COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1399-CR **Cir. Ct. No. 2004CF4173**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL P. TERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Randall P. Terry appeals from the judgment of conviction entered after a jury found him guilty of possession of a firearm by a

felon, contrary to WIS. STAT. § 941.29(2) (2001-02),[1] and possession of a firearm in a school zone, contrary to WIS. STAT. § 948.605(2)(a) (2001-02). Terry contends that the trial court erred in instructing the jury to continue deliberations after the jury indicated it was having difficulty agreeing on a verdict. Terry asserts that giving the jury the ***Allen*** charge[2] twice rose to the level of coercion and was grounds for a mistrial. We conclude that giving the ***Allen*** charge to the jury once and then referencing it again did not amount to coercion, especially given that the jurors were polled individually after reaching a verdict. Therefore, we affirm.

I. BACKGROUND.

¶2 On July 31, 2004, three City of Milwaukee police officers were on routine patrol in the 1500 block of North 33rd Street in plain clothes in an unmarked car when they heard ten to fifteen gun shots coming from approximately three or four blocks away. The officers advanced on foot in the direction of the shots and saw two individuals, later identified as brothers Randall Terry and Raphael[3] Terry, fleeing the area. Each appeared to be clutching something against his right side with his right arm, and as the two men continued to flee, the officers could see that each held a handgun. When the officers ordered the men to show their hands, the officers heard the thud of a heavy object falling on dirt and the sound of another heavy object falling on top of the first object. The brothers

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The term ***Allen*** charge comes from the United States Supreme Court case detailing this instruction, ***Allen v. U.S.***, 164 U.S. 492, 501 (1896).

[3] The record contained two different spellings for Raphael: Ralphael and Raphael.

continued to flee and were eventually apprehended in a vacant lot at 1720 North 32nd Street.

¶3 After the men were apprehended, one of the officers returned to the bushes where the sounds of dropping objects had been heard and recovered a Hi-Point .380-caliber handgun, missing a magazine, and a Taurus 9mm pistol with one brass CBC round in the chamber and four CBC rounds in the magazine, as well as an additional R&P round in the magazine. The officer noted that both weapons were hot to the touch, as if they had been recently fired.

¶4 The officers continued their investigation and found five spent brass .380-caliber CBC casings and seven spent 9mm Ruger CBC casings on the sidewalk at 1926 North 32nd street. The officers noted that this location was across the street and within 1000 feet of the West Side Academy school grounds at 1945 North 31st Street.

¶5 Both Raphael and Randall Terry were arrested. They were each charged with one count of discharge of firearm in a school zone, and one count of possession of firearm in a school zone. Randall Terry was also charged with one count of possession of a firearm by a felon.

¶6 Randall Terry pled not guilty to all three counts. Raphael Terry pled guilty to both charges and agreed to testify for the State. Randall Terry's trial was to begin on January 31, 2005, but was adjourned by the court before the jury was sworn in due to, *inter alia*, a delay in transporting him to court and the jury's viewing him in a yellow jumpsuit. Terry's trial began on June 27, 2005, and went to the jury in the morning of June 29, 2005.

¶7 At 1:09 p.m. that day, the foreperson sent a note to the trial court requesting clarification regarding some of the evidence offered at trial. The judge responded with a note that stated, in relevant part: "As the finders of fact, to respond to these questions, you must rely on your collective memory, and any notes you may have taken." As requested, the judge provided Exhibit 1 to the jury. At 3:57 p.m., the foreperson sent a second note: "The Jury stands at 11 to 1 with no hope of changing the 1 voters [sic] mind. What direction should we take[?]"

¶8 After receiving this second note, the court reconvened outside the presence of the jury. The judge entered the jury's notes into the record and informed counsel that he was going to bring the jury in and read them the jury instruction entitled, Supplemental Instruction on Agreement, WIS JI—CRIMINAL 520, commonly known as an ***Allen*** charge.[4]

¶9 Defense counsel objected to the ***Allen*** charge because he was opposed to "the jury going back in kind of feeling pressure that we have to find a verdict." The trial court noted the objection, saying "[i]f after further deliberation

[4] WISCONSIN JI—CRIMINAL 520 reads:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that might 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 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.
>
> You will please retire again to the jury room.

tomorrow morning the jury has not reached a verdict, then the court will consider a motion for a mistrial." The jury was called back in. However, before giving the ***Allen*** charge, the judge told the jurors they would be released for the evening and expected to return the next day at 8:30 a.m. The judge also assured the jury that the court would reassess "where things are" later the next morning. The judge then gave the ***Allen*** charge:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that might 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 as jurors to make an honest and sincere attempt to arrive at verdicts. Jurors should not be obstinate. They should be open-minded. They should listen to the arguments of 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.

¶10 After giving the charge, the judge reminded the jurors that if they were still deliberating the next day at noon, lunch would be provided.

¶11 The following morning, deliberations began as expected, and at 9:34 a.m., the court received another note from the jury: "1 Juror is not using the evidance [sic] brought by the court to make a decision. Rules given by the court!" The judge sent back the following note: "The Court does refer here to Jury Instruction 520, a copy of which was given to the jury yesterday afternoon." The court did not go on the record before responding to the note.

¶12 At approximately 11:00 a.m., the court reconvened outside the presence of the jury. The court entered the jury's third note and the court's response into the record. Defense counsel again objected to the additional reference to the ***Allen*** charge and the court overruled the objection.

¶13 Within an hour of receiving the judge's response to the third note and reference to the ***Allen*** charge, the jury returned a verdict finding Terry guilty of count one, felon in possession of a firearm, and count three, possession of a firearm within a school zone. The jury found Terry not guilty of count two, discharge of a firearm within a school zone. After reading the verdict, the judge polled the jury individually. When asked whether guilty on counts one and three, and not guilty on count two, were his or her verdicts, each juror responded "yes." Terry was later sentenced to twenty-one months' initial confinement followed by thirty-five months' extended supervision on each count to be served concurrently. This appeal follows.[5]

II. ANALYSIS.

¶14 On appeal, Terry contends that giving the ***Allen*** charge to the jury after the jurors had indicated that they were split eleven to one amounted to coercion of the holdout juror, and consequently, the trial court should have declared a mistrial.

¶15 Our standard of review for reviewing this claim is limited to whether the trial court erroneously exercised its discretion in refusing to declare a mistrial. ***State v. Thurmond***, 2004 WI App 49, ¶10, 270 Wis. 2d 477, 677 N.W.2d 655. In the current case, where no mistrial was declared, "our review of this issue is limited to whether the trial court erroneously exercised its discretion in refusing to [grant a mistrial]." ***Id.***

[5] Terry initially wanted to pursue a postconviction ineffective assistance of counsel claim, but was discouraged by his counsel, who thought the claim had no merit. Terry then filed this appeal.

¶16 WISCONSIN STAT. § 805.13(5) authorizes trial courts to reinstruct the jury after deliberations have begun: "After the jury retires, the court may reinstruct the jury as to all or any part of the instructions previously given, or may give supplementary instructions as it deems appropriate." The issue in this case is whether the supplemental instructions amounted to coercion of the holdout juror. Terry argues that under the standard set forth in ***State v. Echols***, 175 Wis. 2d 653, 499 N.W.2d 631 (1993), there is a reasonable likelihood that the jury was coerced.

¶17 The standard for determining whether a jury was coerced, as stated in ***Echols***, is twofold. First, "'a verdict cannot stand when the jury ha[d] 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.'" ***Id.*** at 666 (quoting ***Brown v. State***, 127 Wis. 193, 201, 106 N.W. 536 (1906)). Second, the determination of whether a jury was coerced by a supplemental instruction must be considered "'in its context and under all circumstances.'" ***Echols***, 175 Wis. 2d at 666 (quoting ***Lowenfield v. Phelps***, 484 U.S. 231, 237 (1988)) (one set of internal quotation marks omitted). The ***Echols*** court summarized these statements in the question: "[whether] in its context and under all circumstances the trial court's instruction to the jury naturally tended to coerce or threaten the jury to agreement." ***Id.***, 175 Wis. 2d at 666-67.

¶18 ***Echols*** was the first Wisconsin case to consider the issue of a jury being coerced by the actions of the court. *See* ***id.*** at 667. Earlier cases dealt with the physical discomfort of cigar smoke and a cold jury room as having a coercive effect on juries. ***Id.*** In ***Echols***, the jury began deliberations on Friday afternoon at 1:30 p.m., and by 5:00 p.m., the jury reported that they had not reached a verdict, but were close to doing so. ***Id.*** at 665. When the court stated that it would adjourn

until the following morning, a juror requested that the jurors be allowed to deliberate longer that evening, as she had a flight scheduled for the next day. ***Id.*** The court agreed to give the jury twenty more minutes to deliberate that evening, but also instructed them not to be pressured into a hasty decision: "I want to make it very clear to you that I don't want anybody to feel that this is in any way forcing you into an impetuous decision that is not your free and voluntary choice with all the deliberation that the importance of this case deserves." ***Id.*** at 666. The jury returned twenty-five minutes later with a guilty verdict. ***Id.***

¶19 In determining whether, under the circumstances, the trial court's instruction to the jury tended to coerce the jury, the ***Echols*** court concluded that: (1) it "cannot draw an inference of coercion from the fact that the jury returned with a verdict shortly after receiving a supplemental instruction"; and (2) polling the jury individually by the court, after the verdict was read, was important to finding that the jury was not coerced.[6] ***Id.*** at 668.

¶20 Turning to the case at hand, we ask the question as posed in ***Echols***: "In its context and under all circumstances [did] the trial court's instruction[s] to the jury … naturally tend to coerce a verdict[?]" ***Id.*** at 667-68. We conclude that it did not.

[6] In ***State v. Echols***, 175 Wis. 2d 653, 499 N.W.2d 631 (1993), the court also concluded that a juror's concern over a business commitment was not evidence of coercion. ***Id.*** at 669. We do not consider this factor because it is not present in this case. In ***Echols***, the court also concluded that the fact that the evidence against the defendant was very strong showed that the jury was not coerced. ***Id.***, 175 Wis. 2d at 669. We also do not consider this factor because the jury in this case decided three verdicts, not just one, as in ***Echols***. With three verdicts in front of the jury, this court has no way of knowing what verdict was causing the juror to hold out and therefore we cannot speculate as to how strong the evidence was for that verdict.

¶21 First, we examine the circumstances surrounding the initial ***Allen*** charge. Terry argues that the court effectively coerced the holdout juror by dismissing the jury early that evening and requiring the jurors to return the following day. Terry argues that the lone juror would have felt pressure to decide because otherwise he stood to be badgered for another whole day. We disagree. On the contrary, we conclude that the court's decision to tell the jury that they would be dismissed for the day *before* reading the ***Allen*** charge took pressure off of the lone juror. When the jury was called back into the courtroom after indicating that they could not make a decision, the jurors did not know whether the judge wanted them to deliberate more that evening or have them return the next day. By dismissing the jury that night without further deliberations, the judge wisely avoided a situation where the lone juror would have to return to deliberations knowing that if he or she did not agree, the jury would have to return the next day.

¶22 In his reply brief, Terry simply contends that the court's decision to give the ***Allen*** charge after the jury's first note was already a "close call," but cites no precedent to support his point. We rely on the United States Supreme Court's decision in ***Lowenfield*** to determine that giving the initial ***Allen*** charge was entirely proper. *See* ***Lowenfield***, 484 U.S. 231. In ***Lowenfield***, the jury found the defendant guilty of first-degree murder and was deliberating whether or not to impose the death penalty. ***Id.*** at 234. After receiving a note stating that the jury was unable to reach a decision, the court polled the jurors as to whether they felt more time would be helpful. ***Id.*** After some confusion about the court's question, which led the court to re-poll the jury, ultimately only one juror responded "no." ***Id.*** The court then gave the jury the ***Allen*** charge, and it returned with a verdict thirty minutes later. ***Id.*** at 235. The facts of ***Lowenfield*** and this case are similar

enough to for us to conclude that the trial court's initial ***Allen*** charge, given after the jury stated that they could not reach a decision, was not a "close call," but entirely proper under the circumstances.

¶23 Because we have determined that the circumstances surrounding the first ***Allen*** charge were not coercive to the jury, we turn to the court's second reference to the ***Allen*** charge made the following day. After deliberating for only an hour on the second day, the foreperson wrote another note to the court indicating that one juror would not properly consider the evidence. In his reply, the judge again referenced the ***Allen*** charge. We conclude that this additional reference to the ***Allen*** charge was appropriate and not coercive under the circumstances. The jury had only been deliberating for an hour, and the jury's note indicated that there was still active debate taking place over the evidence. Additionally, the judge had told the jury the day before that he would assess things later in the morning, so this is not a case where the jury thought it was being left to deliberate indefinitely without guidance. Also, the court went out of its way not to pressure the jury into a quick decision, as it told the jurors that lunch would be provided if they were still deliberating at noon. Under these circumstances, the second reference to the ***Allen*** charge was not coercive because the lone juror was not made to feel as if he or she was holding up the deliberations. Rather, the judge again made it clear that the court was directing the jury to continue.

¶24 Terry argues that the general standard followed in ***Echols*** is correct, but insists that the case cannot be followed in all respects, because in ***Echols*** "[t]here was no indication that the jury was deadlocked or that there were any holdout jurors." ***Id.***, 175 Wis. 2d at 667. Here, the jury revealed to the court that it was split eleven to one. While it would have been preferable for the jury not to disclose its numerical split, this disclosure is immaterial because this fact does not

render the court's actions coercive. Terry argues that the disclosure of the jury split made the instruction narrowly focused on the lone juror. This is mere speculation. The court is not expected to anticipate and control each juror's feelings and motives, only its own actions. *See* ***State v. Edelburg***, 129 Wis. 2d 394, 400, 384 N.W.2d 724 (Ct. App. 1986) (stating that a judge can do nothing to control a juror acting in a certain way because that juror had a business commitment the following day). Indeed, Terry's apparent conclusion that the holdout juror the first day of deliberations was the same juror as the holdout juror the second day of deliberations, while possible, is also mere speculation, because none of the jury's notes indicated whether the holdout juror was the same on both days.

¶25 Moreover, the judge in this case did not single out a specific juror, but merely read the instruction as written. In this regard, this case is unlike ***Mead v. City of Richland Center***, 237 Wis. 537, 297 N.W. 419 (1941), where the judge polled the jury, found out that the jury stood eight to four, and then singled out the minority jurors. ***Id.*** at 539. In ***Mead***, our supreme court held that a judge's admonishment to four minority jurors to "consider whether their judgment is better than the eight," ***id.*** at 539, was coercive under the standard set in ***Brown*** (later used in ***Echols***), ***Mead***, 237 Wis. at 541-42. We also note that here the court was prudent to only reference the ***Allen*** charge the second time, rather than call the jurors into the courtroom and read the entire charge to them again, thereby avoiding a situation where more pressure would be put on the lone juror.

¶26 Terry's contention that the juror was coerced because the court was aware of the jury's numerical split also does not follow the precedent set by ***State v. McMahon***, 186 Wis. 2d 68, 519 N.W.2d 621 (Ct. App. 1994). In ***McMahon***, this court determined that the trial court's polling of the jury after it indicated it

was "stuck" was harmless error because nothing the trial court did after finding out the numerical division could be said to have been coercive. ***Id.*** at 95. In ***McMahon***, the jury sent a note to the court saying, "we are stuck. Now what?" ***Id.*** at 89. The court dismissed the jury for the evening, and after polling the jury the following morning and finding out it was split nine to three, the court gave the ***Allen*** charge and sent the jury back into deliberations. ***Id.***, 186 Wis. 2d at 90. As in the present case, there was no evidence in ***McMahon*** that the minority jurors were singled out, as they were in ***Mead***. In fact, in ***McMahon***, the foreperson accidentally informed the judge that the nine to three split consisted of nine guilty votes and three not guilty votes, ***id.***, 186 Wis. 2d at 90, whereas here, the court knew only the numerical split, further indicating that no coercion occurred. The ***McMahon*** court explains that the court's mere knowledge that a minority exists does not rise to the level of coercion. "While the three jurors may have felt singled out and made uncomfortable anyway simply due to the trial court's asking about the numerical division, we have no way of knowing." ***Id.*** at 95-96.

¶27 Terry contends in his reply brief that the present case is distinct from ***McMahon*** in that two ***Allen*** charges were given in his case and that there was only one holdout juror, so the pressure he or she felt was greater. We are not persuaded because here the trial court read the ***Allen*** charge only once and merely referenced it the second time. Additionally, it would be gross speculation to assume that a single juror felt more pressure than three jurors would.

¶28 Like the ***Echols*** court, we are also persuaded by the fact that the jury was polled individually after the unanimous verdict and that each juror declared his or her agreement. As the judge indicated, "[t]here were no pauses, no crying, no hesitation … [T]hey looked me in the eye and responded affirmatively that these were their verdicts. So the Court is going to enter those judgments." As it

did in ***Echols***, the polling of the jury indicates that each juror made an individual decision and is accountable for that decision; therefore, the likelihood of coercion is minimal.[7] *See* ***id.***, 175 Wis. 2d at 668.

¶29 It is true that a lone juror probably feels pressure from the other jurors to decide, as that is the essential nature of the jury system and part of the rigors of the jury room. The question here is not whether the lone juror was pressured, but whether the court's actions contributed to the pressure and rose to the level of coercion. We conclude that the trial court exercised its discretion properly. Therefore, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] We also note that Terry's argument appears to be based on the assumption that the holdout juror would have acquitted him. However, given that there were three charges and the jury ultimately convicted Terry of two out of the three, it is possible that the holdout juror might have wanted to find Terry guilty on all three counts. None of the jury's notes indicated what the holdout juror disagreed on with the rest of the jurors, and to assume otherwise is speculative.