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### Summary of Saletta v. State, 127 Nev. Adv. Op. No. 34

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*Nevada Law Journal*

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*Saletta v. State*, 127 Nev. Adv. Op. No. 34 (July 7, 2011)<sup>1</sup>  
Criminal Law and Procedure

**Summary**

Appeal from a judgment of conviction by a criminal defendant convicted of indecent or obscene exposure.

**Disposition/Outcome**

District court's judgment reversed and remanded. NRS 175.531 gives the district court some discretion in polling methods, but does not allow questioning of a dissenting juror. The district court's questioning constituted plain error because it intruded into the exclusive province of the jury.

**Factual and Procedural History**

The State charged David Saletta ("Saletta") with indecent or obscene exposure. The State alleged that Saletta exposed his penis to a convenience store clerk from the parking lot. Saletta claimed it was not intentional and that he was urinating. The jury found Saletta guilty.

After the district court published the verdict, Saletta requested a jury poll. The first six jurors affirmed the verdict, the seventh juror dissented, and the rest of the jurors affirmed, resulting in a non-unanimous jury poll. The district court ordered an evidentiary hearing and the dissenting juror was sworn in and examined by the State, Saletta, and the district court regarding "second thoughts," deliberation time, coercion, when the vote changed, and whether further deliberation would change her mind. Subsequently, the district court denied both the State's motion to disqualify the dissenting juror and to use an alternate and Saletta's motion for a mistrial. The district court gave the jury additional instructions and ordered the jury to resume deliberation. The jury again returned a guilty verdict, and the subsequent jury poll revealed the verdict was unanimous.

**Discussion**

*Continuing the Poll*

Saletta claimed it was reversible error when the district court failed to stop the jury poll once the seventh juror made the poll non-unanimous.<sup>2</sup> NRS 175.531 authorizes jury polling. Under the statute, when the poll results in a lack of unanimity, the trial court may direct the jury to continue deliberations or discharge the jury altogether.

NRS 175.531 is similar to Federal Rule of Criminal Procedure 31(d). Like Rule 31(d), NRS 175.531 does not demand that jury polling must stop once a juror dissents and it does not constitute per se reversible error to continue polling.<sup>3</sup> Reversible error is only found when the

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<sup>1</sup> By Erin Elliott

<sup>2</sup> Saletta relied on *United States v. Spitz*, 696 F.2d 916 (11th Cir. 1983).

<sup>3</sup> The Eleventh Circuit used Rule 31(d) to conclude it does constitute reversible error, but five circuits used Rule 31(d) to conclude it does not. See *Lyell v. Renico*, 470 F.3d 1177, 1182-85 (6th Cir. 2006); *United States v. Gambino*, 951 F.2d 498 (2d Cir. 1991); *United States v. Fiorilla*, 850 F.2d 172, 174 (3d Cir. 1988); *Amos v. United States*, 496 F.2d 1269, 1272-73 (8th Cir. 1974); *United States v. Brooks*, 420 F.2d 1350, 1354 (D.C. Cir. 1969).

following factors demonstrate the method was coercive : 1) whether counsel objected to the polling, 2) whether the district court gave a cautionary instruction to the jury before excusing the jury for further deliberation, and 3) the amount of time that it took the jury to reach a verdict after deliberation resumed.<sup>4</sup> Methods of jury polling are left to the discretion of the trial court and are reviewed under an abuse of discretion standard.<sup>5</sup>

Here, the poll's continuation was not coercive under the totality of the circumstances. First, Saletta did not object. Second, the district court gave cautionary instruction when it told the jury to look at the instructions again before it began further deliberation. Finally, the amount of time it took the jury to reach a verdict after resuming deliberations was not indicative of coercion because the jury deliberated longer than it had initially.

### *Questioning the Dissenting Juror*

Saletta claimed the district court should not have allowed the dissenting juror to be questioned during the evidentiary hearing because the questions constituted an undue intrusion into the exclusive deliberative province of the jury. Under NRS 175.531, a court may address a non-unanimous jury poll by directing the jury to deliberate further or discharge the jury. The statute does not authorize the court to ask dissenting jurors why they disagree. Doing so constitutes "undue intrusion into the exclusive province of the jury" to reach a verdict and "exerts pressure on [the dissenting] juror to abandon his own view and conform his vote to the verdict as announced."<sup>6</sup> The questioning constitutes plain error because it is not permissible under NRS 175.531. Additionally, it affected Saletta's substantial rights by depriving Saletta of his Sixth Amendment right to an impartial jury.

### **Conclusion**

The Supreme Court of Nevada denied the Petitioner's contention that the district court's polling method was coercive. However, the Court reversed the judgment of conviction and remanded for further proceedings because it was plain error for the district court to intrude into the jury's exclusive province by questioning the dissenting juror.

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<sup>4</sup> *Gambino*, 951 F.2d at 501-02.

<sup>5</sup> *Id.*

<sup>6</sup> *United States v. Nelson*, 692 F.2d 83, 85 (9th Cir. 1982).