

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

RANDY WRIGHT,

APPELLANT

APPELLATE CASE NO. 2017-002130

FINAL BRIEF OF APPELLANT

RECEIVED
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SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW 3

STATEMENT OF FACTS 4

ARGUMENT
 The trial court erred when it refused to poll the jury where defense
 counsel timely requested the jury be polled, since a poll must be
 taken if the request is made..... 7

CONCLUSION..... 11

TABLE OF AUTHORITIES

Commonwealth v. Downey, 732 A.2d 593 (Pa. 1999)9

Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002).....7

Humphries v. District of Columbia, 174 U.S. 190 (1899)8

Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013)3

Rinker v. State, 492 S.E.2d 746 (Ga. App. 1997)9

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).....3

State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014).....3

State v. Behnke, 456 N.W.2d 610 (Wis. 1990)8, 9

State v. Kelly, 372 S.C. 167, 641 S.E.2d 468 (Ct. App. 2007)7

State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981).....7, 8, 10

State v. Pare, 755 A.2d 180 (Conn. 2000).....8, 9

State v. Pockert, 746 P.2d 839 (Wash. App. 1987)9

State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979).....7

State v. Sanders, 251 S.C. 431, 163 S.E.2d 220 (1968).....7

State v. Tennant, 319 S.E.2d 395 (W.Va. 1984)8

United States v. Randle, 966 F.2d 1209 (7th Cir. 1992).....8

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it refused to poll the jury where defense counsel timely requested the jury be polled, since a poll must be taken if the request is made?

STATEMENT OF THE CASE

On March 22, 2016, a Berkeley County Grand Jury indicted appellant for the offense of assault and battery of a high and aggravated nature. R. 502. Appellant was tried before the Honorable Maite Murphy and a jury August 30 – 31, 2017. R. 1. Steve Davis represented appellant; Wilton McNeely and Jordan Smith represented the state. R. 2.

Appellant was convicted and sentenced to incarceration for fifteen years suspended upon the service of ten years' incarceration and five years' probation. R. 498, ll. 16-20.

This appeal follows.

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).

STATEMENT OF FACTS

On the night of August 8, 2015, Jimmy Taylor was taken to the hospital and received fifteen stitches or staples in his head. R. 502; R. 333, ll. 13-16. Taylor did not have any internal injuries.¹ R. 333, ll. 11-12. How Taylor came to need the stitches was the subject of appellant's trial. Taylor and appellant agreed a physical altercation occurred, but disputed how it unfolded and who was the aggressor. R. 405, ll. 5-9; R. 152, ll. 5-13.

Randy Wright, the appellant, lived "across the way and behind [a] field" from Jimmy Taylor. R. 138, l. 21 – 139, l. 5. Wright was on the way home from work at Swamp Fox Utilities with two of his adult sons, and stopped "at the Country Corner store." R. 399, ll. 6-9; R. 400, ll. 1-21. Wright said he was standing in line when he saw Taylor, who "had two big bottles of Bud Lite" look at him with a "mean look." R. 401, ll. 16-21. "I didn't know what was wrong with him. I had never seen him act like that." R. 401, ll. 22-23.

Wright left the store and headed home, and said that Taylor drove up behind him and began to tail him aggressively. R. 402, ll. 12-14; R. 403, ll. 15-19. "He'd rush up on my bumper, stay there, you know, real close." R. 403, 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. R. 403, l. 23 – 404, l. 1. After the beer bottle hit his truck, Wright "want[ed] to find out what [Taylor's] problem was with me." R. 404, ll. 4-12; R. 418, ll. 17-20. "[M]e and him ain't never had any problems, so I didn't know." R. 404, ll. 12-13.

Wright said he went to Taylor's house, where Taylor was at his truck. R. 404, ll. 13-20. "I said, what's your problem with me? What have I done to you?" R. 404, ll. 21-23. Wright said

¹ Taylor did not have any internal bleeding or broken bones, but required sutures to his scalp and had bruises on his side. R. 346, l. 23 – 347, l. 3; R. 333, ll. 4-5; R. 333, ll. 16-22; R. 341, ll. 16-25.

Taylor reached behind the seat of his truck and grabbed a club. R. 404, ll. 24-25. “[H]e said, I’m going to show you. And he squared back and caught me in my kneecap with the club.” R. 405, ll. 7-9.

“[O]ne of my sons² had come beside me,” and Taylor “caught [my son] in the ribs with [the club]. And about that time, my other son had come up.” R. 405, ll. 5-13. Wright admitted that one of his sons struck Taylor while coming to his defense, but said: “I was on the bottom of the pile. I can’t tell you [which one].” R. 406, ll. 18-23.

Taylor alleged Wright passed him, and someone threw a beer bottle at Taylor’s truck. R. 148, l. 25 – 149, 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.” R. 150, l. 24 – 151, l. 5; R. 152, ll. 3-5. Taylor claimed he was hit in the head with a metal instrument by Shawn. R. 152, l. 12 – 153, l. 2; R. 157, ll. 20-22. According to Taylor, all three men then began to hit him. R. 154, ll. 17-20. Taylor denied that he pulled a baseball bat out of his truck and attacked Wright. R. 191, ll. 9-12.

Verdict

The jury deliberated for two hours, asking to be re-charged on the elements of ABHAN and its lesser included-offenses. R. 484, l. 7 – 487, l. 16; R. 501. A verdict of guilty was later published by the clerk. R. 487, l. 25 – 488, l. 6.

The clerk said: “Ladies and gentlemen of the jury, if this is your verdict, would you please signify by raising your right hand?” R. 488, ll. 7-9. The transcript reflects the jury “raised hands.” R. 488, 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

² 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. R. 417, ll. 7-15.

momentarily.” R. 488, ll. 11-14. The court asked the attorneys: “Anything before I release the jury?” R. 488, 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. R. 488, l. 19 – 489, l. 8. Counsel noted that state law “provide[s] for a process where you can ask for a polling of the jury.” R. 488, l. 19 – 489, 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.” R. 489, 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.” R. 489, ll. 5-8.

The court refused to poll the jury, although it had not yet been released. R. 489, 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.” R. 489, ll. 10-15.

Randy Wright was sentenced to serve an active prison term of ten years. R. 504.

This appeal follows.

ARGUMENT

The trial court erred when it refused to poll the jury where defense counsel timely requested the jury be polled, since a poll must be taken if the request is made.

The court asked the parties if there were any other matters before it released the jury, and the defense requested the court poll the jury. The court's refusal to poll the jury was error. "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). "The trial judge must be satisfied that the verdict is unanimous and must conduct a jury poll at the request of either party." *State v. Kelly*, 372 S.C. 167, 170, 641 S.E.2d 468, 470 (Ct. App. 2007).

While the manner of polling is up to the judge, polling must be a query of **each** juror individually. "Polling is a practice whereby the court determines from the jurors **individually** whether they assented and still assent to the verdict." *State v. Linder*, 276 S.C. 304, 308, 278 S.E.2d 335, 338 (1981) (emphasis added). "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) (emphasis added) (quoting Black's Law Dictionary, Fourth Edition). *State v. Roper*, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) (manner of trial judge's polling of the jury was not coercive because it was necessary that the court ask follow-up questions in order that the record accurately reflect the position of the juror).

A close reading of *State v. Linder, supra*, is instructive here. Linder was a death penalty case, and the court polled the jury when it returned a guilty verdict, but refused the defense's request to poll the jury as to the sentencing phase. *Linder*, 276 S.C. at 308, 278 S.E.2d at 337. The defense asked the court to poll the jury to "determine whether the death sentence remained

each juror's recommendation." *Id.* Instead, the trial judge asked the foreman whether each juror had signed the recommendation, and found the foreman's affirmative reply served in place of a poll. *Id.* The South Carolina Supreme Court found this error required reversal. *Id.* "The trial judge must be satisfied that the verdict is unanimous. A jury poll is not absolutely required if the trial judge is otherwise assured that the above requirements have been met and if no request for a poll has been made by a party." *Id.* at 309, 278 S.E.2d at 338.

"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. We establish this rule to dispel any doubt a party might entertain as to the propriety of a jury verdict as rendered.**" *Linder*, 276 S.C. at 309, 278 S.E.2d at 338. (emphasis added).

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).

"[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).

State v. Pare, supra, is analogous to the case at hand. 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.* at 182. In *Pare*, the court asked the jury collectively about the verdict, and the jury collectively responded that the verdict was unanimous. *Id.* 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.* 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 is no way to ascertain the effects of a poll not taken. *Id.* at 194.

The weight of authority from other states also finds reversible error results from 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 and punctuation 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). *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).

Here, the court asked the parties if they had any matters to address before it released the jury. Defense counsel moved to poll the jury, and correctly explained that although the jurors raised their hands, "that's a continuation—that would be a group aspect polling of the jury." R. 489, ll. 3-5. Counsel requested an individual query of each juror. R. 489, ll. 5-8. "Polling is a

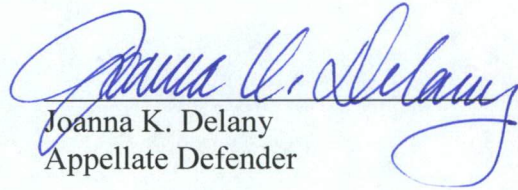
practice whereby the court determines from the jurors **individually** whether they assented and still assent to the verdict.” *Linder*, 276 S.C. at 308, 278 S.E.2d at 338 (emphasis added). The fact that the jurors here “looked around” when they raised their hands illustrates the necessity of an individual poll to “express any reservation” free from the pressure of fellow jurors.

Because counsel made a timely request, the court had a mandatory obligation to poll the jury. The collective question here was not a poll—it was a joint address, not a several poll of each juror. Appellant submits the court’s failure to comply with the law regarding this substantial right requires reversal, since the request was timely made and there is no way to ascertain the results of a poll not taken.³ *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981).

³ Moreover, the length of the jury’s deliberation (two hours) and its request to be recharged on the elements of the offense and its lesser-included offenses indicate it may have been divided.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.


Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of April, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Initial Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 15, 2019.



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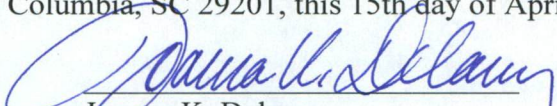
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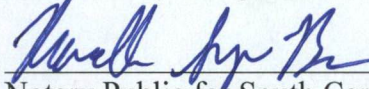
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of April, 2019.



Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of April, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028