2021 IL App (1st) 192219

SECOND DIVISION
September 30, 2021

No. 1-19-2219

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JESSE FLORES, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 17 CR 5607 (01) Honorable Diana L. Kenworthy, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court, with opinion.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Jesse Flores was charged with possessing contraband in a penal institution. He was tried by a jury and found guilty of the charged offense. Following the jury's verdict, the defense requested that the jury be polled. The trial court polled the jury, but only asked 11 of the 12 jurors to verbally confirm their verdict. Defendant did not object to the court's polling of the jury and did not raise the issue in a posttrial motion. On appeal, defendant raises the jury-polling error for the first time and argues that he is entitled to a new trial. We conclude that defendant has forfeited the error for review and that he is not entitled to relief under the plain error doctrine. Accordingly, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with possessing contraband in a penal institution after prison guards found defendant in possession of a prison shank. At trial, the State produced compelling evidence that defendant was guilty of the charged offense. The jury deliberated for under an hour and found defendant guilty. All 12 jurors signed the verdict form to signify their finding that defendant was guilty beyond a reasonable doubt.

¶ 4 After the verdict was announced, the defense asked the trial court to poll the jury. The trial court asked 11 of the jurors to confirm that the guilty verdict was the verdict that each individual juror had selected. Defendant did not object to the court's poll of the jury. Neither the State nor the defense alerted the trial court to the fact that it only polled 11 of the 12 jurors.

¶ 5 A month after trial, the defense filed a motion for a new trial but indicated that it was waiting for trial transcripts and would likely need to amend the motion for a new trial once it received the transcripts. Later, defendant received the trial transcripts, made amendments to the motion for a new trial, and filed the amended motion. Defendant raised at least nine grounds for a new trial, but he did not mention any potential error in the polling of the jury. The trial court denied the motion for a new trial and sentenced defendant to seven years in prison. Defendant filed this appeal predicated solely on the jury polling issue, and he claims that he is entitled to a new trial.

¶ 6 ANALYSIS

¶ 7 Defendant argues that he was denied the right to ensure that the jury's verdict was unanimous when the trial court only polled 11 of the 12 jurors. Defendant points out that the right to have the jury polled is an absolute right in Illinois under which jurors are given the right

to express disagreement with the verdict or change their mind (citing *People v. Kellogg*, 77 Ill. 2d 524, 527-530 (1979)). Defendant contends that by only asking 11 of the 12 jurors to confirm their verdict, the trial court failed to examine "each juror" as required by our supreme court's precedent (citing *id*.) and, as a result, he was not afforded his "right to ensure unanimous agreement in the verdict against him."

¶ 8 Defendant, however, concedes that he failed to object to the trial court's jury poll and that he is raising the issue for the first time on appeal. He urges us to review the issue under the plain error doctrine which permits us, under certain circumstances, to review issues that would otherwise be forfeited for review.

¶ 9 If a defendant either fails to object to an error at trial or fails to raise the issue in a posttrial motion, the issue is forfeited for appellate review. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010). An exception to the forfeiture rule exists for situations in which the alleged error rises to the level of "plain error." *People v. Roman*, 2013 IL App (1st) 102853, ¶ 19. The plain error doctrine allows this court to consider unpreserved errors when either (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Here, defendant argues that we should review the issue under the second prong of plain error review—that there was an error so serious that it affected the fairness of defendant's trial and challenges the integrity of the judicial process. See *id*. at 187.

¶ 10 Defendant argues that a jury-polling error falls under second-prong plain error review because our courts have recognized a defendant's "substantial right" to poll the jury (citing *People v. Wheat*, 383 Ill. App. 3d 234, 237 (2008)). Defendant contends that regardless of whether a jury-polling error is preserved for review, a violation of the "absolute right" to poll the

jury mandates a new trial (citing *i.e.*, *People v. DeStefano*, 64 Ill. App. 2d 389, 408-09 (1965)). He posits that "reversal is required when the polling is insufficient in any way *** because the record must establish that the verdict was unanimous and unhampered by the pressures of the jury room."

¶ 11 We have previously examined the issue of whether a jury polling error constitutes the type of error we will address under second-prong plain error review. In answering that question, we have stated 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." *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 26 (Leave to appeal denied, 968 N.E.2d 1070 (Table, May 30, 2010)). We reached that holding in *McGhee* despite the trial court conducting no jury poll at all even though the defendant requested one. *Id*. at ¶ 17. Here, the trial court conducted the jury poll consistent with defendant's request, but inadvertently neglected to consult one juror.

¶ 12 In *People v. Sharp*, 2015 IL App (1st) 130438 (*abrogated on other grounds by People v. Veach*, 2017 IL 120649, ¶ 39), we addressed a situation very similar to the one presented in this case. In *Sharp*, the defendant requested that the jury be polled, but the trial court inadvertently only polled 10 of the 12 jurors. *Id*. at ¶ 111. The defense did not object to the incomplete polling at trial or in a posttrial motion. *Id*. We reviewed the claim for plain error and held that the error did not amount to second-prong plain error. *Id*. at ¶ 112. We explained that the trial court's "failure to poll the jury on defendant's request is not the kind of error that mandates reversal regardless of whether the defendant was prejudiced by the error because it does not affect the fairness of a defendant's trial or challenge the integrity of the judicial process." *Id*.; see also *People v. McDonald*, 168 Ill. 2d 420, 462 (1995) (*abrogated on other grounds by People v.*

Clemons, 2012 IL 107821) ("We therefore reject defendant's contention that the purportedly improper polling of a juror amounted to plain error.").

¶ 13 Contrary to the two cases discussed above, this court recently addressed the scenario presented in this case when it decided *People v. Jackson*, 2021 IL App (1st) 180672 (Petition for leave to appeal pending, No. 127256). In *Jackson*, the trial court polled 11 of the jurors, but failed to inquire of the twelfth. *Id*. at ¶ 11. The defendant did not object at the time the error occurred, nor did he raise the issue in a posttrial motion. *Id*. at ¶¶ 11-12. The *Jackson* court found that the error was forfeited, but it found that the incomplete jury poll was an error "serious enough to be considered second-prong plain error." *Id*. at ¶ 19.

¶ 14 In reaching the holding in *Jackson*, the court found that failing to poll the *entire* jury constitutes second-prong plain error. *Id*. The court concluded that once a jury poll is sought by a defendant, every juror must be afforded the opportunity to disavow the verdict form. *Id*. at ¶ 31. The *Jackson* court held that "a complete and proper jury poll [is] essential to a fair criminal trial" (*id*. at ¶ 35) and that polling the jury "is a right central enough to the proper functioning of our criminal justice system that the error alone is prejudicial" (*id*. at ¶ 39). Accordingly, the *Jackson* court found that the defendant was entitled to a new trial as a result of the trial court only polling 11 of the 12 jurors. *Id*. at ¶ 3.

¶ 15 The fundamental right that lies underneath the dispute in this appeal is that a defendant cannot be convicted unless the jury delivers a unanimous verdict against him. *People v. Brown*, 2013 IL App (2d) 110327, ¶ 19 (the right to a unanimous verdict is among the most fundamental rights in Illinois). The right to poll the jury is a long-accepted procedure we have adopted as a substantial right to safeguard the unanimity in the jury's verdict. See *McGhee*, 2012 IL App (1st) 093404, ¶ 25. The right to poll the jury is not itself a fundamental right and it is not an

indispensable element of a trial. There is no requirement that the jury be polled in order for the defendant to have had a fair trial. A jury poll is not a necessary element of any trial, it is available upon the defendant's request as a means by which the defendant can test the unanimity of the verdict to protect that fundamental right.

¶ 16 There are a whole host of prophylactic rules designed to protect fundamental rights where failure to have perfect compliance with the safeguard does not amount to a violation of the fundamental right itself. See, *e.g.*, *People v. Tooles*, 177 Ill. 2d 462, 464-65 (1997) (jury waivers); *People v. Glasper*, 234 Ill. 2d 173, 179 (2009) (venire questioning). In other words, a failure to strictly comply with the procedural safeguard does not necessarily mean that the error is addressable under second-prong plain error review. See *People v. Thompson*, 238 Ill. 2d 598, 609-11. In this case, defendant does not suggest that his fundamental right to a unanimous verdict has been violated, but instead argues that a new trial is required because the court failed to strictly comply with the procedural safeguard of polling when it did not poll one of the 12 jurors. Second-prong plain error review allows us to go beyond a forfeiture, without regard to the closeness of the evidence, under circumstances in which the defendant is deprived of the very essence of our criminal system—a fair trial. The error defendant presents here is not such an error.

¶ 17 We decline to follow *Jackson* and adhere to our decisions in *McGhee* and *Sharp*. We find that those pre-*Jackson* decisions are more consistent with the proper scope of second-prong plain error review.

¶ 18 Defendant does not offer any argument or evidence in an effort to show that the jurors were anything other than completely unanimous. Defendant instead relies on the premise that his right to test the jury's expression of unanimity was not fully realized. But the trial court

undertook to poll the jury as defendant requested, and defendant raised no issue with the trial court's examination of the jury. The trial court's inadvertent failure to poll one juror does not rise to the level of an error so serious that it affected the fairness of the trial, nor does it call into question the integrity of the judicial process. The points made by the court in *McGhee* and *Sharp* and by the dissenting justice in *Jackson* are in line with our views of second-prong plain error review of forfeited errors. See *Jackson*, 2021 IL App (1st) 180672, ¶¶ 51-65 (Coghlan, J., dissenting).

¶ 19 All indications from the record and from the parties' representations to the court are that the verdict in this case was unanimous. The jury was instructed that their verdict must be unanimous and, absent any indication to the contrary, we presume that the jury followed the trial court's instructions in reaching a verdict. *People v. Richardson*, 2011 IL App (5th) 090663, ¶ 23. The jury arrived at a verdict in this case in less than an hour and did not send any questions to the court, nor did it express that it was having difficulty reaching a verdict. None of the 12 jurors expressed any dissent or hinted at any equivocation when the jury was polled. See *People v. Black*, 84 Ill. App. 3d 1050, 1055 (1980). All 12 jurors signed the verdict form, all 12 jurors were present during the jury polling, and there were no indications whatsoever that there was anything other than full jury unanimity.

¶ 20 In addition, this is just the type of error that could have been quickly and easily addressed and resolved by the trial court if defendant objected or otherwise brought the issue to the court's attention. A defendant cannot sit silently while a verdict and judgment are rendered and then complain about an issue that could have been addressed contemporaneously. *People v. Campbell*, 126 Ill. App. 3d 1028, 1042 (1984). The trial court was deprived of the opportunity to address the error because of the defense's inaction or inattentiveness. We have previously found

that a defendant's inaction on this issue is conclusive on his subsequent claim of error. *People v. Galloway*, 74 Ill. App. 3d 624, 627 (1979).

¶ 21 Defendant would have the rule be inviolate, that a complete and error-free jury poll is a prerequisite to a fair trial, without regard to anything else that transpires in the proceedings. We have previously noted several other indicia of unanimity that can be considered in assessing an error in polling the jury. The rule defendant suggests would not require a defendant to point to even a scintilla of evidence that there was potential dissent among the jurors. We see little utility to the rule defendant urges us to adopt except to serve as an escape hatch to provide a basis for a new trial after an unfavorable result. Such a rule does not protect the actual unanimity of a verdict or add to the challenges already available to a defendant if there is any actual dissent or equivocation among the jurors.

¶ 22 If a defendant is concerned about the unanimity of a verdict, the defendant is entitled to ask for a poll of the jury in order to assess whether there is any dissent or equivocation from any of the jurors. If the trial court does not examine all 12 members of the jury as occurred here, then the defendant is free to object or otherwise raise the issue with the trial court to ensure that each juror is examined. If, however, the defendant does nothing to exercise or protect his right and he accepts a poll of less than all jurors and allows the jury to be dismissed, he can forfeit his right and it may not be salvageable as plain error. As our supreme court has explained, "any objection to the polling of jurors should be made at the time of the polling, and a failure to do so results in waiver." *McDonald*, 168 Ill. 2d at 462.

¶ 23 We cannot countenance a defendant accepting a jury poll of 11 jurors only to raise the issue for the first time on appeal and claim that the incomplete poll was an affront to the fairness of the trial or the integrity of the judicial system. As the dissenting justice in *Jackson* described

of that case, which applies here, "the trial court's failure to poll the twelfth juror did not affect the integrity of the proceedings or rise to the level of second-prong plain error." *Jackson*, 2021 IL App (1st) 180672, ¶ 58 (Coghlan, J., dissenting). We conclude that defendant has not shown that he is entitled to a new trial under the plain error doctrine.

¶ 24 CONCLUSION

¶ 25 Based on the foregoing, we affirm.

¶ 26 Affirmed.