STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 5, 2006
v	No. 262367 Oakland Circuit Court
CHRISTOPHER MONROE PHELPS, Defendant-Appellant.	LC No. 2004-195917-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

FITZGERALD, J., (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's conclusion that defendant was not prejudiced by the trial court's ex parte instruction to the jury while the jury was deliberating.

The jury began its deliberations on March 23, 2005, at 8:55 a.m. The jury did not reach a verdict that day. On March 24, 2005, at about 2:30 p.m., the jury submitted a note to the trial court, which stated, "We have not made a unanimous decision. How should we proceed?" The trial court replied, "We have days to continue[.] Keep deliberating[.]" The trial court did not inform either counsel of the note at the time it was received.

Defense counsel requested a mistrial after learning of the communication, arguing that he would have objected to the trial court's response because it suggested to the jury that it could be required to deliberate for an indefinite period and placed undue pressure on the jury to reach a verdict. In the alternative, defense counsel asked the court to read an *Allen*[1] charge to cure the alleged improper response. The trial court denied the motion for mistrial, but stated that it would read the *Allen* charge after the court "retrieved it." Defense counsel then indicated that "if you don't want to read that charge like that, just to let them know, look, that although your verdict has to be unanimous, if you guys aren't able to reach a verdict, we're not going to keep you in that room like that, locked away like that and put any pressure on you." The trial court then denied defense counsel's requested instruction but noted that, if it received a note that a verdict could not be reached, it would probably give an *Allen* charge. Defense counsel then explained that, "I thought the Court was looking for the instruction and I was just giving an alternative if

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

you couldn't find it. I would at least like that instruction read." The court did not read the instruction.

Although the jury's note did not use the term "deadlocked," it is fair to assume that, after deliberating for 12 hours and then advising the court that it could not reach a unanimous decision, the jury was communicating that it was deadlocked and was seeking guidance on how to proceed. The court did not read CJI2d 3.12[2], and consequently did not caution the jury not to relinquish his or her honest beliefs simply to reach a verdict. Unlike the majority, I do not believe that the trial court's response merely indicated that the jury would be given ample time to reach a verdict. Rather, the trial court's response essentially threatened that the jury would be required to deliberate for "days" if it was unable to reach a unanimous verdict. See, e.g., *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984). The response could have caused a juror to abandon his or her conscientious opinion and defer to the decision of the majority solely for the sake of reaching a unanimous verdict. The response was unduly coercive and prejudiced defendant. I would reverse.

/s/ E. Thomas Fitzgerald

[2] In *People v Sullivan*, 392 Mich 324, 220 NW2d 441 (1974), the circuit court gave a so-called *Allen* charge to a jury that apparently was deadlocked. While finding the instruction neither coercive per se nor coercive in the situation that arose in *Sullivan*, this Court adopted the American Bar Association's Minimum Standard for Criminal Justice 5.4. *Id*. at 341-342. CJI2d 3.12 is the instruction for deadlocked juries. This instruction incorporates and adapts ABA standard jury instruction 5.4. See *People v Pollick*, 448 Mich 376, 382 n 12; 531 NW2d 159 (1995).