THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0709

State of New Hampshire

v.

Mark A. Kerner

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court / South

BRIEF FOR THE DEFENDANT

David M. Rothstein
Deputy Chief Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301
NH Bar No. 5991
(603) 228-9218

(15 Minutes Oral Argument)

TABLE OF CONTENTS

Page

Table of Authorities ii

Question Presented..... 1

Statement of the Case..... 2

Statement of Facts..... 3

Summary of Argument 10

Argument

I. THE TRIAL COURT ERRED WHEN IT GAVE A COERCIVE DEADLOCKED JURY INSTRUCTION..... 11

Conclusion..... 20

TABLE OF AUTHORITIES

Page

CASES:

Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896) 12

Goldsberry v. State, 182 Md.App. 394, 957 A.2d 1110 (2008) 18

Jones v. United States, 946 A.2d 970 (D.C. 2008) 14

People v. Allen, 102 Mich.App. 655, 302 N.W.2d 268 (1981) 14

People v. Pollick, 448 Mich. 376, 531 N.W.2d 159 (1995) 14

State v. Alexander, 143 N.H. 216, 723 A.2d 22 (1998) 11

State v. Campbell, 294 N.W.2d 803 (Iowa 1980) 11

State v. Jordan, 130 N.H. 48, 534 A.2d 378 (1987) ..... passim

State v. Martin, 297 Minn. 359, 211 N.W.2d 765 (1973) 19

State v. Silva, 142 N.H. 269, 699 A.2d 591 (1997) 14, 15, 16

State v. Watkins, 99 Wash.2d 166, 660 P.2d 1117 (1983) 12

State v. Weidul, 628 A.2d 135 (Me. 1993) 11

United States v. Berroa, 46 F.3d 1195 (D.C. Cir. 1995) 17, 18, 19

United States v. Chermerie, 520 F.2d 325 (5th Cir. 1975) ... 14

United States v. Lloyd, 515 F.3d 1297 (D.C. Cir. 2008) 12

United States v. Norton, 867 F.2d 1354 (11th Cir. 1989) 14

United States v. Spann, 997 F.2d 1513 (D.C. Cir. 1993) 14

United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) 12, 14, 18

QUESTION PRESENTED

Whether the trial court erred when it gave a coercive deadlocked jury instruction.

Issue preserved by objection and instruction. T-II* 280-83.

---

*Citations to the record are as follows:
"NOA" designates the notice of appeal;
"T-I" and "T-II" designate the two volumes of trial transcript.

STATEMENT OF THE CASE

A Hillsborough County (South) grand jury indicted Mark Kerner with eleven charges, all committed against M.L. between 1997 and 2005. T-I 11-16. There was one pattern aggravated felonious sexual assault, six individual acts of aggravated felonious sexual assault, and four counts of indecent exposure. T-I 11-16.

After a trial during which the testimony lasted roughly four hours, the jury deliberated for nearly two hours and announced it was deadlocked. T-II 280. Over defense objection, the court gave a deadlocked jury instruction. T-II 281-83. Just before the end of the day, the jury returned with guilty verdicts on seven charges and not guilty verdicts on four charges. T-II 284-87. The court (Barry, J.) sentenced Kerner to serve a total of 20-40 years. NOA 2.

STATEMENT OF FACTS

Pamela LeBlanc gave birth to M.L. in 1992. T-I 55-56. At the time, she was married to George LeBlanc and had two other children: Amy, who was seven years older than M.L., and Kevin, who was three years older than M.L. T-I 57, 77, 111. Pamela and George divorced in 1996, and Pamela moved with the children to Nashua. T-I 56.

There, Pamela and the children initially lived with Pamela's brother, Mark Kerner, his wife, and Kerner's children. T-I 56, 115. After Pamela had an argument with Kerner's wife, they had to move to a homeless shelter. T-I 135. However, Pamela soon secured an apartment for the family on Chestnut Street in Nashua. T-I 59, 116, 136. Kerner often spent time at the Chestnut Street apartment, and when Pamela and her family moved again, to an apartment on Ledge Street, Kerner and his family lived next door. T-I 59, 116-17, 137.

When Pamela's family lived on Ledge Street, she worked a 4:00 - 10:00 p.m. shift at Market Basket. T-I 60, 119, 138. Kerner babysat while Pamela was at work. T-I 60, 119, 138. He also occasionally spent the night in the Ledge Street apartment. T-I 117, 137. Amy and M.L. testified that Kerner shared a room with M.L. T-I 119, 137. Pamela, however, testified that M.L. always slept in the living room with her. T-I 59.

According to Pamela, while she sometimes had trouble getting enough food for the family, her children did not go hungry and were not neglected. T-I 61, 73-74. Pamela testified that she was aware of M.L.'s dental problems and scoliosis, and that she sought appropriate dental and medical care. T-I 71. Amy and M.L. testified that Pamela consistently failed to ensure the children had food and adequate medical care. T-I 118, 126, 169-70. M.L. stated that her mother never took her to the dentist or doctor. T-I 170. She testified that she sometimes had no food five or six days of the week, that her mother only bought junk food, and that her mother made her eat food off of the floor and spit in her food. T-I 169, 184, 186-87.

According to M.L., Pamela rewarded her with food if M.L. physically assaulted Amy. T-I 188. Pamela also kept M.L. home from school, sometimes locking her in a room to prevent her from leaving. T-I 189. M.L. desperately wanted to move out of the house. T-I 171, 174-75, 190.

M.L. testified that when the family lived on Ledge Street and Kerner was babysitting, he gave her baths even though she did not need a bath. T-I 143. At one point during her testimony, M.L. stated that Kerner gave her baths two to three or three to four times a week. T-I 143, 156. At another point, she said that Kerner only gave her a total of two baths during the entire time frame. T-I 155. When asked by the police and a forensic

interviewer whether Kerner bathed M.L. when he babysat, Amy said she was not aware that Kerner ever gave M.L. a bath. T-I 129; T-II 217.

According to M.L., on two occasions, Kerner touched her vagina during a bath. T-I 141. She told Kerner that she could wash her own private area, but Kerner ignored her and kept his hand there for three to five minutes. T-I 145. M.L. claimed that one time, there were three or four men in the doorway of the bathroom watching her bathe. T-I 155. Each time, after touching her vagina, Kerner masturbated. T-I 148-53.

M.L. testified that Kerner stayed at the Ledge Street apartment for about six months. T-I 157. She claimed that he sometimes slept in her bed with her, touched her underwear near her vagina, and masturbated. T-I 158-60. While at one point M.L. testified that these acts occurred two to three times per week, she subsequently said she could only recall a total of three to four such events. T-I 160. M.L. stated that during the incidents, Kerner told her to be quiet and put his hand over her mouth. T-I 161.

According to M.L., another time at Ledge Street, when she was sitting on the couch between Kerner and her grandfather, each man touched her vagina and his own penis. T-I 164-65. M.L. claimed that her mother walked in while this was occurring and offered the men coffee, but made no comment about the sexual

abuse. T-I 165-66. She did not claim that the room was dark, or that the men made any effort to hide their conduct. M.L. said that a similar incident with Kerner and her grandfather occurred after the family moved to Ridge Street. T-I 167. The jury acquitted Kerner of all allegations involving Kerner and M.L.'s grandfather. T-II 285-87.

After the move to Ridge Street, Pamela told Amy to move out of the house. T-I 126. The family no longer had Amy's income, which made food more scarce. T-I 169. M.L., now in high school, was so desperate to get out of the house that she pretended to faint at school. T-I 171. When that did not work, M.L. told school officials about her mother's abuse, but all this accomplished was to anger her mother. T-I 171, 191.

M.L. then wrote a letter to George, whom she had not seen in years. T-I 83-84, 175. George was recovering from heroin addiction and had a new life. T-I 82. Nonetheless, he was happy to hear from M.L., and met her in Nashua in May of 2007. T-I 85, 174. A month later, M.L. threatened to kill herself while at school. T-I 87, 176. As a result, George brought her to live with him. T-I 88, 176.

The subsequent adjustment period was hard for everyone. T-I 98, 196. George was still dealing with his recovery; he had a young child with his new wife; M.L. did not get along with George's wife; and M.L. was jealous of his child. T-I 98, 196.

According to George, M.L. experienced "extremes of emotion," where she would fluctuate between being "flat" and angry. T-I 88-89.

George tended to M.L.'s obvious dental, medical and nutritional needs and decided to take her to counseling. T-I 89-90. One reason for this decision was that, about a month after M.L. moved into the home, she told George that Kerner had sexually abused her. T-I 91, 177. This disclosure prompted George to contact the Nashua Police. T-I 91. At that point, M.L. had not otherwise reported the alleged abuse. During her first interview with a Nashua investigator, she said only that she had been assaulted two times in the bathtub, even though the investigator repeatedly asked her if there were any other incidents of abuse. T-I 201-02. She did not provide more detail until another interview occurred about a year later. T-I 203.

The Deadlocked Jury

The testimony in Kerner's trial lasted less than a full day. Among the court's instructions was the assurance that the jurors could "[t]ake as much time as you reasonably feel you need to review the evidence and reach a unanimous verdict on each indictment or as short of time [sic] as you feel you need." T-II 277. After deliberating for just under two hours, the jury sent the following note to the court:

> We have had more than sufficient time to review the evidence and collaborate. We have heard and considered carefully each person's thoughts and views, as well as each testimonial [sic] and exhibit. We cannot come to an [sic] unanimous verdict and no amount of time will change that. We are a hung jury.

T-II 280.

The defense proposed that the court tell the jury to continue to deliberate toward a verdict. T-II 280-81. The trial court stated, "They said they're hung. I'm going to give them the deadlock jury charge." T-II 281. Defense counsel objected to the charge, which the court gave as follows:

> I've reviewed the note that the foreman has written, and I've reviewed it by [sic] counsel. And you say that you've had more than sufficient time, and I guess that I'm going to disagree with you and so will Counsel. You've only been at this for an hour. I've had juries deliberate, in all these 21 years for more than seven days, but you know, I think that the time that you spent is relatively short.
>
> And I want to instruct you further that any verdict you reach must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. And as I've told you before, any verdict you reach must be unanimous.
>
> It is also your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to 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 reexamine 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 the 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 the facts. Your sole interest is to ascertain the truth from the evidence that has been presented in this case. And as I indicated to you earlier, your verdict must represent the considered judgment of each juror.
>
> I'm going to request that you continue deliberations. I want to ask you to keep in mind that no other jury of 12 people hearing the same evidence and instructed the way you were would be any better equipped to decide the issues before the Court and to reach a unanimous verdict. And with that, I'd ask that you continue to deliberate.

T-II 281-83. The jury returned with verdicts just before 4:00 p.m., which was roughly 2½ hours after the instruction. T-II 283.

SUMMARY OF THE ARGUMENT

The trial court erred when it gave the jury a coercive deadlocked jury instruction. The instruction, which deviated substantially from the ABA model deadlocked jury instruction this Court has approved, suggested to the jury that it had to reach a verdict, and that the court would extend its deliberations for as long as it took to reach a verdict. Based on the totality of the circumstances, the improper instruction tainted the verdicts the jury reached and entitles Kerner to a new trial.

I. THE TRIAL COURT ERRED WHEN IT GAVE A COERCIVE DEADLOCKED JURY INSTRUCTION.

When a jury indicates that it is having difficulty reaching a verdict, the court "enjoys broad discretion" in deciding whether to discharge the jury, or fashion an instruction to guide further deliberation. State v. Alexander, 143 N.H. 216, 224 (1998)(citation omitted). However, the court cannot give an instruction that is "of a coercive nature that would improperly sway a jury to reach a unanimous verdict." Id. at 224 (quotation and citation omitted). In this case, the instruction the court gave, which deviated from the deadlocked jury instruction this Court has previously approved, was coercive, and it induced the verdict. Kerner is entitled to a new trial.

Courts recognize that "[a]fter the jury is deadlocked, it is particularly vulnerable to suggestions as to how it should proceed." State v. Campbell, 294 N.W.2d 803, 813 (Iowa 1980). "It requires no special insight to see that there is a greater coercive potential when an instruction is given to a jury that believes itself deadlocked." State v. Pollick, 531 N.W.2d 159, 164 (Mich. 1995); see also State v. Weidul, 628 A.2d 135, 136 (Me. 1993)("An erroneous instruction to a potentially deadlocked jury cuts to the heart of the criminal process and any convictions secured following such an instruction are highly suspect."). For this reason, many courts have adopted a deadlocked jury instruction based on a model charge endorsed by

the American Bar Association, "because it is not coercive and its use would therefore eliminate the 'volume and complexity of litigation generated by the Allen charge. . . .'" United States v. Lloyd, 515 F.3d 1297, 1302 (D.C. Cir. 2008)(quoting United States v. Thomas, 449 F.2d 1177, 1186 (D.C. Cir. 1971)); see also State v. Watkins, 660 P.2d 1117, 1121 (Wash. 1983)(ABA instruction designed to "eliminate the possibility of prejudice attendant upon the giving of an 'Allen' instruction")(quotation omitted).**

This Court adopted the ABA instruction in State v. Jordan, 130 N.H. 48, 49-50 (1987). In so doing, the Court rejected New Hampshire Criminal Jury Instruction 1.29-a (N.H.B.A. 1985), and endorsed a slightly modified version of Instruction 1.29 (N.H.B.A. 1985), which itself was derived from the recommended ABA instruction. Id. The Jordan Court rejected Instruction 1.29-a because "it can be read as focusing on reasonable doubt as the subject of likely jury disagreement, and as assuming the odd juror will probably be the one who entertains a reasonable doubt

---

** In Allen v. United States, 164 U.S. 492, 501 (1896), the Supreme Court upheld an instruction to a deadlocked jury that, inter alia, directed the jury to decide the case if they "conscientiously could do so"; listen "with a disposition to be convinced"; and instructed a dissenting juror to "consider whether his doubt was a reasonable one which made no impression on the minds of so many. . . ." In Thomas, the court, in adopting the ABA instruction, rejected as unduly coercive the trial court's instruction that, in part, informed the jury that the court has a "substantial backlog of work, and to spend another day before another jury retrying this case just doesn't make sense to me," and told them to see if they could "decide to come to a verdict, think about it overnight individually." 449 F.2d at 1181. "[W]hile there is need to expedite the work of the courts, this cannot be at the expense of the call of conscience." Id. at 1184.

when others do not. [It is also] objectionable for the further reason that it can be read as a subtle modification of the standard reasonable doubt charge. . . ." Id. at 49.

In this case, the court's deadlocked jury charge was six paragraphs long. T-II 281-83. The middle four paragraphs are nearly identical to the ABA charge adopted in Jordan. Compare T-II 281-83 with Jordan, 130 N.H. at 49-50. The first and last paragraphs, however, are not included in the Jordan/ABA charge.

In the first paragraph, the court stated:

> [Y]ou say that you've had more than sufficient time, and I guess that I'm going to disagree with you and so will Counsel. You've only been at this for an hour. I've had juries deliberate, in all these 21 years, for more than seven days, but you know, I think the time that you spent is relatively short.

T-II 281-82.

In the last paragraph, the court stated:

> I want to ask you to keep in mind that no other jury of 12 people hearing the same evidence and instructed [sic] the way you were and argued to you [sic] in the way you were by able Counsel in this case would be any better equipped to decide the issues before the Court and to reach a unanimous verdict.

T-II 283. These additions to the ABA instruction rendered the charge, as a whole, coercive.

With regard to the instruction in the last paragraph, many courts have disapproved of instructions implying that no other

jury could do a better job of resolving the case. See, e.g., United States v. Spann, 997 F.2d 1513, 1519 (D.C. Cir. 1993)(identifying "no future jury would ever do a better job" instruction as coercive)(Wald, J., concurring); United States v. Norton, 867 F.2d 1354, 1366 (11th Cir. 1989)(instruction that "no future jury would be better situated" to decide the case is coercive); Jones v. United States, 946 A.2d 970, 975 (D.C. 2008)("no future jury would be better situated" instruction is coercive); United States v. Chermerie, 520 F.2d 325, 330 (5th Cir. 1975)(instruction that no other jury would be better able to understand the case is coercive); People v. Allen, 302 N.W.2d 268, 271 (Mich. App. 1981)(instruction that no future jury would be more reliable or impartial goes well beyond ABA charge). "Statements of this sort reflect the judge's assessment that the factual issues bear relatively easy resolution, and pressure jurors, who in their own endeavors have not found it so, to come to some result at all costs." Thomas, 449 F.2d at 1183.

This Court has experience with the "no other jury could do any better" type of instruction that the court here gave in the last paragraph of its deadlocked jury charge. In State v. Silva, 142 N.H. 269, 274 (1997), the court instructed the jury, in part, that if it was "unable to render a unanimous verdict, the Court will declare a mistrial, which will involve the case being retried at a later date before a different jury panel. There is

no reason to believe that a new jury after retrial will have any evidence different from that which has been presented to you or that new jury will in any manner be able to better decide the case than you." The Court deemed it "preferable for a trial judge to use only the wording of the recommended charge in Jordan," but did "not find the language to be of a coercive nature that would improperly sway a jury to reach a unanimous verdict." Id.

The Silva Court's conclusion was presumably premised on a reading of that instruction in its entirety. Two other passages in the Silva instruction deviated from the ABA language, but in a way that would have tended to make the instruction, as a whole, less coercive. First, the court in Silva began this part of its instruction by informing the jury that it did not "have an obligation to decide th[e] case. . . ." 142 N.H. at 274. Second, the court ended the instruction by reminding the jury that it must determine "whether the State has met its burden to prove the elements of the crimes . . . beyond a reasonable doubt. Keep in mind that the burden of proof rests solely with the State." Id. By beginning with a statement that it was acceptable for the proceeding to end in a deadlock, and ending with a discussion of the burden of proof and reasonable doubt, the trial judge balanced the negative impact of the "no future jury" instruction with others specifically empowering this jury

to decide the case, if at all, strictly in accordance with the burden of proof.

Here, unlike in Silva, the court did not link its comment that "no other jury . . . would be any better equipped to decide the issues" to either the burden of proof, or a statement that a deadlock was an acceptable outcome. In addition, the court began its instruction with a separate, coercive comment.

During its original instructions, the court told the jury that it could deliberate for as long or as short as it wished, implying that it was the jury's province to decide the appropriate length of its deliberations. T-II 280. The first paragraph of the court's instruction, however, effectively revoked this grant of independence. The jury's deliberations followed a trial in which the testimony took about four hours. T-I 220 (indicating that the parties rested their cases before 3:08 p.m. on the first day of trial). After its deliberations, which lasted about two hours, T-II 280, the jury reported a deadlock that it was unable to resolve, and stated it was a hung jury. T-II 280. The court, by telling the jury that it had seen other juries deliberate for several days, and that it had not deliberated long enough, suggested that the court would extend the deliberations until it reached a verdict. Moreover, the court's comment that the jury had "only been at this an hour," T-II 282, devalued the jury's efforts to that point, which, in

fact, had involved close to two hours of deliberation and a full review of the evidence. T-II 282.

In a similar case, the D.C. Circuit reversed based on the trial court's erroneous deadlocked jury instruction. United States v. Berroa, 46 F.3d 1195 (D.C. Cir. 1995). After a trial that lasted less than two days, the jury deliberated for three to four hours and sent a note stating it was hung. Id. at 1196. The court gave the following instruction:

> [Y]ou may think you're hung, and you may think that this is the end of it. But long experience has shown me that you have not deliberated long enough for someone to reach the conclusion that you are hung, that you must be hung, that you cannot possibly reach a verdict. . . .
>
> The 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 towards reaching an agreement. Each of you-if you can do so without violence to 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 a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of the other jurors, yet, you should examine the questions submitted to you with a candor and with a proper regard and deference to the opinions of each other.

> You should consider that it is desirable that the case be decided. You are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial, and more competent to decide it or that more or clearer evidence will be produced on one side or the other in any future trial.
>
> With this view, it is your duty to decide the case, if you can conscientiously do so. You are not partisans. You are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Id. The jury returned a guilty verdict approximately ninety minutes later. Id.

The D.C. Circuit characterized the court's remarks and instructions as an intentional departure from the ABA standard it had adopted in Thomas, which is the same instruction this Court adopted in Jordan. Id.; 130 N.H. at 49-50. The Berroa Court noted that deviations from the standard instruction trigger "'the uncertainties of gauging various Allen-type renditions in terms of the coerciveness of their impact,'" and "'cause a drain on appellate resources'" as the "'inevitable aberrations'" inevitably precipitate more and more appeals." Berroa, 46 F.3d at 1197 (quoting Thomas, 449 F.2d at 1184-86). The court deemed the departures from the standard instruction "presumptively coercive." Id. at 1198. See also Goldsberry v. State, 957 A.2d 1110, 1123 (Md. App. 2008)("[S]ubstantial deviations in substance

from the approved pattern instructions mandate a reversal and a new trial."); Pollick, 531 N.W.2d at 159 (holding that substantial departures from the ABA instruction are reversible error).

In this case, the trial court's deviations from the Jordan instruction were substantial. As in Berroa, the court suggested that the jury had to reach a verdict. In addition, the court effectively nullified its earlier instruction that it could deliberate for as long or as short as it wished. Though the jury deliberated for another two hours before reaching a verdict, and returned a split verdict, neither of these factors defeat the instruction's coercive impact. See Berroa, 46 F.3d at 1198 (verdict returned ninety minutes after charge tends to show coercive effect); State v. Martin, 211 N.W.2d 765, 768 (Minn. 1973)(noting split verdict may indicate compromise induced by improper deadlock charge). Kerner is entitled to a new trial.

CONCLUSION

WHEREFORE, Mr. Kerner respectfully requests that this Honorable Court reverse his convictions and remand his case for a new trial.

Mr. Kerner requests fifteen minutes of oral argument before a full panel of this Court.

Respectfully submitted,

By _____

David M. Rothstein, NH Bar #5991
Deputy Chief Appellate Defender
NH Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, this 9th day of March, 2010, to:

Criminal Bureau
Attorney General's Office
33 Capitol Street
Concord, NH 03301

_____
David M. Rothstein

DATED: March 9, 2010