

**IN THE COURT OF APPEALS 05/07/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-KA-00103 COA**

**AARON CARAY TRAVIS**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

EDWARD BLACKMON, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: ED PETERS; BOBBY DELAUGHTER

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI  
DEPARTMENT OF CORRECTIONS

BEFORE BRIDGES, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Aaron Travis was convicted of aggravated assault in the Circuit Court of Hinds County. He contends that a mistrial or new trial should have been granted when, upon polling of the jury, one of the jurors indicated that she did not agree with the verdict. We reverse. Because of the nature of the issue raised on appeal, we discuss only those facts relating to the unanimity of the jury verdict.

After the guilty verdict was returned, the jury was polled. The judge asked each individual juror whether the verdict which he read was in fact the verdict for which they had voted. He told them that they need to respond "yes" if they voted for the verdict and "no" if they did not. The first three jurors responded "yes."

JUROR NO. 4. No.

THE COURT: You voted no to this verdict?

JUROR NO. 4: Well, we all agreed.

THE COURT: Let me make something clear. There was an instruction which says that unless all 12 of you agree upon a verdict, then there is no verdict. So am I to understand that there is no agreement.

JUROR NO. 4: We all agreed.

THE COURT: Then let me ask my question again. Can you tell me whether or not--let me tell you what I just read. I just read, "we, the jury, find the Defendant guilty as charged." Did you vote for the verdict?

JUROR NO. 4: Yes.

After completing the poll of the remaining jurors, the following exchange took place:

THE COURT: Anything further?

MR. DeLAUGHTER [assistant district attorney]: No, sir.

MR. BARNETT [defense counsel]: Your Honor, I would submit that Juror Number 4 when she first answered, she said, no, that was not her verdict and then she attempted to

explain her answer by saying we all agreed. It makes it rather confusing to the Defendant as to whether or not this is her verdict. Of course, we would like to think that it is not her verdict since she first said that it was not her verdict.

Would it be in conformity with the rules if I ask her a couple of questions?

THE COURT: Request is denied. Is there anything further?

MR. DeLAUGHTER: No, sir.

The court denied the defense's motion for a mistrial which was based upon juror number four's responses to the court's questioning. Travis contends that juror number four's responses indicated that substantial doubt existed regarding whether she had agreed with the guilty verdict. Travis maintains that the verdict potentially was not unanimous.

Our state constitution does not state that a unanimous verdict is required in criminal cases. The requirement of unanimity is clear, but it is found circuitously.

The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

Miss. Const. art. III, § 31. Similar language was used in earlier Mississippi constitutions. Early in the state's existence the court explained the method of interpreting the constitutional right of trial by jury.

It is a rule that when a statute or the constitution contains terms used in the common law, without defining particularly what is meant, then the rules of the common law must be applied in the explanation. The framers of the constitution must have meant, therefore, to secure the right of trial by jury as its existence in England, either by statute or common law, and the constitution, in the absence of all subsequent legislation, would have secured to the citizen this mode of trial and all its incidents not incompatible with the republican form of government.

*Byrd v. State*, 2 Miss. (1 Howard) 163, 177 (1834). The issue in *Byrd* was whether there must be twelve jurors, and the answer derived from the common law was that there must be. *Id.* The right to trial by jury in criminal cases, as understood and applied at common law, also required a unanimous verdict. *Markham v. State*, 209 Miss. 135, 137, 46 So. 2d 88, 89 (1950). Thus eleven jurors out of twelve is not enough.

Because jurors are often highly susceptible to a judge's influence, a judge "cannot be too careful and guarded in his language and conduct in the presence of the jury." *Beyersdoffer v. State*, 520 So. 2d 1364, 1366 (Miss. 1988) (citation omitted). Once juror number four responded "no" to the poll, the judge should not have attempted to clarify his response.

At the moment Juror Martin responded "No, sir" to the polling of the jury, the judge should have declined to continue and sent the jury back for further deliberations. *Morgan v. State*, 370 So. 2d 231, 232 (Miss. 1979).

*Beyersdoffer*, 520 So. 2d at 1366. To probe the meaning of a juror's negative response in open court injects the judge and potentially counsel into the deliberations that are supposed to occur only among the jurors. There was nothing ambiguous about the trial court's initial question, to which three jurors had already answered "yes." Nor was there uncertainty about juror number four's original "no." Answers to the judge's questions created an ambiguity, as the answers could be read as revealing the juror's reluctance to vote guilty, but a decision to do so anyway. However, the juror's meaning "should have been resolved by further deliberation and, if necessary, by additional instructions." *Id.* (citations omitted). By engaging the juror in this dialogue, the trial judge brought the potential pressures of open court into the decision-making that is to occur in private. The supreme court has held that the only proper and immediate response is to send the jurors back to deliberate.

We cannot conclude from the record that a unanimous verdict was reached. We consequently hold that this case must be tried anew. *Id.* (citing *Morgan*, 370 So. 2d at 232). We reverse the judgment and remand for a new trial.

**THE JUDGMENT AND CONVICTION OF THE HINDS COUNTY CIRCUIT COURT FOR AGGRAVATED ASSAULT IS REVERSED AND REMANDED FOR A NEW TRIAL. COSTS ARE ASSESSED TO HINDS COUNTY.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.**