STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Maite Murphy, Circuit Court Judge

Opinion No. 5782 (S.C. Ct. App. filed November 18, 2020)

2016-GS-08-00306

THE STATE,

PETITIONER,

V.

RANDY WRIGHT

RESPONDENT.

APPELLATE CASE NO. 2021-000146

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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PETITIONER'S QUESTION 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 the jury polling was conducted since nothing suggested the jury's verdict was anything other than unanimous?

RESPONDENT'S QUESTION 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 Randy Wright, Respondent, for the offense of assault and battery of a high and aggravated nature (ABHAN). R. 502. Respondent was tried before the Honorable Maite Murphy and a jury August 30 – 31, 2017. R. 1. Steve Davis represented Respondent; Wilton McNeely and Jordan Smith represented the State. R. 2.

Respondent was convicted and sentenced to fifteen years' imprisonment, suspended upon the service of ten years and five years of probation. R. 498, ll. 16-20. Respondent pursued a direct appeal and the Court of Appeals heard argument on August 19, 2020. On November 18, 2020, Respondent's conviction was reversed when the Court of Appeals held the trial court improperly denied Respondent's request to poll the jury. *State v. Wright*, 432 S.C. 365, 852 S.E.2d 468 (2020). The State filed a petition for rehearing December 3, 3030. App. 549 – 565. Rehearing was denied on January 13, 2021. App. 565.

The State filed its petition for writ of certiorari. This return follows.

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.

In *State v. Linder*, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981), this Court in held, "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." "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). The Court of Appeals properly applied the precedent of this Court when it reversed Respondent's conviction where the trial court refused his request to poll the jurors.

Relevant facts

On the night of August 8, 2015, Jimmy Taylor, the complainant, was taken to the hospital. Taylor had bruises on his side and need stitches to his scalp. R. 346, l. 23 – 347, l. 3; R. 333, l. 4 – 22; R. 341, ll. 16-25; R. 502. How Taylor came to need the stitches 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. R. 405, ll. 5-9; R. 152, ll. 5-13.

Randy Wright, Respondent, lived "across the way and behind [a] field" from 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" staring at him. R. 401, ll. 16-21.

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 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 sons 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 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. 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.

In contrast, Taylor alleged Wright passed him, and Taylor claimed 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. Taylor alleged 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.

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 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 ten years' imprisonment. R. 504.

The Court of Appeals reversed, noting that while "[e]arly South Carolina cases permitted polling in the trial court's discretion," . . . "[t]he trial court's discretion ended in *State v. Linder*, which held a poll must be taken if requested and implied each juror must be polled individually." *State v. Wright*, 432 S.C. at 368, 852 S.E.2d at 470 (citing *Linder*, 276 S.C. at 309, 278 S.E.2d at 338).

The Court of Appeals recognized that the "right to poll the jury is not itself a constitutional right but a procedural protection of the defendant's constitutional right to a unanimous verdict." *Id*. at 369, 852 S.E.2d at 470 (citing *State v. Pare*, 755 A.2d 180, 188 (Conn. 2000). The Court of Appeals explained the right to poll the jury also "safeguards the right to a public trial," and "promotes finality and accountability of the verdict stage and enhances the integrity of the deliberative process by ensuring no juror was coerced in the jury room." *Id*. (citing *State v. Kelly*, 372 S.C. 167, 170-71, 641 S.E.2d 468, 470 (Ct. App. 2007); *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899)).

The Court of Appeals concluded that "individual polling means each juror must be separately asked to confirm verbally in the record the verdict announced is still his or her verdict. We believe this person-by-person inquiry best advances the prime reason for individual polling: "to dispel any doubt a party might entertain as to the propriety of a jury verdict as rendered.'" *Id*. (citing *Linder*, 276 S.C. at 309, 278 S.E.2d at 338).

The Court of Appeals further found this error to be one which was reversible *per se* and not subject to harmless error analysis, pursuant to *Weaver v. Massachusetts*, 139 S.Ct. 1899, 1908 (2017), which held an error was structural if: "(1) the right at issue is designed to protect an interest other than the defendant's interest in being wrongly convicted; (2) the effects of the error

are 'simply to hard to measure'; or (3) the error always results in fundamental unfairness." *Wright*, 432 S.C. at 371, 852 S.E.2d at 471-72.

The Court of Appeals explained, "We believe 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." *Id*. at 371, 852 S.E.2d at 472. "Denial of the polling right also defies harmless error analysis . . . It would be an odd end to the matter to deem it harmless, for in effect we would be presuming the unanimity of the verdict while simultaneously denying the defendant the only real right he has to check beyond the presumption." *Id*. "Finally, the denial of the polling right caused fundamental unfairness by undermining the systemic requirements of a fair and open judicial process." *Id*. (internal alteration, quotations and citation omitted) (quoting *Weaver*, 137 S.Ct. at 1911).

Discussion

"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. "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*).

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 in original).

Here, part and parcel with publication of the verdict, 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. 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. *Linder*, 276 S.C. at 308-09, 278 S.E.2d at 338.

"[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). 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. at 194. "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 at 193. "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 Petition for Certiorari 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. In fact, the record reflects the jurors looked around at each other when jointly addressed by the clerk. R. 489, ll. 12-13. A fair reading of this record shows the jurors here were addressed jointly rather than severally.

State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995), recited the typical form a jury poll takes in this state. In *Singleton*, 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 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 verdict.

In its petition for certiorari, the State argues that the Court of Appeals improperly "adopted an entirely new rule of criminal procedure for jury polling." *See* State's Petition for Certiorari at 10. This argument is unsound. By the State's reasoning, this Court would have apparently engaged in illicit rule-making, 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 pre-trial and that the defendant had the burden to prove immunity by a preponderance of the evidence. This Court would have engaged in illegitimately expansive rule-making 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 when determining whether to admit remote convictions under Rule 609(b), SCRE. Likewise, this Court would have engaged in prohibited rule-making 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 of this state did not create new rules of criminal procedure but instead properly exercised their authority to correct errors of law and ensure that parties' rights are protected. While jury polling is a matter which certainly could be addressed by the South Carolina Rules of Criminal Procedure, an appellate court is not prohibited from deciding this issue simply because it was not addressed there. The Court of Appeals did not establish a new rule of procedure and instead merely explained how a trial court should safeguard a defendant's rights in this context. As the Court of Appeals observed, the right to poll the jury is a "procedural protection of the defendant's constitutional right to a unanimous verdict." *Wright*, 432 S.C. at 369, 852 S.E.2d at 470 (citing *Pare*, 755 A.2d at 188). "It also safeguards the right to a public trial." *Id*. (citing *Kelly*, 372 S.C. at 170-71, 641 S.E.2d at 470).

The Court of Appeals correctly found the error here required reversal. "[D]epriving a defendant of his or her polling right is not a technicality, but a material and prejudicial error."

Wright, 432 S.C. at 372, 852 S.E.2d at 472. "The individual poll is the best chance the trial court and the parties have to ensure the sanctity and unanimity of the verdict." *Id*.

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 applied *Weaver* here, finding "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." *Wright*, 432 S.C. at 371, 852 S.E.2d at 472. "Denial of the polling right also defies harmless error analysis . . . It would be an odd end to the matter to deem it harmless, for in effect we would be presuming the unanimity of the verdict while simultaneously denying the defendant the only real right he has to check beyond the presumption." *Id.* "Finally, the denial of the polling right caused fundamental unfairness by undermining the systemic requirements of a

fair and open judicial process." *Id*. (internal alteration, quotations and citation omitted) (quoting *Weaver*, 137 S.Ct. at 1911).

Another jurisdiction confronting this same issue has held as the Court of Appeals did. *State v. Pare*, 755 A.2d 180, is analogous to this case. 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 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). *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 its petition for certiorari, the State does not refute the Court of Appeals' analysis and finding of structural error. Instead the State claims 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 Petition for Certiorari at 18 – 19. However, a closer look at these cases reveals they do not support such a position. In *Singleton*, the 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 Singleton's claim that 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 post-conviction relief (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*[1] prejudice for the purposes of prevailing on PCR. *Id*. Neither *Green* nor *Singleton* support the State's argument.

Respondent Wright requested an individual poll and one was not taken. This Court should deny certiorari. *Linder*, 276 S.C. at 309, 278 S.E.2d at 338; *Weaver*, 137 S. Ct. at 1908.

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

CONCLUSION

Respondent respectfully requests this Court deny the State's petition for certiorari.

Respectfully Submitted,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR RESPONDENT

This 5th day of April, 2021.

RECEIVED
Apr 05 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
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RANDY WRIGHT,

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to the Petition for Writ of Certiorari in this case has been served on Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Randy Wright, #373809, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 5th day of April, 2021.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR RESPONDENT