IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DARRELL ROBERT JOHNSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	
	)	Case No. F 2003-1084
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

C. JOHNSON, JUDGE:

Appellant, Darrell Robert Johnson, was convicted by a jury in Tulsa County District Court, Case No. CF 2002-5046, of Trafficking Illegal Drugs (Cocaine Base) (Count 1), in violation of 63 O.S.2001, § 2-415(A), and Unlawful Possession of Paraphernalia (Count 2), in violation of 63 O.S.2001, § 2-405, after former conviction of two or more felonies. Jury trial was held before the Honorable Thomas Gillert, District Judge, on September 8-11, 2003. The jury set punishment at life imprisonment without the possibility of parole on Count 1 and imposed a fine of One Thousand Dollars ($1,000.00) on Count 2. Formal sentencing was held on September 26, 2003. Judge Gillert sentenced Johnson to life imprisonment without the possibility of parole on Count 1 and found the fine imposed on Count 2 satisfied by time served. From the Judgment and Sentence of the trial court, Appellant filed this appeal.

Mr. Johnson raises ten (10) propositions of error. Because we find relief is required on Proposition Six which concerns jury deliberations and the

validity of the resulting verdict, a statement of the facts of this case is unnecessary.

In Proposition Six, Mr. Johnson contends his convictions should be reversed because the first stage of trial produced an invalid verdict. Mr. Johnson complains the trial court did not give a proper *Allen*[1] charge when, after receiving jury notes, it learned the jury was deadlocked eleven to one and was frustrating further deliberations. Mr. Johnson also complains that, after the jury resumed deliberations, returned with a verdict, and still did not have a unanimous verdict, the trial court erred by not giving the Deadlocked Jury Charge set forth in OUJI-CR 2d. (2000 Supp.) 10-11 and by requiring further deliberations to produce a unanimous verdict. Mr. Johnson claims these trial court errors had the effect of coercing an invalid guilty verdict which requires reversal of his convictions.

The jury retired to deliberate Mr. Johnson's guilt or innocence at 2:15 p.m. on September 10, 2003. The trial record does not indicate how long the jury deliberated[2] before the trial court received the following two notes from Juror McBee and from Juror Hawthorne:

> Judge Gillert,
>
> Howard Hawthorne does not clearly understand the purpose of deliberation. We have all agreed upon a verdict with the exception of one. He feels like we are badgering him & he is getting upset, and he wanted to ask you is that our job as the other jurors to convince him of what we believe, as well as him convince us of what he believes. I have

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[1] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

[2] The district court docket sheet shows the jury retired to deliberate on "9/10/03 at 2:15 p.m." Then the docket sheets shows "at 9:30 p.m., the jury returns into open court with their verdict." *See* docket sheet entry from 09/08/2003.

explained to Mr. Hawthorne what I believe the purpose of deliberating (sic) and this is somewhat of a debate and at some point we need to all come to a decision that we all feel is fair and right. Please Respond to Mr. Hawthorne in this matter.

s/M. McBee
Forperson (sic)

Judge,

Are the juriest (sic) supposed to convince me of the defendents (sic) guilt or innocince (sic)?

s/Howard Hawthorne

Upon receipt of these notes, the trial court stated

. . . And so it is my proposal to bring the jury back in, admit to them I don't understand entirely the problem, but that deliberation means and requires that they discuss the evidence, that they consider the opinions of others, but that no one is required to surrender their judgment to that of any other person or any other group of people, and see whether that answers the problem, answers the question, whether it solves the problem or not.

Neither party objected. (Tr. 394) When the jurors returned to the courtroom, the trial court stated:

. . . I'm responding to the inquiries from Ms. McBee and apparently from Mr. Hawthorne. I'm not sure I understand entirely the questions really from both, but I'll try to treat it by doing this: And that is to say that the deliberation process contemplates and requires a discussion of the evidence, a discussion of your recollection of the evidence, your view of the evidence, your view of the instructions as it relates to the evidence. So that's what deliberation means, that's what it requires, is some discussion, some deliberation about that, and people are required to be involved in that process.

. . .

That is not to say, though, that in that process, in being involved in that process that anyone needs to surrender their own judgment to that of another person or other groups of people, but it does require that there be some deliberation. And, again, by deliberation that would be discussion of what you have heard and that sort of thing.

I'm not sure that answers the question, but that's probably as good as I can do is, again, to say that it does require deliberation. But it doesn't require the forfeiting of your opinions or judgments about things, but we do expect for you, you are required, to talk.

So with that, I'll ask you all to deliberate. All right?

(Tr. 395) The jurors were excused to deliberate further.

When the jurors announced they had reached a verdict, they returned to the courtroom. Foreperson McBee read the verdict and defense counsel asked that the jury be polled. When the trial court asked Juror Hawthorne if this was his verdict, the following transpired:

Juror Hawthorne: I guess.

The Court: Well, you understand, Mr. Hawthorne, that I'm trying to figure out whether this is your verdict. Is this your verdict?

Juror Hawthorne: Yeah. We all agreed that he was guilty of being in proximity of the drugs.

The Court: My question, sir, is this your verdict? Have you determined that he's guilty?

Juror Hawthorne: Everyone wants to go home, yeah.

The Court: That is not my question, sir. My question for you, sir, is is this your verdict?

Juror Hawthorne: It's not my honest verdict, no, to be totally honest.

The Court: Okay. Well, we don't have a verdict then, sir. All right. Well, then you don't have a unanimous verdict and I'll ask you all then to retire for your deliberations. You need to return – let's do this. Let's print out some new ones and give them new verdict forms.

(Tr. 399-400) [3]

[3] The record does not indicate at what time the trial court received the jurors' notes, what time they returned with the (first) verdict or what time the polling of the jury occurred. *See f.* 2.

The jury resumed deliberations and then returned with a guilty verdict around 9:15 p.m. When the jurors were polled, all agreed it was their verdict. (Tr. 401)

It is clear to this Court from reading the notes from Juror McBee and from Juror Hawthorne that the jury was deadlocked, eleven to one, and that Juror Hawthorne felt pressured to continue deliberations. It is also evident from the notes that Juror Hawthorne felt the other jurors were pressuring him to agree with them and to change his vote to guilty so the jurors could "all come to a decision that we all feel is fair and right." Upon learning of the jury's impasse, it would not have been improper for the trial court to give the jury the uniform deadlocked jury charge commonly referred to as an *Allen* instruction. *See* OUJI-CR 2d. (2000 Supp.) 10-11; *Gilbert v. State*, 1997 OK CR 71, ¶ 57, 951 P.2d 98, 114, *cert. denied*, 525 U.S. 890, 119 S.Ct. 207, 142 L.Ed.2d 170 (1998)(no error in giving *Allen* instructions after the jury announces it is deadlocked after several hours of deliberation); *Sartin v. State*, 1981 OK CR 157, ¶ 7, 637 P.2d 897, 898 (*Allen* instruction is proper when the jury is apparently deadlocked but the trial court must carefully avoid any coercion).

Here, Mr. Johnson complains the after receiving the jurors' notes, the trial court failed to instruct them according to the law and its instruction did not address critical points approved by this Court in OUJI-CR 2d. (2000 Supp.) 10-11. He submits the verbal instruction given by the trial court was coercive. The State argues "there was nothing wrong" with the instruction given and notes trial counsel did not object to it.

Trial counsel did not object to the trial court's response to the jurors' notes and we review for plain error. *Kamees v. State*, 1991 OK CR 91, ¶, 815 P.2d 1204, 1207 (failure to object to giving of *Allen* instruction waives all but fundamental error); *Simpson v. State*, 1994 OK CR 40, ¶ 12, 876 P.2d 690, 693(fundamental error is referred to as plain error).

The trial court told the jurors not to "surrender their own judgment to that of another person or other groups of people" and deliberation did not "require the forfeiting of your opinions or judgments about things." The instruction given by the trial court did not track the language of the uniform jury instruction referred to as the Deadlocked Jury Charge. OUJI-CR 2d. (2000 Supp.) 10-11. It did not advise the jury that it should try to resolve their differences "if at all possible" and it did not advise the jurors against surrendering their convictions solely "for the purpose of arriving at a verdict."

Telling the jury that it should try to reach a verdict "if possible," and stating that the individual jurors should not surrender their honest convictions to be congenial or to reach a verdict is in essence what keeps a deadlocked jury instruction from seeming coercive. *See e.g. Thomas v. State*, 1987 OK CR 113, ¶¶ 20-21, 741 P.2d. 482, 488; *Pickens v. State,* 1979 OK CR 99, ¶¶10-11, 600 P.2d 356, 357-58; *Glaze v. State*, 1977 OK CR 206, ¶¶ 23-24, 565 P.2d 710, 714-715.

After the jury deliberated further, it returned with a verdict and was polled. Juror Hawthorne informed the trial court that "[e]veryone wants to go home, yeah" and "[i]t's not my honest verdict, no, to be totally honest," the trial

court stated "*Okay. Well, we don't have a verdict then, sir. All right. Well, then you don't have a unanimous verdict and I'll ask you all then to retire for your deliberations.*" No further instruction was requested or given, but Mr. Johnson contends the trial court should not have sent the jury to deliberate further without giving them the complete and proper uniform Deadlocked Jury Charge. We agree.

After the jury was polled and Juror Hawthorne indicated that guilty was not his verdict, it was not improper for the trial judge to require the jury to return for further deliberation. 22 O.S.2001, §§ 921. However, under the facts of this case, it was error for the trial court to state "we don't have a unanimous verdict" and return the jury for further deliberation without instructing them, particularly Juror Hawthorne, that they should try to reach a verdict "if at all possible" and that further deliberation did *not* require any juror to surrender his or her honest convictions or opinions just to arrive at a unanimous verdict.

Juror Hawthorne was singled out and identified as the hold out juror by the foreperson because he refused to find guilt and to agree with the other jurors. Foreperson McBee's and Juror Hawthorne's notes, read together, show Juror Hawthorne felt "badgered" because the other jurors were trying to convince him of Mr. Johnson's guilt or innocence. Even after the trial court tried to define for Juror Hawthorne and the entire jury what was required of them in deliberations and even after informing the jurors that deliberation "doesn't require the forfeiting of your opinions or judgments about things," Juror Hawthorne did just that and obviously felt compelled to return a verdict

he did not agree with because "everyone wants to go home." Juror Hawthorne was pressured by the other jurors, as well as the trial court, to continue to deliberate until he changed his mind and the jury reached a unanimous verdict. This clearly was the import of the trial court's words – "Well, then you don't have *a unanimous verdict* and I'll ask you all then to retire for your deliberations." (emphasis added)

The State submits *Scales v. State*, 1987 OK CR 100, 737 P.2d 950 and *Van Woundenberg v. State*, 1976 OK CR 12, 545 P.2d 1274 are dispositive and demonstrate the verdict in this case is valid and was not coerced. In *Scales*, the defendant claimed the trial court erred by sending the jury out for further deliberations after one juror, when polled, stated he did not agree with the jury's verdict. There, the trial court read the *Allen* instruction before returning the jury for further deliberations. *Id.* at ¶ 13, 737 P.2d at 951. After noting the issue was not properly preserved for review, we found the trial court's decision to send the jury for further deliberations was proper and was required by statute, and we found the *Allen* instruction given was also proper. *Id.* at ¶ 14, 737 P.2d at 951. In *Van Woundenberg*, the defendant claimed the trial court erred by not granting his motion for mistrial after one juror, when polled, would not affirm his agreement with the verdict. We found the trial court complied with the statute and did not abuse its discretion in denying the motion for mistrial and requiring the jury to deliberate further. *Van Woundenberg, id.* at ¶ 24, 545 P.2d at 1278-1279.

We do not find these cases dispositive and both are distinguishable. In *Scales*, the trial court *gave* a proper deadlocked jury charge before requiring the jury to deliberate further and we found the procedure and the instruction were proper. *Scales, id.* The facts in *Van Woundenberg* are similar, but we addressed a completely different issue – whether the trial court properly denied the motion for mistrial, not whether the verdict was coerced or influenced by an improper instruction. Further, the trial courts' actions in these cases were not preceded by the presentation of jury notes demonstrating any juror's specific inclination to find the defendant not guilty. While we believe this case is different from *Spomer v. State*, 1964 OK CR 92, 395 P.2d 657, where the trial court gave a lengthy lecture to the jury about the necessity of deliberating until a unanimous verdict was reached, there we noted "[i]f there is a doubt whether defendant was prejudiced thereby that doubt should be resolved in favor of the defendant." *Id.* at ¶ 9, 395 P.2d at 664.

In this case, the trial court's decision to require further deliberations after Juror Hawthorne did not concur in the verdict was not improper. However, the trial court's statement "Well, then you don't have *a unanimous verdict* and I'll ask you all then to retire for your deliberations," without a complete Deadlocked Jury Charge or further instruction that the jurors (in this case Juror Hawthorne) were not being forced to agree, was coercive. Had the jury initially been given the uniform Deadlocked Jury Charge after the trial court received Juror McBee's and Juror Hawthorne's notes, we might come to a different conclusion. At no time, however, was this jury advised that it should

try to resolve their differences "if at all possible" nor were the jurors advised against surrendering their convictions solely for the purpose of arriving at a verdict.

While the law requires a guilty verdict in a felony case to be unanimous, *see* Okla.Const. art. II, § 19, the law does not require the jury to reach a verdict. In fact, the law requires the jury be discharged when it appears to the trial court that the jury is unable to reach a unanimous verdict. 22 O.S.2001, § 896. Here, after the polling of Juror Hawthorne, the trial court did not inquire whether further deliberations would be helpful. Under these facts, where the trial court already knew Juror Hawthorne was inclined to acquit and, after polling the jury, learned Juror Hawthorne did not concur in a guilty verdict, we cannot be sure the trial court's statement emphasizing the necessity of further deliberations requiring a unanimous verdict did not coerce Juror Hawthorne and coerce a verdict.

"A verdict resulting from confusion as to the law of the case, where it is clear that a different result *favorable to the accused* might have resulted, in the absence of confusion, should not be permitted to stand where the defendant's rights have been materially affected." (emphasis added) *Williams v. State*, 92 Okla.Crim. 70, 220 P.2d 836, 843. Plain error is error "which go[es] to the foundation of the case, or which take[s] from a defendant a right which was essential to his defense." *Simpson*, 1994 OK CR 40, ¶ 12, 876 P.2d at 695. In this case, the defendant was deprived of his constitutional right to a

unanimous verdict free from coercion and confusion. U.S.Const. amend. VI; Okla.Const. art. II, §19.

Accordingly, we find Mr. Johnson's convictions in Tulsa County District Court, Case No. CF 2002-5046, should be **REVERSED AND REMANDED FOR A NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeal*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

APPEARANCES AT TRIAL
JEFFREY D. FISCHER
ATTORNEY AT LAW
403 SOUTH CHEYENNE, SUITE 1100
TULSA, OK 74103
ATTORNEY FOR DEFENDANT

JAMES M. HAWKINS
ASST. DISTRICT ATTORNEY
TULSA COUNTY COURTHOUSE
500 SOUTH DENVER
TULSA, OK 74103
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL
S. GAIL GUNNING
APPELLATE DEFENSE COUNSEL
P. O. BOX 926
NORMAN, OK, 73070
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
THEODORE M. PEEPER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR STATE

OPINION BY: C. JOHNSON, J.
CHAPEL, P.J. SPECIALLY CONCURS
LUMPKIN, V.P.J. DISSENTS
A. JOHNSON, J.: CONCURS
LEWIS, J: CONCURS

CHAPEL, PRESIDING JUDGE, SPECIALLY CONCURRING:

I concur in reversing and remanding this case based upon Proposition Six. However, I would go further as Proposition One has merit. I would hold that Article II, § 30 of the Oklahoma Constitution is violated by "knock and talk" searches and that evidence gained as a result of such searches must be suppressed unless the victim signs a written authorization to search which contains clear language that the search is voluntary and may be denied.

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

My trial judge background appears to have deprived me of the blessings of the indwelling of the gifts of clairvoyance and extrasensory perception exhibited through the analysis exhibited in this opinion. The management of trials, especially juries, is challenging and trial judges must be able to adapt to unique circumstances quickly, efficiently and with maximum flexibility. After reviewing the record in this case, I believe Judge Gillert did just that.

Would it have been a better pro forma response to have given the Deadlocked Jury Charge, OUJI-CR (2d) (2000 Supp.) 10-11, when Juror Hawthorne backtracked on his vote for the verdict rendered when the jury was polled? Probably so, but failure to give that instruction was not fatal in this case when the record is read in context. Even the majority recognizes, and includes in its opinion, the fact that the jury had substantially been given that instruction by the judge prior to the polling of the jury, albeit not in the same format. However, while the form may have been different, the substance was the same, i.e. the jurors had been instructed they should consider opinions of others but "no one is required to surrender their judgment to that of any other person or any group of people . .". The written jury instructions had already informed the jury their verdict must be unanimous. So, I fail to see that any error occurred in this case.

The trial judge is an outstanding, experienced and conscientious District Judge. He observed the jurors, we cannot. He fully informed the jurors of

their duties and the law to be applied to the evidence presented in this case. No evidence in this case reveals the juror was in any manner coerced, the conclusions are all pure supposition by members of this Court without any basis in fact. If the Court were to pursue this line of supposition to its illogical conclusion, the same type of conclusory leap could be made every time a jury is engaged in extended deliberations. That is the reason our system of justice looks to facts and not suppositions to draw its conclusions. I believe if this judge had any indication that coercion of a juror was taking place, appropriate action would have been taken. Was the juror having a hard time making a decision, even in the face of overwhelming evidence? Yes, and that is not unusual for some people. Individuals not used to making decisions of this type often have difficulty making decisions that will affect the lives of others. I do not think the mere failure to use the words "if at all possible" in the context of any of the instructions given by Judge Gillert would have made any difference at all in the conduct of these jury proceedings.

Because I believe decisions of this Court must be made on the law and evidence, not supposition or clairvoyance regarding what we think may have occurred, I must dissent to the reversal of this case. I would affirm the judgment and sentence.