

NO. 49501-5-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBIN LANDER,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUE

1. Did the trial court violate the Appellant's right to a fair and impartial jury when it ordered the jury to continue deliberations?

II. SHORT ANSWER

1. **No.** The trial court did not improperly coerce the jury into returning a guilty verdict when it ordered the jury to continue deliberations.

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 RIGHT TO A FAIR AND IMPARTIAL JURY 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 is 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. RP at 255-56. The jury was then informed that the trial court was “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*.” RP at 256 (emphasis added). The Appellant argues that “the court made it clear that failing to agree was not an option.” *Brief of Appellant* at 4.

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. RP at 253-55. The trial court then brought the jury back into the court room, informed them that they would be continuing with their deliberations. This court of action was approved by the Appellant’s trial counsel. RP at 255.

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.

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 8 day of June, 2017.



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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 8th day of June, 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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