

NO. 45894-2-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL BROGAN,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

1. Did the trial court violate the Appellant's right to due process when it ordered the jury to continue deliberations?
2. Did the trial court err in denying the Appellant's motion for mistrial?

II. SHORT ANSWERS

1. **No.** The trial court did not improperly coerce the jury into returning a guilty verdict when it ordered the jury to continue deliberations.
2. **No.** The trial court properly denied the Appellant's motion for a mistrial after the jury returned its verdict.

III. FACTS

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to specific facts in the record regarding the issues before the Court.

IV. ARGUMENT

A. **THE TRIAL COURT DID NOT VIOLATE THE APPELLANT'S DUE PROCESS RIGHTS OR CrR 6.15 WHEN IT ORDERED THE JURY TO CONTINUE ITS DELIBERATIONS.**

It is commonly recognized that a defendant's right to a jury trial includes "the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d

789 (1978). “To prevail on a claim of improper judicial interference with the verdict, a defendant ‘must establish a reasonable substantial possibility that the verdict was improperly influenced by the trial court’s intervention.’” *State v. Ford*, 171 Wn.2d 185, 188-89, 250 P.3d 97 (2011) (quoting *State v. Watkins*, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983)). More than mere speculation is required; rather, a defendant must affirmatively show the trial court’s intervention improperly influenced the jury. *Ford*, 171 Wn.2d at 189.

The trial court has broad discretion in deciding whether to discharge a jury. *Arizona v. Washington*, 434 U.S. 497, 509, 58. S.Ct. 824, 832, 54 L.Ed.2d 717 (1978). Thus, a reviewing court grants great deference to the trial court’s determination whether to discharge a “deadlocked” jury. *State v. Dykstra*, 33 Wn. App. 648, 650, 656 P.2d 1137 (Div. II 1983). The basis for this deference is simple:

On the one hand, if...[the trial judge] discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his “valued right to have his trial completed by a particular tribunal.” But if he fails to discharge a jury which in unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.

Arizona v. Washington, 434 U.S. at 509, 58. S.Ct. at 832.

A trial court's determination must rest on the presence of "extraordinary and striking" circumstances which indicate substantial justice cannot be obtained without declaring a mistrial." *Dykstra*, 33 Wn. App at 651 (citing *Jones*, 97 Wn.2d at 163). When exercising its discretion, the trial court should "evaluate the length of time the jury had been deliberating, viewing that in light of the volume and complexity of the evidence." *Boogaard*, 90 Wn.2d at 739. The improper discharge of a jury would have the same effect as an acquittal in that retrial would be barred. *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982). "[A] too quick discharge of a hung jury would be held a violation of the defendant's right to a verdict of that jury..." *State v. Connors*, 59 Wn.2d 879, 883, 371 P.2d 541 (1962).

Here, the Appellant cannot affirmatively establish that the trial court's decision to have the jury continue its deliberations improperly influenced its verdict; rather, the Appellant can only offer speculation. The trial court inquired with the jury and the foreman whether a verdict could be reached if given additional time. The jury indicated that a verdict could not be reached. 2RP at 49-51. Much of the Appellant's argument is based upon the notion that four hours of testimony, five hours of deliberations, and the issue of witness credibility should have been sufficient to find the jury deadlocked. *Brief of Appellant* at 10.

However, the determination to discharge a jury does not simply end there. As stated above, the trial courts must find the presence of “extraordinary and striking” circumstances when declaring a mistrial for a deadlocked jury. Instead of simply accepting the jury’s announcement, the trial court approached the situation with caution. After conferring with both attorneys, the court decided that the best course of conduct was to have the jury continue its deliberations. 2RP at 51-55. The trial court then brought the jury back into the court room, informed them that their deliberations were going to continue on the following Monday, and not to discuss the case until deliberations resumed. 2RP at 57-59.

The trial court did not offer the jury a specific amount of time in order to reach a verdict. The jury was not instructed to disclose its numerical division to the court, nor was the jury required to instruct the court as to how the voting had occurred. Despite the fact that the jury indicated it could not reach a verdict, there is nothing in the record to establish that the jury was “hopelessly deadlocked” or “frustrated over its inability to reach a verdict.” *State v. Barnes*, 85 Wn. App. 638, 657, 932 P.2d 669 (Div. II 1997). The trial court did explore an alternative to simply discharging the jury – grant them additional time to deliberate.

A key factor the Appellant either ignores or fails to recognize is that his own trial counsel agreed with the trial court’s decision to have the jury

continue its deliberations. “My one concern with that, Your Honor, *I think it’s an appropriate plan*, is that I’m in Wahkiakum County at 9:30 on Monday morning.” 2RP at 55. (*emphasis added*). The Appellant’s trial counsel was only concerned with whether he could find coverage for the verdict. It was only after the jury came back with a guilty verdict did the Appellant seek a mistrial based upon the jury being deadlocked.


The Appellant claims that upon being brought back for its deliberations, “the jury almost immediately reached a verdict.” *Brief of Appellant* at 11. This is a mischaracterization of the record. The trial court ordered the jury to return for its deliberations on Monday at 8:50 a.m. 2RP at 57. After reconvening, the jury reached its verdict at approximately 9:40 a.m. 3RP at 11. This is not indicative of the jury convening in the jury room and almost immediately saying guilty. Instead, the jury had the opportunity to deliberate for almost an additional hour.

The trial court did not tell the jury that it had to reach a verdict. The jury was not offered a specific amount of additional time to continue deliberations in order to reach a verdict. Simply put, the trial court never made any statements that were likely or designed to influence the jury’s decision in reaching a verdict. Instead, the record is quite clear the trial court used its discretion and allowed the jury additional time to deliberate.

V. CONCLUSION

The Appellant's due process rights were not violated when the trial court ordered the jury to continue its deliberations. Thus, the State requests the Court affirm the Appellant's conviction and deny the Appellant's appeal.

Respectfully submitted this 2 day of October, 2014.



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 3rd, 2014.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

October 03, 2014 - 10:56 AM

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