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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Berkeley County
Honorable Maite Murphy, Circuit Court Judge
Appellate Case No. 2021-000146

THE STATE,

Petitioner,

vs.

RANDY WRIGHT,

Respondent.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals err by reversing Wright's conviction due solely to the manner in which jury polling was conducted when it failed to recognize: (1) the jury polling actually conducted was sufficient to ensure the jury's verdict was a unanimous one and was fully consistent with the "practice as it has heretofore existed" in South Carolina; (2) its decision violated the clearly-defined limits of our state constitution that prevent new rules of procedure from being created and articulated solely by the issuance of published appellate decisions; (3) the new procedural rule it adopted—even if somehow valid—could not properly be applied retroactively; and (4) Wright suffered no prejudice as a result of the method by which jury polling was conducted since nothing suggested the jury's verdict was anything other than unanimous?

STATEMENT OF THE CASE

In August of 2015, Respondent Randy Wright was arrested—along with two of his adult sons—following an investigation into a brutal attack perpetrated in the driveway of the victim's home. In March of 2016, the Berkeley County Grand Jury indicted Wright for one count of assault and battery of a high and aggravated nature. On August 30, 2017, a jury trial was commenced in the Berkeley County Court of General Sessions with the Honorable Maite Murphy, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Wright as indicted. Following the verdict, the trial judge sentenced Wright to a fifteen-year term of imprisonment and suspended that sentence to a ten-year term of imprisonment to be followed by five years of probation.[1] Wright then filed and perfected an appeal.

On appeal, the Court of Appeals—following oral argument—unanimously reversed Wright's conviction in a published opinion.[2] State v. Wright, 432 S.C. 365, 852 S.E.2d 468 (Ct. App. 2020). Thereafter, the State petitioned the Court of Appeals for rehearing, and the petition was denied. The State then filed a petition for a writ of certiorari in the Supreme Court, and that petition was granted on June 28, 2022.

[1] Subsequent to Wright's trial, Wright's sons entered guilty pleas to the lesser-included offense of first-degree assault and battery in connection to the incident, and each was sentenced to a ten-year term of imprisonment that was suspended to a four-year term of imprisonment to be followed by two years of probation. Records for Adam Shane Wright and Shawn Lee Wright, Berkeley County Ninth Judicial Circuit Public Index, https://publicindex.sccourts.org/Berkeley/PublicIndex.

[2] Prior to conducting oral argument, the Court of Appeals requested the matter be certified for review by this Court pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, but this Court rejected that request through an order dated June 16, 2020.

STATEMENT OF FACTS

On the evening of August 8, 2015, Dale Williams and his wife were watching television together inside their home located in Moncks Corner, South Carolina, when their dog began to growl. (App'x pp. 57-58; pp. 82-83; p. 147). Because such an occurrence was very unusual, Williams got up and went outside to find out what was going on. (App'x p. 58; pp. 83-84). When he did so, Williams observed three men standing in the private driveway leading to the residence of his neighbor, Jimmy Taylor ("Victim"), and those men were gathered around another individual who was on the ground. (App'x pp. 58-60; p. 77; p. 93; pp. 139-141). Upon seeing Williams, the three men standing over the other man scurried away "in a hurry," headed to a truck that had been parked on the side of the road just off Victim's property, and fled from the area. (App'x pp. 60-61; pp. 69-70; p. 78; p. 159). Meanwhile, Victim, who was the man on the ground and was covered in blood, cried out for someone to call 911. (App'x p. 59; p. 85; p. 90). In response, Williams quickly asked his wife to call the police and then attempted to provide assistance to Victim until help arrived. (App'x pp. 63-64; p. 78; p. 85; p. 87; p. 172).

A short time later, paramedics arrived at the scene and rushed Victim to the hospital. (App'x pp. 65-66; pp. 73-75; p. 87; p. 172; p. 185; p. 252). At the hospital, Victim received treatment for his injuries, which were "pretty significant." (App'x p. 329; p. 344). More specifically, Victim had multiple "severe" lacerations to his head, one of his eyes was swollen shut, his other eye was nearly swollen shut, and he had extensive bruising to his face, torso, abdomen, and back. (App'x pp. 99-100; pp. 102-103; pp. 329-330; pp. 334-338; p. 340; p. 344). Significantly, Victim's injuries were consistent with being kicked or struck multiple times with a blunt object, and they potentially could have been life-threatening. (App'x p. 336; p. 346). Fortunately though, Victim somehow avoided suffering any internal injuries or bleeding. (App'x

pp. 336-337; p. 349). However, as a result of his injuries, Victim did suffer from lasting pain along with other issues and had to receive numerous sutures and staples to close his wounds. (App'x pp. 99-100; p. 112; p. 174; pp. 180-181; p. 217; p. 338).

On that same date, Deputy Michelle Ward from the Berkeley County Sheriff's Office spoke with Victim about what had occurred while he was still at the hospital. (App'x p. 120; pp. 248-250; pp. 252-253; p. 277). During their conversation, Victim reported he was confronted and attacked in his own driveway by Wright and two of Wright's sons—Adam and Shawn—shortly after they parked their truck near his home following an incident in which a beer bottle had suddenly been thrown at his vehicle. (App'x pp. 253-254; p. 273). Victim further indicated the attack was carried out with some sort of "stick-like" weapon. (App'x p. 253).

After speaking with Victim, Deputy Ward obtained arrest warrants for Wright and his sons Adam and Shawn, and Wright was taken into custody a few days later. (App'x p. 121; p. 252; p. 256; pp. 258-259; p. 296). Once Wright had been taken into custody, Deputy Ward met with him and—upon advising him of his rights—asked him if he had been involved in any altercations on the date of the incident. (App'x pp. 122-124; pp. 259-261; p. 265). In response to the query, Wright—who had no signs of injuries at that time—flatly denied being involved in any altercations at all. (App'x p. 129; pp. 133-134; p. 265). Deputy Ward then advised Wright he had been identified by Victim as one of Victim's assailants, and Wright immediately changed his version of events and—in direct contradiction to what he had just asserted—admitted he was, in fact, involved in an altercation. (App'x p. 129; pp. 265-267). However, Wright attempted to cast blame for that altercation squarely on Victim and alleged a bottle was thrown at his truck on the date of the incident, he followed the vehicle from which it was thrown in an attempt to find out why, he confronted Victim after doing so, and he was assaulted by Victim with a club in

response. (App'x p. 129; p. 133; p. 267). Beyond that, Wright claimed two of his sons—Adam and *Randy, Jr.*—were with him at that time, expressly denied Shawn was with him, and alleged Adam was the only one who struck Victim. (App'x p. 267; pp. 270-271; p. 273). Furthermore, Wright asserted Adam only did so in an effort to get Victim off of him during the scuffle. (App'x p. 267; pp. 270-271).

Ultimately, at the conclusion of the investigation, Wright was indicted for assault and battery of a high and aggravated nature, and he elected to proceed forward to trial. (App'x p. 12; pp. 506-507). During the course of trial, Victim recounted how he was brutally attacked by Wright and Wright's sons in his own driveway on the date of the incident, and additional testimony and evidence was presented detailing the discoveries made during the investigation into the attack. (App'x pp. 56-78; pp. 80-93; pp. 97-118; pp. 138-217; pp. 248-296; pp. 322-360; pp. 364-377). Furthermore, testimony was presented about Wright's initial complete denial of any involvement in any altercations on the date of the incident and his rapid pivot to an entirely different—and contradictory—version of events as soon as he learned his victim had been able to identify him as one of the assailants involved. (App'x pp. 265-271).

Following the presentation of that testimony and evidence, Wright decided to testify in his own defense and offered yet another account of the incident involving Victim. (App'x pp. 399-426). Specifically, through his latest account, Wright stated he was driving home with his sons Adam and *Shawn* on the date of the incident when Victim got behind his truck and began driving close to its bumper.[3] (App'x pp. 406-407). Wright claimed something then hit the back

[3] Regarding why Wright might have asserted Shawn was with him at the time of the incident during his trial testimony in direct contradiction to his earlier claim of being with Randy, Jr. at that time, evidence was presented during trial establishing a hat recovered from the scene of the crime was analyzed as part of the investigation into the assault and Shawn was identified as the

of his truck, and he decided to go to Victim's house to confront Victim about it. (App'x pp. 407-408). When he did, Wright alleged Victim, whom he claimed appeared to be intoxicated, attacked him with a club, and he responded by grabbing Victim around the waist to stop the assault. (App'x pp. 408-409; p. 418). After that, Wright claimed Victim began choking him, and his sons responded by trying to pull Victim off of him. (App'x pp. 409-410). Wright stated they all then fell to the ground, and that fall stopped the altercation, which ended with him having never struck Victim a single time. (App'x p. 410). However, Wright conceded his sons must necessarily have struck Victim—including with something more than their fists—at some point during the "brawl" based on Victim's injuries. (App'x p. 410; p. 417; pp. 425-426).

At the conclusion of the evidentiary phase of trial, the trial judge instructed the jury on the applicable law. (App'x pp. 470-488). In doing so, the trial judge specifically instructed the jurors their verdict must be a unanimous one and expressly explained: "[A]ll 12 of you must agree on the verdict."[4] (App'x p. 487). Following the presentation of those unmistakable instructions, the jurors began their deliberations. (App'x p. 489).

Thereafter, just under an hour and a half later, the jurors reached a verdict.[5] (App'x p. 489; p. 491). Upon reaching a verdict, the jurors returned to the courtroom, and their verdict was announced as follows: "As to the charge of assault and battery of a high and aggravated nature, we, the jury, unanimously find [Wright] guilty." (App'x p. 492). The jurors were then swiftly

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major contributor to the DNA profile developed from it. (App'x pp. 176-177; pp. 218-220; pp. 228-229; pp. 319-321; p. 368; pp. 371-372).

[4] Throughout the trial, the trial judge also made clear to the jurors they were required to accept and apply the law exactly as instructed. (App'x pp. 32-33; pp. 470-471).

[5] More specifically, the jurors began their deliberations at 4:58 p.m. and returned to the courtroom with their verdict at 6:26 p.m., which meant the length of their deliberations was eighty-eight minutes in total. (App'x pp. 488-489; p. 491).

asked to individually raise their right hands if the verdict announced was their verdict, and all of the jurors did so in response. (App'x pp. 492-493). At that point, the trial judge—having received confirmation of the verdict from each juror—sent the jurors back to the jury room and advised them they would be released from their service momentarily. (App'x p. 492).

Once the jurors had exited the courtroom, defense counsel acknowledged the jurors had been "poll[ed]" by being asked to raise their hands, which he conceded led to all the jurors raising their hands in response. (App'x p. 493). However, defense counsel indicated there was a "group aspect" to that particular method of "polling" and requested—as part of his "standard procedure"—for the jurors to be polled by "calling out each specific juror." (App'x pp. 492-493). Ultimately though, the trial judge denied that request due to the fact the jurors had already been asked to confirm the verdict after it was announced and the jurors all raised their hands *individually* in response.[6] (App'x p. 493).

Subsequently, Wright appealed, arguing the trial judge's refusal to poll the jurors at defense counsel's request constituted reversible error without any need for a showing of specific prejudice. (App'x pp. 510-525). On appeal, the Court of Appeals agreed with Wright's argument and reversed. State v. Wright, 432 S.C. 365, 368, 852 S.E.2d 468, 470 (Ct. App. 2020). In reversing, the Court of Appeals recognized this Court's decision in State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), held trial judges were required to conduct jury polling when requested to do so and further concluded that decision "*implied* each juror must be polled individually." Id. (emphasis added). Additionally, the Court of Appeals noted other courts throughout the country had determined collective jury polling similar to the polling conducted in

[6] Specifically, in denying the request, the trial judge explained: [T]he Clerk did ask them, is this your verdict, and each of the jurors raised their hands individually. They looked around and they raised their hand individually, and that's on the record." (App'x p. 493).

Wright's case was "not the best method" of accomplishing the purpose of such polling. Id. at 369, 852 S.E.2d at 471. Then, despite recognizing the Linder decision "did not endorse a particular method of individually polling the jurors" and "provided no guidance on the mechanics of proper individual polling," the Court of Appeals concluded the method of polling conducted by the trial judge in Wright's case was inadequate while holding the method that must now be followed in South Carolina in order for polling to be sufficient is "each juror must be separately asked to confirm verbally on the record that the verdict announced is still his or her verdict." Id. at 370, 852 S.E.2d at 471. Finally, after adopting a new and specific requirement as to the method by which jury polling must be conducted in our state, the Court of Appeals determined the question of whether the error it believed had occurred required reversal was a "novel" one in South Carolina, and it answered that question by finding the trial judge's failure to conduct jury polling by what it considered to be the "best method" constituted a "reversible error per se" that was not subject to harmless error analysis. Id. at 373, 852 S.E.2d at 472.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a decision regarding the manner in which a criminal trial was conducted, an appellate court will not reverse the trial judge's decision unless it constituted a *prejudicial* abuse of discretion in light of the fact such decisions are ordinarily left largely to the sound discretion of the trial judge. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). Similarly, although jury polling must be conducted when requested in South Carolina, the *method* by which such polling is carried out rests within the trial judge's discretion, and, thus, a trial judge's decision regarding how jury polling is conducted should not be reversed on appeal absent a showing of a prejudicial abuse of discretion. See State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 576 (1995) (recognizing the manner of jury polling falls within the trial judge's discretion); State v. Linder, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981) (holding "a [jury] poll must be taken" if requested). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's discretionary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ARGUMENT

The Court of Appeals erred by reversing Wright's conviction due solely to the manner in which jury polling was conducted because it failed to recognize: (1) the jury polling actually conducted was sufficient to ensure the jury's verdict was a unanimous one and was fully consistent with the "practice as it has heretofore existed" in South Carolina; (2) its decision violated the clearly-defined limits of our state constitution that prevent new rules of procedure from being created and articulated solely by the issuance of published appellate decisions; (3) the new procedural rule it adopted—even if somehow valid—could not properly be applied retroactively; and (4) Wright suffered no prejudice as a result of the method by which jury polling was conducted since nothing suggested the jury's verdict was anything other than unanimous.

Through the published opinion it issued in Wright's case, the Court of Appeals vacated the jury's verdict, reversed Wright's conviction, and remanded the matter for a new trial based solely on the method by which jury polling was conducted. In doing so, the Court of Appeals determined the manner by which the jurors—who were actually polled and who did, in fact, all individually express assent in the verdict announced—were polled was insufficient and not the "best method" for accomplishing the purpose of a jury poll. Then, despite recognizing no South Carolina authority has ever previously mandated jury polling must specifically be conducted in a person-by-person manner, the Court of Appeals held the trial judge reversibly erred by failing to conduct polling in precisely such a manner and, by so holding, adopted an entirely new rule of criminal procedure for jury polling in South Carolina consistent with rules that have been promulgated in jurisdictions *other than* our own. Finally, the Court of Appeals concluded the trial judge's failure to conduct polling by the "best method" was reversible per se without any need for a showing of specific prejudice to Wright. For multiple reasons, the decision of the Court of Appeals was an erroneous one. Specifically, the Court of Appeals erred by reversing in Wright's case because it failed to recognize: (1) the jury polling actually conducted was sufficient to ensure the jury's verdict was a unanimous one and was fully consistent with the "practice as it has heretofore existed" in South Carolina; (2) its decision violated our state's

clearly-defined constitutional limits that prevent new rules of procedure from being created and articulated solely by the issuance of published appellate decisions; (3) the new procedural rule it adopted—even if somehow valid—could not properly be applied retroactively; and (4) Wright suffered no prejudice as a result of the method by which jury polling was conducted since nothing suggested the jury's verdict was not unanimous. Accordingly, the decision of the Court of Appeals should be reversed and vacated, and Wright's conviction should be affirmed.

Polling of the jury is sometimes—but not always—conducted after a verdict is announced at the conclusion of a trial, and its purpose is simply to help ensure the jury's verdict is a unanimous one. Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002); see Singleton, 319 S.C. at 316, 460 S.E.2d at 576 (recognizing jury polling serves "to ensure that the juror did not misunderstand the verdict and to confirm that the verdict was unanimous"). Significantly, jury polling achieves that purpose by giving each of the members of the jury an opportunity to individually assent to the verdict, which typically—up to that point—has only been announced by someone like a foreperson or clerk on the jurors' collective behalf. See Miranda v. United States, 255 F.2d 9, 17 (1st Cir. 1958) (explaining the purpose of jury polling "is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned," which enables the trial judge and the parties to ascertain with certainty a unanimous verdict free of inducement or coercion has been reached).

In South Carolina, no statute or criminal procedure rule exists that expressly addresses if, when, and how post-verdict jury polling must be conducted in a criminal case tried in one of our state courts. Cf. State v. Beaty, 423 S.C. 26, 39, 813 S.E.2d 502, 509 (2018) ("[T]here is no codified or otherwise duly adopted court rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence."). Accordingly, based on

the mandates of the South Carolina Rules of Criminal Procedure, the proper procedures for jury polling in our state must necessarily be derived from the "practice as it has heretofore existed" in our courts unless and until a specific rule of procedure is adopted through the appropriate constitutionally-delineated process. Rule 37, SCRCrimP; see S.C. Const. art. V, § 4A ("All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.").

Regarding the jury polling practices that have heretofore existed in our courts, South Carolina trial judges historically were vested with complete discretion as to both whether and how jury polling was conducted following the return of a verdict in a criminal trial, which left trial judges free to conduct *no* polling at all if satisfied it was not necessary under the circumstances. See, e.g., State v. Simon, 126 S.C. 437, __, 120 S.E. 230, 232 (1923) (instructing "the well-settled rule" in South Carolina is "neither party has an absolute right to have the jury polled"); State v. Daniel, 77 S.C. 53, __, 57 S.E. 639, 640 (1907) ("[N]either party has the absolute right to have the jury polled, but it is a matter addressed to the discretion of the presiding judge."); State v. Wyse, 32 S.C. 45, __, 10 S.E. 612, 615 (1890) (indicating jury polling is a matter addressed to the discretion of the trial judge); State v. Dodson, 14 S.C. 628, 628 (1881) ("The matter of polling the jury is within the discretion of the presiding judge."), State v. Wise, 41 S.C.L. (7 Rich.) 412, 420 (1854) ("The defendants had no right to the individual opinion of every juror, on his mere motion, to be declared by each. When the verdict

is published in the usual mode in the presence of all, each juror speaks through the verdict, as their assent is presumed from their very silence."); State v. Allen, 12 S.C.L. (1 McCord) 525, 526-527 (1822) (indicating jury polling is a means a trial judge "sometimes" employs "to ascertain if the jury [a]re agreed on their verdict" while further explaining "it w[ill] not be resorted to" when the trial judge is "fully satisfied" of the jurors' unanimity "by other and more accustomed means"). However, the practice of unfettered polling discretion was modified with this Court's 1981 decision in State v. Linder, which announced and established the following new—and succinct—procedural rule: "If [a] request [for jury polling] is made, *a* poll must be taken."[7] Linder, 276 S.C. at 309, 278 S.E.2d at 338 (emphasis added). Importantly though, when articulating that new rule, this Court elected *not* to mandate a specific method by which a jury poll must be taken. Id. Instead of doing so, this Court chose to leave the particular manner by which polling of the jury is accomplished to the trial judge's discretion, which has been expressly recognized in this Court's post-Linder jurisprudence and is consistent with what has been described as the "prevailing view" in our nation. Singleton, 319 S.C. at 316, 460 S.E.2d at 576; see United States v. Miller, 59 F.3d 417, 420 (3d Cir. 1995) (explaining "the prevailing view is that the method chosen [for jury polling] is within the discretion of the trial judge"). Moreover, even after the decision in Linder, jury polling still is not a necessary or critical component of the criminal trial process in our state, and there is no affirmative duty on defense counsel to request jury polling even though the right to do so now exists. See Green, 351 S.C. at

[7] Notably, at the time Linder was decided, this Court was constitutionally vested with authority to directly promulgate procedural rules for state courts to follow. See Beaty, 423 S.C. at 41, 813 S.E.2d at 510 ("Before 1973, the South Carolina Constitution did not address in any manner the power of [the Supreme] Court to implement rules of practice and procedure in the courts of this State. On April 4, 1973, article V, section 4 of the South Carolina Constitution was amended to grant power to this Court, subject to statutory law, to make rules governing the practice and procedure in all such courts in the unified judicial system." (internal quotations and brackets omitted)).

196, 569 S.E.2d at 324 (explaining a trial judge "is not required to conduct a jury poll if the court is satisfied the verdict is unanimous" and defense counsel has "no affirmative duty to request the trial judge poll the jury"); see also Humphries v. District of Columbia, 174 U.S. 190, 194 (1899) ("[Jury polling] is *not a matter which is vital*, is frequently not required by litigants; and, while it is an undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict." (emphasis added)).

In the case sub judice, the trial judge—through her jury instructions—made abundantly clear to the jurors their verdict had to be a unanimous one. And, to ensure absolute clarity on that point of law, the trial judge expressly emphasized to the jurors: "[A]ll 12 of you must agree on the verdict." Following that unambiguous and easily-understood directive, the jury began deliberations and, within just under an hour and a half, reached a verdict. Once they had done so, the jurors returned to the open courtroom, and, with all of them present, the verdict was announced as follows: "As to the charge of assault and battery of a high and aggravated nature, we, the jury, unanimously find [Wright] guilty." Immediately after that, the jurors were asked to *individually* raise their right hands if the verdict announced was their verdict, and *each* member of the jury *individually* raised his or her hand in response. Thus, the jury was unquestionably polled during Wright's trial as all twelve of the jurors were asked to—and did—reveal how they individually and personally voted in Wright's case, and the manner of polling employed resulted in twelve *individual* hands being consciously raised towards the courtroom ceiling to signify all twelve jurors were in full agreement with the guilty verdict that had been announced. Cf. United States v. Tucker, 596 F. App'x 616, 618 (10th Cir. 2014) ("[Tucker] asserts that the court did not poll the jury at all, but the trial transcript shows otherwise. After the clerk read the jury's

verdicts of guilty on all counts, the court asked the jurors to raise their hands if these were the verdicts of each and every one of them. The transcript states that all jurors raised their hands."); Posey v. United States, 416 F.2d 545, 554 (5th Cir. 1969) (finding the jurors were "[c]learly" polled when asked collectively by the clerk of court to confirm the accuracy of the announced verdict and further explaining "the court and parties, from the individual expressions of concurrence from each juror, could and did ascertain with certainty that the verdict, as returned, was the present and unanimous verdict of the jury"). Despite the fact the jurors were polled and confirmed both collectively *and* individually the verdict returned was a unanimous one, the Court of Appeals nonetheless reversed due to the purported inadequacy of the particular method of jury polling followed in Wright's case. For a number of different reasons, the Court of Appeals reversibly erred by reaching such a conclusion.

Initially, the Court of Appeals erred because the polling conducted in Wright's case did, in fact, fully satisfy the purpose of jury polling and was entirely consistent with the "practice as it has heretofore existed" in our state. That is true because—through the jurors being asked to raise their hands individually to confirm the announced verdict was their own—*a* poll was unquestionably taken, which was all this Court said in Linder must occur when polling is sought. Linder, 276 S.C. at 309, 278 S.E.2d at 338; see Singleton, 319 S.C. at 316, 460 S.E.2d at 576 (indicating—in a case decided after Linder—the manner in which jury polling is conducted rests within the trial judge's discretion); cf. Miller, 59 F.3d at 421 ("[W]e are bound by our precedent to review the procedure followed in the case before us as one that is within the discretion of the district court."). Likewise, based on the process employed, the jurors were unmistakably given an opportunity to *individually* express agreement or disagreement with the verdict, and they all did just that, which enabled a determination of each individual juror's assent to the verdict. See

Miranda, 255 F.2d at 17 (instructing the purpose of jury polling "is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned"); see also Linder, 276 S.C. at 308, 278 S.E.2d at 337 ("Polling is a practice whereby the court determines from the jurors individually whether they assented and still assent to the verdict."); cf. Commonwealth v. Jenkins, 625 N.E.2d 1344, 1347 (Mass. 1994) (concluding the trial judge did not abuse his discretion by "asking the jury for their collective, oral response when the defense asked that the jury be polled" while further explaining "[a] *show of hands* would be better than a voice vote" (emphasis added)). Similarly, since all twelve jurors were required to individually respond based on the manner in which the polling was conducted, the trial judge—along with everyone else in the courtroom—was able to confirm the jury's verdict was a unanimous one simply by counting the twelve *separate* and *individual* raised hands. See Singleton, 319 S.C. at 316, 460 S.E.2d at 576 ("[T]he trial judge must be satisfied that the verdict is unanimous."); cf. State v. Ramos, 478 P.3d 515, 535 (Or. 2020) (rejecting a challenge to the sufficiency of a jury poll in a case in which the trial judge polled the jury by "ask[ing] all jurors who voted 'guilty' to raise their hands" and expressing skepticism "jurors, however polled, would not respond honestly"). Under such circumstances, there cannot be any legitimate grounds upon which to find the trial judge abused her broad discretion or otherwise erred merely because she refused to conduct *further* polling of jurors who had already been polled and had all individually expressed agreement with the verdict. Cf. United States v. Carter, 772 F.2d 66, 67-68 (4th Cir. 1985) (indicating it could *not* "conclude the trial judge abused his discretion in polling the jurors by asking for a show of hands" when nothing expressly prescribed the manner by which a jury poll must be conducted at that time and the applicable rule merely indicated "the jury shall be polled at the request of any party or upon the court's own motion").

Nonetheless, the Court of Appeals concluded the jury polling conducted in Wright's case was legally inadequate, and that conclusion was not correct based on the mandates of our existing precedent.[8]

Beyond that, the Court of Appeals erred by ignoring the clearly-defined constitutional limits that prevent new rules of procedure in our state from being created and articulated solely by the issuance of published appellate decisions. Regarding those limits, this Court has explained appellate courts in South Carolina do "not have the power to adopt new rules of procedure for future trials by writing opinions to decide cases" in light of the fact such courts are limited to reviewing for errors of law only in criminal cases. Beaty, 423 S.C. at 41, 813 S.E.2d at 510; see S.C. Const. art. V, § 5 ("The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe."). Likewise, the citizens of our state have exclusively delegated authority to promulgate rules—and amendments to rules—governing the practices and procedures to be followed in our state's courts not to the Court of Appeals but to this Court, and our citizenry further elected to place limits on that authority in the form of legislative oversight. S.C. Const. art. V, § 4A. As a result, the Court of Appeals was constitutionally restricted from altering, amending, or expanding the practices and procedures for jury polling that have heretofore existed in South Carolina regardless of how

[8] Interestingly, although our Court of Appeals now believes *only* person-by-person jury polling can be legally adequate in South Carolina, our earlier Court of Appeals previously found well more than a hundred years ago—in a capital case no less—individualized polling, which it suggested was something that might be "torturing to the timid," was neither required nor necessary in order for the unanimity of a jury verdict to reliably be confirmed. See State v. Whitman, 48 S.C.L. (14 Rich.) 113, 116 (1866) ("The Court must be satisfied that the verdict has the assent of all twelve jurors, and in its discretion may direct polling, but the regular form practised in cases of felony and pursued in this case—'This is your verdict: so say ye all'—if due solemnity be observed, and this is rarely if ever wanting in capital cases, *makes it inexpedient* that those who, by silence, have declared acquiescence, should be subjected to a proceeding which would be torturing to the timid, and might give occasion for abuses by overawing arts or disorder." (emphasis added)).

prudent it believed the practices and procedures that have been formally adopted in *other* jurisdictions might be. See, e.g., Advisory Committee's Notes on 1998 Amendments to Fed. R. Crim. P. 31 ("[T]he rule requires that the jurors be polled individually when a polling is requested, or when polling is directed sua sponte by the court."); Conn. Practice Book § 42-31 ("The [jury] poll shall be conducted by the clerk of the court by asking each juror individually whether the verdict announced is such juror's verdict."); Ky. RCr 9.88 ("When the verdict is announced, either party may require the jury to be polled, which is done by the clerk's or court's asking each juror if it is his or her verdict."). Despite those limitations, the Court of Appeals nevertheless did alter and amend our state's existing procedures through its decision in Wright's case by holding—for the first time in the history of our state's jurisprudence—jury polling *must* be specifically conducted in a person-by-person method when it is requested, and, by doing so, the Court of Appeals acted in a manner directly contrary to the carefully-crafted process set out in our state constitution. See Beaty, 423 S.C. at 46, 813 S.E.2d at 512 ("Article V, section 5 of the South Carolina Constitution limits this Court's authority to correcting errors of law and does not empower us to promulgate a procedural rule for future cases by simply issuing an opinion. Article V, section 4A, of the South Carolina Constitution prohibits this Court from adopting *any* rules of practice and procedure . . . without first going through the prescribed legislative process." (emphasis added)).

Furthermore, even assuming it was somehow proper for it to adopt a new procedural rule via nothing other than an appellate decision, the Court of Appeals still erred by ignoring the fact it would not be appropriate to apply such a new rule retroactively in Wright's case. That is true because new procedural rules generally do not apply retroactively, and, for obvious reasons, a trial judge cannot be faulted for failing to comply with a trial procedure not yet in existence. See

generally Schriro v. Summerlin, 542 U.S. 348, 352 (2004) ("New rules of procedure . . . generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise."). Even though new procedural rules typically do not apply retroactively, the Court of Appeals applied the new rule it articulated regarding the specific method by which requested jury polling must be conducted to Wright's case despite also correctly recognizing "Linder provided no guidance on the mechanics of proper individual polling." See Hutto v. S. Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) ("It is, of course, settled law that a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion." (citation and internal quotations omitted)). Critically, in light of the lack of any specified requirements in Linder regarding the manner in which requested jury polling must be conducted, nothing required the trial judge to specifically conduct person-by-person polling *at the time of Wright's trial*. See Linder, 276 S.C. at 309, 278 S.E.2d at 338 (holding only "[i]f the request is made, a poll must be taken"). Therefore, the trial judge could not have abused her discretion or otherwise erred by failing to comply with the Court of Appeals's not-yet-articulated procedural rule, which likewise could not logically or fairly be applied to Wright's case since it was not yet in existence in South Carolina at the time the jury was polled. Cf. Miller, 59 F.3d at 421 (declining to reverse in a case in which only collective polling of the jury was conducted but adopting a supervisory rule that would make individualized polling mandatory when requested "[i]n the future"); Carter, 772 F.2d at 67-68 (finding the district court judge did not commit reversible error in polling the jury by asking for a show of hands in light of the fact nothing—at that time—"prescribe[d] the manner in which the poll is to be conducted" but suggesting "each

juror be asked to respond individually" in *future* cases). However, the Court of Appeals found the trial judge did so err, and its conclusion in that regard was plainly erroneous.

Finally, in concluding no showing of prejudice was necessary in order for a failure to conduct jury polling via a person-by-person method to constitute reversible error, the Court of Appeals ignored several critical points, including this Court's post-Linder jurisprudence demonstrating a prejudice analysis *should*, in fact, be conducted when evaluating an appellate challenge to the manner of jury polling. Specifically, since Linder was decided, this Court has directly conducted a prejudice analysis when addressing an issue involving the method by which a jury was polled, which makes clear such an analysis remains necessary when conducting appellate review of such an issue. See Singleton, 319 S.C. at 316, 460 S.E.2d at 576 (finding reversal was not warranted based on an issue with the method by which jury polling was conducted because Singleton was *not prejudiced* by it); see also Green, 351 S.C. at 196, 569 S.E.2d at 324 (affirming the denial of post-conviction relief based—in part—on the fact prejudice had not been established even though defense counsel's actions resulted in the jury not being polled *at all* in a case in which one of the jurors may have been crying when the verdict was announced and the jury foreman expressly stated the verdict was reached "reluctantly"). Additionally, requiring prejudice to be established based on a complaint regarding the manner in which jury polling was conducted would also be fully consistent with the fact appellants in South Carolina are ordinarily required to establish both error *and* prejudice in order to be entitled to reversal on appeal. See Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice."); State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("Error without prejudice does not warrant reversal."). Furthermore, Wright's case did *not*

involve a situation in which the trial judge failed to comply with an express rule of criminal procedure like occurred in many of the cases in which reversal has been found to be appropriate. See, e.g., Gov't of the Virgin Islands v. Hercules, 875 F.2d 414, 419 (3d Cir. 1989) ("Where reversal may be a harsh result, nothing short of reversal suffices to remedy *this Rule 31 violation*." (emphasis added)); Miles v. Commonwealth, 256 S.W.3d 46, 46-47 (Ky. Ct. App. 2008) (finding the trial judge's failure to comply with the jury polling method expressly delineated in a Kentucky procedural rule constituted reversible error). Therefore, just like with other issues involving the jury, prejudice necessarily must be established in order for an appellant in South Carolina to obtain reversal based on the manner in which jury polling was conducted, and a conviction cannot be vacated merely because the trial judge perhaps did not conduct polling in the most ideal manner conceivable. See United States v. Hasting, 461 U.S. 499, 508-509 (1983) ("[T]here can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial. . . . [W]hen courts fashion rules whose violations mandate automatic reversals, they retreat from their responsibilities, becoming instead impregnable citadels of technicality." (citations, internal quotations, and brackets in original omitted)); cf. Smith v. Phillips, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable."); State v. Aldret, 333 S.C. 307, 313-314, 509 S.E.2d 811, 814 (1999) ("Given that we have not found automatic reversal warranted even in cases of external influences on a jury's verdict, we decline to do so in the cases of internal misconduct consisting of premature deliberations. Our decision is consistent with the majority of jurisdictions which hold a defendant must demonstrate prejudice from jury misconduct in order

to be entitled to a new trial." (citations omitted)). Once again though, the Court of Appeals reached a contrary conclusion, and that conclusion warrants correction.

Critically, when a prejudice analysis is actually conducted as required in Wright's case, such an analysis shows Wright was not prejudiced by the method of jury polling that was employed during his trial, which is true for several different reasons. First, the jury in Wright's case was unquestionably properly instructed its verdict must be a unanimous one in a clear and direct manner, and the jurors must be presumed to have followed the trial judge's clear directive on that point. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."); see also United States v. Runyon, 707 F.3d 475, 497 (4th Cir. 2013) ("The assumption has become axiomatic because it is so essential to the efficient functioning of the criminal justice system."). Second, the jurors in Wright's case were actually polled and provided individual responses regarding the unanimous nature of the verdict by a show of hands, which both distinguished the situation involved significantly from cases in which *no* individual responses of any kind were obtained from all the members of the jury and provided objective evidence there were no issues with the unanimity of the verdict announced. Compare Carter, 772 F.2d at 68 (holding the jury polling procedure employed of "asking for a show of hands" was not reversible error even though the jurors were not questioned one at a time in a person-by-person manner as requested by defense counsel), with Miranda, 255 F.2d at 17 (concluding the trial judge reversibly erred by solely questioning the jury foreman as to whether the verdict was unanimous even though a request for jury polling was timely made); and Linder, 276 S.C. at 308, 278 S.E.2d at 337 (finding the trial judge erred by concluding confirmation of the verdict solely by the jury foreman was sufficient to serve in place of an actual poll). Third, the jury only needed a little more than an hour to reach a verdict

in Wright's straightforward case, and nothing that occurred before or after the verdict was announced suggesting anything other than complete unanimity amongst the jurors.[9] Cf. Miller, 59 F.3d at 418 ("When that [collective jury polling] proceeding is considered against the backdrop of a relatively simple case, a short period of deliberation by the jury, and no indication in the record that any of the jurors displayed reluctance or disagreement with the verdict, we cannot say that the district court abused its discretion."); People v. Masajo, 49 Cal. Rptr. 2d 234, 237 (Cal. Ct. App. 1996) (instructing "the trial court's failure to ask each juror if the verdict was his or hers requires reversal *only* if appellant were prejudiced by that error" and concluding no prejudice resulted to Masajo from the trial judge's erroneous refusal to individually poll the jurors as statutorily required in California since nothing in the record indicated the verdict was not unanimous or uncoerced, the swift seventy-two-minute period of deliberations was "indicative of unanimity of opinion," and each juror was given an opportunity in open court to indicate dissent from the verdict by not raising his or her hand when asked to do so). Fourth and lastly, jury polling—which has been described by the highest of legal authorities as a "minor matter"—still does *not* even have to be conducted at all if not requested in our state, which strongly demonstrates such polling is not a fundamental or necessary component of a criminal trial such that the integrity and legitimacy of the proceedings is jeopardized without it. See Humphries, 174 U.S. at 195 (characterizing a trial judge's failure to conduct polling of the jury as a "minor matter"); Linder, 276 S.C. at 309, 278 S.E.2d at 338 ("Whether a poll of the jury will be conducted is discretionary with the trial judge *unless* polling is requested." (emphasis added)); see also Greer v. United States, __ U.S. __, 141 S. Ct. 2090, 2100 (2021) (explaining structural

[9] Notably, defense counsel did not make his request for additional polling based on anything he had observed or detected regarding the jury and, instead, explained he did so solely pursuant to his "standard procedure." (App'x pp. 492-493).

errors are "errors that affect *the entire conduct of the proceeding from beginning to end*" and instructing situations in which errors have been deemed to be structural in nature are "highly exceptional" and "very limited" (emphasis added and citations, internal quotations, and brackets omitted)); Martin v. United States, 182 F.2d 225, 227 (5th Cir. 1950) (instructing "experience of the years has shown that [the] benefit [of jury polling] to a defendant in effecting a change or modification of the jury's verdict is substantially nonexistent"); People v. Anzalone, 298 P.3d 849, 857 (Cal. 2013) ("The technical error here [in failing to poll the jury] did not affect the essential framework within which [Anzalone]'s trial was conducted. . . . To call what transpired here structural error would be to expand that notion beyond any example articulated by the United States Supreme Court, and elevate form over substance."); People v. McGhee, 964 N.E.2d 715, 723 (Ill. App. Ct. 2012) ("[P]olling the jury is merely a procedural device that helps to ensure that the jury's verdict is unanimous, but it is not an indispensable prerequisite to a fair trial. . . . [W]e must conclude that polling the jury on request, while mandatory, is not so fundamental that the failure to do so affects the fairness of a defendant's trial and challenges the integrity of the judicial process."). Thus, since the jurors must be presumed to follow the instructions given to them, the jurors collectively and individually confirmed they all agreed in the verdict, and nothing occurred suggesting anything other than complete unanimity on the part of the jurors, there are no proper grounds upon which to conclude Wright suffered any prejudice from the manner in which the jurors were polled in his case. Carter, 772 F.2d at 68; see United States v. Hager, 721 F.3d 167, 189 (4th Cir. 2013) ("Without any evidence to the contrary, we must assume that the jury followed the instructions given to it by the court."). Under such circumstances, a reversal of Wright's conviction cannot be legitimately justified, and,

accordingly, the Court of Appeals erred by finding reversal was not only warranted but unyieldingly *required*.

For all those reasons, the Court of Appeals—and not the trial judge—erred by concluding the manner in which the jury polling—which unquestionably occurred and resulted in a show of twelve individual hands in support of the verdict announced—was conducted in Wright's case was not legally sufficient or proper. Based on that, this Court should intervene to correct the Court of Appeals's erroneous decision, and, by doing so, this Court can ensure the decision ultimately reached in Wright's case affords due respect to a verdict returned by an impartial—and properly-instructed—group of jurors who collectively and individually affirmed it was a unanimous one, complies with the limits our state's citizenry has chosen to put into place concerning the procedural rule-making process, and avoids the unnecessary imposition of the significant social costs that flow from the reversal of a conviction. See United States v. Mechanik, 475 U.S. 66, 72 (1986) (explaining the reversal of a conviction results in "substantial social costs"); Graham v. United States, 231 U.S. 474, 484 (1913) ("It would be absurd to upset a verdict upon a speculation that the jury did not do their duty and follow the instructions of the court."); Beaty, 423 S.C. at 46, 813 S.E.2d at 512 (instructing our appellate courts are prohibited from adopting "even a much-needed" criminal procedure rule without going through the process delineated by the South Carolina Constitution). The decision of the Court of Appeals should be reversed and vacated, and Wright's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the decision of the Court of Appeals be reversed and vacated and the judgment and conviction of the trial court be affirmed.

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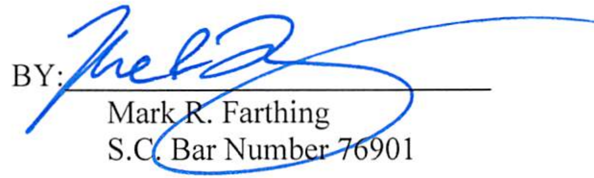
BY: 

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