

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL R. LYELL,

Defendant-Appellant.

UNPUBLISHED

May 4, 2001

No. 214100

Wayne Circuit Court

Criminal Division

LC No. 98-000124

Before: Zahra, P.J., and Hood and McDonald, JJ.

Hood, J., Dissenting

I must respectfully dissent. While I agree with the majority's conclusion that the trial court committed error when it continued to poll the jury after a juror indicated she did not agree with the announced guilty verdict, I disagree as to whether the court's error requires reversal.

The majority's conclusion, in my opinion, is contrary to our Supreme Court's rationale in *People v Wilson*, 390 Mich 689, 690-691; 213 NW 2d 193 (1973). While *Wilson* involved a specific comment of the trial court in relation to the numerical division, the ruling of the Court was not limited to situations where the court ascertains the numerical division *and* comments on it. In fact the language used by the Court specifically indicated that "*whenever* the question of numerical division is raised by the bench in the context of an inquiry into the progress of deliberation", it can have a coercive effect. *Id.*

The continued polling of a jury, in and of itself can be coercive, and the trial court's conduct in this case was coercive. The court improperly ascertained the numerical division when it failed to discontinue the polling when the tenth juror indicated disagreement with the verdict as read. The trial court's conduct in continuing to poll the jury did not serve any purpose other than to ascertain where the remaining jurors stood in relation to reaching a unanimous verdict. As soon as the dissenting juror indicated that she was not in agreement, there was no reason for the trial court to make any further inquiry. Doing so was coercive, because it highlighted that there was an eleven to one split in favor of conviction, and further highlighted that juror Becker was the lone holdout for acquittal. The failure to stop polling also put undue pressure on the dissenting juror by informing the entire courtroom not only of her position, but the fact that she alone held it. The trial court also commented that, although it was not urging anyone to give up their ideas, it wanted the jury to try to reach a verdict. The trial court did not return the jurors to their deliberations without comment. Under the circumstances, I would conclude that the trial

court's clear error was coercive. Where there is "some" coercive effect, there is error. *People v Bufkin*, 168 Mich App 615, 617; 425 NW2d 201 (1988).

I must also respectfully dissent from the majority's conclusion that the trial court's conduct did not deny defendant a fair trial. I agree with the majority that a party who challenges a judge based on bias or prejudice bears a heavy burden of overcoming the presumption of impartiality. *People v Wells*, 238 Mich 383, 391; 605 NW2d 374 (1999). Defendant is, however, entitled to a neutral and detached magistrate, whose conduct does pierce the veil of impartiality. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 977 (1996).

My review of the record leads me to conclude that defendant was denied a fair trial. In front of the jury, the trial court called defense counsel juvenile, and referred to him as a child. It told defense counsel to act like an adult lawyer, and held him in contempt. In addition, several objections of defense counsel were not acknowledged or ruled on, and counsel was repeatedly interrupted by the court, even though the prosecutor had raised no objections. In some respects, the court appeared to assume the role of prosecutor. The trial court assisted the prosecutor's case in numerous instances. For example, the trial court prompted the prosecutor to ask a question that he had obviously been avoiding because he believed it called for a hearsay answer. The trial court later instructed the prosecutor to ask a question that he had already withdrawn in the face of an objection. The judge's questioning of the victim and other witnesses was not always neutral and detached. The exchanges took place in front of the jury, and included interruptions, discussions and disparaging remarks. These actions could not have been other than distracting, particularly during cross examination of the victim. I would conclude, after a review of the record, that the excessive interference of the trial court in examining witnesses, repeatedly rebuking defense counsel, making disparaging remarks directed at defense counsel, and demonstrating marked impatience in the presence of the jury, showed an attitude of partisanship, which resulted in the denial of a fair trial. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992).

I would reverse and remand for a new trial.

/s/ Harold Hood