

IN THE COURT OF APPEALS OF MARYLAND

No. 81

September Term, 1994

PAUL RENARD BISHOP

v.

STATE OF MARYLAND

Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker
McAuliffe, John F.
(retired, specially assigned)

JJ.

Dissenting Opinion by Chasanow, J.
in which Raker, J. joins

Filed: January 22, 1996

I respectfully dissent. In the instant case, the second jury poll established that the trial judge was correct in his assumption that when juror number four responded to the jury poll "reluctantly, yes," the juror "really wasn't reluctant and that when he said yes, he meant yes." There is no reason why the judge should be reversed merely because he conducted a second poll of the jury without first sending them back to the jury room.

LATTISAW V. STATE

In *Lattisaw v. State*, 329 Md. 339, 619 A.2d 548 (1993), after a verdict of guilty was returned as to both counts, Lattisaw requested that the jury be polled. The clerk of the court asked each juror whether his or her individual verdict was the same as the verdict of the jury as a whole. All responded, "yes, it is," except for juror Patricia Kiefer, who replied, "yes, with reluctance." A bench conference was held and defense counsel pointed out for the record that the juror was visibly upset and shaking her head as she responded. The prosecutor expressed no objection to this proffer. The trial judge, believing he had no discretion to probe into the meaning of the juror's response, simply enrolled the verdict. This Court reversed, holding that, under the totality of circumstances, the juror's response was ambiguous and the trial judge had abused his discretion in failing to "cure the ambiguity." *Lattisaw*, 329 Md. at 346-47, 619 A.2d at 551-52. The Court also suggested that, if a juror's response is

ambiguous, the judge should cure the ambiguity by either sending the jury back to the jury room for further deliberations or by further interrogating the juror in a non-coercive manner. If, however, the juror's response, under the totality of circumstances, is determined by the judge not to be ambiguous then the judge may accept the verdict.

The instant case is distinguishable from *Lattisaw*. The judge, in the instant case, assumed that the response was ambiguous and cleared up any possible ambiguity in a non-coercive manner by having the clerk again poll the jury. When a jury is polled and one juror responds "with reluctance, yes" or something similar, the trial judge may get some indication from the juror's tone, manner of answering and demeanor that the juror is expressing uncertainty about the decision or that the juror is merely expressing reluctance or unhappiness with having to render the decision.

The law in this area was well summed up in an annotation, "*Juror's Reluctant, Equivocal, or Conditional Assent to Verdict, On Polling, as Ground for Mistrial or New Trial in Criminal Case*," 25 A.L.R.3d 1149 (1969, 1995 Cum. Supp.). That annotation, which was cited with approval in *Lattisaw*, states:

"It has been recognized that where the juror indicates merely some degree of reluctance or reservation about the verdict, the proper course of action depends largely upon the discretion of the trial judge; that whether the juror has given his free and voluntary assent, or whether his reluctance to assent is so strong that it is extremely unlikely that

he will ever voluntarily agree to the verdict, must be determined by the trial judge not only from the exact words used by the juror, but from all the circumstances, including the juror's expression and demeanor; and that in the absence of extraordinary circumstances compelling a conclusion to the contrary, the determination of the trial judge will not be disturbed on appeal." (Footnote omitted).

25 A.L.R.3d at 1151-52.

IF THE JUROR'S RESPONSE WAS AMBIGUOUS THE TRIAL JUDGE TOOK PROPER ACTION TO SECURE AN UNAMBIGUOUS RESPONSE FROM THE JUROR

The trial judge in the instant case, although not convinced that the juror's response was ambiguous, assumed that it was and took appropriate corrective action to have the juror render an unambiguous verdict. If a juror's response to the jury poll is deemed ambiguous, then the trial judge has the discretion to take some non-coercive action to attempt to secure an unambiguous response. See *Lattisaw, supra*.

When a juror gives an ambiguous response to a jury poll, two responses by the trial judge were suggested by dicta in *Lattisaw*.

We said:

"To cure the ambiguity in Kiefer's verdict, the trial court may have employed either of two options. The safest course would be for the court to send the jury out for further deliberations in accordance with Maryland Rule 4-327(e), *supra*, with the simple instruction that their verdict must be unanimous. Alternatively, the trial court may attempt to clarify the juror's ambiguous response by questioning the juror directly. In doing so, however, the court must be

careful not to influence or coerce the juror's decision during the course of the questioning.

* * *

We believe, however, that a limited exchange for the sole purpose of clarifying a juror's ambiguous response may be productive in averting unwarranted further deliberation and delay, where the juror in fact concurs with the verdict once the ambiguity is resolved. In *State v. Frederick*, 783 S.W.2d 469 (Mo. App. 1990), for example, the court wrote:

`Questioning about a juror's verdict by a trial judge in open court "need not be `inherently' coercive." The reviewing court must distinguish between a court's effort to eliminate confusion and its attempt to compel an answer. The trial court errs if it continues to question a juror only after that juror's answers clearly evince disagreement with the verdict.' [(Citations omitted).]

Id. at 472, quoting *State v. Jackson*, 522