

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Berkeley County
Honorable Maite Murphy, Circuit Court Judge
Lower Court Case No. 2016-GS-08-00306

RANDY WRIGHT,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2021-000146

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE PRESENTED

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?

COUNTER-STATEMENT OF ISSUE PRESENTED

Whether the court of appeals correctly reversed Respondent's conviction where the trial court denied Respondent's request to individually poll the jury, since a poll must be taken if one is requested?

STATEMENT OF THE CASE

On March 22, 2016, a Berkeley County Grand Jury indicted the respondent, Randy Wright, for the offense of assault and battery of a high and aggravated nature. App. 506 – 507. Wright was tried before the Honorable Maite Murphy and a jury from August 30 – 31, 2017. App. 5. Steve Davis represented Wright; Wilton McNeely and Jordan Smith prosecuted the case. App. 6. Wright was convicted and sentenced to incarceration for fifteen years suspended upon the service of ten years' incarceration and five years' probation. App. 502, ll. 16-20; App. 508.

Wright appealed and on August 19, 2020, the court of appeals heard oral argument in the case. On November 18, 2020, the court of appeals issued a unanimous, published opinion in which it held the trial court improperly denied Wright's request to poll the jury and reversed Wright's conviction. *State v. Wright*, 423 S.C. 365, 852 S.E.2d 468 (Ct. App. 2020). App. 544 – 548. The State sought rehearing. App. 549 – 564. On January 13, 2021, the court of appeals denied rehearing. App. 565. On June 28, 2022, this Court granted certiorari.

STANDARD OF REVIEW

The appellate courts of South Carolina review questions of law de novo. *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). “We clarify that appellate courts review questions of law de novo, with no deference to trial courts.” *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 840 (2018).

ARGUMENT

The court of appeals correctly reversed Respondent's conviction where the trial court denied Respondent's request to individually poll the jury, since a poll must be taken if one is requested.

The State mischaracterizes what occurred as a poll. The jury was not polled since the jurors were addressed collectively rather than individually. "To poll the jury means to examine each juror separately, after a verdict has been given, as to his concurrence in the verdict." *State v. Sanders*, 251 S.C. 431, 436, 163 S.E.2d 220, 224 (1968) (internal quotations omitted) (quoting Black's Law Dictionary, Fourth Edition); accord *Sanders v. Charleston Consol. Ry. & Lighting Co.*, 154 S.C. 220, 151 S.E. 438, 447 (1930) (polling the jury is a practice whereby the jurors are asked individually whether they assented and still assent to the verdict).

"Whether a poll of the jury will be conducted is discretionary with the trial judge unless a polling is requested. If the request is made, a poll must be taken." *State v. Linder*, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981). The court of appeals properly applied the precedent of this Court when it reversed Respondent's conviction upon the trial court's refusal to poll the jurors.

Relevant facts

On the night of August 8, 2015, Jimmy Taylor, the complainant, was taken to the hospital. Taylor's face and body were bruised and swollen and he needed sutures and staples to his scalp. App. 335, l. 11 – 345, l. 22; App. 507. How Taylor was injured was the subject of Respondent's trial. Taylor and Respondent agreed a physical altercation occurred but the men disputed how it unfolded and who was the aggressor. App. 409, ll. 5-9; App. 156, ll. 5-13.

Randy Wright, Respondent, lived not too far from Taylor. App. 141, l. 21 – 143, l. 5. Wright was on the way home from work at Swamp Fox Utilities with two of his adult sons and he stopped

at a convenience store. App. 403, l. 6 – 404, l. 21. Wright said he was standing in line when he saw Taylor, who was purchasing beer, staring at him. App. 405, ll. 16-21. Wright left the store and headed home. He said that Taylor drove up behind him and began to tail him aggressively. App. 406, ll. 12-14; App. 407, ll. 15-19. “He’d rush up on my bumper, stay there, you know, real close.” App. 407, ll. 22-23. Wright said: “I put my blinker on and went to turn in, and just as I turned in, something hit the back of my truck. App. 407, l. 23 – 408, l. 1. After the beer bottle hit his truck, Wright “want[ed] to find out what [Taylor’s] problem was with me.” App. 408, ll. 4-12; App. 422, ll. 17-20.

Wright said he went to Taylor’s house, where Taylor was at his truck. App. 408, ll. 8-20. “I said, what’s your problem with me? What have I done to you?” App. 408, ll. 21-23. Wright said Taylor reached behind the seat of his truck and grabbed a club. App. 408, ll. 24-25. Wright said Taylor hit him in the knee with a club. App. 409, ll. 7-9. Wright’s sons approached and Taylor hit one of them with the club too. App. 409, ll. 5-13. Wright told Detective Ward that his sons Adam and Randy, Jr., were with him, but testified that he gets his kids “mixed up” sometimes, and that it was actually Adam and Shawn who were with him. App. 421, ll. 7-15. Wright admitted that one of his sons struck Taylor while coming to his defense, but he said: “I was on the bottom of the pile. I can’t tell you [which one].” App. 410, ll. 18-23.

In contrast, Taylor alleged Wright passed him and someone threw a beer bottle at his (Taylor’s) truck. App. 152, l. 25 – 153, l. 21. According to Taylor, Wright and his sons came up to Taylor in his driveway and Wright said “he was going to F me up.” App. 154, l. 24 – 155, l. 5; App. 156, ll. 3-5. Taylor claimed Shawn hit him in the head with an object. App. 156, l. 12 – 157, l. 2; App. 161, ll. 20-22. Taylor alleged all three men then began to hit him. App. 158, ll. 17-20. Taylor denied that he pulled a bat out of his truck and attacked Wright. App. 195, ll. 9-12.

The jury deliberated for approximately an hour and a half, and asked to be re-charged on the elements of ABHAN and its lesser-included offenses. App. 488, l. 7 – 491, l. 16; App. 505. A verdict of guilty was later published by the clerk. App. 491, l. 25 – 492, l. 6. The clerk jointly addressed the jury: “Ladies and gentlemen of the jury, if this is your verdict, would you please signify by raising your right hand?” App. 492, ll. 7-9. The transcript reflects the jury “raised hands.” App. 492, l. 10. The court immediately told the jury: “Thank you ladies and gentlemen. If you would please go to the jury room for the very last time, I will be in there to release you momentarily.” App. 492, ll. 11-14. The court asked the attorneys: “Anything before I release the jury?” App. 492, ll. 17-18.

Defense counsel asked to approach the bench, and after a bench conference transpired, defense counsel put on the record that he requested the court poll the jury. App. 492, l. 19 – 493, l. 8. Counsel noted that state law “provide[s] for a process where you can ask for a polling of the jury.” App. 492, l. 19 – 493, l. 2. Defense counsel said: “I am aware that they all raised their hands, but that’s a continuation—that would be a group aspect polling of the jury.” App. 493, ll. 3-5. A party may “[r]equire an individual—calling out each specific juror, and I respectfully request that at this time, Your Honor.” App. 493, ll. 5-8.

The court refused to poll the jury, although it had not yet been released. App. 493, ll. 9-17. “[T]he Clerk did ask them, is this your verdict, and each of the jurors raised their hand individually. They looked around and raised their hand individually, and that’s on the record. Your request is respectfully denied.” App. 493, ll. 10-15. The court sentenced Wright to fifteen years’ imprisonment suspended upon the service of ten years’ imprisonment and five years’ probation. App. 508; App. 502, ll. 16-20.

Wright directly appealed the jury polling issue, and in its Brief of Respondent, the State asked the court of appeals to “clarify what type of poll is mandated under *Linder*[.]” See State’s Final Brief of Respondent at 12; App. 540. The court of appeals requested this matter be certified for review by this Court pursuant to Rule 204(b), SCACR, and the request was denied.

The court of appeals reversed, noting that *State v. Linder, supra*, had held a poll must be taken if requested and had implied each juror must be polled individually. App. 544 – 548. The court of appeals explained the right to poll the jury protected the defendant’s constitutional right to a unanimous verdict, safeguarded the right to a public trial, ensured no juror is coerced and promoted finality of the verdict stage. App. 545. The court of appeals concluded that polling requires “each juror must be separately asked to confirm verbally in the record the verdict announced is still his or her verdict.” App. 546. It further concluded the error was reversible *per se* pursuant to *Weaver v. Massachusetts*, 139 S.Ct. 1899, 1908 (2017). App. 546 – 548.

Discussion

The jurors were not polled despite Respondent’s timely request to poll. The court of appeals correctly found this was an error, and one which required reversal.

First, this was not a poll. To constitute a poll, there must be an individual address of each juror. “To poll the jury means to examine each juror separately, after a verdict has been given, as to his concurrence in the verdict.” *State v. Sanders*, 251 S.C. at 436, 163 S.E.2d at 224 (internal quotations omitted) (quoting Black’s Law Dictionary, Fourth Edition). See also *Sanders v. Charleston Consol. Ry. & Lighting Co.*, 154 S.C. 220, 151 S.E. 438, 447 (1930) (“The rule in such matters is very clearly stated in 16 C. J. 1098: ‘Polling the jury is a practice whereby the jurors are asked individually whether they assented and still assent to the verdict.’”) (emphasis removed). Here, the clerk asked the jury if it would confirm the verdict by a show of hands. Despite the

collective question to the jury, Respondent requested the jury be polled; he specified he was requesting an individual inquiry of each juror. The trial court denied the request.

“[T]he right to poll the jury, although not constitutional, is nonetheless a substantial right.” *United States v. Randle*, 966 F.2d 1209, 1214 (7th Cir. 1992). “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*, 456 N.W.2d 610, 612 (Wis. 1990). It also safeguards the right to a public trial. The object of a jury poll “is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent.” *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). “Courts have recognized that the chief purpose behind an individual poll of jurors is to enable a juror to express any reservation he may have about the verdict free from the pressure of his fellow jurors.” *State v. Tennant*, 319 S.E.2d 395, 399 (W.Va. 1984).

“[M]embers of a group may react differently when addressed as a group, and when addressed individually.” *State v. Pare*, 755 A.2d 180, 193 (Conn. 2000). “The right is one to have the conscience of each individual juror tested by an individualized question directed at him or her, not a question directed at any group of jurors in which individuals may find some degree of anonymity.” *Miles v. Commonwealth*, 256 S.W.3d 46 (Ky. Ct. App. 2008) (citing *Powell v. Commonwealth*, 346 S.W.2d 731, 733 n. 1. (Ky. Ct. App. 1961)). The State argues that the clerk’s question and jury’s raised hands “unquestionably” constituted an individual poll. *See* State’s Brief of Petitioner at 14. However, since the jurors were not individually addressed, they were not invited to express any reservations free from the pressure of the other jurors. The clerk’s question was directed at a “group of jurors in which individuals may find some degree of anonymity.” *Id.* The

record reflects the jurors looked around at each other when jointly addressed by the clerk. R. 489, ll. 12-13. The jurors here were addressed jointly rather than severally.

The form of a typical jury poll in general sessions court is for each juror to be asked whether the verdict announced was their verdict and if it is still their verdict, a process that takes approximately ninety seconds in total. In *State v. Singleton*, 319 S.C. 312, 460 S.E.2d 573 (1995), the jury poll was found to be proper where the clerk asked jurors individually,

[CLERK]: [Juror], was this your verdict?

[JUROR]: Yes.

[CLERK]: Is it still your verdict?

[JUROR]: No.

Id. at 315-17, 460 S.E.2d at 575-76. Similarly, in *Sanders v. Charleston Consol. Ry. & Lighting Co.*, 154 S.C. 220, 151 S.E. at 446,

counsel for the plaintiff preferred a request that the jury be polled, which was granted. **To each juror the clerk propounded the question as to his assent to the verdict as announced;** all expressed their assent except the juror W. M. Mitchell, Jr. The transcript shows that when he was asked the question, “Is this your verdict?” “*he replied that it was not his verdict.*” His honor then proceeded to interrogate the juror as to what he meant by saying that that was not his verdict, and had him sworn to undergo a further examination.

(emphasis added) (emphasis in original). Both of these cases reflect that the poll was performed in a manner that provided an opportunity for each juror to voice dissent when separately addressed as to his concurrence in the verdict. That opportunity was not present here, as the jury was addressed collectively.

Because Respondent requested a poll, polling was mandatory. “Whether a poll of the jury will be conducted is discretionary with the trial judge unless a polling is requested. If the request

is made, a poll must be taken.” *Linder*, 276 S.C. at 309, 278 S.E.2d at 338. “We establish this rule to dispel any doubt a party might entertain as to the propriety of a jury verdict as rendered. Language in our early cases suggesting a contrary rule is modified to conform to this holding.” *Id.* “A trial judge must conduct a jury poll if requested by either party.” *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (citing *Linder*). Based on this Court’s holding in *Linder*, that a poll must be taken when one is requested, the court of appeals correctly found error.

Next, the court of appeals’ opinion was not an improper usurpation of authority. Surprisingly, the State argues in its brief that the court of appeals’ “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.” *See* State’s Brief of Petitioner at 10; State’s Brief of Petitioner at 17. But in its Final Brief of Appellant, the State asked the court of appeals to clarify the correct polling process under *Linder*: “for the benefit of the bench and bar in future cases, the State submits this Court should clarify what type of poll is mandated under *Linder*, but should not reverse Appellant’s valid conviction.” *See* State’s Final Brief of Respondent at 12; App. 540. The court of appeals did not engage in illicit procedural rulemaking here. In keeping with the State’s own request in this case, the court of appeals properly explained, for the benefit of the bench and bar, how to protect a party’s rights when polling a jury.

Moreover, the State’s argument misapprehends the law. If the State’s argument was correct, this Court would have apparently engaged in illicit procedural rulemaking, for example, in *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011), when it held that immunity under the Protection of Persons and Property Act was to be determined pretrial and that the defendant had the burden to prove immunity by a preponderance of the evidence. This Court would have engaged in illegitimate procedural rulemaking in *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d

246, 248 (2000), when it articulated the five-factor balancing test that must be conducted by the trial court in determining whether to admit remote convictions under the evidence rules. Likewise, this Court would have engaged in prohibited procedural rulemaking in *Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003), when it held a pre-trial hearing must be convened on mental retardation in death penalty cases when requested by a party, and that the defendant has the burden of proving mental retardation by a preponderance of the evidence.

However, in those cases, as in this case, the appellate courts did not create illegitimate rules but instead properly exercised their authority to correct errors of law and ensure that parties' rights are protected. The court of appeals properly explained how a trial court should safeguard a defendant's rights in this context, and correctly applied those protections to Respondent's rights in this case.

Finally, the error was one which required reversal. *Linder*, 276 S.C. at 309, 278 S.E.2d at 338, held that reversal is required where a poll was requested but not taken. In *Linder*, defense counsel requested a poll of the jury to confirm that the death penalty remained each juror's recommendation, but the judge refused to conduct the poll and ruled that confirmation by the foreman that each juror had signed the recommendation constituted a jury poll. *Id.*, 276 S.C. at 308, 278 S.E.2d at 337. As seen, this Court in *Linder* held that a verdict is improper when a poll is requested but not taken. *Id.*, 276 S.C. at 309, 278 S.E.2d at 338.

As the court of appeals correctly found, "depriving a defendant of his or her polling right is not a technicality, but a material and prejudicial error." App. 548. "The individual poll is the best chance the trial court and the parties have to ensure the sanctity and unanimity of the verdict." App. 548. When an error is structural, it means "that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable

doubt.”” *Weaver v. Massachusetts*, 137 S. Ct. at 1910 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). “Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to ‘automatic reversal’ regardless of the error’s actual ‘effect on the outcome.’” *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)). There are three rationales for why an error is deemed structural and thus, not susceptible to harmless error analysis. “First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest.” *Weaver*, 137 S. Ct. at 1908. “Second, an error has been deemed structural if the effects of the error are simply too hard to measure.” *Id.* “Third, an error has been deemed structural if the error always results in fundamental unfairness.” *Id.*

The court of appeals correctly determined “the denial of the right to individual polling bears all three of these traits. The polling right protects not only the defendant from being wrongfully convicted but also the public’s interest in ensuring the outcome of the criminal trial process is reliable.” App. 547. As the court of appeals recognized, the error here was one which defies harmless error analysis. Since the error occurred after the verdict was announced, one cannot evaluate whether the error contributed to the verdict. And, absent polling, the defendant is denied the ability to ensure the verdict was unanimous. App. 547.

The State argues that *State v. Singleton*, 319 S.C. 312, 460 S.E.2d 573 (1995) and *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002), support its position that this error is subject to harmless error analysis. *See* State’s Brief of Petitioner at 20. However, those cases are inapposite to this case—*Singleton* dealt with a situation where the jury actually was polled, while *Green* was a post-conviction relief (PCR) case so the prejudice standard was *Strickland* prejudice.¹ In *Singleton*, the

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

jurors were individually polled, and one juror answered “No,” to the question, “Is it still your verdict?” *Singleton*, 319 S.C. at 315, 460 S.E.2d at 575. This Court addressed whether the trial judge intimidated the juror by asking follow-up questions and found *Singleton* “failed to establish that the judge’s comments during the supplemental instruction were coercive.” *Id.* at 316, 460 S.E.2d at 576. Importantly, *Singleton*, unlike Respondent Wright, was not altogether denied an individual poll. It was the denial of an individual poll here which the court of appeals found to be reversible error *per se*.

In *Green v. State*, 351 S.C. at 188-91, 569 S.E.2d at 320-22, which was an appeal from the denial of PCR, *Green*’s counsel did not request a poll of the jury after it returned a guilty verdict. This Court explained, “Trial counsel had no affirmative duty to request the trial judge poll the jury.” *Id.* at 196, 569 S.E.2d at 324. This Court noted that *Green* conceded he could not establish *Strickland* prejudice for the purposes of prevailing on PCR. *Id.* Neither *Green* nor *Singleton* support the State’s argument.

The weight of authority from other states holds that reversal flows from the failure to conduct a mandatory poll. “The right to a poll of the jury is a material right derived from the common law. In criminal cases the right to poll the jury is not discretionary, and the denial of that right when timely requested is reversible error.” *Rinker v. State*, 492 S.E.2d 746, 747 (Ga. App. 1997) (internal alternations omitted). “[T]he denial of one’s right to poll the jury dictates that a new trial be awarded.” *Commonwealth v. Downey*, 732 A.2d 593, 595 (Pa. 1999). See *State v. Behnke*, 456 N.W.2d at 614 (failure to poll jury without the defendant’s knowing, voluntary, and unequivocal waiver is grounds for automatic reversal: “Prejudice is presumed.”); *State v. Pockert*, 746 P.2d 839, 841 (Wash. App. 1987) (failure to poll jury upon defendant’s request is reversible error, even absent any showing of prejudice).

In an analogous case, the Connecticut Supreme Court has held as the court of appeals did. *State v. Pare*, 755 A.2d 180. Connecticut had a state practice rule similar to South Carolina's mandate in *Linder* that if a request is made, a poll must be taken. *Id.*, 755 A.2d at 182. In *Pare*, the court asked the jury collectively about the verdict, and the jury collectively responded that the verdict was unanimous. *Id.*, 755 A.2d at 184-85. Pare's defense counsel requested that the jurors be polled, but the court refused: "I was looking right at the jury, they all nodded and answered yes to my questions, so I'll deny your request." *Id.*, 755 A.2d at 186. The Connecticut Supreme Court found the trial court's failure to conduct a poll was "not subject to harmless error analysis but, rather, requires automatic reversal of the defendant's conviction," because there was no way to ascertain the effects of a poll not taken. *Id.*, 755 A.2d at 194.

The State mischaracterizes what occurred as a poll. Respondent Wright requested an individual poll, and one was not taken. Absent polling, Respondent was unable to check the validity of the verdict. This was an error which required a new trial. *Linder*, 276 S.C. at 309, 278 S.E.2d at 338; *Weaver*, 137 S. Ct. at 1908.

CONCLUSION

Respondent respectfully requests that this Court dismiss the writ of certiorari as improvidently granted or affirm the court of appeals.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR RESPONDENT

This 15th day of August, 2022.