

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY DEMARION MCCULLOUGH,

Defendant-Appellant.

UNPUBLISHED

August 12, 2008

No. 260592

Kent Circuit Court

LC No. 04-000946-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST GORDON, III,

Defendant-Appellant.

No. 261724

Kent Circuit Court

LC No. 03-007771-FC

Before: White, P.J., and Zahra and Kelly, JJ.

WHITE, P.J. (*dissenting*).

I respectfully dissent from the majority's conclusion that the trial court did not err in removing juror number 13, Ms. King, (McCullough) and juror number 9, Ms. Rapier, (Gordon), and replacing them with an alternate jurors.

I observe at the outset that a reading of the transcript makes clear that the trial court presided over these trials in a thoughtful and deliberative manner. Nevertheless, I conclude that the court abused its discretion in removing these jurors without questioning them.

No. 260592 McCullough

Although the majority has quoted extensively from the transcript, I find it necessary to provide additional background. The primary issue for the McCullough jury, as framed by the testimony and arguments, was whether McCullough was involved only in a drug deal, or in a plan to rob and murder French. The McCullough jury began its deliberations at approximately

1:38 p.m. on Tuesday, September 21st, after juror Kelley was chosen as the alternate and excused. The jury was dismissed for the day at about 4:15 p.m., with instructions to return the next morning. The jury resumed deliberations at 8:30 a.m., Wednesday morning. At 11:48 a.m., the jury was brought into the courtroom so that the court could respond to a jury note:

Let's see, you have a question. One of the notes says, quote:

“Clear definition of the meaning of aiding and abetting. We're splitting hairs.

Page six, line 4 through next page.

Page seven, lines five through eight, seems to contradict everything else.”

We did supply the jury a written transcript of that portion of the Court's instructions dealing with all of the elements, and it is a seven-page transcript. We begin discussing aiding and abetting actually on page six, at line seven.

* * *

In any event, what you're talking about is on page six, line seven, where we begin talking about aiding and abetting, and there's no need to reread this because you have the printed transcript in front of you.

Your question is whether lines five through eight on page seven contradict everything else.

Well, on page seven, lines five through eight say:

“Even if the defendant knew that the alleged crime was planned or being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in the commission of it.”

Actually, it doesn't contradict [sic] with everything else. It's in complete harmony with everything else. In order to be convicted of aiding and abetting, it must be established that the defendant aided and assisted in the commission of the crime, intending that the crime be committed, or that he knowingly aided somebody else to commit it, knowing that that person intended the commission of the crime.

Just standing there and watching a crime go down doesn't count. That's what that means. You need to, in order to be guilty as an aider and abettor, actually aid and assist the commission of the crime, and it has to be done intending that the crime be committed. Simply being present at a crime scene even if, you know, a crime is going to be committed and standing there and watching it unfold is not sufficient.

So, actually, there's nothing inconsistent. All of it fits together, but you have to read all of the words and size up what everything means, and if you do that, I think you'll be all right.

If you need any further instruction or amplification there, I'll be happy to provide it, but I think that if you read the instructions, they mean pretty much what they say. And everything really is in harmony and does work together well.

The court addressed two additional issues, not relevant here, and the jury resumed its deliberations at 11:55 a.m. The jury recessed for the day at 3:00 p.m., and returned Thursday

morning. The jury resumed its deliberations in the morning, and, at 2:15 p.m., the jury was brought into the courtroom so that the court could address its notes:

I have been handed a sheath of papers from the jury, but the top one appears to be the one that we need to deal with first. It states, quote:

“We are at an impasse. What do we do? What can be discussed when everyone is not in the room?”

Starting with the second question first. “What can be discussed when everyone is not in the room,” the answer is nothing. This is a twelve-member jury panel, and no discussion can be had without all twelve members participating. Everybody has to participate in all discussions pertaining to the case. It is strictly forbidden to discuss it in separate context.

Furthermore, if you imagine, it’s really not very productive to do. The whole idea of this is a group deliberative process, so if for some reason someone has to leave the room – although what that would be I can’t imagine, unless it would be to use the restroom or something – then everyone waits until that person gets back and then you resume the discussions. So that’s easy.

With regard to being at an impasse, let me instruct you that it’s important for you to deliberate sincerely and in good faith with a diligent effort to reach a verdict if you possibly can. I think you need to continually keep foremost in your minds the deliberation instructions and guidelines I provided you previously in my instructions.

It is your duty to consult with your fellow jurors and do everything possible to reach an agreement if you can do so without violating your own judgment. To return a verdict, it’s necessary that all of you agree to it, and the verdict must represent the judgment of each member of the panel.

As you deliberate, you should carefully and seriously consider the views of your fellow jurors and talk things over in a spirit of fairness and frankness. It’s natural for differences of opinion to occur. When they do, you each must not only express your personal opinions, but also give the reasoning, logic, and factual basis for your opinions so that other jurors can think about it, and discuss it, and debate it openly in the presence of everyone in the jury room.

By reasoning the matter out and expressing the basis for your opinions, as well as the opinions themselves, it’s much more likely that you’ll be able to come to a consensus and arrive at a decision.

We should again make clear to you that in the event that you can’t arrive at a decision, then we would have to mistry the case and start it over again, and we’ll bring in twelve more people who will listen to the same thing you twelve have heard and in all likelihood be neither smarter nor dumber than the twelve of you are, and they will have to come to grips with the same sort of issues.

So while I appreciate this is difficult, and, certainly, I don’t mean to suggest otherwise, nevertheless, we ask that you put your diligent, sincere, best effort into the process.

You should consider deliberations and in the process be ready to rethink your prior opinions and views, especially if the reason, and basis, and logic that supports your opinions and views is disputed successfully by other members of the jury.

We want everybody to be thinking about everybody else's views and analyze it carefully in light of all the evidence in the case. Certainly none of you should give up your honest belief about the weight and effect of the evidence only because of what other jurors think and only for the sake of reaching an agreement, but you do need to rationally approach the matter and reason it out like logical, reasonable, rational adults, and that's what we expect you to do.

Now, you have handed me a bunch of other issues here which we can talk about briefly, and we may want to do that for a moment.

You've asked, among other things, for some definitions. For instance, you've said:

“Are there elements to be considered that define high risk?”

Define ‘high risk.’”

Well, high risk is in fact exactly what it says. This is not a term of art. And any normal terms that are used in these instructions are to be given their everyday, workaday dictionary definitions. In other words, high risk is not a Latin term. It's not a technical legal term. It's an everyday term of usage. So you should use it in these instructions the same way as you would use it in your daily, everyday lives.

You also likewise say - - you've got a quote there out of one of the instructions. I think:

“Defendant knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would be the likely result of his/her actions.”

You probably should focus more on the word “likely” than on the word “would.” In other words, a person to be considered under that particular element has to knowingly create a high risk - - meaning, obviously, a risk that's high - - that death or great bodily harm will occur, with the knowledge that death or great bodily harm is likely to occur.

Presumably, that's about as strong as I can give it to you. There's no word in there that isn't probably in the average eighth grade lexicon, and, therefore, you should use it according to those normal definitional uses.

You've asked whether the Court has to assemble for all your questions. Not necessarily. If, for instance, you ask for something that's an exhibit that we can just round up and give you, we can do that, but if you have a technical question or a legal question, or something you want me to address as I'm doing now, we generally have to assemble for that purpose.

* * *[Court addresses other jury requests.]

There's also been a question here in which you ask about “in concert,” when we talked about the killing either being done by the defendants or others acting in concert with them. Once again, that's not a technical term. However, I did consult the big Webster's dictionary we keep in chambers on that one, and just to give you some definitions, concert is from the French or Italian concerto and it means:

“Agreement in a design or plan; union formed by mutual communication of opinions and views; accordance in a scheme; harmony; simultaneous action.”

And then it gives the musical definition:

“Musical accordance or harmony; concord.”

So that actually is a dictionary definition, and I think it probably comports pretty much with our general understanding of what it means to act in concert with someone or act in agreement, in a design or plan or union formed by mutual communication of opinion or views or in accordance with a scheme.

So I think that’s about the best I can do there.

Again, none of these things have technical ramifications. These are all to be used as if they are regular words in regular conversation. And sometime I think juries are straining for a technical meaning for a word that really has pretty much everyday, workaday meaning.

You shouldn’t read too much into this. If you need a technical term defined, I’ll give you the technical definitions. But some of these words, most of these words are to be given the same meaning, definition, and usage as you would apply in your normal, everyday lives.

So what I’m going to do is ask that you again return to the process with the idea that in answer to the first question, or the first two questions, all of your discussions need to be in the presence of everybody. Once you break for the day, that’s it, you’re done.

When you’re here, everybody needs to participate. It’s very helpful if you don’t just say, “Well, my opinion is such and such,” but you say, “Well, my opinion is supported by the following logical analysis,” or, “My opinion is based on these three facts that are in evidence,” and then let other people listen to it and say, “Oh, well, that’s right,” or, “No, in fact, you’re wrong, and these are my opinions, and this is the logical analysis based on the known facts that support my opinion.”

Now, sometimes you just can’t get anywhere with that, and if you are hopelessly deadlocked and you honestly can’t come to a decision, we’ll have to confront that, painful though it may be, but I want to make sure that you have exhausted all possibilities before I get to that point, and I think it’s important that you really roll up your sleeves and scratch your heads and put on your thinking caps, as my first grade teacher used to say, and grapple with this thing, because I think the chances are when you do, although it’s a long and arduous process, it will take you where you need to be.

I should emphasize that we will attempt to do everything we possibly can to facilitate your discussions. If you have any questions at all or any issue you wish to take up, do as you have done. You’ve written some excellent notes and I can even read them very clearly, and I will attempt to respond to them promptly and fully, if I possibly can.

If we can get you anything, we’ll get you what you need, and if you still have problems with some of these everyday definition, we can I suppose look up other things in the dictionary for you, but whatever we can do, we will, and just please ask us and keep in touch both with each other and with the Court, and we will attempt to get through this as best we can.

So, with that, I'll see you out to deliberate:

JUROR NUMBER FOURTEEN: Your Honor, I think we all agreed before we came in here that we have to get everybody that's on this jury to take their blinders off and we have to have an open mind.

We have a situation here—and we all agreed we're going to speak freely here—if you go into that jury room the first day and you make a comment about what your decision is already and it's not going to change, no matter what we do and no matter what logic we try to apply in the jury room, if an individual or more than one individual has blinders on so much that they will not—and is just dead set on, “This is how I am and nothing that you can say is going to change,” and, in fact, people may have made the comment, “I'll even tell the judge that,” I think that it's important that anybody on this jury that's not willing to take their blinders off needs to address that right now with you, so when we go back to the jury room we don't go back and deal with what we have been dealing with in the last two days, because we're not going to get anywhere.

THE COURT: I appreciate that, and I have to say that the jurors have taken a solemn oath and obligation to deliberate this case honestly and in good faith, which means, as I said earlier, not only expressing views, but also explaining what facts in evidence and what logical analysis those views are based on so that other people can then say, “Oh, I agree with that,” or, “No, I believe there's an error in your thinking with regard to this point and here's why.” That's how deliberations are conducted.

If persons refuse to participate in that process and refuse to deliberate with a view toward reaching an agreement, then they are not following their juror's oath, and if there's anyone here that will not do that, then we need to know about it, because that clearly is a violation of the oath they have taken and potentially makes that person unsuitable as a juror.

People have to participate in the process, they have to deliberate, and going into a room and folding one's hands and saying, “I don't want to be confused by the facts, I don't want to be confused by the law, I don't want to be confused by logic, this is my position and I'm not moving,” that's not participating in the deliberative process. That's a violation of the juror's oath. That's against the law. It's contrary to everything we're trying to achieve here.

You've got to be open-minded and you've got to approach the process with a view that it's a logical exercise and an exercise in which reasonable adults can participate and exchange views if they become convinced they're wrong.

JUROR NUMBER FOURTEEN: Could you please give us a time-frame that anybody that may feel that way can come to you or to somebody here and we can clear this up?

THE COURT: Well, if there's a problem, I think I've made myself as clear as I can. I'm trying not to pull any punches. If there's anyone who feels they just can't participate, for whatever reason, I guess we need to know that. But I sincerely hope everyone can, because that's the engagement we've taken here. That's the oath everybody took.

JUROR NUMBER FOURTEEN: So everybody has that opportunity right now? Anybody who goes back to that jury room saying, “I'm not going to do what the judge says” - -

THE COURT: If there are people who want to identify themselves that “I can’t do that” or refuse to participate, I don’t want to put you on the spot right now. Send me a note and tell me about it and we can address it.

I hope anybody with that view is now disabused of it and they will now in good faith participate in the process, because it is a group deliberative process, but it requires not an arbitrary opinion, but an analytical factual approach to the issues so that when you explain your analytical approach, your views of the facts in evidence, others can say, “Oh, yes, I think you’re right,” or, “No, I think you’re wrong on this point and here’s my view,” and that’s how eventually we move to where we get agreement and generally arrive at the truth, which, after all, is the bottom goal of this exercise.

All right, well, thank you. I appreciate this, ladies and gentlemen, and, as I said, let me know if there’s anything else I can do and please specify if there’s anything I can do to help in the process.

The jury left the courtroom to resume deliberations at 2:33 p.m., and returned to the courtroom at 3:44 p.m., so that the court could address further questions:

We have some questions from the jury.

First of all quote:

“Does ‘aiding and abetting’ apply to what was intended to happen (drug deal) or what actually happened (felony murder)?

Does the ‘aiding’ of a drug deal ‘cross over’ to murder/robbery?

If he was ‘aiding and abetting’ of an ‘innocent drug deal,’” that phrase in quotes, “and it turned into a murder, is he guilty of murder?”

The answer is that aiding and abetting must apply, in the case of first-degree premeditated murder, to the killing of Ean French, and in the case of first-degree felony murder, to the robbery of Ean French, and not to some other enterprise.

So I think that’s the short, sweet answer to that question.

The court also provided information regarding phone records. The jury left the courtroom at 3:50 p.m., and the court observed to counsel:

I would also say that, again, maybe it’s just me getting punchy, but the jurors seem to be [sic] more of a convivial mindset. They seemed to be smiling and having a good time. Perhaps they are making progress at this point. We can only hope.

The court then adjourned for the day.

At 10:12 a.m. the next morning, Friday, September 24, the court stated:

Good morning, everybody. We’re re-assembled in the matter of People versus Corey McCullough. File 04-00946-FC. We have had some interesting developments overnight and this morning.

First, we had a phone call on the answering machine when we came to work here this morning at 8:00. There was a message from Ms. King, who is Juror Number 55, in seat thirteen, on the jury. Ms. King sounded rather weak and frail and said that she and her children were ill. She didn’t specify what the problem was, although she did say that she didn’t see how they could manage

because they were running to the bathroom at regular intervals, which allows us to draw certain conclusions. She said she would not be coming in.

Gail, the jury clerk, apparently reached her by phone and found that she was on her way to the doctor and she is apparently, I don't know, going to secure appropriate treatment.

While all that was going on, the rest of the McCullough jurors, of course, were in the jury assembly room downstairs awaiting a full panel before coming up here, and apparently the jury foreperson penned a note and sent it up to me, which I received a short time ago. It's dated today's date and its reads as follows, quote:

"As foreman for the McCullough jury I need to point out the problems we are having. One of our jurors (Seat #13) from day one has stated and maintains the position that we will not be able to convict Mr. McCullough because she is going to vote not guilty on all counts. It doesn't matter what any of the other jurors have to say. She maintains her" - - I don't know what that is. Looks like V-I-K-N. I don't know - "and nothing (I believe) any of us has to say is going to change her mind.

Yesterday when confronted by another juror about her stand, her response was, 'You shut up.' She has on at least two occasions stated, 'You will not get a conviction because I vote not guilty on all counts.'" There's no end of quote but there should be one there. I guess.

"Her attitude in the jury room is what caused us to be brought into your chambers yesterday," by which he means the courtroom.

"It is my feeling that unless this issue is addressed, we will end up in a hung jury, no matter how long we deliberate. So unless you want us to be at the courtroom Christmas party, you must intervene. Sincerely, Foreman McCullough jury."

There's no name on it, but it's generically signed. "Foreman McCullough jury," and I have no reason to doubt that's where it came from, since it came directly from that individual to my hand.

It happens, of course, that the person alluded to in the note is the same Ms. King who is having medical issues and called in sick.

With this in mind, we have taken steps to contact the alternate who was excused from Seat Number Seven, Juror Number 7. Sheila Denise Kelley. S-H-E-I-L-A Denise Kelley, and I understand that the jury clerk has reached her and she's on her way down so we can talk to her about whether it might be possible to substitute her in for the ill and apparently nondeliberating Ms. King.

Reference in this connection may be had to MCR 6.411, which does allow alternate jurors to be substituted in the place of other jurors for appropriate reasons.

The alternate has not been sequestered, and so, obviously, if we were to contemplate doing that, we would have to conduct I think some sort of a brief voir dire to find out whether this particular juror, Ms. Kelley, has said or done anything or been exposed to anything that might foreclose her from serving.

I think we can safely say she has not been exposed to any media publicity because, very fortunately, there's been none. . . .

So there's been no publicity for her to be exposed to.

Although one is reluctant to get into ethnicity in these matters, the other attractive part of this possibility is that Ms. King and Ms. Kelley are both black females, and indeed they live in the same neighborhood.

So it's not a case of losing minority representation if we were to go this particular route.

I thought that the record should simply contain this information concerning what's happened here this morning in the presence of counsel and Mr. McCullough so that we have some footing before we go further. I would suggest that assuming Ms. Kelley arrives here soon, which I think she will do, we contemplate conducting a brief voir dire to see whether she may properly be seated on the jury again.

In any case, this is what's happened. This is where we are. This is what I'm thinking of doing. And before we go any further, I wanted to share it with everybody and get the benefit of their opinions and views for the record.

Mr. Schieber [the prosecutor], is there anything you'd like to say about all of this?

MR. SCHIEBER: I wholly endorse the plan. Ms. King's obviously in violation of her oath and apparently doesn't feel well and may be using the illness as an excuse to try to get off the jury at this point. So I wholly endorse this method.

THE COURT: Mr. Kirchhoff [counsel for co-defendant Gordon, who was standing in for McCullough's counsel]?

MR. KIRCHHOFF: I would object to this in any form. It's very apparent that she is being removed from the jury because she has a firm moral conviction that Mr. McCullough's not guilty. I don't think that's a proper reason for removing her from the jury.

This court, and we talked about this yesterday, has instructed the jury that if you have a firm moral conviction, don't give in and stick with it, and that's apparently what she's doing, and she's being removed as a result of that.

Now, she has called in sick and said she's sick today. There's no reason to believe that this won't carry over until Monday. It may be unfortunate and inconvenient but there's no reason to believe she would not show up Monday if told to come back Monday. And taking her off the jury because she refuses to find Mr. McCullough guilty I don't think is an appropriate reason.

Finally, the court rules require that alternate jurors can be replaced or the court can replace jurors if it's an appropriate reason. Again, as I said, I don't think it's appropriate, and secondly it says if the jurors have been retained. These jurors have not been retained. They were released from service last Tuesday, which was four days ago, three days ago.

THE COURT: Well, the last point that you make is precisely why if we go forward with this we would need first to conduct a voir dire of Ms. Kelley to find out whether there is anything that's transpired since she left here that would foreclose her from serving as a juror. And indeed something may have happened and it may be unworkable to proceed in that way.

With respect to Ms. King, the sick juror, if counsel wish to pursue more fully what the foreman means in his note, I would certainly not be adverse to having him brought up and question him either in court or in chambers, with the court reporter present, to determine whether this is a person who simply has a firm conviction and is participating meaningfully in deliberations, or whether it's a person who has simply parked in her chair and refused to deliberate and responded as indicated in the foreperson's note. "You shut up." when people tried to talk to her.

So again, I'm at the disposal of counsel, if anyone wants to pursue the matter more fully.

MR. KIRCHHOFF: I think I would, but she's also not here to give her side, and it's usually two sides to every story and if she says, if she were to say, "I have this firm moral conviction," which you also instructed on, "that he is not guilty on all counts," then I don't see how you can say she has violated her oath because you instructed her that way.

THE COURT: I think if a juror for articulable reasons has a firm moral conviction that the defendant is not guilty, there is not a problem with that. On the other hand, if a juror says, "You're not going to convict anybody because I'm voting not guilty, and I don't want to talk about it and I won't deliberate and I'm not expressing my views and not participating in the discussions," I think we have a problem.

MR. KIRCHHOFF: We're speculating at this point because we don't know what she's saying.

THE COURT: If you'd like, we'll bring the foreperson up and question him.

MR. KIRCHHOFF: Well, I think if you question the foreperson - -

THE COURT: Let's see where that leads us. We have got time, since nothing's happening here. All of us are sitting on our hands. We might as well put it to good use.

[Court addresses court personnel.]

MR. KIRCHHOFF: I think, in all fairness, I'd like to hear both sides of the story.

THE COURT: I think I'd just like to hear what's going on here first.

MR. SCHIEBER: Is the Court to be alerted when the alternate gets here?

THE COURT: I have no idea, but I suspect somebody will come in here with a note or send me an E-mail or do something. In any case, we can utilize the few minutes to ascertain what the foreperson has to say about all this.

(At about 10:28 a.m. – The McCullough jury foreman enters the courtroom.)

THE COURT: Good morning, sir. Would you have a seat, please? Everybody else can be seated too.

[Court confirms juror's identity.]

[W]e understand that you're the foreperson of the McCullough jury panel. We received a note from you a short time ago, actually about an hour ago. It's taken me a while to round everybody up and share it with the attorneys.

Basically, you say, for the record:

"As foreman for the McCullough jury I need to point out the problems we are having. One of our jurors (Seat #13) from day

one has stated and maintains the position that we will not be able to convict Mr. McCullough because she is going to vote not guilty on all counts. It doesn't matter what any of the other jurors have to say. She maintains her" - - and I can't make out this word - - "and nothing (I believe) any of us has to say is going to change her mind.

Yesterday when confronted by another juror about her stand, her response was, 'You shut up.' She has on at least two occasions stated, 'You will not get a conviction because I vote not guilty on all counts.'

Her attitude in the jury room is what caused us to be brought into your chambers yesterday.

It is my feeling that unless this issue is addressed, we will wind up having a hung jury no matter how long we will deliberate. So unless you want us to be at the courtroom Christmas party, you must intervene. Sincerely, Foreman McCullough jury."

Mr. Foreman, we're trying to ascertain the specific nature of the problem, although I think your note is pretty thorough. As you perhaps know, the obligation of jurors that we discussed yesterday in court when the jury was brought back up is to deliberate in good faith, with a view toward sharing not only opinions, but reasons for opinions, facts, and reasoning so that the jurors can discuss those facts and reasons and hopefully come to some resolution, be it guilty, not guilty, or guilty of a lesser-included offense, or whatever it may be.

If a juror is not participating in the process, then it obviously causes a problem. On the other hand, the law is clear that a juror does not have to change the juror's honest conviction as to the facts in evidence just because other jurors may disagree with him or her.

Now, I think the question is whether the person to whom you refer, the juror in Seat Number Thirteen, is honestly of the moral conviction that the defendant is not guilty of anything and is willing to explain reasons and participate in deliberation or whether the juror is simply being an obstructionist and not participating.

Can you help us out a little being here?

JUROR NUMBER FOURTEEN: I think I can. It's not just the foreman that has this opinion. It just seems that what I have been trying to do is run the process as organized as I can, and I'm trying to get everybody involved.

The Juror that we're speaking of, every time somebody makes a point, there's got to be a dig, there's got to be a dig, there's got to be a dig, and it's a situation where the loudest voice is going to win, and it gets to the point where it gets out of control.

So I try to bring it back to ground zero and start over again.

The problem that we have is that this particular juror, from the moment we walked in there, from the moment we walked in - -

THE COURT: Before any deliberations?

JUROR NUMBER FOURTEEN: Before it even started, before it even started, she made the comment, and I put it right in there. "You are not going to get a conviction because I am not going - - I'm going to vote not guilty on all counts."

And that's why yesterday when we came back in I thought we made some progress, in the hope that the aiding and abetting with the supposed - - with the drug deal might cross over and that would have helped us out.

However, as soon as we got back in there and as soon as you explained the law, that, hey, this is the way it is, aiding and abetting applies to the first two counts and third count, and really the drug deal didn't enter into it, we were right back to ground zero.

This particular juror, in the juror's defense, has made the comment that she plain and simply does not believe, to be honest with you all, that it was a robbery/murder. She won't get past the fact she thinks it's just a drug deal. Having said that, I don't think that I should talk about the rest of the jurors.

THE COURT: No. I don't mean for you to divulge - -

JUROR NUMBER FOURTEEN: *What's happening is it didn't get anywhere. It's not going to go anywhere, no matter what logic that applies. I've gone through every juror. Every juror has gotten up and said how they feel and tried to give reasons for why they feel the way they do. When it comes to this particular juror's turn, I think it was maybe five seconds. "It don't matter what you say. I don't believe that's what it was," and that's it, and she has - - and that juror has that right, and I understand that.*

THE COURT: That's why it's a fine line. Clearly the juror has a right to an honest conviction about the evidence, but it's also clear that jurors have an obligation to discuss and deliberate with one another toward reaching a verdict, and that's the question, is what side of the line we're on here.

JUROR NUMBER FOURTEEN: Just to give you another example, everybody else is intent on - - we're trying to listen, and, you know, after all, this is not easy for any of us.

THE COURT: No, it is a very difficult task.

JUROR NUMBER FOURTEEN: But what we have from this juror, because she just won't listen or just doesn't - - really, the only thing she'll do is throw digs if somebody - and it affects everybody around her, around that juror. The juror will just sit there and just thumb through magazines and stuff, and it just - - all I can do is tell you that if we don't do something, my note is self-explanatory, we'll be here with gray beards and I'll look like Santa Claus.

THE COURT: Well, having a gray beard isn't all that bad. Well, all right, thank you, sir, and let me ask if the lawyers have any questions about the process.

Mr. Schieber, is there anything you'd like to ask of Mr. Verstrat?

MR. SCHIEBER: Yes.

Are you saying that she is not meaningfully participating in the exchange of ideas during the deliberations?

JUROR NUMBER FOURTEEN: *That's exactly what I would say, sir.*

MR. SCHIEBER: Thank you.

THE COURT: Mr. Kirchhoff?

MR. KIRCHHOFF: *But she has expressed the opinion that this is a drug deal that went - well, this was a drug deal, and Mr. McCullough's participation in it was only to the drug deal?*

JUROR NUMBER FOURTEEN: *Period.*

MR. KIRCHHOFF: *And, therefore, she effectively believes Mr. Johnigan?*

JUROR NUMBER FOURTEEN: *Yes.*

MR. KIRCHHOFF: *And that is the basis for her opinion?*

JUROR NUMBER FOURTEEN: *I don't know what else it would be. I would only have to say yes. I can't speak for the particular juror. All I know is what's happening in that jury room.*

MR. KIRCHHOFF: *But she has in fact responded to various other arguments made by other jurors?*

JUROR NUMBER FOURTEEN: *Arguments made by other jurors. I think it always comes back, no matter what is said, it comes right back to drug deal, drug deal only, and nothing else matters. And the comment's been made. "I don't care what you say. I don't believe that it was any more than a drug deal, and not guilty."*

So there you go.

MR. SCHIEBER: *May I ask one more question?*

THE COURT: *Very well.*

MR. SCHIEBER: *You made a reference during your exchange here with the judge about "day one." Did you mean day one of the trial or day one of the deliberations?*

JUROR NUMBER FOURTEEN: *In deliberation, when we walked in the room, it was within five minutes, before I even got really started.*

MR. SCHIEBER: *Thank you, sir.*

THE COURT: *All right, thank you, sir. We appreciate your coming up, and I apologize if we've embarrassed you in any way.*

JUROR NUMBER FOURTEEN: *No. You haven't embarrassed me. I apologize. I'm left-handed.*

THE COURT: *There's only one word I couldn't read. Otherwise it was just fine. Thank you sir. You can go back downstairs.*

(At about 10:37 a.m. – the McCullough jury foreman left the courtroom)

THE COURT: *All right, gentlemen, any comments? Mr. Schieber?*

MR. SCHIEBER: *Well, my question was, is she meaningfully involved in the exchange of ideas, and he said, no, she is not, and apparently she walked in within a matter of minutes and expressed her ideas and entrenched herself and hasn't involved herself in the exchange of ideas, which is a direct violation of her instructions, both originally and your encouragement yesterday.*

I still suspect that her illness is an attempt on her part to excuse herself, but I'd ask that she be excused, in any event.

THE COURT: *Mr. Kirchhoff?*

MR. KIRCHHOFF: *I think at this point probably we should wait until Monday to see if she's back, and if so, it sounds to me like it may very well be a hung jury. But when someone goes into the jury after argument and closing and instructions and says, "Well, I think this was just a drug deal," there is a logical basis, based upon Mr. Johnigan and Mr. Gordon's testimony, that that's all this was or that's all their participation was.*

I don't think she should be removed, because she has viewed all the evidence for three weeks and has come to the moral certainty that that was the only participation. That's exactly what I argued, in effect. That's exactly what Mr. Keel argued to that jury. And because she agrees with what the defendant's argument is is not a reason to be removing her from the jury.

I guess it harkens back to the old English case of – I can't remember who was on trial, but the jury came back and said innocent, and the judge says, "Well, go back in the jury deliberation room," and kept them until they came back with a guilty verdict.

You're removing one juror because she has a moral certainty based upon the evidence, based upon Mr. Johnigan's testimony that this was only a drug deal.

THE COURT: Well, I think what we have is a juror who at the beginning and without even going through deliberations announced that she was not going to be voting any other way than not guilty, and it didn't matter what anybody else had to say. When other jurors try to reason with her, she says, "You shut up," and when the discussions are going on and deliberations are being had, she's thumbing through magazines.

I'm not sure this is participating in the deliberative process.

Personally, I have no stake in what verdict is returned. I would prefer to have a verdict rather than no verdict, and if the jurors have a reasonable doubt as to the guilt of this defendant, they should certainly acquit him. My function is simply to try to make the process move according to the rules and make sure the people behave in conformity with them.

I don't see this as evidence of a deliberating juror participating in the process in good faith, and it seems to me there's a problem there. Now, we can certainly wait and see when we can talk to the juror or when the juror can recover sufficiently to participate. However, it seems to me we should explore the alternative of possibly returning Ms. Kelley if we can get her on board and if we can get the process up and running again.

I don't know that we can, and it seems to me it's an issue that remains open. At this point I think we ought to see about the circumstances of Ms. Kelley and see whether she can be realistically seated at this point.

There is a distinct possibility, it seems to me, that one way or another she may not be able to participate or may have engaged in some sort of conduct or behavior, or may have some other problem that would preclude her reasonably from being a participant at this stage of the game. But again, we don't know unless we explore it.

I just got an E-mail here indicating that the alternate has arrived, and I would suggest that we talk to her at this time and see where that puts us, and then we can excuse her to go back to wherever she is being kept and make a decision.

So if the alternate's here, let's bring Ms. Kelley in. [Emphasis added.]

The court then conducted a voir dire of Ms. Kelley, during which she said that she had not discussed the case with anyone since leaving the courtroom, had read no newspaper articles, and would be available to deliberate through Tuesday of the following week. Ms. Kelley left the

courtroom, and the court asked for the positions of counsel. The prosecutor urged that Ms. King be replaced with Ms. Kelley. Defense counsel objected:

MR. KIRCHHOFF: *I don't think this Court can make a ruling that Juror Number Thirteen, whatever her name is - -*

THE COURT: I believe we decided her name is Ms. King.

MR. KIRCHHOFF: *-- Ms. King has not been participating in the deliberations without actually talking to her first. It sounds to me like she's being removed because she has already concluded to a moral certainty that he's not guilty, and that's the reason she's being removed.*

I think we need to get her in here and ask her the questions on the record. Obviously, there's a disagreement in the jury room and you've only taken one side of it, so I think you need to hear from her before you make a ruling that she's not participating.

THE COURT: Well, all right. It is an extraordinary circumstance. I think the record should reflect that I have been in the judging business for more than a quarter century, having taken the bench February 19, 1979, and I've never had this happen. This is a pretty busy court. We try cases all the time. I wouldn't venture a guess as to how many jury trials I've conducted in that time, and I was an active trial lawyer for ten years before that and I've never heard of this happening.

I've never in my entire 35 years of practice had a jury foreperson report in a case with which I was familiar or in which I was involved that a juror was not participating in deliberations, and had stated right from the outset, before deliberations commenced, that it didn't matter what other jurors had to say and that nothing would convince him or her to do other than vote not guilty. It's that extraordinary.

I am a strong believer in the sanctity of the jury.

I should also point out that in my entire career on the bench I've never set aside a jury verdict. I've never granted a JNOV, or an additur or remittitur, and I have always felt that even when I thought the jury verdict was inconsistent with anything that I knew and was not even a particularly smart verdict, that, nevertheless, the jury had spoken and the case was resolved according to the jury's views.

So I'm not inclined to want to in any way tamper with the process, and whatever verdict the jury comes up with, I think it's a verdict that we should all live with.

On the other hand, it seems to me that we do have this extraordinary circumstance, where we have a juror, Ms. King, who has not deliberated but indeed announced before deliberations commenced that she had made up her mind and was not about to change it. She thumbs through magazines when jurors are discussing the case, and when jurors address her in order to try and draw out the basis of her opinion, she tells them to shut up.

To make matters worse, she has apparently suffered some sort of illness, and indeed Michelle Vidro, my clerk, advises that she mentioned during the trial that she had not been feeling well and was having difficulty sleeping, which is

perhaps not unusual. I think the lawyers frequently have the same problem during a trial.

She has indicated this morning by way of a call-in message that she's suffering what apparently is some sort of, apparently some sort of an intestinal problem, which may or may not be exacerbated by nerves or whatever else is involved.

It seems to me our choices are to go into limbo for several days to await some outcome here, and then perhaps question her about this whole matter, or simply to mercifully replace her, as she requested on the answering tape this morning, and proceed with deliberations with Ms. Kelley seated in her place.

I am inclined, I think, bearing in mind the length of the trial that we've engaged in thus far, to opt for the replacement, simply because we have a very good opportunity to proceed with a juror who is evidently untainted and who even represents the same demographics as the replaced juror, and I think can fill in, even though we have to start deliberations over again.

Rather than lose another day and possibly several more days and perhaps wind up at the same point we are now, I think it's prudent to proceed in that fashion.

So everyone's views are I think clearly articulated for the record, and in the event some higher court wishes to review this matter, I think we've dealt with the record sufficiently so they can make an informed judgment as to our proceedings here today.

But based on what we've heard, I'm going to direct that Ms. King be removed from the jury and allowed to recuperate from her maladies and Ms. Kelley be substituted in her stead. As soon as that arrangement can be made, I'll ask the McCullough jury to come up here and instruct them they have to start the deliberations over again with the new jury seated, and that will probably take us a couple of minutes, but let's make those arrangements quickly, take maybe a five-minute recess, and then proceed.

MR. KIRCHHOFF: Before we go off the record, your Honor, you said now that she requested to be replaced - -

THE COURT: Well, she said that she was unable to be here and didn't want to be on the jury any more because of her illness. Now, that's not requesting to be replaced per se, but she said. "I'm not coming in and I can't participate."

MR. KIRCHHOFF: Is that message still available?

THE COURT: I don't know whether it is or not.

MR. KIRCHHOFF: I think I would ask that it be preserved.

THE COURT: If it can be preserved, it can be preserved. All right, thank you, we'll take a break and then we'll reconvene with the slightly reconstituted jury in a few moments. [Emphasis added.]

The court then instructed the jury that Ms. Kelley would replace Ms. King and that the jury should start its deliberations over again. It is unclear how long the jury deliberated on Friday. It returned a verdict Monday at 11:35 a.m.

I glean the following from the various excerpts quoted above. Ms. King expressed the view, within five minutes of retiring to the jury room to begin deliberations, that she was convinced that McCullough was not guilty of the charges and would not permit him to be convicted. She did not change her view in light of the views and opinions expressed by the other jurors, and repeatedly expressed the view that she was convinced that McCullough only participated in a drug transaction, not a robbery or murder. It is unknown whether the account of her behavior given by the jury foreperson (flipping through a magazine, and saying “shut up” or making “digs” in response to the other jurors) described her conduct before, or before and after, the court’s instructions Thursday afternoon regarding the duty to deliberate. After receiving the court’s additional instruction on the duty to deliberate, no juror accepted the court’s invitation to send a note expressing the juror’s inability or unwillingness to deliberate in accordance with the court’s instructions. Rather, the jury returned with a request for more information about cell phone records, and significantly, with the questions “Does aiding and abetting apply to what was intended to happen (drug deal) or what actually happened (felony)? Does the ‘aiding’ of a drug deal ‘cross over’ to murder/robbery? If he was ‘aiding and abetting’ of an ‘innocent drug deal,’ and it turned into murder, is he guilty of murder?” After answering the jury’s questions, and excusing the jury from the courtroom, the court expressed the opinion that it appeared that the jury seemed to be “of a more convivial mindset” than before. And, although invited to do so if Thus, if one were to draw a conclusion, it would appear that upon resuming deliberations Ms. King repeated her conviction that McCullough intended to aid only a drug deal, and the others responded to her by arguing that it did not make a difference, but were informed by the court that under the law, the distinction was, in fact, a crucial one. It is possible that deliberations deteriorated at that point in light of Ms. King’s insistence that McCullough only intended the drug deal. However, the jury could not have had any significant deliberations after the aiding and abetting questions because the court broke for the day shortly thereafter, and Ms. King called in sick the next morning.

Also unclear is whether Ms. King in fact asked to be replaced. The court’s first account of the phone message was that she had said she and her children were ill and she would not be able to attend court. Later, the court asserted that she had asked to be replaced. When questioned by defense counsel regarding the discrepancy, the court clarified that “she said that she was unable to be here and didn’t want to be on the jury any more because of her illness. Now, that’s not requesting to be replaced per se, but she said, ‘I’m not coming in and I can’t participate.’” The statement “My children and I are sick, I am not coming in and I can’t participate,” is not the equivalent of “My children and I are sick and I don’t want to be on the jury anymore.” The record does not demonstrate either that Ms. King asked to be excused from the jury, or that she would not be able to resume jury service Monday morning.

Also evident from the excerpts is that despite her rather curt and unsocial remarks, Ms. King expressed opinions about the facts to be found by the jury. In other words, she did not simply state, “I find defendant not guilty for reasons I need not express nor share, and nothing you say will change that opinion.” Rather, although she rejected efforts to persuade her otherwise, she expressed the view that McCullough never intended to participate in or aid a robbery/murder, but only a drug transaction, a position consistent with the defense theory and witness testimony.

In sum, the court excused Ms. King for two reasons, because she was ill, and because she was not deliberating properly. Neither was sufficient under the circumstances. While Ms. King was indeed ill, she called in Friday morning, and there was no reason to believe that she would not be able to resume her participation Monday morning.

The court also discharged Ms. King for failure to deliberate. While courts have excused jurors for an inability to deliberate, the circumstances in such cases clearly showed that the juror was unable or unwilling to deliberate.¹ Here, we have only the foreman's report that Ms. King was not deliberating. As noted above, it is unclear whether the behavior and conduct the foreperson described continued after the court gave additional instructions to the jury regarding the duty to deliberate Thursday afternoon, and there was some indication that the situation may have improved. More important, the court never questioned Ms. King to determine whether she felt she was in fact deliberating. Nor did the court question any of the other jurors, except the foreperson. Further, there is some indication that Ms. King was deliberating in some fashion because the foreman related that she based her position on the conclusion that McCullough had not intended to participate in a murder/robbery.

Lastly, the relevant case law makes clear that where a juror is excused for illness or failure to deliberate, the court must be careful that the dismissal is not for reasons relating to the juror's view of the case. This concern is not based on the need to establish good cause to dismiss the juror, which the majority correctly observes is not a requirement under the Michigan court rules, as distinguished from the Federal Rules of Criminal Procedure.² Rather, it is based on the concern that excusing a juror on the basis of the juror's view of the sufficiency of the government's evidence undermines the defendant's right to a unanimous verdict. *United States v Brown*, 262 US App DC 183; 823 F2d 591, 596-597 (1987). Many of the cases that affirmed the trial court's dismissal of a juror for illness or inability to deliberate expressly make the point that there is no indication in the record that the excused juror was a hold-out juror, or that the dismissal had any relation to the juror's position in deliberations. *United States v Stratton*, 779 F2d 820, 882 (CA 2, 1985); *United States v Wilson*, 894 F2d 1245, 1250 (CA 11, 1990). In those cases where the juror's view of the case was relevant to the alleged failure to deliberate, it

¹ *United States v Leahy*, 82 F3d 624 (CA 5, 1996) (juror whose hearing impairment was discovered only after the deliberations had begun, refused to discuss the case in deliberations, had not heard significant amounts of testimony, and could not hear and could not follow the conversations in the jury room); *United States v Walsh*, 75 F3d 1 (CA 1, 1996) (juror had been making constant interruptions and irrelevant statements about events in his life); *United States v Geffard*, 87 F3d 448 (CA 11, 1996) (juror's religious beliefs rendered her unable to follow court's instructions).

² In 1983, Federal Rule of Criminal Procedure 23(b) was amended to permit the trial court to excuse a juror for just cause after the jury has begun its deliberations, and continue to verdict with eleven jurors. Michigan does not have a similar rule. At the same time the federal rules were so amended, a proposal to permit substitution of alternate jurors after the jury has begun to deliberate was dropped. From 1983 until the amendment of the federal rules in 1999, allowing the substitution of alternate jurors after the deliberations have commenced, the cases focused on FR Crim P 23(b).

was held to be error to excuse the juror. *Brown, supra; United States v Thomas*, 116 F3d 606 (CA 2, 1997) (dismissal of juror intending to commit jury nullification reversed); *United States v Symington*, 195 F3d 1080 (CA 9, 1999) (“If the record evidence discloses any reasonable possibility that the impetus for a juror’s dismissal stems from the juror’s view of the case, the court must not dismiss the juror.”)

Indeed, in the few cases where the dismissal of a juror based on complaints that the juror was refusing to deliberate, or was biased, was upheld, the trial court questioned the juror directly and made an independent determination that the juror was unable to follow the law. In *United States v Baker*, 262 F3d 124 (CA 2, 2001), after receiving notes from the foreperson regarding a juror’s refusal to deliberate or look at the evidence, because “she has a feeling and that’s it,” the court questioned the juror directly before concluding that she had made up her mind before deliberations, refused to participate in the exchange of views a half hour into deliberations, and said that if she were sent back to continue deliberations, she would refuse to participate. Based on the court’s questioning of the juror, and distinguishing *Thomas, supra*, the Court affirmed, concluding that the juror was removed “for her admitted refusal to perform her duty as a juror by deliberating together with the other jurors.” While it is possible that examination of Ms. King might have supported a similar conclusion, it is equally possible that it would not, and, more important, the instant record provides an inadequate basis for the court to have removed Ms. King for refusing to deliberate. Similarly, in *United States v Edwards*, 303 F3d 606 (CA 5, 2002), the trial court dismissed a juror for his inability to follow the court’s instructions regarding bringing material into, and taking material from, the jury room, and his lack of candor in answering the court’s questions, but only after questioning the juror several times, as well as the other jurors. Again, no such record was made in the instant case.

The majority concludes that the trial court’s action is supported by *People v Tate*, 244 Mich App 553, 562; 624 NW2d 524 (2001), and *People v Dry Land Marina, Inc*, 175 Mich App 322, 325; 437 NW2d 391 (1989), although it recognizes that those cases are distinguishable because the trial court in the instant case did not question the excused juror. I find this and other distinctions between the cases important. In *Tate*, the sick juror was excused by the court without objection. In *Dry Land Marina*, the juror was excused over defense objection, but only after the court examined the juror and determined that she could not sit because of her condition. Both cases noted the balance between a defendant’s fundamental right in retaining the composition of the jury as originally chosen to decide the case, and the fundamental right to have a fair and impartial jury that is able and willing to cooperate to decide the case. *Dry Land Marina, supra* at 326; *Tate, supra* at 562. In both cases, this Court determined that the trial court had not abused its discretion in removing the juror. In neither case, however, was there any indication that the excused juror was a holdout in favor of a not guilty verdict.

The majority also finds it significant that Ms. King “refused to return to court to fulfill her duties as a juror,” and that the court properly concluded that she was no longer able or willing to serve on the jury.” I cannot agree with these conclusions. The record does not support that she was no longer able or willing to serve on the jury. The record only supports that she was unable to serve on the jury on Friday, September 24, due to her illness. The majority further concludes that the juror herself, and not the trial court, requested that an alternate replace her, and thus it cannot be said that the court replaced a willing juror. The majority finds this fact important in distinguishing *Riggs v State*, 809 NE2d 322 (Ind, 2004). Again, I cannot come to

this factual conclusion on this record. It was never resolved whether the juror, in fact, asked to be replaced. Additionally, even where a juror requests to be excused, the court should not do so if the request is rooted in the juror's dissatisfaction with the government's proofs. *Brown, supra*.

I would reverse and remand for a new trial.³

No. 2761724 Gordon

I am also constrained to conclude that the trial court erred in permitting Juror 9 to withdraw from Gordon's jury without determining whether she could deliberate further.

The Gordon jury that sat with the McCullough jury was unable to return a unanimous verdict and was discharged. On retrial, the second jury was excused to deliberate a little after 2 p.m. on Wednesday November 3rd. The jury asked a question regarding the meaning of "in concert" late Thursday morning, and another question about the testimony late Thursday afternoon. After the court answered the second question, the jury resumed deliberations and then sent another note, which the court addressed at 5:09 p.m. Thursday afternoon:

We have a question from the jury. It reads, 'if a juror cannot come to a decision on a charge, can that juror just be excused.' The simple answer is no, it's not like reality TV, we can't vote somebody off the island here. As long as all jurors are deliberating in good faith, trying to arrive at a verdict, then the process continues until we do or until we find that it just is hopeless and not possible to do so. It's a little unclear from the note whether this means that the juror just can't make up his or her mind or whether the juror is having difficulty on one charge as opposed to another charge, so I'm not able to ascertain the depth of the problem, but I gather there are disagreements or at least some disagreements between one juror and the rest of the panel, and about all I can say in that connection is that you have taken a solemn oath to deliberate in good faith and to work toward arriving at a verdict, if you can do so without violating your own consciences.

[The court explains that it is useful to express not only opinions but also the reasoning, logic and facts behind them.]

So, it's important that you remember that you are on oath to attempt to resolve this case if you possibly can, and to deliberate in good faith with a view toward coming to a resolution. I'm going to ask that you continue doing that, but it seems to me in light of the hour it might be not a bad idea to call it a day. You've been at this all day long and although I think you had sandwiches sent in here, you even were working effectively during the lunch hour, subject to a couple of breaks that I know you took for some fresh air.

³ I note that I read O'Connor's testimony somewhat differently than does the majority, but I would not reverse based on the admission of his testimony alone.

The court excused the jury, and in its colloquy with counsel observed:

It's a little unclear, as I said from the note, exactly what the problem is. The way the note is phrased, a juror is having a difficult time coming to a decision, which would suggest that the juror can't make up his or her mind. It also talks about a charge, so it may be one count and not another count. It's a little hard to tell from context exactly what the problem is, but it seems to me it's a good time for everybody to go home and take a break and come back fresh in the morning and if we get further difficulties along this line, we'll read the specific instruction which is in the book and go through whatever other response would seem to be called for or helpful in the situation.

The jury resumed deliberations the following morning and sent out another note, which the court addressed on the record at about 12:48 p.m.:

THE COURT: Members of the Jury, you have returned a note during your deliberations indicating you believe you cannot reach a verdict. I'm going to ask that you not give up the exercise just yet, in the hopes that further discussions and deliberations may assist you in resolving your differences and arriving at a verdict. Needless to say, the process in which we are engaged is a very lengthy one. The expenditure of time and money to present a case of this sort of enormous and if we have to retry it because this jury cannot decide, we'll have to bring in 12 more people and go through the whole thing again. The 12 people that come in to take your spot will probably be neither any smarter nor any more enlightened than you 12. And for that reason obviously it's important that we exhaust all reasonable opportunities to resolve the case through a deliberative process, if it can be done. Now I want you to remember that it is your duty to consult with each other and attempt to reach agreement, if you can do so without violating your own judgment. Obviously in order to return a verdict, it is necessary for all of you to agree upon the verdict that you return and it must represent the judgment of each member of the panel.

[Court gives further instructions regarding the process for deliberating, offers any assistance the jury may need, including rereading the instructions and providing additional written instructions, and answering questions, and offers to let the jury either continue deliberations or break for the weekend.]

But under the circumstances, the matter is of sufficient importance that I'm reluctant to have you discontinue the process until all reasonable opportunities to decide the case through a deliberative process have been exhausted, for the reasons that I think I've made as clear to you as I possibly can.

So I'll ask the jury to return to the jury room. If you want to continue this afternoon, that's fine. If you want to take a break and then come back this afternoon, that's fine. If you want to call it a weekend and come back Monday, that's fine. If Monday's a problem you can come back Tuesday. We'll do everything we can to accommodate your schedules.

[Court assures the jury that the law, and the court, will protect them against any employer penalties for jury service.]

I can only tell you that the easy cases are settled long before they get to this state, it's the tough ones that require the efforts by the jurors. Again, as I said, everybody should articulate their positions, but more importantly why they have arrived at their positions, and be open to other persons pointing out fallacies in the thinking and logic that they're applying to the task. All we need from you is a good faith effort, and certainly if at the end of a process which seems to go nowhere we can't accomplish the goal and people can't in good conscience come to agreement, then, of course, we will end the case, bring in another jury panel and start this process over again. But you can understand, I think, why we would prefer not to do that and why it's an extremely difficult time-consuming process, if it comes to that point.

So, with that I'll let you go out, see what you can come up with by way of schedule . . . So, the jury will be asked to return to the jury room for that purpose and we'll await further word.

The jury was excused from the courtroom, and the court addressed the attorneys:

The jury has again retired to the jury room. Counsel are aware of the communication we received from the jury and now you have the benefit of the Court's response. If anybody has any comments, I'd be happy to entertain them.

Mr. Schieber [the prosecutor].?

MR. SCHIEBER: I don't have a response, I have an observation. *They look spent to me and nobody is more drained from this case than me and the victim's family, but this is going to get into the category of heroic effort at some point here and at some point maybe the mercy rule applies.*

THE COURT: Well, I agree with that and, certainly, if they get to the point where they say this is absolutely positively hopeless we'll throw in the towel. My reluctance to do that, I think, is obvious, but I want to do everything we can, if it's reasonably possible to achieve a verdict without having to go through this yet again.

Mr. Kirchhoff, any observations?

MR. KIRCHHOFF: I'm satisfied with what was said.

THE COURT: Let's go into recess and wait and see what the jury has to say. I think my preference frankly would be to send them out of here and let them go home because, as Mr. Schieber said, *it looked like two or three of the women had been crying and obviously are very emotional and usually when we get to that point it's a good idea to take a break.* But I must say over the long years of my experience I've found that sometimes when you take a weekend break and people

come back fresh after they've been gone for a couple of days, they have a fresh approach to it and they're able to arrive at a verdict. And while I'm certainly not going to absolutely positively flog them into it, if it's reasonably possible that they can achieve that result, one way or the other I'd like to see it done. [Emphasis added.]

The jury resumed deliberations Monday morning, November 8, and sometime before 9:49 a.m., sent a note stating "Need to break until 1 p.m." At 2:06 p.m., the court reconvened after lunch:

THE COURT: Looks like juror in Seat #9. Evidently took off her juror badge and turned it in at the jury clerk's office and more or less seceded from the jury. She called the Court over the noon hour and left a recorded message which counsel and I have listened to. In the message she says essentially that it's been a long, hard trial and it's been very stressful, that's it's ruining her health and that she's sorry, but she just can't go on, that she can't come back, that she can't do this anymore. And I think in about three different ways reiterated that she's not coming back. . . .

MR. SCHIEBER: Thank you. I think the Court has accurately stated the situation and hopefully we can preserve that tape of the phone call that Ms. Rapier made and with reference to the McCullough trial, we brought in the jurors, at least one alternate, and asked her if she could - - if she'd had any contact with anyone, had she talked about the case, she said no, then she went in there and deliberated and went to the verdict. I think it's significant Mr. Rapier did not reveal what her decision was, indeed if she had made any decision.

THE COURT: In fact, if she's the juror I'm thinking about, my assumption is that she's having difficulty arriving at a decision, but again that may be an untoward assumption.

MR. SCHIEBER: Either she hasn't made a decision or if she has made a decision she hasn't revealed it so there's no identifiably prejudice to either side, so I would ask the Court to replace her with one of the alternate jurors.

* * *

MR. KIRCHHOFF: I think that involves having some sudden circumstance come up making it impossible for a juror to come and deliberate. I don't think we have that here. I think before a decision can be made, I think she needs to be brought in and questioned on the record as to what it is that she has - the juror don't have that there before decision brought in and questioned on the record as to what it is if she has - - if she's basically come to a decision and it just disagrees with the other jurors, I don't think that's a sufficient reason for getting her off and we don't know that right now. So I would ask that she be brought in before any decision was made about replacing her. I don't think this is the type of situation where, you know, there's a car accident and one of the jurors is involved in that or there's a sudden illness. Doesn't sound like that either, it sounds like

she's tired of deliberating and I don't think that's a legitimate reason for getting off a jury.

THE COURT: Well, I don't think that legally a person can secede from the jury any more than a state can secede from the union. But, nevertheless we're confronted with the fact that this seems to have happened. The woman has turned in her badge and called us up and said she's not coming back. Now I suppose we can go and round her up and bring her back in there by main force and grill her about all of this. I am not necessarily unwilling to do it, although I don't know whether that would be terribly helpful, or if we did proceed in that way whether we would necessarily have a particularly cooperative, willing participant in the process when we were done with it.

MR. SCHIEBER: I don't think anybody can question the sincerity of what she said on that.

THE COURT: She sounded - - I mean, the tone of her voice certainly sounded sincere and I think he's having physical problems, perhaps having difficulty sleeping and she said it's affecting her and she just can't do it anymore.

* * *

My concern with Cheiquea, I think it is, C-H-E-I-Q-U-E-A Rapier, the juror who called in, is - - as I said, she in her message says several times she's not coming back and if we go and drag her in here, it seems to me we simply exacerbate whatever the problem is. I don't believe she has any legal right simply to leave the jury and say she's done on the one hand. On the other hand, having done so, if she gets dragged back by force, I can't think that her participation is likely to be particularly productive to the process. And under the circumstances, it seems to me, as Ronald Reagan used to say, she's manifestly voting with her feet here. and I don't know that while she has any - - has no right to do what she did, that we improve the deliberative process by dragging her back here by the scruff of the neck or sending the police out to do it, and then grilling her about her non-appearance. I think at this point I'd like to explore what we are with the alternates and see what that does for us. Now let's ask the alternates to report to the courthouse and when they're downstairs perhaps Gail can let us know and we can reconvene. We'll recess in the meantime.

MR. SCHIEBER: Thank you, your Honor.

MR. KIRCHHOFF: Your Honor, just for the record I'm assuming you overruled my request then to bring her back. Correct?

THE COURT: Well, I guess I am of the opinion that to bring her back will simply be counterproductive. If I thought that by bringing her back and holding hands with her we could woo her back to the process, I'd say let's do it. But if we bring her in here by force and against her will, I just don't see her as being a productive deliberating participant in the process. I think she's seceded

from the panel, lawfully or not, and I think we have to accept that as a fete accompli. So to the extent that you want us to go round her up and drag her back, I'm disinclined to do that.

* * *

MR. KIRCHHOFF: Yes, your Honor. I want to make sure the record is clear that my objection still stands to not bringing in Ms. Rapier to question her before going through this. Since that time, I think it's been done properly, assuming your ruling in removing her or in replacing her is proper, I think the way that you've done it, questioning the jurors that were initially excused and then doing it by blind draw, that I have no problem with, but I do want to make sure it's clear on the record that I - -

THE COURT: You preferred to stay with Ms. Rapier in the first place.

MR. KIRCHHOFF: No, I thought it appropriate to bring her in.

THE COURT: All right.

MR. KIRCHHOFF: That was - - I want my objection to stand for the record, your Honor. Once you already ruled against me on that basis, I think everything's been done i[n] the proper way.

THE COURT: All right. Anything you want to add, Mr. Schieber?

MR. SCHIEBER: No, your Honor. I guess I'm happy.

THE COURT: All right. Well, again, as I said earlier, I thought that because she had very vociferously indicated she did not want to be part of the jury any longer and that it was ruining her health, it seemed to me that having Ms. Rapier return was simply not productive or really even possible. I do note that I have another message here from Gail VanTimmeren, the jury clerk, saying that she had heard, I'm not sure if it's the same message we heard or another message, she may have left voice message in both places saying that "she doesn't want to return and she feels she will have a nervous breakdown", and she's saving the message. So I think once a juror has taken that position that its counterproductive to attempt to proceed further. Even if we brought her back and grilled her and then put her back in the jury room, I don't think we can expect any reasonable participation at this stage. But the point is well taken and Mr. Kirchhoff's remarks will, I think, preserve his objection to those things he objects to, and his concurrence to those things he concurs with.

The instant facts differ from those in McCullough. Here it is clear that the juror asked to be excused. It is also unclear whether the juror was a hold-out juror. There is no indication that

the juror refused to deliberate, but assuming that she was the juror first mentioned, it appears that she may have been having difficulty coming to a decision on at least one of the counts.

The record reflects that the jury had deliberated Wednesday afternoon, all day Thursday and Friday morning, when the jury stated that it could not reach a verdict. At that point the court asked the jury to continue its deliberations, offering the opportunity to adjourn for the weekend. The prosecutor observed that “nobody is more drained from this case than me and the victim’s family, but this is going to get into the category of heroic effort at some point here and at some point maybe the mercy rule applies.” The court observed that two or three of the women looked like they had been crying, and sent the jury home for the weekend. Deliberations resumed Monday morning, but only for a short time before the jury requested another break. Juror 9 turned in her badge after declaring that she could not deliberate further without “having a nervous breakdown.” Under the circumstance that the jury had stated its inability to reach a verdict, and the court observed that two or three of the female jurors had been crying, the court was obliged to determine whether Juror 9’s departure was due to an inability to deliberate, in which case excusing her would be appropriate, or to her view of the evidence in the case and an inability to tolerate additional futile deliberations, in which case the court should have declared a mistrial.

I would reverse and remand for a new trial.

/s/ Helene N. White