

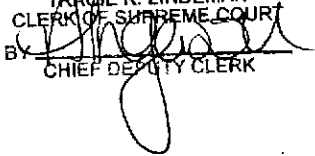
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JERMAINE DERRELL COOPER, A/K/A
JERMAINE DERRELL TURNER, A/K/A
JERMAINE D. TURNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68884

FILED

JUL 26 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of prohibited acts by a convicted sex offender, second offense. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Appellant Jermaine Cooper claims his trial was fundamentally unfair because the jury was coerced into making a unanimous decision. Cooper argues the district court's "threat to require the jury to deliberate for an unreasonable length of time and/or for an unreasonable interval was coercive because it suggested to the holdout juror that there was no possible ending except for a unanimous decision."

"The law is well established that the length of time a jury may be kept together for deliberation is discretionary with the trial judge. The law is also settled that the trial judge may not coerce the jury into the returning of a verdict." *Mills v. Tinsley*, 314 F.2d 311, 313 (10th Cir. 1963) (footnote omitted); see *United States v. Pope*, 415 F.2d 685, 690 (8th Cir. 1969) (collecting cases); *Farmer v. State*, 95 Nev. 849, 855, 603 P.2d 700, 704 (1979). "While some courts have found the length of time the jury was to deliberate, to be coercive, [those] cases have involved *affirmative*

coercive conduct of the district court, such as reminding the jury that the weekend was approaching or creating the impression that the jury would be locked up all night." *United States v. Graham*, 758 F.2d 879, 885 (3rd Cir. 1985) (internal citations omitted). We review a claim that a district court improperly coerced the jury in "context and under all the circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) (internal quotation marks omitted).

Here, the record reveals the jury began its deliberations at 10:30 a.m. and received its lunch at noon. Between 12:30 p.m. and 1:48 p.m., the district court responded to three jury notes. The first note asked "was it seven consecutive days," the second note stated "can't reach a verdict," and the third note declared "we can't come to a decision dead lock on residence issue if its 7 days consecutive or just 7 days." At 4:25 p.m., the jury announced it had reached a unanimous verdict, but, when the jury was polled, Juror No. 11 stated he did not believe the verdict read was his verdict. The district court immediately stopped polling and sent the jury back for further deliberations.

At about 5:00 p.m., the jury foreman informed the district court the jury was deadlocked. The jury was summoned and given the approved version of the *Allen* instruction¹ set forth in *Wilkins v. State*, 96 Nev. 367, 373 n.2, 609 P.2d 309, 313 n.2 (1980). After the instruction was read, the district court stated, "we're going to have you deliberate some more, maybe for three or four hours, maybe Monday, maybe for another ten minutes. I don't know. But it's going to be up to me, and I'll let you know. So go back with the bailiff and continue deliberating some more."

¹See *Allen v. United States*, 164 U.S. 492 (1896).

At 6:30 p.m., the district court received a jury note stating that “We can’t come to a total agreement ever.” The word “ever” underlined twice. The district court sent the bailiff to retrieve the jurors, but the jury foreman asked if they could deliberate for another five minutes. At 6:37 p.m., the foreman announced the jury had reached a verdict. The verdict was read, the jury was polled, and each of the jurors acknowledged the verdict was their true verdict. This record indicates the jury deliberated for eight hours and seven minutes and during that period it had lunch.

We conclude the district court’s charge to continue deliberation after the jury reported it could not reach a unanimous decision did not invade the province of the jury, amount to coercion, or deny Cooper a fair trial. Further, to the extent Cooper argues the district court erred in denying his motions for mistrial based on the length of the jury’s deliberations, we conclude he failed to demonstrate an abuse of discretion in this regard. *See Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006).

Cooper also claims the jury’s unanimous decision was coerced because the district court failed to explain “to the jury that the parties were entitled to a mistrial if the jury could not agree on a verdict and that the jury had no absolute duty to agree on any verdict.” Because Cooper did not object to the adequacy of the jury instructions, we review his claim for plain error. *See Ramirez v. State*, 126 Nev. 203, 208, 235 P.3d 619, 623 (2010).

“An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial

rights.” *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks, brackets, and citations omitted).

There was no error here. The district court’s *Allen* instruction “makes [it] clear to the jury that each member has a duty to conscientiously adhere to his own honest opinion and the charge avoids creating the impression that there is anything improper, questionable or contrary to good conscience for a juror to create a mistrial.”² *Basurto v. State*, 86 Nev. 567, 570, 472 P.2d 339, 341 (1970) (citing *Posey v. United States*, 416 F.2d 545, 552 (5th Cir. 1969)). Furthermore, Cooper failed to provide any authority to support his argument that a district court is

²The district court instructed the jury,

[T]he verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so, without violence to the individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

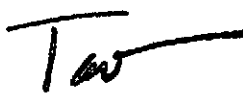
In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans. You are judges, judges of fact. Your sole interest is to ascertain the truth from the evidence in this case.

required to instruct the jury on the consequences of a jury's failure to reach a verdict.

Having concluded Cooper is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Robert W. Lane, District Judge
The Law Firm of Nathan L. Gent, PLLC
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk