

When is a unanimous verdict not unanimous?

By Donald P. Eckler

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When jury trials start again in federal and state court and whether in person, virtually (I hope not), or on a hybrid basis (I am withholding judgment), they will begin with two recent decisions, one from the 7th U.S. Circuit Court of Appeals and one from the 1st District Appellate Court, that provide color and context to the potential of juror coercion and how to avoid it.

As the U.S. Supreme Court held in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), and the Illinois Supreme Court affirmed in *Kakos v. Butler*, 2016 IL 120377, the right to a jury trial in a criminal matter under the Sixth Amendment to the federal Constitution and the right to a jury trial in a civil matter under Art. I, Sec. 13 of the Illinois Constitution, respectively, require that a jury’s verdict be unanimous. However, achieving unanimity can be easier said than done as shown recently in *United States v. Banks*, 982 F.3d 1098 (7th Cir. 2020), and *Pineiro v. Advocate Health*, 2020 IL App (1st) 191638-U.

In *Banks*, the defendant was charged with conspiracy to rob a postal facility where she worked. After a five-day trial, the jury returned a verdict of guilty at 8:45 p.m. following four hours of deliberations. When polled at the request of defense counsel, the following colloquy occurred:

The court: Juror No. 32, is this your verdict as to Ms. Banks?

Juror No. 32: Forced into.

The court: Is this your verdict?

Juror No. 32: I suppose so.

The court: Is it your verdict that she is guilty on both Counts One and Two?

Juror No. 32: I don’t know how to answer that.

The court: I’m asking you to answer that at this time.

Juror No. 32: I feel like I need more time.

The court: Let me go finish the poll, and then I’ll come back to you.

The poll was completed, and it was decided that the jury needed to be sent back with instruction to deliberate further, but that instruction did not include a reminder of the unanimity instruction to “not to surrender their honest belief.” The jury did deliberate further, and 29 minutes later, the jury returned a verdict of guilty, and the poll confirmed the unanimity this time.

In reversing the entry of guilt, Chief Judge Diane S. Sykes, writing for the panel, held the combination of the failure to include the reminder not to surrender their honest belief, the late hour of the proceedings and the speed of the renewed deliberations all indicated coercion. The court stated, “The use of a supplemental instruction after a jury poll reveals division can help guard against an impermissibly coercive atmosphere. We have not mandated a specific jury instruction in this situation, and we do not do so today. But a robust cautionary instruction can lessen the pressure on a dissenting juror.”

In *Pineiro*, following a three-week complex medical malpractice trial, there was a similar issue, but an opposite result. The jury deliberated for four hours the first day and halfway through the second day sent a note that they were deadlocked 11-1, followed by a note from the dissenting juror saying that “I’ve reached my decision and the 11 won’t rest it, yet continue to try and sway my decision, at what point can this end?”

The court gave Illinois Pattern Instruction 1.05 as suggested by *People v. Prim*, 53 Ill.2d 62 (1972). After reconvening, the juror sent another note stating that the deliberations were affecting her health. The court then, after consulting with counsel, read a second *Prim* instruction as well as all of the jury instructions again in order not to emphasize the cautionary instruction about the jury’s duties.

Several hours later the jury returned a unanimous defense verdict, and upon polling of the jury when the court reached the juror who had previously dissented from the other jurors, she stated that the defense verdict was not her verdict, which was followed by:

The court: Would you explain? Was that when you signed the verdict form your verdict?

Juror [3]: Yes.

The court: And is it now your verdict?

Juror [3]: No.

The court: So[,] since the time that you signed the verdict form, you’ve changed your mind?

Juror [3]: Yes, your Honor.

The court: OK. Have a seat.

When the other jurors confirmed their verdict, the court consulted with counsel and brought the jurors back in, gave them clean verdict forms and charged them to continue to deliberate. About 90 minutes later the jury returned a defense verdict, which was confirmed by the poll.

The plaintiff’s various motions for mistrial made during the deliberations having been denied and the post-trial motion also denied, the appeal followed based principally on the contention that the juror was coerced into a defense verdict and that the trial court “isolated Juror 3 by questioning her immediately after she dissented from the verdict, instructing her to stand, and asking her four questions not posed to any other juror.”

In finding that the procedure utilized by the trial court was proper, the court stated, “We find that Juror 3 was not improperly isolated by being questioned immediately after she dissented from the jury verdict. ... The trial court succinctly confirmed that Juror 3 had changed her mind and then the court continued to poll the rest of the jury. The trial court’s procedure was neutral, efficient, and consistent with the holding in *Freeman*, 2017 IL App (1st) 153644, Para. 65-66.”

These cases demonstrate that care should be taken by the court and counsel in handling such situations to ensure that a verdict is truly unanimous.

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