

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBIN LANDER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Ms. Lander was deprived of her right to a fair and impartial jury guaranteed by the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution .

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The constitutional right to a jury trial includes the right of a jury to fail to agree. Accordingly, after jury deliberations have begun, a court may not instruct the jury in such a way as to suggest the need for agreement. After the jury had been deliberating for several hours, it told the court it was hopelessly deadlocked, and the foreperson said “no” when asked whether there was a reasonable possibility of reaching agreement within a reasonable time. The court ordered the jury to continue deliberating. Did the court coerce a verdict, in violation of the constitutional right to a fair and impartial jury trial?

C. STATEMENT OF THE CASE

The Cowlitz/Wahkiakum County Narcotics Task Force set up a “buy-bust” operation with a confidential informant named Jessica. RP 151-59. Officers gave her money and watched her purchase methamphetamines from someone in an alley. RP 163-71. They did not arrest the seller at that time. RP 213. Instead, one of the officers went back

to the office and retrieved a picture of Robin Lander that he thought looked like the seller. RP 213-14.

Ms. Lander was eventually charged with one count of delivering a controlled substance within a school bus zone. CP 6. The contested issue at trial was identity. RP 236-49. After the jury had been deliberating for a few hours, the foreperson told the court the jury was hopelessly deadlocked. The judge nevertheless ordered the jury to continue deliberating. RP 253-56. Ms. Lander was eventually convicted as charged and sentenced to 38 months in prison. CP 52-63. She timely appeals. CP 64-76.

D. ARGUMENT

The trial court violated Ms. Lander’s constitutional right to a fair and impartial jury by ordering the jury to continue deliberating after it unequivocally stated it was hopelessly deadlocked.

The Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution guarantee the right to a fair and impartial jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22. This right “demands that a judge not bring to bear coercive pressure upon the deliberations of a criminal jury.” State v. Boogaard, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978).

Furthermore, the constitutional right to a jury trial “includes the right of a jury to **fail** to agree.” State v. McCullum, 28 Wn. App. 145, 149, 622 P.2d 873 (1981), rev’d on other grounds, 98 Wn.2d 484 (1983) (emphasis added). The criminal rules recognize this constitutional guarantee:

After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

CrR 6.15(f)(2).

In this case, despite its best efforts, the trial judge coerced a verdict in violation of the Sixth Amendment and article I, sections 21 and 22.

After deliberating for several hours, the jury alerted the bailiff that it was at an impasse. RP 253. In front of the whole jury, the court then asked the foreperson whether there was a reasonable probability of their reaching an agreement within a reasonable time. RP 255-56. The foreperson said, “No.” RP 256.

But the judge did not accept this answer. In response to the foreperson’s unequivocal statement that the jury had not and would not reach agreement, the court said:

Okay. Okay. So what I'd like to do -- and don't throw anything at me, please -- is that I'm going to invite you to go back and to continue to deliberate to see if you can reach a verdict. So I'm going to send you back in an effort to

reach a verdict. So we'll send you back in and then you can communicate with the bailiffs to tell us where you're at in the future. But I'm going to send you back now.

RP 256. By ordering the jury to go back to the jury room and continue deliberating, the court made it clear that failing to agree was not an option.

The judge instead should have either dismissed the jury and declared a mistrial, or explained to the jury that it was to continue deliberating but was **not** required to reach a verdict.¹ An example of the former option occurred in State v. Dykstra, where this Court held the trial judge properly declared a mistrial after the jury had been deliberating for over 13 hours and the foreperson answered “no” when asked whether there was a reasonable probability of the jury reaching agreement within a reasonable time. State v. Dykstra, 33 Wn. App. 648, 649-51, 656 P.2d 1137 (1983). An example of the latter option occurred in State v Lee, 77 Wn. App. 119, 889 P.2d 944 (1995), rev'd on other grounds, 128 Wn.2d 151. In that case, some jurors thought it unlikely that further deliberations would be useful while others thought agreement might be possible. Id. at 125. The trial court told the jury to continue deliberating, but also stated that “Judges cannot in any way give any idea to the jurors that the judge is

¹ Although both the prosecutor and defense counsel agreed with the court’s plan to inquire of the jury and then instruct them to continue deliberating, defense counsel did not acquiesce in the failure to instruct the jury that it was not required to reach a verdict. RP 253-56. Thus, any argument that defense counsel invited the error should be rejected.

forcing them to reach a verdict.” Id. Thus, it was clear to the jurors in Lee that they were **not** required to reach an agreement.

But here, the court implied the jury **was** required to reach a verdict. The jury had already deliberated for almost four hours on a single count of drug delivery with a single disputed issue, and had already made clear that it was hopelessly deadlocked. The court’s order indicated that none of that mattered. Any reasonable juror would understand the court’s order to require agreement, because the jurors had already told the court they could not agree after lengthy deliberations, and yet they were told they were not finished with their job.

A new trial should be granted, because there is a reasonably substantial possibility that the verdict was improperly influenced by the trial court’s order. See State v. Watkins, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983) (setting forth prejudice standard). The evidence of identity was weak and the jurors could not agree after discussing the issue for a long time. But because the court implied they had to keep deliberating until they reached agreement, the jurors who doubted the State’s case eventually acquiesced. Under these circumstances, the violation cannot be considered harmless, and this Court should reverse and remand for a new trial.

E. CONCLUSION

For the reasons set forth above, Ms. Lander respectfully requests that this Court reverse her conviction and remand for a new trial.

Respectfully submitted this 10th day of February, 2017.

/s Lila J. Silverstein
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Attorney for Appellant

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v.)	NO. 49501-5-II
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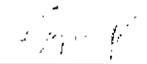
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