

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

FINAL

2003-SC-0401-MR

DATE 11-8-05 EWA Grant DC

JAMES GOWANS

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
02-CR-949

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Fayette Circuit Court jury convicted Appellant, James Gowans, of manslaughter in the first degree, KRS 507.030, and sentenced him to twenty years in prison. He appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), claiming that the trial court committed reversible error by failing to give a proper "Allen charge" to a deadlocked jury and in refusing to grant a mistrial because of such failure. Finding no error, we affirm.

On the night of June 29, 2002, Appellant was with his wife at the Rainbow Tavern in Lexington, Kentucky. Appellant was armed with a handgun that he had borrowed from his neighbor to provide protection for himself and his wife. Paul Payne, the victim, entered the bar a few minutes after Appellant's arrival. There was a history of

altercations between Appellant and Payne. According to Appellant, when he exited the bar's restroom, Payne started shouting at him and moved toward him in a threatening manner. Appellant pulled his handgun out of his back pocket and shot Payne twice, killing him.

Appellant was indicted and tried for murder. At the conclusion of Appellant's two-day trial, the jury deliberated for approximately four and one-half hours, then informed the bailiff that it was deadlocked and unable to reach a verdict. The trial court informed the attorneys of this fact and stated:

I'm not fond of the Allen charge at all, but I'd be willing to bring them out and ask them if any further deliberations would benefit them. I'll phrase it in the context that if anybody thinks it would, raise their hand. That way we'll know if we need to send them back in.

While Appellant's attorney expressed his doubts that this proposed inquiry would produce a verdict, he did not object or offer an alternative procedure. Once the jurors were in the courtroom, the trial court then questioned and instructed them as follows:

Do any of you feel, and you can raise your hand to express this if this is accurate, do any of you feel like further deliberations would benefit you as far as resolving the issues that have been submitted to you?

[One juror raised her hand.]

. . .

Let me ask the reverse question; does anybody think that it would not benefit you at all to continue to deliberate?

[No jurors raised their hands.]

All right, then I'm going to ask you to go back and deliberate a little longer, and see how things go and progress. If you feel like that, after a reasonable period of time, that you are unable to reach a verdict, then just notify us at that point. At this point, you can go back and resume your deliberations. Thank you.

After the jury retired for further deliberations, Appellant's attorney objected to the court's instruction, arguing that by requiring additional deliberations of a deadlocked jury, the court had sent a message to the jurors that they needed to reach some sort of compromise. The objection was overruled. The jury deliberated for approximately ten minutes and returned a verdict finding Appellant guilty of manslaughter in the first degree. Subsequently, at the conclusion of the penalty phase, Appellant moved for a mistrial based upon the trial court's instruction to the jury to resume its deliberations. That motion was overruled.

As an initial matter, Appellant's objection to the trial court's instruction to the jury was untimely. Appellant's attorney was specifically informed that the jury was deadlocked, that the trial court did not intend to give them the so-called "Allen charge," and that the trial court intended to determine whether additional deliberations would be beneficial, and if so, to send the jury back for additional deliberations. Despite this knowledge, Appellant's attorney failed to object to the proposed inquiry and instruction until after the jury had resumed its deliberations. This untimely objection was insufficient to preserve Appellant's claim for appellate review. Ernst v. Commonwealth, 160 S.W.3d 744, 766 n.5 (Ky. 2005); Hopper v. Commonwealth, 516 S.W.2d 855, 857 (Ky. 1974). Accordingly, reversal is warranted only if the trial court's charge to the jury was a palpable error that affected Appellant's substantial rights and resulted in manifest injustice. RCr 10.26.

The so-called "Allen charge" referred to by Appellant and by the trial court in this case stems from Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), in which the United States Supreme Court approved a set of lengthy instructions given to a deadlocked jury. Id. at 501-02, 17 S.Ct. at 157. While the "Allen charge"

enjoyed a period of acceptance in this state, Earl v. Commonwealth, 569 S.W.2d 686, 688 (Ky. App. 1978), the wide discretion previously afforded to trial judges in instructing deadlocked juries has since been superseded by RCr 9.57(1). That Rule provides:

If a jury reports to a court that it is unable to reach a verdict and the court determines further deliberations may be useful, the court shall not give any instruction regarding the desirability of reaching a verdict other than one which contains only the following elements:

- (a) in order to return a verdict, each juror must agree to that verdict;
- (b) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (c) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;
- (d) in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change his or her opinion if convinced it is erroneous; and
- (e) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

(Emphasis added.) As the emphasized language indicates, the five listed elements are required only when a trial court proposes to give "any instruction regarding the desirability of reaching a verdict." If the trial court decides to give such an instruction, these elements are mandatory and exclusive, although they need not be recited verbatim. Commonwealth v. Mitchell, 943 S.W.2d 625, 627 (Ky. 1997).

However, upon learning that the jury is deadlocked and ascertaining that further deliberations may be useful, a trial court is not required to instruct the jury as to the desirability of reaching a verdict. Rather than instructing the jury regarding the desirability of a verdict, the trial court in this case merely instructed the jurors to continue their deliberations for a "reasonable period of time." When a trial court makes a statement that does not discuss the desirability of a verdict, the issue is not whether

the statement complies with RCr 9.57(1), but whether the statement was coercive. Mills v. Commonwealth, 996 S.W.2d 473, 493 (Ky. 1999); Mitchell, 943 S.W.2d at 628.

Appellant cites as evidence of coercion the fact that the jury deliberated for approximately four and one-half hours before informing the trial court that it was deadlocked, and subsequently returned a verdict only ten minutes after being instructed to continue its deliberations. While the time lapse between the alleged coercive comment and the verdict may be relevant as part of the totality of circumstances, we have specifically declined to find coercion based on the time lapse alone. Mitchell, 943 S.W.2d at 628. Instead, our focus is primarily on the language of the statement or instruction itself, id., bearing in mind that "[t]he ultimate test of coercion is whether the instruction actually forces an agreement on a verdict or whether it merely forces deliberation which results in agreement." Abbott v. Commonwealth, 352 S.W.2d 552, 554 (Ky. 1961).

Here, after ascertaining that one juror thought that additional deliberations would be helpful, the trial court instructed the jury "to go back and deliberate a little longer, and see how things go and progress," and to notify the court if it was still unable to reach a verdict "after a reasonable period of time." The trial court's statement implied that the jury would not be required to deliberate ad infinitum, and would be dismissed if it was unable to reach a verdict after a reasonable period of additional deliberations. The language of the statement did not contain any indicia of coercion and thus merely forced deliberation that resulted in agreement. Mitchell, 943 S.W.2d at 628; Abbott, 352 S.W.2d at 554. See also Lewis v. Commonwealth, 463 S.W.2d 137, 138-39 (Ky. 1970) (holding that no coercion occurred where jury announced inability to reach verdict after one hour and fifteen minutes of deliberations and trial court instructed jury to "go back

and try to reach a verdict"). As Appellant was not deprived of a substantial right and manifest injustice did not occur, there was no palpable error. RCr 10.26.

Finally, Appellant claims that the trial court erred in overruling his motion for a mistrial, which was based on the same instruction to the jury. A trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion. Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002). Declaration of a mistrial is an extraordinary remedy, which should only be granted when the record demonstrates "manifest necessity." Maxie, 82 S.W.3d at 863; Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky. 1985), habeas corpus granted on other grounds by Skaggs v. Parker, 235 F.3d 261, 275 (6th Cir. 2000). As previously stated, the trial court's statement properly instructed the jury to continue its deliberations and contained no indicia of coercion. As such, there was no "manifest necessity" to declare a mistrial, and the trial court did not err in overruling Appellant's motion.

Accordingly, the judgment of conviction and the sentence imposed by the Fayette Circuit Court are AFFIRMED.

All concur.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
Suite 302
100 Fair Oaks Lane
Frankfort, KY 40601-1133

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General
Room 118
State Capitol
Frankfort, KY 40601

David A. Smith
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204