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**DISTRICT I**

April 25, 2023

To:

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Clerk of Circuit Court  
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You are hereby notified that the Court has entered the following opinion and order:

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2021AP2160-CR

State of Wisconsin v. Marcell J. Hendrix (L.C. # 2018CF5746)

Before Brash, C.J., Donald, P.J., and Dugan, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Marcell J. Hendrix appeals his judgment of conviction for possession of cocaine with the intent to deliver, as a party to a crime, and fleeing or eluding an officer. Hendrix argues that he was denied his right to a unanimous jury verdict after one of the jurors asked to talk to the trial court when it polled the jury after the verdict was read. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21(1) (2021-22).<sup>1</sup> We summarily affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

According to the criminal complaint, the charges against Hendrix stem from an incident in January 2018. An officer from the Wauwatosa Police Department attempted a traffic stop of a vehicle that he had seen driving erratically two hours earlier. The vehicle fled, and proceeded to crash into a tree; the occupants fled from the scene.

The officer searched the vehicle and found six cell phones and a large baggy holding two smaller baggies which contained substances that tested positive for cocaine and heroin. Furthermore, two of the cell phones had email and social media accounts for Hendrix, and two of the other phones contained text messages indicative of drug trafficking, using nicknames that were also used on the phones associated with Hendrix. Additionally, prints recovered from the driver's door of the vehicle were Hendrix's.

Hendrix was charged with possession of cocaine with the intent to deliver, and fleeing or eluding an officer.<sup>2</sup> The matter proceeded to trial in February 2020, with the jury returning guilty verdicts on both counts.

After the verdict was announced, the trial court polled the jury regarding the verdicts. One of the jurors, when asked if the verdict read was her verdict, responded “[c]an I talk to you?” The court responded “[n]ot at this time,” explaining that the verdicts had been read and that she needed to respond to the polling question as to whether those were her verdicts. The juror responded “[y]es,” and then repeated “Juror Number 27 is a yes.”

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<sup>2</sup> The Information was subsequently amended to add party to a crime liability to the possession with intent to deliver charge.

Prior to the jury being dismissed, counsel for Hendrix moved the trial court to reject the verdicts on the grounds that they might not be unanimous based on Juror 27's question during polling. The trial court denied the motion and accepted the verdicts. Hendrix subsequently filed a motion for a new trial on the same grounds. The trial court heard the motion just before sentencing and again rejected it, finding that Juror 27's two "yes" responses to the polling question were "not ambiguous or ambivalent" and therefore there was "not a need for any additional questions or questioning" by the court.

The trial court imposed a total sentence of one and one-half years of initial confinement to be followed by two and one-half years of extended supervision. Hendrix appeals.

"The right to poll the jury at the return of the verdict is a corollary to the defendant's right to a unanimous verdict." *State v. Behnke*, 155 Wis. 2d 796, 801, 456 N.W.2d 610 (1990). The purpose of polling is so that each juror takes "individual responsibility and state[s] publicly that he or she agrees with the announced verdict." *Id.* This is the "means by which the uncoerced unanimity of the verdict can be tested." *Id.* In fact, polling "allows a juror to dissent although previously agreeing." *State v. Wiese*, 162 Wis. 2d 507, 518, 469 N.W.2d 908 (Ct. App. 1991).

If, during polling, a juror "creates some doubt" as to his or her vote, the trial court "should interrogate" that juror. *State v. Cartagena*, 140 Wis. 2d 59, 62, 409 N.W.2d 386 (Ct. App. 1987). However, prior to engaging in further questioning, the trial court "should make a determination that the juror's answer was ambiguous or ambivalent." *Id.* In making this determination, "demeanor and tone of voice play a large role in understanding the proper meaning of a response[.]" *Id.* Therefore, this court will "accept the trial court's finding on the issue of assent unless the record shows that the trial court foreclosed dissent." *Id.*

Here, the record demonstrates that the trial court did not foreclose a dissent by Juror 27 during polling. Instead, it simply denied her request to “talk” to the court, stating that it was not an option at that time, and further explaining that “[a] lot will depend on your response [to the polling question] to be honest, ma’am.” Juror 27 then clearly responded—twice—that her answer to the polling question as to whether the verdicts read were her verdicts was “yes.”

The trial court further addressed this issue prior to sentencing in response to a motion filed by Hendrix. The court found that based on Juror 27’s “yes” responses, her answer was not ambiguous or ambivalent. The court explained that the juror “had the opportunity to express her dissent to the verdict” during the polling, and did not do so. Therefore, the court determined that there was no need for additional questioning.<sup>3</sup>

The record supports the trial court’s determination. *See id.* We therefore reject Hendrix’s claim that his right to a unanimous jury verdict was violated, and affirm his judgment of conviction.

Therefore, upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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<sup>3</sup> Prior to that hearing, a defense investigator interviewed Juror 27, who explained that her question during polling related to her feeling that Hendrix was “taking the entire rap” for the incident, in that the other people in the vehicle were not charged. She expressed that she “did not like” the party to a crime “part of the law.” However, she understood that it was the law as explained by the trial court, and thus she “had to vote to convict” Hendrix.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*