

Friday, October 3, 2008

**Poll the jury.**

Photo from website of U.S. District Court (W.D. Mi.). Before going to trial with or without a jury, it is critical to have a good trial checklist. For jury trials, a critical part of that checklist is to have the jury polled in the event of an adverse jury verdict. Every criminal defendant has the right to require that s/he not be convicted unless his or her request is fulfilled to have each juror asked if the foreperson's verdict is the individual juror's verdict. See, e.g., *Maloney v. Maryland*, 17 Md. App. 609, 304 A.2d 260 (1973). Last year, fellow Trial Lawyers College attendee Mark Bennett wrote of a mistrial that would have been missed without a polled jury: "This morning the Houston Chronicle had an article about a health care fraud jury trial in federal court in which, when the jury came back with a guilty verdict, defense lawyer Joel Androphy ... asked that the jury be polled. Judge Werlein polled the jury, and one woman said, 'That's not my verdict.' Joel moved for a mistrial, which was granted. The accused will get another trial - not right away, probably, but, as Percy Foreman used to say, a continuance is as good as an acquittal, for as long as it lasts." Commenting on Mark's posting, another fellow Trial Lawyers College attendee, David Tarrell, added this mini-victory from a jury polling: "[T]he lawyer asked for it, a juror hesitated and then said 'No, that's not my verdict.' The defendant, who was obviously not cuffed during the trial, was now in handcuffs awaiting the verdict. The judge then sent the jury back and when they came back out, their verdict was unanimous to convict. The defense lawyer's motion for a mistrial was overruled by the judge, but it was a 'slam dunk' on appeal, given the juror's hesitation and the fact that she changed her mind only upon seeing the man cuffed between 2 deputies. It's a lesson I'll never forget, but I don't think it's requested often enough." Why would a lawyer not have a jury polled in a criminal case? Yesterday, Maryland's intermediate appellate court affirmed a conviction where the defendant alleged inconsistent jury verdicts (the Court of Special Appeals found no inconsistency) where he was convicted of child abuse but acquitted on assault and fourth degree sex offense counts. At least from the way the appellate court recounts the entry of the jury verdict, no jury polling was requested (although the Deputy Clerk continued the practice of inserting archaic language into the proceeding: "Ladies and Gentlemen of the Jury, harken to your verdict as the Court hath recordeth it. Your Foreman sayeth."): In our case, the appellant clearly did nothing by way of objecting to the reception of the verdicts or by way of asking that the jury be sent back to resolve any alleged inconsistency in its verdicts. The entire exchange as the jury came back into the courtroom was as follows: THE DEPUTY CLERK: Ladies and Gentlemen of the Jury, are you agreed of your verdict? THE JURY: Yes, we are. THE DEPUTY CLERK: Who shall say for you? THE JURY: Foreman. THE DEPUTY CLERK: Mr. Foreman, how do you find in the Criminal Trial 05-0520X, State of Maryland versus Darren Joseph Tate, Count One: Do you find the Defendant not guilty or guilty of child abuse by a family member? THE FOREMAN: Guilty. THE DEPUTY CLERK: Count Two: Do you find the Defendant not guilty or guilty of fourth degree sexual offense? THE FOREMAN: Not guilty. THE DEPUTY CLERK: Count Three: Do you find the Defendant not guilty or guilty of second degree assault? THE FOREMAN: Not guilty. THE DEPUTY CLERK: Ladies and Gentlemen of the Jury, harken to your verdict as the Court hath recordeth it. Your Foreman sayeth, in Criminal Trial 05-0520X, the Defendant is guilty of child abuse by a family member, not guilty of child abuse or fourth degree sexual offense and not guilty of second degree assault. And so say you all? THE JURY: Yes. THE COURT: Thank you very, very much, Ladies and Gentlemen. Have a nice evening. We won't call you again for three more years. Thank you. THE JURY: Thank you. THE COURT: Anyone need a ride to their car or anything? A JUROR: Is the shuttle still running. It's 6:00 o'clock. THE BAILIFF: It runs until 7:00. A JUROR: Okay. THE COURT: Thank you very much. Court is going to order a Presentence Investigation. I'll schedule this for sentencing on December the 30th. *Tate v. Maryland*, \_\_\_ Md. App. \_\_ (Oct. 2, 2008). Writing for Tate's unanimous three-judge panel, Judge Charles E. Moylan, Jr. underlined: "In our case, the appellant clearly did nothing by way of objecting to the reception of the verdicts or by way of asking that the jury be sent back to resolve any alleged inconsistency in its verdicts." Clearly, Judge Moylan could not have meant that defendant Tate risked being convicted on either of the two counts for which the jury had acquitted him. After all, it is "settled that once the trier of fact in a criminal case, whether it be the jury or the judge, intentionally renders a verdict of 'not guilty,' the verdict is final and the defendant cannot later be retried on or found guilty of the same charge. And, contrary to one of the arguments advanced by the State in the present case, it is not necessary that final judgment be entered on the docket." *Pugh v. Maryland*, 271 Md. 701, 706, 319 A.2d 542 (1974). Perhaps Judge Moylan meant that the only way for defendant Tate to have set up a sufficient inconsistent verdict argument would have been to have waived his right to the final verdict, and to have given the jury a chance to re-deliberate. Do you know of any good reason not to poll a jury that returns a guilty verdict? Jon Katz ADDENDUM: I posted this blog entry to two criminal defense lawyers' listservs, asking if anyone knows of any reason not to poll a jury. Around five answered, and none gave a good reason not to poll the jury, except for the one respondent who said the only reason is to stop hearing the word "guilty". Thanks to those who responded, including the respondent drawing attention to the following Supreme Court case on the double jeopardy issue discussed in this blog entry: *Smith v. Massachusetts*, 543 U.S. 462 (2005).

Posted by Jon Katz in Criminal Defense at 00:00