COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1790-CR **Cir. Ct. No. 2001CF110**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. PHERNETTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County: KENNETH L. KUTZ, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Richard Phernetton appeals a judgment of conviction for repeated sexual assault of a child. On the third day of trial, after hearing six hours of evidence and deliberating for nine hours, the jury returned a guilty verdict at 12:03 a.m. During deliberations, the trial court twice inquired

about the jury's "numerical breakdown," stated the jurors were making "progress" after some minority jurors apparently joined the majority, and, upon being asked by the jury whether it could "go home, sleep on it and come back with clearer heads," erroneously advised the jurors they could not be separated after deliberations had begun, until a verdict had been reached. We conclude that under the totality of the circumstances, there was an impermissible risk that the jury's verdict was coerced. Accordingly, we reverse and remand for a new trial.

BACKGROUND

¶2 On October 29, 2001, Phernetton was charged with first-degree sexual assault of a child under the age of thirteen. He was arrested in 2009 in Washington and was transported back to Wisconsin. The State then filed an information charging Phernetton with one count of repeated sexual assault of a child. The case proceeded to a jury trial, at which the primary issue was the credibility of the witnesses.

¶3 On the third day of trial, witnesses began testifying at 9:00 a.m. The jury retired to deliberate at 3:00 p.m. The court was in recess until 8:48 p.m., when it resumed after nearly six hours to address a question from the jury.

¶4 After answering the question, the court inquired, "Who is the foreperson of the jury at this time?" When the foreperson identified herself, the following exchange took place:

> THE COURT: Ma'am, without indicating whether it's toward guilt or toward innocence, can you tell me what the numerical breakdown is in terms of your deliberations with the jury? In other words, six to six, seven to five, eight to four? I don't want to know in which direction the balance is tilting, but can you tell me –
>
> JUROR: Eight to four.

> THE COURT: Currently eight to four. All right. How long has it been at that particular breakdown?
>
> JUROR: Five hours.
>
> THE COURT: So most of the time that you've been back in there. All right. Bear with me for one second and I'll be right back.

¶5 The court then dismissed the jury and stated it intended to give the jury WIS JI—CRIMINAL 520 (2001), entitled "Supplemental Instruction on Agreement." The court denied a minor modification requested by the defense, and the jury returned at 8:59 p.m. The jury was instructed as follows:

> THE COURT: Ladies and gentlemen, this may come as somewhat of a surprise to you, but you're not the first jury to be in this particular situation where you've been deadlocked for a substantial period of time. Because of this, the Wisconsin Jury Instructions Committee has provided the courts with what's called a supplemental instruction that we normally provide to juries in this case which I intend to read to you now. Once I've read this follow-up instruction to you, we'll send you back to the jury room to continue your deliberations. We'll let you know we're not going to make you go all night working on this thing until you reach a verdict, but we do try to encourage you to reach one if you possibly can.
>
> The instruction reads as follows: You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues. You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate, they should be open-minded. They should listen to the arguments of the others and talk matters over freely and fairly and make an honest effort to come to a conclusion on all of the issues presented to them.

The court directed the jury to return to deliberations and "do your level best to try to reach a unanimous verdict."

¶6 The court brought the jury back to the courtroom around 11:00 p.m. The court indicated it had sent a note to the jury asking whether it was still deadlocked at eight to four and whether the jurors believed there was a reasonable likelihood that they would be able to reach a unanimous verdict if allowed to continue their deliberations. The jury responded that they were now divided ten-one-one, which the court took to mean ten for one verdict, one for the other, and one undecided.

¶7 The jury also asked, "What are the options that we have? Any chance to go home, sleep on it and come back with clearer heads?" The court responded with its erroneous belief that the jury was effectively sequestered, and questioned the jury about its "progress" in deliberations:

> Folks, I have to tell you in a perfect world that would be absolutely a wonderful idea. The problem that I have is that once the case is turned over to the jury to make their deliberations we can't split you up until a verdict comes back or I make some other decision here. Because if this was a more affluent county we'd probably put you up at a hotel overnight and then bring you back to continue your deliberations. Regrettably, we don't have the resources to do that.
>
> So essentially the options that I … have here are to let you folks continue to deliberate until you reach a verdict or until such point in time that you tell me it's basically cast in stone and there is absolutely no way that you're going to be able to reach any resolution.
>
> Right now it is 11:07. You've been going at this now for about eight hours. Let me ask the foreperson at this time. At this point do you think there is any likelihood that you're going to be able to reach a unanimous verdict at this point based on the status?
>
> FOREPERSON: Probably.

> THE COURT: It does seem like you've obviously made some progress.
>
> FOREPERSON: Probably.[1]

The court then instructed the jury to return to deliberations and stated it would "check back with you in about another half hour, 45 minutes, and we'll see where you're at unless you return a verdict in that time."

¶8 Phernetton moved for a mistrial immediately after the jury retired to deliberate. Phernetton observed the eight hours of deliberation had exceeded the six-plus hours of evidence taken that day, and the jurors had been "systematically pressured for longer than the case took to put forward." Counsel opined that any verdict rendered as a consequence of the jury's continued deliberations would be the product of coercion.

¶9 The State opposed the motion, echoing the circuit court's comment that there had been "progress" since the court read the supplemental instruction. The court ultimately denied the motion, reasoning that the length of deliberations was likely attributable to the fact that the jury had to determine the credibility of the witnesses. The court also stated it was clear the jury was taking the supplemental instruction to heart, suggesting three minority jurors had changed positions since it was given.

[1] Phernetton observes that both the prosecutor's and defense counsel's subsequent comments suggest the foreperson responded "possibly" rather than "probably." Even if the transcript is slightly inaccurate, as Phernetton contends, we do not view the difference as material.

¶10 The jury returned with a guilty verdict at 12:03 a.m. The court confirmed the verdict was unanimous, and defense counsel requested that the jury be polled. Each juror orally confirmed his or her vote. Phernetton now appeals.

DISCUSSION

¶11 Whether to declare a mistrial is left to the sound discretion of the trial court. ***State v. Thurmond***, 2004 WI App 49, ¶10, 270 Wis. 2d 477, 677 N.W.2d 655. "When no mistrial is declared, our review of this issue is limited to whether the trial court erroneously exercised its discretion in refusing to do so." ***Id.*** An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion. ***State v. Jensen***, 141 Wis. 2d 333, 338, 415 N.W.2d 519 (Ct. App. 1987), *aff'd*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988). We therefore must determine whether the trial court properly concluded the jury verdict was not coerced.

¶12 It has been long-settled "that a verdict cannot stand when the jury have been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to agreement at all, unless it be clearly shown that no influence was thereby exerted." ***Brown v. State***, 127 Wis. 193, 201, 106 N.W. 536 (1906). ***State v. Echols***, 175 Wis. 2d 653, 666-67, 499 N.W.2d 631 (1993), reaffirmed this standard, and emphasized that determining coercion requires an analysis of the totality of the circumstances, taking the allegedly coercive statements in context.

¶13 The first problem with the trial court's conduct was its inquiry into the jury's numerical division. There is no question the trial court erred by making such an inquiry. ***State v. McMahon***, 186 Wis. 2d 68, 91, 519 N.W.2d 621 (Ct. App. 1994). A jury's numerical division is immaterial, and the practice of asking

about it has long been frowned upon in Wisconsin. ***Id.***; *see also* ***Mead v. City of Richland Ctr.***, 237 Wis. 537, 542, 297 N.W. 419 (1941). "No one knows or should know what is going on inside the jury room." ***McMahon***, 186 Wis. 2d at 91. Yet the trial court here asked for the jury's numbers not once, but twice.

¶14 The State observes that in ***McMahon***, we concluded we lacked the supervisory authority necessary to adopt a per se rule against inquiring into the jury's numerical division, as the federal courts have done.[2] *See* ***id.*** at 94. All this means is that we do not automatically reverse simply because a trial court asked about the jury's numerical division. Instead, we employ a form of harmless error analysis, asking if the verdict should stand despite the court's inquiry. As ***McMahon*** made clear, this inquiry requires evaluation of the totality of the circumstances, and we look for other potentially coercive conduct by the trial court. ***Id.*** at 94-95.

¶15 Here, once the trial court learned the jury was no longer split eight to four, but ten to one with one undecided juror, the court followed its numerical inquiries by remarking the jury had made "progress." The State contends this statement was not coercive, as the court had previously encouraged the jury to reach consensus using the "wholly unobjectionable phrasing" of WIS JI—CRIMINAL 520. *See* ***Quarles v. State***, 70 Wis. 2d 87, 89, 233 N.W.2d 401 (1975) (supplemental jury instruction is not coercive on its face). The State, however, has not pointed to any case endorsing the term "progress" in the face of multiple numerical inquiries, which were themselves improper. "Progress" suggests

[2] The State also rallies several cases from other jurisdictions to its aid. Because we conclude this subject is adequately addressed by Wisconsin law, we do not address these foreign authorities. *See* ***Mead v. City of Richland Ctr.***, 237 Wis. 537, 542, 297 N.W. 419 (1941).

momentum toward a goal. While some jurors may have perceived that goal as unanimity of the verdict, it is equally possible minority jurors perceived the goal to be joinder with the majority.

¶16 The trial court's use of the term "progress" harkens back to instructions that openly solicited minority jurors to reconsider their views. In ***Mead***, 237 Wis. at 539-40, for instance, the trial court instructed the jury, deadlocked at eight to four, that it was their "duty to agree on a verdict if it is possible to do so," and though no juror was to "surrender his or her honest conviction based on the evidence," they were directed to "listen very carefully to all views of the other jurors; and those in the minority might well consider … whether they are warranted in standing on their views as against that of their fellow jurors …."[3] Our supreme court found the latter portion of these instructions to be reversible error. The instruction was in effect an argument directed to the four minority jurors that the eight in the majority were more likely to be right. ***Id.*** at 540-41. While the trial court's "progress" comment in this case was not as egregious as the court's comments in ***Mead***, we nonetheless conclude that when coupled with the court's repeated inquiries into the numerical division of the jury, it created reasonable grounds to suspect coercion. *See* ***Brown***, 127 Wis. at 201 (reasonable ground to suspect coercion is sufficient).

¶17 Third, when the jury specifically asked whether it could "go home, sleep on it and come back with clearer heads," the trial court erroneously

[3] The trial court had previously given a similar instruction encouraging minority jurors to reconsider their views. *See* ***Mead***, 237 Wis. at 539.

responded that it could not allow the jury to separate.[4] The jury made this request at about 11:00 p.m., after deliberating for eight hours. Although the State paints these deliberations as "similar to a standard workday," it ignores that the jury also heard approximately six hours of evidence and argument before beginning deliberations. The trial court acknowledged having the jury separate to get some rest "would be absolutely a wonderful idea."

¶18 The State contends that because the jury received WIS JI—CRIMINAL 520, it was "already aware that they would not be made to deliberate all night if they were unable to reach a verdict." Once again, though, the trial court's subsequent statements undermined the instruction's non-coercive language. As a result of the court's erroneous understanding of WIS. STAT. § 972.12, the jury was informed it would not be permitted to separate "until a verdict comes back or I make some other decision here." The court then told the jury it would be kept out until it reached a verdict or informed the court the deadlock was "cast in stone" and there was "absolutely no way" it was able to reach a resolution.

¶19 As a practical matter, the court's statements undoubtedly left the jurors uncertain how long into the night they would be made to deliberate. Further, the court created a nebulous secondary standard by requiring a deadlock to be "cast in stone" to have any significance. This threshold of disagreement likely precluded a mistrial, to Phernetton's potential detriment. And given that the

[4] The State concedes the court was mistaken in its belief that the jury had to be sequestered. WISCONSIN STAT. § 972.12 vests the trial court with discretion to keep the jurors together or permit them to separate.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court had already expressed approval of the jury's "progress" when minority jurors seemingly shifted to the majority, the risk is too great that minority jurors simply threw in the towel after a fourteen-hour day rather than disappoint the trial court and fellow jurors.

¶20 The State responds by citing ***State v. Edelburg***, 129 Wis. 2d 394, 384 N.W.2d 724 (Ct. App. 1986), for the proposition that the pressures imposed by individual needs or the demands of daily living do not constitute coercion. In ***Edelburg***, 129 Wis. 2d at 398, the trial court instructed a deadlocked jury that it was to return to the jury room and try to reach a conclusion based on the evidence. At 10:30 p.m., the jury informed the court it had not yet agreed. ***Id.*** The jury was instructed to return for additional deliberations at 8 a.m. rather than 9 a.m. to accommodate one of the juror's business commitments. ***Id.***

¶21 Edelburg appealed, challenging the guilty verdict on two grounds. First, he asserted the supplemental instruction was erroneous because it did not specifically advise the jurors they would not be forced to agree or kept together until they agreed. We concluded the proper inquiry was "whether the jury could reasonably conclude that the judge had said or inferred that they would be kept out until they reached a verdict, no matter how long that took." ***Id.*** at 399. Using this standard, we found nothing improper in the court's instruction. ***Id.*** Second, Edelburg asserted the juror's concern for a business commitment created a likelihood of coercion. ***Id.*** at 400. We also rejected this argument because there was no way to know whether the juror felt pressured to agree for the sake of attending to the business commitment, and in any event there was nothing the trial court could do about it but give extra time for deliberation. ***Id.***

¶22 We conclude ***Edelburg*** cuts against the State's position. The trial court in this case, undoubtedly with good intentions, created a situation in which jurors may have believed they would be kept out until a verdict was reached. The court specifically stated, "[W]e can't split you up until a verdict comes back or I make some other decision here."[5] This directly contravenes ***Edelburg*** because the jury could reasonably conclude this statement meant they would be kept out indefinitely until they reached a verdict. *See* ***id.*** at 399. Although there was nothing the trial court could do about the juror's business commitment in ***Edelburg***, the situation here was entirely within the trial court's power to control.

¶23 The State finds it significant that the jury exceeded the time suggested by the court's last instruction to reach a verdict. Around 11:07 p.m., the court stated it would check back with the jury in "about another half hour, 45 minutes," but the jury reached a verdict at 12:03 a.m. without further interruption. At most, then, the jury deliberated about ten minutes beyond the time suggested by the court. This hardly demonstrates, as the State contends, that the jury felt no pressure to reach a verdict. If anything, the jury may have been aware the court would soon be inquiring about the state of their deliberations and rushed to conclude.[6] The State's argument is based solely on speculation.

¶24 The State also asserts we should affirm because the jury was polled after announcing the verdict and each juror confirmed his or her vote. The

[5] The "other decision" can only be a reference to a mistrial, which the court likely discouraged by saying the jury deadlock had to be "cast in stone" to be significant.

[6] In any event, we question the significance of the timing of the jury's verdict. In ***State v. Echols***, 175 Wis. 2d 653, 666, 499 N.W.2d 631 (1993), the court imposed a twenty-minute time limit on the jury's deliberations, which the jury exceeded. Our supreme court did not even discuss that fact when affirming the judgment of conviction.

purpose of polling is to test the uncoerced unanimity of the verdict by requiring each juror to take individual responsibility for the result. *See* ***State v. Wojtalewicz***, 127 Wis. 2d 344, 348, 379 N.W.2d 338 (Ct. App. 1985). Polling gives each individual juror the opportunity to indicate the verdict "was brought about through the coercion or domination of one of them by some of his fellow jurors or resulted from sheer mental or physical exhaustion of a juror." ***Id.*** However, polling is not outcome-determinative; rather, it is merely an important consideration when judging the totality of the circumstances. *See* ***Echols***, 175 Wis. 2d at 668-69. In this case, the poll, while important, does not restore our confidence in the verdict.

¶25 We conclude the trial court in this case subjected the jury to "statements or directions naturally tending to coerce or threaten them to agreement …." *See* ***Brown***, 127 Wis. at 201. It did so by repeatedly inquiring about the jury's numerical division, stating the jury had made "progress" when minority jurors seemingly shifted to the majority, and, after a fourteen-hour day and eight hours of deliberation, erroneously told the jury it had to remain together until a verdict was reached. We reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.