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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Berkeley County
The Honorable Maite Murphy, Circuit Court Judge
Appellate Case No. 2017-002130

The State,

Respondent,

v.

Randy Wright,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly determined each juror concurred in the verdict because each individual juror affirmed their concurrence in open court by raising their hand when the clerk asked the jurors to indicate if the published verdict was their verdict.

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In March 2016, the Berkeley County Grand Jury indicted Appellant Randy Wright on one count of assault and battery of a high and aggravated nature, arising from an altercation between Appellant and Jimmy Taylor ("Taylor") on August 8, 2015. The case was called for a jury trial on August 30, 2017, before the Honorable Maite Murphy, Circuit Court Judge.

Dale Williams testified he lived next door to Taylor, and around 8:00 or 9:00 p.m. on August 8, 2015, he was home watching television when his dog starting barking. He went to his front porch and saw a group of people in Taylor's driveway. As he stood on his porch, Williams saw Taylor get up off the ground and start coming up the driveway, and heard Taylor yelling for his girlfriend to call 911. The other people in the driveway went to a truck parked at the end of the street, and quickly drove away.

When Taylor got closer to Williams' house, Williams saw that Taylor was bleeding from a wound on his head. Williams told Taylor to come over to his house, Williams wrapped a towel around Taylor's head to stop the bleeding, and saw that Taylor was "beat pretty severely." While they waited for an ambulance, Taylor told Williams the people who beat him were Appellant and two other people. (Trial Transcript [TT], pp. 52-62; Record on Appeal [R.], pp. 52-62).

Williams' wife Deanna testified she was also at home the night of the altercation, and described Taylor as "covered in blood." She was on the phone with emergency services while they waited on her porch for an ambulance. While they waited, Taylor stated Appellant and his two sons jumped him in his driveway. (TT, pp. 75-87; R., pp. 75-87).

Taylor's sister testified she went to the hospital when she learned Taylor had been injured. She saw Taylor in the emergency room, and described him as "a mess," with staples in the wound on his head, and bad bruising on his face and body. (TT, pp. 92-109; R., pp. 92-109).

Taylor testified he met Appellant and his sons approximately a year before the altercation when a friend brought them to Taylor's house to help fix Taylor's truck. He had no further contact with Appellant until approximately six months later when Appellant approached him in the grocery store and stated he did not appreciate Taylor talking about his family. (TT, pp. 134-142; R., pp. 134-142).

On August 8, 2015, Taylor went shopping at the Goodwill Store, and then stopped to eat. He started home around 8:00 p.m., and stopped at a convenience store on the way home to buy cigarettes and sodas. As he pulled out of the convenience store parking lot, he saw Appellant and his sons sitting in a truck parked across the street. When he left the parking lot, Appellant pulled out behind him and followed as he drove home. As he turned onto the road leading to his house, Appellant passed him, and someone threw a bottle out of the passenger window, which hit the front and right turn signal light of Taylor's truck. (TT, pp. 142-149; R., pp. 142-149).

After the bottle hit Taylor's truck, Appellant turned into a road before the driveway to Taylor's house. Taylor pulled into his driveway, and when he got out of his truck to unlock the driveway gate, Appellant and his sons approached him. Appellant stated he was going to "f***" Taylor up. Immediately thereafter, one of Appellant's sons hit Taylor in his left eye with a metal object. After he was hit multiple times, Taylor fell to the ground, and Appellant and his sons continued to hit and kick him until Williams came outside. When Williams came onto his porch, Appellant and his sons ran to Appellant's truck, which was parked down the street from Taylor's driveway. Taylor testified he never struck Appellant or his sons. (TT, pp. 149-179; R., pp. 149-179).

Appellant was arrested on August 19, 2015. He initially told the police he had not been involved in an altercation with Taylor, but subsequently stated he and his sons confronted Taylor

after he threw a bottle at Appellant's truck. He further stated Taylor got a club out of his truck and started hitting Appellant on the leg. Appellant claimed his sons tried to block Taylor from hitting him, and Appellant grabbed Taylor by the waist and threw him to the ground. He stated they left when Taylor said he was going to call the police. (TT, pp. 233-271; R., pp. 233-271).

Appellant testified Taylor followed him from the convenience store, and threw a bottle at the back of Appellant's truck. He stated he went to Taylor's house to ask him what was wrong, but Taylor grabbed a club out of his truck and hit Appellant. Appellant testified Taylor was intoxicated, and tried to choke Appellant by holding the club on his neck from behind. His sons tried to pull Taylor off Appellant. Everyone ended up on the ground, and Appellant testified Taylor said he was going to his house to get a gun, so he and his sons left. Appellant testified he had no idea why Taylor attacked him. (TT, pp. 395-415; R., pp 395-415).

On cross-examination, Appellant stated he did not tell the truth about which sons were with him that night because he was "confused," but denied he changed his story about what happened after the police told him Taylor had identified him. He admitted he did not file a police report or seek any medical care for the injuries he purportedly sustained when Taylor hit him with the club, but claimed he tried to show the police the injury to his knee when he spoke with them, but they would not look at it. Appellant also testified he had no idea how Taylor sustained a head injury or bruises. (TT, pp. 415-422; R., pp. 415-422).

The circuit court charged the jury on the elements of assault and battery of a high and aggravated nature, assault and battery first degree, assault and battery second degree and assault and battery third degree. During deliberations, the jury asked for the definitions of assault and battery first, second and third degree. With agreement of counsel, the court sent the written charges regarding those charges to the jury. (TT, pp. 477-487; R., pp. 477-487).

After deliberating for approximately a total of two hours, the jury convicted Appellant of assault and battery of a high and aggravated nature. After announcing the verdict, the clerk asked jurors to signify that was their verdict by raising their right hands, and all jurors raised their hands. The court sent the jury back to the jury room until they were released. Appellant then acknowledged all the jurors raised their hands, but requested further polling by asking each juror to state individually he or she concurred in the verdict. The court denied the request, noting the clerk asked the jurors to raise their hands if the verdict announced was their verdict, and "they raised their hand individually" in response. (TT, pp. 485-489; R., pp. 485-489).

The court sentenced Appellant to fifteen years incarceration, suspended to ten years incarceration and five years probation. (TT, pp. 496-498; R., pp. 496-498). This appeal followed.

STANDARD OF REVIEW

The standard of review in South Carolina's appellate courts depends on the specific issue presented. Smalls v. State, 422 S.C, 174, 810 S.E.2d 836, 840 (2018). The courts give great deference to the trial court's findings of fact, but reviews questions of law *de novo*. *Id.* In criminal cases, the appellate court sits to review errors of law only. State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789, 791 (2015). Matters within the trial court's discretion will not be reversed on appeal absent an abuse of discretion. State v. Jones, 423 S.C. 631, 817 S.E.2d 268, 270 (2018).

ARGUMENT

The circuit court properly determined each juror concurred in the verdict because each individual juror affirmed their concurrence in open court by raising their hand when the clerk asked the jurors to indicate if the published verdict was their verdict.

Relying primarily on State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), and case law from other jurisdictions, Appellant contends the circuit court erred in denying his request for individual verbal polling of the jurors, and the error mandates reversal of his conviction. Appellant's contention is premised on an expansive interpretation of Linder, and his reliance on it is misplaced. Further, if the circuit court erred in denying Appellant's request, the error is harmless based on the circumstances of this case.

The trial judge must be satisfied the verdict is unanimous, and must conduct a jury poll at the request of either party. Linder, 278 S.E.2d at 338. Polling is intended to provide the trial court a method to determine jurors individually "assented [to] and still assent to the verdict." *Id.*; *see also* State v. Kelly, 372 S.C. 167, 641 S.E.2d 468, 470 (Ct. App. 2007) (same). The trial judge is not required to poll the jury if the court is satisfied the verdict is unanimous, but must conduct a poll if either party requests it. Linder, 278 S.E.2d at 838. Polling the jury means examining the jurors separately as to his concurrence in the verdict. State v. Sanders, 251 S.C. 431, 163 S.E.2d 220, 224 (1968) (*citing* Black's Law Dictionary, Fourth Edition, Page 1320).

The right to a jury poll is not a constitutional right. United States v. Carter, 772 F.2d 66, 67 (4th Cir. 1985) (the right to a poll is not "of constitutional dimension," and the trial judge's collective polling did not violate the defendant's constitutional right to a unanimous verdict); United States v. Miller, 59 F.3d 417, 419 (3rd Cir. 1995) (right to a jury poll is not constitutional, but is rooted in early common law). While acknowledging the significance of a defendant's right

to a jury poll upon request, the Linder court did not mandate any particular method of conducting the poll. 278 S.E.2d at 337-338. In the absence of a mandated procedure to conduct a requested jury poll, the court necessarily left the method of conducting the poll to the trial judge's discretion.

In this case, the circuit court assured each juror separately concurred in the verdict as announced by a show of hands. While the court did not conduct an individual verbal inquiry to each juror, the polling method used certainly achieved the goal of Linder by giving each individual juror the opportunity to express disagreement. Unlike a group question and a group verbal response, where individual assent may be difficult to ascertain, the poll taken allowed the court to easily discern if one or more of the jurors did not raise his or her hand.

Linder is distinguishable from the instant case. In Linder, the trial judge asked the jury foreman if each juror had signed the statutorily required form indicating the jury's recommendation to impose the death penalty. The form was signed in the jury room, and the jurors were not polled in open court, either collectively or individually, as to their assent to the recommendation. The Supreme Court reversed the conviction and sentence, finding, *inter alia*, the trial judge erred by accepting the jury foreman's attestation of the jurors' unanimity. 278 S.E.2d at 338.

Contrary to mere acceptance of the jury foreman's attestation of unanimity, the jurors in the instant case were asked in open court, in the circuit court's presence, to confirm the verdict rendered was their verdict. Each individual juror raised his/her hand in response to the question, and nothing in the record indicates hesitation or uncertainty on the part of any juror. The circuit court was in the best position to observe the jurors as they responded, and determined the verdict was unanimous based on those observation. (TT, pp. 488-489; R., pp. 488-489).

The case law Appellant cites from other jurisdictions is likewise distinguishable. *See* United States v. Randle, 966 F.2d 1209, 1214 (7th Cir. 1992)(federal criminal procedure rule required a poll if requested; no jury poll conducted); State v. Pare, 755 A.2d 180, 194-196 (Conn. 2000)(court rule required jury poll if requested and specifically set forth procedure of asking each juror individually to affirm agreement with the verdict; collective poll violated the rule and required reversal); Commonwealth v. Downey, 732 A.2d 593 (Pa. 1999)(criminal procedure rule required jury poll if requested; trial court erred in refusing timely request for a jury poll); Rinker v. State, 492 S.E.2d 746 (Ga. App. 1997)(denial of defendant's timely request for a jury poll was reversible error; no jury poll conducted); State v. Behnke, 456 N.W.2d 610, 64 (Wis. 1990)(combination of violation of defendant's constitutional right to counsel when the verdict was rendered in defense counsel's absence and no jury poll mandated reversal); State v. Pockert, 746 P.2d 839, 840 (Wash. App. 1987)(criminal procedure rule required jury poll; judge refused request for jury poll); State v. Tennant, 319 S.E.2d 395 (W.Va. 1984)(juror expressed disagreement with the verdict during poll and trial judge's subsequent questioning of the juror was coercive). Contrary to these cases, there is no South Carolina case or procedure rule indicating a collective jury poll, with each juror showing concurrence in the verdict by a show of hands in the trial court's presence, does not meet the requirement of Linder.[1]

Appellant's contention the denial of his request for further polling of the jury mandates reversal of his conviction places form over substance, and requires pure speculation regarding the impact of an individual poll. "It must be rare that members of a jury would listen to, or speak

[1]In Carter, the Fourth Circuit acknowledged Rule 31, FRCRP merely mandated a jury poll if requested, the manner of conducting the poll was discretionary with the trial court and the collective poll conducted was not reversible error, but "strongly suggest[ed]" the district courts in future cases should ask each juror to respond individually whether he agrees with the verdict. 772 F.2d at 68. Rule 31 was amended in 1998 to specifically require "individual" polling of each juror.

collectively in support of, their foreman, and immediately thereafter contradict themselves if asked to speak individually." Jaca Hernandez v. Delgado, 375 F.2d 584, 586 (1st Cir. 1967)(explaining why a defendant might think it pointless to require a jury poll). By comparison, it is difficult to imagine how asking jurors to respond collectively, particularly by a show of hands, is more coercive than singling out each individual juror to respond to the same question. Indeed, asking each juror individually to affirm or disavow the verdict in the presence of the other jurors would rationally be more coercive, and less likely to encourage the individuals to dissent after the verdict has been announced. Thus, provided a request for a jury poll is not denied, the trial judge should be permitted to exercise its discretion to poll the jury in the manner it deems most likely to assure individual assent without coercion.

Significantly, Appellant raises no other issue regarding the circuit court's rulings during the trial. As the United States Supreme Court noted in Humphries v. District of Columbia, 174 U.S. 190 (1899), while the right to poll a jury exists, the "minor matter of failing to poll the jury" does not render the verdict null and void when it is clear the verdict received the assent of all the jurors. *Id.* at 194-195. The record in this case amply supports the circuit court's determination all the jurors concurred in the verdict as announced.

If this Court determines the circuit court erred by failing to further poll the jurors, the error is harmless. This case was a relatively straightforward two day trial from jury selection to verdict, and it primarily rested on the jurors assessing the credibility of the victim and Appellant. During deliberations, the jury requested the definition of the three charges against Appellant (assault and battery first, second and third degree), and with agreement of counsel, the circuit court sent the jury a written copy of the instructions as originally given. The jury reached its verdict after deliberating for a total of approximately two hours. (TT, pp. 485-488; R., pp. 485-

488). There is no indication the jury struggled to reach a verdict, and as stated above, nothing in the record indicates any of the jurors hesitated in responding affirmatively with a show of hands to the question of whether the verdict as announced was their verdict.

Finally, in light of the fact Linder requires a jury poll if requested, but does not mandate a particular method of polling, the circuit court acted well within current law in determining the collective poll with a show of hands in the court's presence was sufficient, and its ruling should be affirmed. If this Court determines each juror must be asked individually to verbally affirm the announced verdict is his/her verdict, 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.

CONCLUSION

Based on the foregoing reasons, the State respectfully submits the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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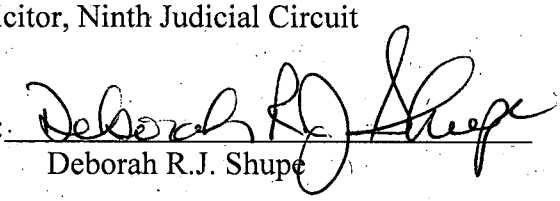
BY: 
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CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 14, 2015, order from the South Carolina Supreme Court entitled, "revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally Ellison, certify I served the Final Brief of Respondent on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 12th day of April, 2019.

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