

64425-4

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NO. 64425-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL CUNNINGHAM,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied a defense motion for mistrial after jurors declared themselves deadlocked.

2. The trial court improperly influenced deliberations when it told deadlocked jurors the inability to reach a decision created a dilemma and it might be necessary to seat an alternate juror to participate in deliberations if they did not reach a verdict that afternoon.

Issues Pertaining to Assignments of Error

1. This was a simple case that turned on whether jurors believed the alleged victim's version of events. Yet, after several hours of deliberations, jurors were deadlocked and indicated they did not believe further discussions would be fruitful. Did the trial court err when it refused to declare a mistrial?

2. Not only did the court refuse to declare a mistrial, the court made comments indicating that the failure to reach a verdict had created a dilemma because one juror had to leave and it might be necessary to replace him with an alternate, thereby requiring jurors to begin their deliberations anew. Did these comments improperly influence the holdout jurors to retreat from their not guilty verdicts?

B. STATEMENT OF THE CASE

The Whatcom County Prosecutor's Office charged Daniel Cunningham with one count of Robbery in the First Degree while armed with a deadly weapon. CP 61-62.

Preston Waters and Cunningham have known each other for years. 3RP¹ 69. According to Waters, on May 25, 2009, Cunningham and a female friend stopped by his home. Cunningham looked angry and said they needed to talk. 3RP 69-72. Cunningham said that he had served several years in prison because of Waters and that Waters needed to compensate him. 3RP 73-74.

According to Waters, Cunningham wanted to go inside the home and pick out items with value. He asked if Waters owned any vehicles and wanted the titles. 3RP 76. Cunningham then pulled out a knife and held it close to Waters' face while removing a watch and bracelet from Waters' wrist. 3RP 74-75, 77-78. Cunningham said he would be back for more and then left with the female. 3RP 79-80.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 7/15/09; 2RP – 7/16/09; 3RP – 9/9/09; 4RP – 9/10/09; 5RP – 9/14/09; 6RP – 9/15/09; 7RP – 9/16/09; 8RP – 11/3/09.

About twenty minutes later, Cunningham returned. This time he was with Trevor Dubois, who Waters recognized because Dubois had previously dated one of his roommates. 3RP 81-82. Cunningham wanted money in exchange for the watch and bracelet. Waters did not have money, so Cunningham said he would be back again in several hours. 3RP 83, 87-88. While Cunningham and Dubois were still there, one of Waters' roommates and Waters' boss arrived with a load of firewood. 3RP 84. The two did not know anything was amiss until Cunningham and Dubois left. Waters then called police. 3RP 86-87, 90-91.

Waters told police he had been robbed. 3RP 92. After officers left Waters' home, Lonnie McQuiston, whom Waters had not seen in years, appeared at his house and returned the watch and bracelet. McQuiston said he wanted nothing to do with the situation because he was out on bail. 3RP 94-95.

Officers contacted Cunningham. 4RP 212. He was carrying a knife, which officers confiscated. 4RP 213-14, 269. Officers informed Cunningham of Waters' allegations and Cunningham said that he wanted to give a statement. 4RP 216, 235-237. Cunningham denied the robbery and indicated he had gone to Waters' house to confront him about dealing heroin to children. 4RP

217-218, 220, 238; exhibit 2. Cunningham suggested police talk to Dubois, which they did. 4RP 220, 238-239, 255-256. Dubois told police that at no time in his presence did Cunningham demand any money from Waters. 4RP 261-262.

At trial, Dubois testified that on the day of the incident, he was with Cunningham and Cunningham's girlfriend at a local restaurant. 3RP 152. At one point, the other two left Dubois at the restaurant. When Cunningham returned, he was wearing a watch and a bracelet. 3RP 153. Cunningham told Dubois he got them from Waters, a heroin addict, "to make things right." 3RP 153-154. Cunningham explained that Waters had once "told on him," leading to time in prison. 3RP 155.

According to Dubois, Cunningham wanted to go back to Waters' house and Dubois accompanied him there. 3RP 156-158. Dubois heard Cunningham tell Waters he needed "to make it right." 3RP 159. Waters agreed to pay Cunningham for the return of his watch and bracelet, but he needed several hours to find the money. 3RP 160-161. There was no violence and, according to Dubois, Cunningham always carries a knife. 3RP 162-164. Waters' friend and his boss arrived while he and Cunningham were still there. 3RP 159.

According to Dubois, he and Cunningham separated after leaving Waters' house. 3RP 165. Later, he received a phone call from Lonnie McQuiston, who said that somehow his name had come up as possibly being involved in the situation with Waters. He had heard his name on a police scanner. 3RP 165, 181-182. Dubois and McQuiston asked Cunningham to return the items to Waters. Cunningham initially refused, but ultimately gave the watch and bracelet to McQuiston, who returned them to Waters. 3RP 165-168.

Cunningham did not testify at trial. 4RP 281. The defense spent considerable time examining Waters on inconsistencies in his version of events. 3RP 101-143. Waters accused police of making mistakes in his written statement and, at one point, testified officers might have conspired with Cunningham and been responsible for "[s]ending these guys to my house." 3RP 121-123. Waters had a prior conviction, as a juvenile, for a crime of dishonesty. 3RP 100-101.

Witness testimony required less than five hours over the course of one afternoon and the following morning. See 3RP-4RP; Supp. CP ____ (sub no. 21, clerk's minutes, at 4-6). Jurors began deliberating the case on Monday, September 14, 2009 at 2:53 p.m. 5RP 331; Supp. CP ____ (sub no. 21, clerk's minutes, at 7). At 11:00

a.m. the following day, jurors sent a note to the judge indicating they were at an impasse in their deliberations with 10 voting guilty and two voting not guilty. CP 29-30.

In the presence of the entire panel, the court asked the presiding juror how long the panel had been deadlocked. The juror answered one hour the previous afternoon and all of that morning. 6RP 5. The court asked, "Do you anticipate with further deliberation you would be able to make further progress?" 6RP 5. The presiding juror answered, "I don't believe so, no." 6RP 5.

At that point, the court turned its attention to juror 6, asking if that juror was limited in how long he could deliberate. Juror 6 indicated he was only available until 3:30 p.m. that day. 6RP 5. The court noted this created a dilemma and told jurors they should take a lunch recess and then resume their deliberations. 6RP 5-6. The court continued:

If at the point in time where Juror Number 6 is unavailable for the remainder of the day, you can come back either tomorrow, or if he is unavailable tomorrow and you think you're making progress, we'll call in the alternate because we have an alternate available to do that.

6RP 7.

Defense counsel moved for a mistrial, noting jurors had been

deadlocked for a considerable period and, based on the presiding juror's comment, jurors were fixed in their positions. 6RP 7. The court indicated it would give jurors one more chance. 6RP 7.

At 3:15 p.m., the court asked the presiding juror if the panel had made any progress and whether there had been a change "in the direction of your deliberations since the noon hour." 6RP 14. The juror indicated in the affirmative. 6RP 14. The court then excused juror 6 and replaced him with an alternate juror. 6RP 15-16. Defense counsel renewed her motion for mistrial, which was denied. 6RP 16-17.

Jurors were told to begin their deliberations anew the following morning. 6RP 16; 7RP 336-338. After two hours, jurors found Cunningham guilty. Supp. CP ___ (sub no. 21, clerk's minutes, at 9). He was sentenced to 126 months in prison and timely filed his Notice of Appeal. CP 2-12, 17

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION FOR MISTRIAL AND PRESSURED JURORS TO CONVICT.

It is appropriate to discharge a deliberating jury when there is no reasonable probability jurors will agree even if given more

time. See RCW 4.44.330;² CrR 6.10.³

The jury's acknowledgement that it is hopelessly deadlocked satisfies this standard. State v. Jones, 97 Wn.2d 159, 164, 641 P.2d 159 (1982). Indeed, this is the most important factor. State v. McCullum, 28 Wn. App. 145, 152, 622 P.2d 873 (1981) (citing United States v. Lansdown, 460 F.2d 164, 169 (4th Cir. 1972)), rev'd on other grounds, 98 Wn.2d 484, 656 P.2d 1064 (1983). But the judge also may consider the length of time jurors have deliberated and the complexity of the evidence and legal issues. Moreover, the judge can make limited inquiry to determine the progress of deliberations. Jones, 97 Wn.2d at 164-165; State v. Kirk, 64 Wn. App. 788, 793, 828 P.2d 1128, review denied, 119 Wn.2d 1025 (1992).

A trial judge must, however, "use great care when he

² RCW 4.44.330 provides:

The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

³ CrR 6.10 provides, "The jury may be discharged by the court on consent of both parties or when it appears that there is no reasonable probability of their reaching agreement."

questions jurors about the status of their deliberations, so that his questioning does not constitute an impermissible coercion to reach a verdict.” Jones, 97 Wn.2d at 165. On this subject, the criminal rules provide:

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). The inquiry is “whether the court’s intervention ‘tended to and most probably did influence the minority jurors to vote with the majority.’” State v. Watkins, 99 Wn.2d 166, 177, 660 P.2d 1117 (1983) (quoting State v. Boogaard, 90 Wn.2d 733, 740, 585 P.2d 789 (1978)).

Cunningham’s jury indicated it was at an impasse. CP 30. And when questioned by the court, the presiding juror expressed the jury’s belief that further deliberation would not help. 6RP 5. Moreover, this was not a complex case. See 5RP 297 (prosecutor notes facts of case are “pretty straightforward”); 5RP 306 (calls case “simple”). If jurors believed Waters’ version of events – that Cunningham stole his watch and bracelet at knifepoint – Cunningham was guilty as charged. If, however, jurors believed Cunningham’s denial, he was not guilty. Despite this straightforward

case, jurors had been in a stalemate for part of one afternoon and the entire morning that followed. In denying the defense motion for mistrial, the court indicated its belief that it was “obligated to try to give [jurors] one more opportunity.” 6RP 7. But there was no such obligation and, based on the circumstances, the court abused its discretion.

Making matters worse, the court also imparted information to the panel that improperly pressured minority jurors to retreat from their not guilty verdicts. The court’s initial inquiry, whether further deliberations might be fruitful, was not inconsistent with accepted protocol. See Washington Pattern Jury Instructions, WPIC 4.70, at 142 (West 2008) (court should only ask presiding juror if there is a reasonable probability of reaching a verdict in a reasonable time).

But the court went much further. The court made jurors aware that if they did not reach a verdict by 3:30 p.m., when one juror had to leave, it would create a “dilemma” for the court. 6RP 5. Moreover, if that occurred, jurors might have to begin deliberations the following day with the alternate taking the place of juror 6. 6RP 6. Only after this information had been provided did the jury indicate it was “making some progress” and that there had “been a change in the direction of . . . deliberations” 6RP 14.

The problem is twofold. First, by making it clear to jurors that a failure to reach a verdict by 3:30 p.m. would create a dilemma for the court, the judge produced an additional incentive – beyond the desire to reach a verdict based on the evidence and law – to agree; *i.e.*, to not place him in a difficult position.

Second, jurors now knew that if they did not reach a verdict in the next few hours, they faced the prospect of having to deliberate starting the next day with a new juror. While the court had not yet advised them they would have to begin those deliberations anew, jurors would have surmised this as a matter of common sense because the alternate had not been involved in any of the prior deliberations.

By imparting the additional information not covered in WPIC 4.70, the court suggested the need for agreement (to avoid a “dilemma”), the consequences of no agreement (creating that dilemma and possibly requiring deliberations with a new juror), and the length of time the jury would be required to deliberate (until 3:30 p.m. with the current jurors). This was a violation of CrR 6.15(f)(2).

Critically, the trial court knew the division of Cunningham’s jurors because jurors had made this clear in their note, indicating there were two jurors holding out for acquittal. 6RP 3; CP 30.

Iverson v. Pacific American Fisheries, 73 Wn.2d 973, 442 P.2d 243 (1968), provides an apt illustration of the inherent coerciveness of a court's instruction to continue deliberating after it knows how the jurors stand on the merits of the case.

After eight hours of deliberation, the Iverson jury sent the judge a note indicating it was deadlocked 9-3 for the defendant. Iverson, 73 Wn.2d at 973-975. The trial court read former WPI 1.05:

"Any verdict you reach must be agreed upon by ten jurors. In your deliberations you should examine the questions submitted with a proper regard and consideration for the opinions of each other. You should listen to each other's arguments with an open mind, and give due consideration to the opinions of your fellow jurors without surrendering your own convictions for the law contemplates that by your discussion you should harmonize your views if possible and thereby arrive at a verdict. On the other hand, the law does not contemplate that you compromise with your consciences nor yield your views for the mere purpose of agreement. You should make every reasonable effort to reach a verdict.

Again let me remind you that you should not single out any instruction or part thereof, including this one, and place undue emphasis upon it. In your deliberations continue to consider the instructions as a whole."

Iverson, 73 Wn.2d at 975 n.1 (quoting former WPI 1.05). Ten minutes after returning to the jury room, the jury returned a defense verdict, 11-1. Iverson, 73 Wn.2d at 974-75.

On review, the Supreme Court held the court's instruction, when considered with the jurors' knowledge that the trial court was informed of their numerical split and the almost immediate impact on the jury's vote, "represents almost conclusive evidence that two jurors were pressured into a change of position." Iverson, 73 Wn.2d at 975.

The importance of this knowledge by the court was again emphasized in State v. Watkins. The court noted the holding in Iverson was "not a criticism of [former WPI 1.05], but a recognition of its probable coercive effect when the jurors knew that the trial court had been advised how they stood on the merits of the case." Watkins, 99 Wn.2d at 174 (citing Iverson, 73 Wn.2d at 975-76).

While jurors did not immediately reach a verdict after the court's improper comments at Cunningham's trial, they did move sufficiently in their deliberations to convince the court they should continue the next day with the alternate. And, with that alternate, the jury convicted relatively quickly (about two hours). There is a high probability the improper comments impacted jurors because without them, jurors would have remained deadlocked, requiring a mistrial.

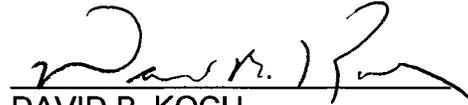
D. CONCLUSION

The trial court erred when it refused to declare a mistrial. Subsequently, the court improperly pressured the two dissenting jurors to reach a verdict. Both errors require a new trial.

DATED this 16th day of June, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64425-4-1
)	
DANIEL CUNNINGHAM,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] DANIEL CUNNINGHAM
DOC NO. 848415
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*

2010 JUN 16 PM 4:23