Extraneous Information About Racial Bias and An Alleged Alternative Definition of Reasonable Doubt Reached the Jury and was Prejudicial

¶37 As stated, to overturn a jury's verdict based upon the jury being exposed to extraneous information, there must be clear, satisfactory, and convincing evidence that a juror made or heard the alleged extraneous statements, and the moving party's rights must have been prejudiced. ***Messelt***, 185 Wis. 2d at 281; and ***Poh***, 116 Wis. 2d 516-17, 522-23.

¶38 Tetting contends first that the court erred in determining that Tetting had not established that an alleged racially biased statement was made and that if it was, the statement was not prejudicial to Tetting.

[3] In the next section we also reject Tetting's argument that the circuit court erred in finding that the alternative definition of "reasonable doubt" did not, in any event, reach the jury.

¶39 At the evidentiary hearing on Tetting's motion for a new trial, juror C.G. testified that during deliberations, a juror stated that Tetting is "a black inner city kid from the city, and he's guilty." C.G. testified that the statement was made by a female juror, but C.G. was unable to remember what particular juror made that statement or anything that would assist in identifying the juror who made the statement. C.G. testified that the statement was made when "there was a lot of people talking at once," but C.G. was unable to recall when the statement was made or whether any other jurors heard the statement. C.G. testified that the statement did not affect her deliberations.

¶40 Juror T.H. testified that as "far as [he] can remember," during deliberations someone said "something similar" to Tetting is a "black kid from Milwaukee, he's got to be guilty," but T.H. could not "state precisely or specifically what [he] remember[ed] being said." T.H. was unable to recall who made the statement, or when the statement was made. T.H. testified that he did not know whether any other jurors heard the statement, and he further testified that the statement did not affect him during deliberations. However, in an earlier affidavit to the court, T.H. averred that he recalled someone saying "he's a bad guy, he deals drugs, he's from the big city," and the court found that T.H. had previously stated that he did not recall any remarks during deliberations suggesting racial bias.

¶41 Each of the remaining ten jurors testified that they did not remember anyone stating that Tetting is "a black kid from Milwaukee, he's got to be guilty," or anything similar.

¶42 The circuit court found that the evidence was not clear that the alleged statement was in fact made, pointing out that only one of the twelve jurors

stated that a racial statement was made during deliberations, and that none of the remaining jurors' testimony confirmed that the statement was in fact made. We may overturn this finding only if the finding is clearly erroneous. *See* WIS. STAT. § 805.17(2); and ***Messelt***, 185 Wis. 2d at 282.

¶43 Tetting does not argue that the circuit court's finding was clearly erroneous. However, even if Tetting had, we would conclude that the court's finding was not clearly erroneous. A finding is not clearly erroneous if it is supported by any credible evidence in the record or any reasonable inferences from that evidence. *See* ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). We conclude that, as outlined in the preceding paragraphs, credible evidence supports the circuit court's finding that there was not clear, satisfactory, and convincing evidence that a juror made the alleged extraneous statement.

¶44 Because our decision that the circuit court was not clearly erroneous in finding that the alleged statement did not reach the jury is dispositive as to the question of racial bias, we do not reach Tetting's assertion that the circuit court erred in determining that the alleged racial statement, if in fact made, was not prejudicial. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

¶45 Tetting next contends that the circuit court erred in determining that Tetting had not established that a juror's statement of an alternative definition of the reasonable doubt was made and that if it was, it was not prejudicial to Tetting.

¶46 The circuit court found that the alternative definition of "reasonable doubt" did not reach the jury. The court went on to rule that even if that finding

was in error, the court would still deny Tetting's motion because that "information was [not] of the type that would sway the jury against [] Tetting." As pointed out by the State, Tetting does not challenge as clearly erroneous the court's finding that extraneous information on the definition of reasonable doubt did not reach the jury, and even if Tetting's briefs on appeal could be construed as making that assertion, Tetting fails to present this court with a developed argument in support of that assertion. Accordingly, that finding stands. To set aside a jury verdict based on prejudicial extraneous information, the information must have reached the jury. Because the court's finding that such information did not reach the jury was not clearly erroneous, we also reject Tetting's argument that the court erred in determining that the information was not prejudicial.

D. New Trial in Interest of Justice

¶47 Tetting contends that he is entitled to a new trial in the interest of justice. WISCONSIN STAT. § 752.35 permits this court to order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" Tetting asks that we order a new trial, arguing that the real controversy was not tried here because the court failed to provide proper clarification to the jury's question during deliberations and because Tetting was prejudiced by improper extraneous information. We have already reviewed those issues and concluded that they do not warrant a new trial. Therefore, Tetting fails to show that there is a basis for a new trial in the interest of justice.

CONCLUSION

¶48 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

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