

64425-4

64425.4

No. 64425-4-I

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

STATE OF WASHINGTON, Respondent,

v.

DANIEL S. CUNNINGHAM, Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By KIMBERLY THULIN
Sr. Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #21210**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

2011 MAR 23 11:11:01
THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR	1
B.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR	1
C.	FACTS	1
1.	Substantive facts	1
D.	ARGUMENT.....	4
1.	The trial court acted within its discretion by denying a mistrial after jurors initially reported they were deadlocked and by asking jurors to continue to try to deliberate after lunch.....	4
2.	Cunningham fails to provide more than mere speculation that the trial court's limited intervention could reasonably substantially possibly coerce the verdict.....	7
E.	CONCLUSION	11

TABLE OF AUTHORITIES

Washington State Court of Appeals

State ex rel. Charles v. Bellingham Municipal Court, 26 Wn.App. 144, 612 P.2d 427 (1980) 6

Washington State Supreme Court

Iverson v. Pacific American Fisheries, 73 Wn.2d 973, 442 P.2d 243 (1968)..... 10

State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978) 8

State v. Johnson, 124 Wn.2d 57, 873 P.2d 514 (2004)..... 9

State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982)..... 5, 8

State v. Labanski, 117 Wn.2d 405, 816 P.2d 26 (1991) 4

State v. McCollum, 28 Wn.App. 145, 622 P.2d 873 (1981)..... 5, 6, 8, 10

State v. Taylor, 109 Wn.2d 438, 745 P.2d 510 (1987) 4, 5

State v. Watkins, 99 Wn.2d 166, 660 P.2d 1117 (1983) 8

Rules and Statutes

CrR 6.10..... 4

CrR 6.15..... 8

RCW 4.44.330 4

A. ASSIGNMENTS OF ERROR

None

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court had discretion to instruct the jury to take a lunch break and continue with deliberations instead of declaring a mistrial immediately after jurors notified the trial court that they were deadlocked.
2. Whether the record demonstrates the trial court's limited response to a deadlocked jury created reasonably substantial possibility the jury verdict was coerced when the court comments were neutral, did not result in a verdict and where ultimately, a newly composed jury determined Cunningham's guilt anew the following day.

C. FACTS

1. Substantive facts

Daniel Cunningham was charged and convicted by jury with one count of robbery in the first degree while armed with a deadly weapon. CP 61-62. Following closing arguments Monday September 14th, 2009 at approximately 11 a.m., the case was submitted to the jury. CP 71 (sub no. 21, clerk's minutes at 4-6). An alternative juror had also been selected and placed on stand by following the trial in the event any of the jurors could

not continue with deliberations. RP 331. The next day, Tuesday September 15th 2009, the trial court was notified the jury was at an impasse. CP 72. The bailiff also informed the court that one of the jurors indicated he needed to be excused by 3:15 p.m. that day. Id.

The parties anticipated time constraints would arise because the case had taken longer than expected. RP 190, RP 8-10. Initially, the state expected to be done presenting its case by Wednesday September 9th, 2009 but by mid trial the state realized the case would likely run into Monday September 14th, 2009 since the court was unavailable Friday. Id.

Upon declaring the jury was at an impasse, the jury foreman informed the trial court the jury had been deadlocked for one hour the afternoon before and throughout the morning and that he did not think further deliberations would be useful. RP 5. Nevertheless, the trial court asked the jury “to continue to try” and advised the jury to take a lunch break and “come back and get back at it.” RP 6. The court told the jury to let the bailiff know if after further deliberations they decide they can’t go any further but reassured the jury that the juror conflict would not necessarily derail further deliberations by instructing them as follows:

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.

RP 6-7. After the jury left for lunch, Cunningham unsuccessfully moved for a mistrial. 6 RP 7. At 3:15 p.m. the trial court brought the jury in and inquired whether they were making any progress. 6 RP 14. The foreman informed the trial court they were. 6 RP 14. The trial court then informed the jury that it was obligated to bring in the alternative juror in the morning and that the jury would begin deliberations anew at that time. 6 RP 14. The trial court then excused juror 6 from the jury panel. Id. Cunningham renewed his motion for mistrial and the trial court again denied the request. Id.

At 9 a.m. the next morning the court briefly questioned the alternative juror and then instructed the newly composed jury to begin their deliberations anew. 6 RP 16, 7 RP 337-338. At 11:10 a.m. the newly composed jury reached a guilty verdict. CP 74. Cunningham timely appeals. CP 2-12.

D. ARGUMENT

- 1. The trial court acted within its discretion by denying a mistrial after jurors initially reported they were deadlocked and by asking jurors to continue to try to deliberate after lunch.**

Cunningham first asserts the trial court erred by denying his motion for mistrial after the jury reported it was at an impasse the morning after deliberations began. Br. of App. at 7.

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.

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.

A trial court has broad discretion in determining whether a jury is genuinely deadlocked. State v. Taylor, 109 Wn.2d 438, 745 P.2d 510 (1987), *disapproved of in part on other grounds by* State v. Labanski, 117 Wn.2d 405, 417, 816 P.2d 26 (1991). The trial court should consider factors such as length of time the jury had been deliberating, the length of trial, the complexity of the evidence, any progress in the deliberations, and the jury's own assessment that it is deadlocked. State v. Taylor, 109

Wn.2d at 442. The jury's own assessment however, is not controlling as the trial judge "is in the best position to determine whether a jury's stalemate is only a temporary step in the deliberation process or the unalterable conclusion to that process." *Id.*

A trial court therefore must carefully balance between "unnecessary interfering with the jury's deliberative function and making sufficient inquiry" whether there is a reasonable probability of the jury reaching a verdict within a reasonable time before discharging a jury. State v. McCollum, 28 Wn.App. 145, 150-151, 622 P.2d 873 (1981), *reversed on other grounds*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

A trial court's decision not to discharge a jury after it reports that it is deadlocked is reviewed for an abuse of discretion. State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982). The trial court should only grant a mistrial if he thinks there is no reasonable probability that the jury will reach a verdict if given more time. State v. Taylor, 109 Wn.2d at 442.

The jury in this case reached an impasse after only a short period of deliberations. While the case was not complex, it did require the jury to assess the credibility of the various witnesses and apply the applicable law to the facts. Given these circumstances, it was reasonable for the trial court to conclude that lunch and a break in deliberations could be helpful to the

deliberative process. The trial court was keenly aware that simply discharging the jury after only a short period of deliberations because the foreman did not think further deliberations would help, was problematic and unwarranted. RP 7. Precipitously discharging a jury may be grounds for denying a new trial on the basis of double jeopardy. State v. McCollum, 28 Wn.App. 145, 622 P.2d 873 (1981), *reversed on other grounds* at 98 Wn.2d 484, 656 P.2d 1064 (1983); *see also State ex rel. Charles v. Bellingham Municipal Court*, 26 Wn.App. 144, 612 P.2d 427 (1980) (error where jury discharged the jury immediately only upon the foreman's statement that the jury had been unable to arrive at a verdict where the record otherwise reflects no basis for discharge other than length of deliberation.).

Given that the case was not complex, the jury had not been deliberating long, the trial court reasonably determined consistent with State ex rel. Charles v. Bellingham Municipal Court, that the jury could possibly reach a verdict if given a break and some more time to deliberate. Thus, the trial court appropriately instructed the jury to take a lunch break, to continue to deliberate and to keep the bailiff informed whether further deliberations were fruitful or not.

2. Cunningham fails to provide more than mere speculation that the trial court's limited intervention could reasonably substantially possibly have coerced the verdict.

Cunningham asserts nevertheless that the trial court's response to the deadlocked jury and to a juror's time conflict, exerted impermissible coercive pressure on the jury's deliberations. Br. of App. at 10.

Cunningham cannot demonstrate from this record however, that the court's limited intervention created a reasonable substantial possibility that the jury verdict was impermissibly coerced.

First, the jury did not reach a verdict following the court's intervention, it simply continued with deliberations. The verdict was not reached until a new jury was convened and deliberated anew the next day after one juror was removed due to time constraints. Thus, the record does not support Cunningham's contention that the trial court's comments were coercive and it is improbable the intervention with the prior jury had any impact on the verdict.

Nor was the jury impermissibly advised it needed to reach a decision by the end of the afternoon. Instead the court simply encouraged the jury to "continue to try" after lunch and reassured them that the juror conflict was not a concern that would derail the deliberation process

because they could deliberate further the next day or an alternate could be brought in if necessary.

The right to a fair and impartial trial requires a judge refrain from exerting coercive pressure upon the jury's deliberations. State v. Jones, 97 Wn.2d at 164. Once deliberations start, the court should not instruct the jury in such a way as to suggest the need for agreement, the consequences of disagreement, or the length of time a jury will be required to deliberate. CrR 6.15(f)(2).¹ To demonstrate judicial coercion a defendant must provide "more than mere speculation" about how the trial court's intervention might have influenced the verdict. State v. Watkins, 99 Wn.2d 166, 177-78, 660 P.2d 1117 (1983). The defendant must establish "a reasonably substantial possibility" that the verdict was improperly influenced by the trial court's intervention. State v. Watkins, 99 Wn.2d at 178. In reviewing whether the trial court impermissibly influenced the jury, appellate courts consider all the circumstances of the court's intervention. State v. McCollum, 28 Wn.App. at 153.

In State v. Boogaard, 90 Wn.2d 733, 739, 585 P.2d 789 (1978), the trial court asked a deadlocked jury to reveal their voting history and then

¹ CrR 6.15(f)(2) provides: 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.

asked each juror if they thought they believed a verdict could be reached if they deliberated another thirty minutes. Thirty minutes later the jury reached a verdict. The court held that under these circumstances, these interactions with the jury reasonably substantially impermissibly coerced the jury to reach verdict within the allotted thirty minutes.

In this case the court did not ask the jury to discuss or review their voting history with the court, did not place time limits on the jury's deliberations or inform the jury of future consequences in the event they remained deadlocked or made progress other than to ask them to continue to try to deliberate and to reassure them they could work around the one juror's time conflict-either by setting over further deliberations to the next day or by bringing in an alternate juror. The jury had no way of knowing which option the court would chose or that bringing an alternative juror would require the jury to deliberate anew.

Secondly, the record reflects the jury did not reach a verdict in the wake of the trial court's limited intervention but instead that the jury was able to deliberate after a lunch break without further problems until the court reconvened just after 3p.m..

Moreover, it was a newly composed jury that deliberated anew the following day that concluded Cunningham was guilty. The jury is

presumed to have followed the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Under these circumstances, Cunningham cannot demonstrate there is any reasonable substantial possibility that the newly composed jury was impermissibly coerced by the trial court's comments to the previous jury the day before. Certainly, even if the court's comments were construed as impermissive, error if any under these circumstances was harmless beyond a reasonable doubt. State v. McCollum, 28 Wn.App. at 148.

Cunningham speculates that because the jury indicated at the end of the day that they were "making some progress" the trial court's limited intervention before lunch must have pressured minority jurors to retreat from their positions. Cunningham argues that as in Iverson v. Pacific American Fisheries, 73 Wn.2d 973, 442 P.2d 243 (1968) this movement in deliberations illustrates the coercive effect of the trial court's comments. In the Iverson case however, jurors returned with a verdict ten minutes after being advised in part, to "harmonize" their views if possible and "arrive at a verdict." In contrast to Iverson, the court's comments in this case were limited and nothing the court said in this case advised or pressured any of the jurors that they needed to reach a verdict one way or the other or that they needed to reach consensus by the end of the

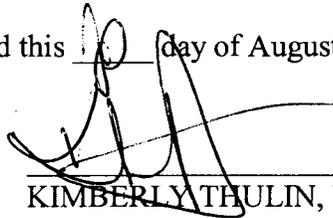
afternoon. Instead the trial court carefully asked them to take a break and continue to try-whether or not those efforts resulted with progress or not. The trial court also reassured jurors that they could work around one of the juror's time conflict thereby eliminating concerns this problem was impermissibly interfering with juror deliberations.

Under these circumstances Cunningham's argument that the new jury must have been impermissibly influenced by the trial court's limited instructions to the previous jury the day before amount to nothing more than mere speculation.

E. CONCLUSION

For the reasons set forth above, the State asks this court to affirm Daniel S. Cunningham's judgment and sentence for one count of robbery in the first degree while armed with a deadly weapon.

Respectfully submitted this 10 day of August, 2010.

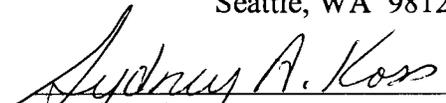


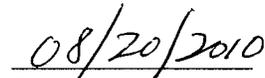
KIMBERLY THULIN, WSBA #21210
Sr. Appellate Deputy Prosecutor

CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to this Court and Appellant's counsel, addressed as follows:

DAVID B. KOCH
Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122


Legal Assistant


Date