

No. 83617-5

STEPHENS, J. (dissenting)—According to the lead opinion, Tyrone Ford’s trial was over once the trial court asked, “Has the jury reached a unanimous verdict?” and the presiding juror responded, “Yes.” Verbatim Report of Proceedings (VRP) (Aug. 29, 2007) at 390. Though the jury was not at this point polled and the court had not yet accepted its verdict, the lead opinion concludes, “Deliberations had ended, which we know because the jury indicated its unanimity before the judge sent it back to fill out the verdict form.” Lead opinion at 7. From this mistaken premise, the lead opinion reasons that the trial court’s instructions to the jury could not have influenced the deliberations because the deliberations were over.

The lead opinion compounds its error by misreading the jury instructions to entirely foreclose the possibility that the jury could leave the verdict form blank on a particular charge. While the written instructions clearly allowed for this result, the trial court verbally instructed the jury that it had more work to do, stating, “Verdict form No. 1 is completely blank. It must be filled in.” VRP (Aug. 29, 2007) at 390. Having given the jury this additional direction, the trial court sent the jury back for

what can only be described as further deliberations.

Because I agree with the Court of Appeals that the trial court's actions present a reasonably substantial possibility that the verdict was improperly influenced, I respectfully dissent.

## ANALYSIS

### I. Standard of Review for Improper Judicial Influence

I agree with the lead opinion that Mr. Ford's claim of improper judicial influence is a "manifest error affecting a constitutional right" reviewable under RAP 2.5(a)(3). Lead opinion at 5.<sup>1</sup> I also agree that our analysis is guided by precedent. *Id.* Under *State v. Watkins*, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983), a defendant demonstrates improper judicial influence by "establish[ing] a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention." The lead opinion mentions the *Watkins* standard at the outset but does not apply it. Instead, it imposes on Mr. Ford a burden to establish improper judicial influence by showing "judicial action *designed to force or compel* a decision." Lead opinion at 11-12 (emphasis added). No authority is cited for this standard because none exists. A party challenging a verdict need not demonstrate intentional misconduct on the part of the judge. Nor does our precedent prohibit only force or compulsion; improper influence can come in many forms that do not

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<sup>1</sup> The lead opinion makes this point early, but in the last paragraph bewilderingly concludes that Mr. Ford's challenge to the verdict fails because, among other reasons, he has not shown manifest constitutional error. Lead opinion at 12. Notwithstanding this single-line conclusion, the lead opinion clearly resolves Mr. Ford's claim on the merits. So would I.

rise to that level of judicial encroachment.

The lead opinion also requires a threshold showing “that the jury was still within its deliberative process” and “that the jury was at that point still undecided.” *Id.* Drawing from the factual context of *State v. Boogaard*, 90 Wn.2d 733, 585 P.2d 789 (1978), the lead opinion essentially requires an affirmative showing that the jury was undecided when the trial court intervened. Lead opinion at 6-7, 11-12. Again, no authority is cited for these new requirements. Requiring parties challenging a verdict to make a threshold showing that the jury was still deliberating is completely unnecessary. It is no more meaningful than requiring appellants asserting trial error to make a threshold showing that there was a trial below. More importantly, requiring defendants to show that the jury was actually undecided at the time of the allegedly improper conduct has no place under *Watkins*. A judicial officer could certainly assert improper influence over the jury’s deliberations even when the jury has not sent out questions or is otherwise in apparent unity. Nor is it clear how the court could determine whether the jury was undecided without making a specific inquiry. Rather than stray from our well-settled precedent, I would adhere to *Watkins* as the correct standard for assessing improper judicial influence.<sup>2</sup>

## II. Jury Deliberations

The lead opinion concludes that Mr. Ford’s claim of improper judicial influence must fail because, in its view, the jury had finished its deliberations before

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<sup>2</sup> The concurrence likewise agrees that *Watkins* furnishes the governing standard, though it concludes there was no improper influence in this case.

the court made the allegedly improper remarks. According to the lead opinion, because the jury was done deliberating, any comment by the court could have had no influence on the jury's verdict. The lead opinion's assertion that the jury had finished deliberating is puzzling in light of the fact that the trial court refused to accept the jury's verdict and sent the jury back to the jury room to continue deliberations. What more is needed to establish that the jury was not done deliberating? The lead opinion's assertion, however, provides the crux of its entire argument and therefore warrants a more detailed analysis.

We have long recognized that a jury is not done deliberating until the court accepts the verdict and the jury is discharged. *See State v. Badda*, 68 Wn.2d 50, 60-62, 411 P.2d 411 (1966); *see also State v. Robinson*, 84 Wn.2d 42, 46, 523 P.2d 1192 (1974) (“[A] jury’s action does not become a verdict until it is finally rendered in open court and received by the trial judge.”); *Haney v. Cheatham*, 8 Wn.2d 310, 325, 111 P.2d 1003 (1941) (“The court’s right to send the jury back to consider further of its verdict is not ended until the verdict has been accepted and filed.”); *Beglinger v. Shield*, 164 Wash. 147, 152, 2 P.2d 681 (1931) (“Until a verdict is received and filed for record, the trial court may send the jury back to consider and clarify or correct mistakes appearing on the face of the verdict.”); *Bino v. Veenwhuizen*, 141 Wash. 18, 22, 250 P. 450 (1926) (“Until a verdict is reached and the jury discharged its action is not final.”).

*Badda* is instructive. The defendant there was tried on two counts of robbery. The jury announced it had reached a verdict late in the evening and was brought into

the courtroom. The court clerk read the verdict form, which indicated the jury had found the defendant guilty of two counts of second degree burglary. The court immediately recognized it had given the jury the wrong verdict form—second degree burglary instead of robbery—at which point the court gave the jury the correct form for robbery and sent the jury back “for further deliberation.” *Badda*, 68 Wn.2d at 59. A short time later, the jury returned with a guilty verdict on both counts of robbery. On review, we found no error in the proceedings, noting that the first verdict “was never filed” and that the jury therefore continued in its deliberative capacity until the corrected verdict form was completed. *Id.* at 60-61.

In *Beglinger*, the jury returned a unanimous verdict awarding damages to the plaintiff. The jury was polled to confirm its unanimity. The court then excused the jury. Before any jury members left the jury box, however, one of the jurors arose and attempted to clarify the jury’s damages award. The remaining jurors agreed that the verdict did not clearly reflect their intended award. The court advised the jury that it was powerless to send them back to the jury room to correct the verdict, as it had already polled the jurors to confirm their unanimity. On review, we held that the court erred in refusing to allow the jury to reconsider the verdict. We explained that “[u]p to the time of the colloquy, the jury had not been discharged nor had the verdict been received or filed. The verdict had merely been read.” *Beglinger*, 164 Wash. at 152.

The principle we can draw from these cases is that the jury continues to function in its deliberative capacity up to the point that the court accepts the verdict

and the jury is discharged. This conclusion is consistent with statutes and court rules governing trial proceedings and the receipt of jury verdicts. For example, in situations where the jury returns a general verdict that is inconsistent with the jury's special findings of fact, the court can attempt to reconcile the inconsistency by "return[ing] the jurors to the jury room for further deliberations." RCW 4.44.440. Similarly, when a jury returns a unanimous verdict but polling reveals disagreement among individual jurors, "the jury may be directed to retire for further deliberations." CrR 6.16(a)(3); *see also* RCW 4.44.460 ("If the court determines that the verdict meets the requirements contained in this chapter and in court rules, the clerk shall file the verdict. The verdict is *then* complete and the jury shall be discharged from the case." (emphasis added)). These provisions plainly contemplate a jury that continues to operate in its deliberative capacity even after it returns a verdict that is read in open court. *Cf. State v. Goldberg*, 149 Wn.2d 888, 891-94, 72 P.3d 1083 (2003) (recognizing the jury can still be subject to improper influence even after indicating a unanimous verdict).

Here, there can be no doubt that the jury continued to function in its deliberative capacity at the time the trial court made the allegedly improper remarks. Although the presiding juror indicated that the jury had reached a unanimous verdict, the court refused to accept the verdict after reading the verdict form. The judge instead sent the jury back to the jury room for further deliberations. If the jury had in fact already concluded its deliberations, as the lead opinion contends, I fail to see any reason why the court would send the jury back to the jury room.<sup>3</sup>

Despite the jury's return to the jury room to continue deliberations, the lead opinion remains firm in its conclusion that deliberations had ceased based on the presiding juror's initial declaration that the jury had reached a unanimous verdict. This argument fails for several reasons. First, the presiding juror's declaration that the jury had reached "a unanimous verdict" is consistent with the verdict the jury returned. The jury had in fact reached *a* unanimous verdict, but only with regard to count II. When the court asked the presiding juror whether the jury had reached a unanimous verdict, the court did not specify which count it was referring to or whether it was referring to both counts. It asked an imprecise yes or no question. The presiding juror's response was also ambiguous. The lead opinion opines that if the jury had not reached a unanimous verdict on count I, it would have volunteered this information. Lead opinion at 7. But this is not an assumption we can entertain. Even the trial court recognized the ambiguity in the situation, noting that it was possible the jury could not reach a decision on count I and therefore intentionally left the verdict form blank. VRP (Aug. 29, 2007) at 391. Thus, the presiding juror's declaration of unanimity cannot be read to conclusively show the jury was unanimous on both counts.

Second, the lead opinion overstates the evidence in the record to conclude that the jury had reached a unanimous verdict on both counts. The lead opinion

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<sup>3</sup> We do not need to speculate about what actually took place in the jury room—for example, whether the jury simply filled in the form for count I or whether there was last-minute lobbying of hold-out jurors. The *Watkins* standard does not require us to know, but instead examines the totality of the circumstances that do not inhere in a jury verdict to determine whether there is a reasonably substantial possibility of improper judicial influence. *Watkins*, 99 Wn.2d at 178.

repeatedly says the jury declared its unanimous verdict twice and was polled to confirm its unanimity. Lead opinion at 6-7, 9. But in fact, before the court sent the jury back to the jury room to fill in the verdict form, the jury had declared its unanimity only through the presiding juror's one-word answer to the trial court's ambiguous question. And the jury was not polled at that point. It was only after the trial court instructed the jury to fill out the verdict form for count I and sent the jury back for further deliberations that the jury declared it was unanimous on count I and was polled.<sup>4</sup> The lead opinion's reliance on circumstances that did not occur until *after* the trial court's comments provides little insight into the jury's position *before* the comments were made. Nor is it helpful in deciding whether the comments impermissibly influenced the jury's deliberations.

Third, even assuming the presiding juror's declaration of unanimity applied to both counts, this does not render the verdict complete and thereby cut off the jury's deliberative process. As discussed above, a jury is not done deliberating until the court accepts the verdict and the jury is discharged. The jury's mere declaration of unanimity does not end the deliberations. *See Beglinger*, 164 Wash. at 152 (noting the verdict was not complete even after jury returned unanimous verdict and was polled); CrR 6.16(a)(3) (allowing further deliberations even after unanimous verdict declared when polling reveals lack of agreement). Certainly the presiding juror's initial declaration of jury unanimity would not have precluded individual jurors from

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<sup>4</sup> It is not clear from the record that the jury was ever polled as to its verdict on count II. When the jury returned, the trial court asked only about its verdict on count I. VRP (Aug. 29, 2007) at 391-92.



changing their mind while deliberating back in the jury room.<sup>5</sup>

The flaw in the lead opinion's reasoning becomes apparent when considering how it might play out in a typical case. Imagine that, after advising the court it has reached a verdict, the jury returns to the courtroom and the presiding juror advises the court that the jury's verdict is unanimous. There is no evidence of disagreement or deadlock among the jury. At this point, under the lead opinion's approach, the verdict is complete and the jury deliberations have ended. The verdict is read in open court. The court then proceeds to poll the jurors individually. The polling reveals that two jurors are not in full agreement with the verdict. Under CrR 6.16(a)(3), the court instructs the jury to return to the jury room to continue deliberations. After several hours of delay, the jury informs the court it is hopelessly deadlocked and that further deliberations will be unavailing.

Under the lead opinion's approach, how is the court supposed to address this situation? If the verdict was complete when the jury initially declared its unanimity, can the court declare a mistrial based on the jury's later deadlock? What if, instead of indicating it is deadlocked, the jury returns with a unanimous verdict different from the one it initially announced was unanimous? Which verdict must the court accept? Such questions are not fantastical. They illustrate that the lead opinion's approach of declaring the jury's task done at the first intimation of jury unanimity

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<sup>5</sup> Almost as an afterthought, the lead opinion in a footnote acknowledges that a jury's initial indication of unanimity does not conclusively prove that deliberations have ended. Lead opinion at 6 n.1 (citing *Badda*, 68 Wn.2d at 61). This acknowledgment is at odds with the entire premise of the lead opinion's argument, which rests on the conclusion that the jury in this case was done deliberating when it indicated its unanimity.

makes little sense and raises practical concerns for trial courts attempting to clarify and resolve inconsistencies in jury verdicts. Our long-standing rule has been, and should remain, that jury deliberations do not end until the court accepts the verdict and the jury is discharged.<sup>6</sup>

### III. Improper Judicial Influence of Jury Deliberations

Because the jury was still in the deliberative process when the court returned the jury to the jury room, the question becomes whether the court's comments improperly influenced the jury's verdict under *Watkins* and CrR 6.15(f)(2). Turning first to CrR 6.15(f)(2), that rule provides that "[a]fter jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement." We have explained that "[t]he purpose of this rule is to prevent judicial interference in the deliberative process." *Boogaard*, 90 Wn.2d at 736. Because we cannot know at what point in the deliberations individual jurors will reach their final decision, these protections must endure as long as the jury continues to operate in its deliberative capacity.

In this case, upon seeing the blank verdict form for count I, the court said, "I'm sending the jury back to the jury room. Verdict form No. 1 is completely blank. It must be filled in." VRP (Aug. 29, 2007) at 390. The written jury instructions required unanimous agreement in order to fill in the form and return a

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<sup>6</sup> The lead opinion mischaracterizes the dissent as suggesting that the trial judge cannot instruct the jury to "fix mistakes" without engaging in judicial coercion. Lead opinion at 6 n.1. However, it is perfectly appropriate for the judge to send the jury back for further deliberations after a polling of the jury reveals an apparent inconsistency in its verdict. As explained in section III, the problem of judicial coercion arises if the judge suggests to the jury how it must act.

verdict. Clerk's Papers (CP) at 35. Thus, by telling the jury that the verdict form for count I "must be filled in," the court effectively required the jury to come to an agreement that Mr. Ford was guilty or not guilty. This removed from the jury the option of leaving the verdict form blank. This is an option to which the jury was entitled under the law, as we do not allow courts to essentially hold jurors hostage until they can come to a unanimous verdict. Simply put, under the written jury instructions and settled law, the jury had three options in terms of the decision it could reach: agree guilty, agree not guilty, or leave the form blank. But, after the court's comments, the jury had only two options to consider: agree guilty or agree not guilty. By removing the third available option from the jury—the option to leave the form blank—the court improperly interfered with the jury's deliberative process.

The lead opinion sees no harm in the court's comment, reading it as merely a restatement of the court's written instructions to the jury. Lead opinion at 10. The lead opinion highlights the written jury instruction stating that the jury "'must fill in the blank provided in each verdict form the words 'not guilty' or the word 'guilty' . . . .'" *Id.* (quoting CP at 35). While at first glance this instruction and the court's comments appear similar, they are in fact critically different. The written instruction required the jury to fill in the verdict form "guilty" or "not guilty," but only if the jury came to a decision in the first place. This is evident from a reading of the entire instruction, including the last clause, which the lead opinion omits from its quotation: "You must fill in the blank provided in each verdict form the words 'not guilty' or the word 'guilty,' *according to the decision you reach.*" CP at 35

(emphasis added). The instruction to fill in the verdict form therefore presupposed the jury had come to a unanimous decision of guilty or not guilty. But nothing in the jury instructions actually required the jury to fill in the form. A permissible way for the jury to indicate it was unable to reach a unanimous decision, for example, was to leave the verdict form blank. The court's verbal instruction materially differed from the written instructions because the judge categorically told the jury it had to fill in the verdict form for count I, which gave two options, "guilty" or "not guilty." This improperly suggested the obligation to reach a unanimous verdict in violation of CrR 6.15(f)(2), while the written instructions provided a correct statement of the law.<sup>7</sup>

The trial court's comments in this case implicate "the broader principle" we recognized in *Watkins* "that the jury must be free from judicial pressure in reaching its verdict." 99 Wn.2d at 176. Contrary to the lead opinion's view, *Watkins* does not require an affirmative showing of intentional judicial misconduct. Nor does it require a showing that the court forced the jury to reach a particular result. Here, the *Watkins* standard is met because the trial court's statements narrowed the options available to the jury during its deliberations by requiring a unanimous decision of guilty or not guilty, thereby presenting a "reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention." *Id.* at 178.

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<sup>7</sup> If the lead opinion's reading of the trial court's written jury instructions were correct, the instructions themselves would violate CrR 6.15(f)(2) because they would require the jury to come to a unanimous decision and would foreclose any option of leaving the verdict form blank. *See* CrR 6.15(f)(2) (prohibiting the court from instructing the jury in a manner that "suggest[s] the need for agreement").

## CONCLUSION

Juries must be allowed to decide cases free from external influences. I would reaffirm our long-standing rule that the jury's deliberative process does not end until the verdict is accepted by the court and the jury is discharged. And I would hold that by requiring the jury to return to deliberations and come to a unanimous verdict of either guilty or not guilty on count I, the trial court in this case improperly influenced the jury's deliberations. I respectfully dissent.

AUTHOR:

Justice Debra L. Stephens

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WE CONCUR:

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Justice Tom Chambers

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Richard B. Sanders, Justice Pro  
Tem.

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