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Jane Pryback, "Judge in Jury Room is Found to be Harmless Error"

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showing disruptive behavior during a supervised visit to Chowen House, Mary A Hennepin County District Court judge ruled that while Jeffrey's professional that she didn't contact DeYoung's physicians to verify Chowen House's reports Dan Heilman can be reached at heilman1028@gmail.com.

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Judge in jury room is found to be a harmless error

By Jane Pribek
Special to Minnesota Lawyer

Per longstanding precedent, there's no figurative welcome mat for judges in front of jury rooms.

But the Minnesota Supreme Court nonetheless found harmless error when a District Court judge entered a jury room, in a July 13 decision affirming the two-year-old conviction of Jack Willis Nissalke for first-degree premeditated murder.

Judge Robert Benson's entry into the Fillmore County jury room to deliver corrected verdict forms and the trial exhibits a few minutes after the sworn bailiffs escorted the jury into the jury room did not constitute error requiring automatic reversal, the split high court held in *State v. Nissalke*, because Benson's conduct didn't invade the integrity of the jury's deliberative process or the independent role and function of the jury during its deliberations.

Nissalke appealed to the high court, citing numerous errors but focusing principally on Benson's entry into jury room.

The decision

Nissalke, relying upon *State v. Mims*, 306 Minn. 159, 165, 235 N.W.2d 381 (1975) and *Brown v. State*, 682 N.W.2d 162, 167-68 (Minn. 2004), argued that any communication relating to the case occurring during the judge's uninvited entry into the jury room during deliberations, and in the absence of defendant and counsel, constitutes reversible error, entitling him to a new trial.

The high court affirmed.

Writing for the majority, Chief Justice Lorie Gildea distinguished the events of Nissalke's trial from *Mims* and *Brown*.

In *Mims*, the judge went into the jury room four hours after deliberations began specifically to inquire about the jury's prospects of reaching a verdict, and he remained in the room as the jurors voted on the question of how long deliberations would proceed. Similarly in *Brown*, the judge went into the jury room and questioned the jury as to whether there was "realistically ... any possibility" of them reaching a verdict that evening.

Gildea wrote: "By contrast, the judge's entry in this case, while undoubtedly improper, does not constitute an interference with the jury's independent decision-making authority. The judge went into the jury room only a few minutes after the jury left the courtroom and after telling the jury that he would be coming in with the corrected verdict forms."

While in the jury room, and accompanied by a clerk and two bailiffs, Benson informed the jurors they would have to return all verdict forms. He also answered two questions, regarding the availability of videotaped testimony and access to the transcript. The majority opinion called the exchange "generic and not about specific pieces of evidence."

The high court went on to hold that the error was harmless because Benson had provided Nissalke with an opportunity to have a record made of his delivery of corrected verdict forms. And when the court offered to bring the jurors back into court for a reading of the corrected verdict forms, Nissalke's counsel replied, "That's not necessary." Afterward, the court informed the parties of its intent to walk into the jury room with his clerk to deliver the corrected verdict forms, and neither Nissalke nor his counsel objected.

Justice Alan Page dissented, joined by Justices Paul Anderson and Helen Meyer.

Page wrote: "[A] reasonable inference to be drawn from the fact that jurors asked the judge two questions while the judge was in the jury room is that the jury had already begun deliberations. Although the court characterizes the questions asked as 'generic and not about specific pieces of evidence,' the questions were not generic. The questions concerned the jury's ability to get a videotape of witnesses' testimony as well as the official transcript or a copy of the official transcript. These questions are typical of questions asked by deliberating juries."

Page additionally opined, "[T]he *Mims* rule is clear, longstanding and effective."

Reaction from counsel

Tom Gort, a former assistant Winona County attorney and now with Olmstead County, prosecuted Nissalke at trial and in the appeal as well. He acknowledged the judge's jury room entry was unusual.

His co-counsel for the trial and appeal, former Winona County Attorney Chuck MacLean, recalled that Benson was "mortified" by his misdrafted jury instructions.

"He then told the jury, 'I'm going to fix this myself and I'll bring them back to you myself,' It was just because he was courteous and gentlemanly, as that trial judge certainly is. There was no flaw in the proceeding whatsoever, and no compromising of the jury sanctity or deliberations," said MacLean.

Gort agreed. "The reason for the concern in *Mims* and *Brown* was that those were entries that really did raise the concern that the judges were trying to steer the jurors toward concluding their deliberations. This was a different type of entry, and our position was it didn't trigger the same type of concerns."

Nissalke's attorney, Chief Appellate Defender David Merchant of St. Paul, said the decision is "regrettable."

"We thought the case law was quite clear and that there was a bright-line rule, but it seems like the majority — as the dissent articulates very strongly and in our minds, correctly — is paring back from that rule. It's much more manageable if you do have a bright-line rule. That's no longer going to be the case and it goes against established precedent."

Assistant public defender Davi E. Axelson of St. Paul also represented Nissalke in the appeal; he declined to comment.

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