

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP367-CR

Cir. Ct. No. 2015CF15

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE W. SCHERTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. George Schertz appeals a judgment, entered upon a jury’s verdicts, convicting him of operating a motor vehicle while intoxicated as a fifth offense, and of hit-and-run, both counts as a repeater. Schertz also appeals the order denying his motion for postconviction relief. Schertz argues: (1) the circuit court’s method of polling the jury violated his right to have the jury individually polled; and (2) trial counsel was ineffective by failing to demand that each juror be individually polled. We reject Schertz’s arguments and affirm the judgment and order.

BACKGROUND

¶2 After the jury returned guilty verdicts on the crimes charged, the circuit court polled the jury on its own motion.¹ The court stated: “I’m just going to ask you if this is your verdict. If this is your verdict, just say yes. We’ll start with the foreperson and work our way down and around. Is this your verdict?” Rather than transcribing the entire exchange, the court reporter included the following language in the trial transcript: “(ALL JURORS RESPONDED BY SAYING ‘YES.’)”

¶3 Schertz filed a motion for postconviction relief, asserting, in relevant part, that his right to poll the jury was violated because the circuit court failed to poll each juror individually, and his trial counsel was ineffective by failing to

¹ Although the jury also found Schertz guilty of operating a motor vehicle with a prohibited alcohol concentration, the circuit court did not impose judgment of conviction on that count, consistent with WIS. STAT. § 346.63(2)(am) (2015-16).

object to the manner in which the jurors were polled.² During its oral ruling on the postconviction motion, the judge who presided over the jury trial explained:

I asked the foreperson if that is his or her verdict, and I instruct[ed] them that we will go all around the jury box and they will answer *and each one answered individually*. The court reporter in the future will indicate that each one answered individually so that we don't have this discussion in the future. But the jurors were polled and they all agreed that that was their verdict, that defendant was guilty.

(Emphasis added.) Having concluded that it polled the jurors individually, the circuit court denied Schertz's motion. This appeal follows.

DISCUSSION

¶4 Jury polling is a common-law procedure whereby “after verdict each juror is separately asked whether he or she concurs” in the verdict. *State v. Coulthard*, 171 Wis. 2d 573, 580, 492 N.W.2d 329 (Ct. App. 1992). As a corollary to a defendant's right to a unanimous verdict in a criminal trial, a defendant has the right to poll jurors individually. *See State v. Cartagena*, 140 Wis. 2d 59, 61-62, 409 N.W.2d 386 (Ct. App. 1987). “Collective polling, or merely asking jurors to stand to indicate their assent to the verdict, has been held insufficient” to satisfy a defendant's right to individually poll jurors. *State v. Wojtalewicz*, 127 Wis. 2d 344, 349, 379 N.W.2d 338 (Ct. App. 1985). Whether the circuit court properly polled the jury is reviewed as a matter of discretion. *See State v. Raye*, 2005 WI 68, ¶16, 281 Wis. 2d 339, 697 N.W.2d 407.

² The postconviction motion also sought 180 days' sentence credit. That issue is not before us because the circuit court granted the credit sought.

¶5 Citing *Wojtalewicz*, Schertz argues his right to individually poll the jury was violated because the circuit court failed to call each juror by name. Schertz suggests that without their names, the record does not reflect “whether there was indeed assent by all twelve jurors.” We are not persuaded by Schertz’s interpretation of *Wojtalewicz*. There, the circuit court collectively polled the jury with the following question: “I want to ask you all if this is the verdict of each of you and if there is any member of the jury panel who dissents from either one of the two verdicts that I’ve just read, I want you to raise your right hand at this time.” *Wojtalewicz*, 127 Wis. 2d at 346. When none of the jurors responded to the question, defense counsel immediately requested the jurors be individually polled, but the court refused. *Id.*

¶6 On appeal, *Wojtalewicz* argued that the circuit court’s decision to collectively poll the jury constituted reversible error. *Id.* This court agreed, concluding that “where timely asserted, a defendant in a criminal case has the right to have the jurors polled individually as to their verdict.” *Id.* at 350. In reaching this conclusion, we cited a number of cases for the proposition that individual polling was required, one of which was *Burnett v. State*, 242 S.E.2d 79 (Ga. 1978). There, a Georgia trial court happened to call each juror individually by name when asking: “Was that your verdict?” and “Is it now your verdict?” *Burnett*, 242 S.E.2d at 85. The *Burnett* court held: “The foregoing *questions* meet the minimum requirements of the defendant’s right to a poll of the jurors.” *Id.* (emphasis added).

¶7 In summarizing the *Burnett* court’s holding, the *Wojtalewicz* court stated: “Calling each juror by name and asking whether the announced verdict is his or her verdict is said to meet ‘the minimum requirements of [a] defendant’s right to a poll of the jurors.’” *Wojtalewicz*, 127 Wis. 2d at 349 (citation omitted).

Wojtalewicz, however, does not *require* that jurors be called by name; rather, the court observed that such a practice together with properly questioning the jury was *sufficient* to safeguard the defendant's right. All that is required under *Wojtalewicz* is that each juror be individually polled as to their verdict when the request for polling is timely asserted. *Id.* at 350. Here, the circuit court individually polled the jurors as to their verdict as required under Wisconsin law. Because the court did not err in the manner in which it polled the jury, Schertz's alternative challenge to the effectiveness of his trial counsel also fails. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel not ineffective for failing to pursue meritless claim).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

