

TABLE OF CONTENTS

NATURE OF THE CASE	1
ISSUE PRESENTED FOR REVIEW.....	1
JURISDICTION.....	1
STATEMENT OF FACTS	1
STANDARD OF REVIEW.....	4
ARGUMENT	4

POINT AND AUTHORITIES

ARGUMENT	4
The Trial Court’s Inadvertent Failure to Poll One Juror Did Not Constitute Second Prong Plain Error	5
<i>People v. McGhee</i> , 2012 IL App (1st) 093404.....	5, 11-13, 15
<i>Nomaque v. People</i> , 1 Ill. 145 (1825)	5
<i>Martin v. Morelock</i> , 32 Ill. 485 (1863).....	5
<i>People v. Kliner</i> , 185 Ill. 2d 81 (1998)	5
<i>People v. McDonald</i> , 168 Ill. 2d 420 (1995).....	5, 6
<i>People v. Kellogg</i> , 77 Ill. 2d 524 (1979)	5, 15
<i>People v. Wheat</i> , 383 Ill. App. 3d 234 (2d Dist. 2008)	5
<i>People v. Jackson</i> , 2021 IL App (1st) 180672	6, 10, 13, 14
<i>People v. Enoch</i> , 122 Ill. 2d 176 (1988)	6
<i>People v. Herron</i> , 215 Ill. 2d 167 (2005).....	6, 7
<i>People v. Birge</i> , 2021 IL 125644	6, 8, 14
<i>People v. Leach</i> , 2012 IL 111534	6

<i>People v. Piatkowski</i> , 225 Ill. 2d 551 (2007)	7
<i>People v. Blue</i> , 189 Ill. 2d 99 (2000)	7
<i>People v. Thompson</i> , 238 Ill. 2d 598 (2010)	7, 8, 10, 11, 13
<i>People v. Washington</i> , 2012 IL 110283	7
<i>People v. Glasper</i> , 234 Ill. 2d 173 (2009).....	8, 10, 11, 13
<i>People v. Sebby</i> , 2017 IL 119445	8
<i>People v. Belknap</i> , 2014 IL 117094	8
<i>People v. Wilmington</i> , 2013 IL 112938.....	8
<i>People v. Rivera</i> , 227 Ill. 2d 1 (2009).....	8
<i>United States v. Martinez-Salazar</i> , 528 U.S. 304 (2000)	8
<i>People v. Towns</i> , 157 Ill. 2d 90 (1993).....	9
<i>People v. Tooles</i> , 177 Ill. 2d 462 (1997)	9, 10, 13
<i>People v. Lewis</i> , 165 Ill. 2d 305, 344 (1995)	10
<i>People v. Galloway</i> , 74 Ill. App. 3d 624 (1st Dist. 1979)	11
<i>People v. Sharp</i> , 2015 IL App (1st) 130438.....	12, 13, 15
<i>People v. Flores</i> , 2021 IL App (1st) 192219.....	12-15
<i>People v. Radford</i> , 2020 IL 123975	13, 14
<i>In re Linda B.</i> , 2017 IL 119392	14
<i>People v. Hopp</i> , 209 Ill. 2d 1 (2004).....	15
<i>Colvin v. State</i> , 150 A.3d 850 (Md. 2016).....	15
<i>People v. Anzalone</i> , 298 P.3d 849 (Cal. 2013)	16
Ill. Sup. Ct. R. 431(b)	7, 8, 10

725 ILCS 5/115-1 (1996)	9
-------------------------------	---

CONCLUSION	17
-------------------------	----

CERTIFICATE OF COMPLIANCE

PROOF OF FILING AND SERVICE

NATURE OF THE CASE

A jury found defendant Brandon Jackson guilty of first degree murder and attempted armed robbery. Sec C34-36.¹ The People appeal from the judgment of the Illinois Appellate Court, First District, which reversed defendant's convictions. *People v. Jackson*, 2021 IL App (1st) 180672. No question is raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether overlooking a single juror while polling the jury does not constitute second prong plain error that requires reversal in the absence of evidence that the jury verdict was anything other than unanimous.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rules 315, 604(a)(2), and 612(b)(2). On September 29, 2021, this Court allowed the People's petition for leave to appeal.

STATEMENT OF FACTS

On the evening of December 20, 2013, outside a VFW hall that Cuauhtemoc "Temo" Estrada had rented for a Christmas party, defendant and another man attempted to rob Rigoberto Anaya. R960, 1069-77, 1110-13, 1180-83. Defendant and his partner carried guns. R1074-77, 1113. Estrada, who was an investigator with the sheriff's office, approached and told the

¹ "Sec C," "C," "R," "Sup R," and "E" refer to the secured common law record, the common law record, the report of proceedings, the supplement to the report of proceedings, and the volume of exhibits, respectively.

offenders that he was an officer. R1076-77, 1105, 1116, 1183. As Estrada reached for his own weapon, defendant fatally shot him and ran away. R1077-78, 1183-85. Surveillance footage recorded the crime. R977-80, 1023-24, 1131-45, 1189-94. Defendant later admitted to a friend that “he had tried to rob somebody at the bar,” but that he “didn’t mean to shoot the person.” R1260-63. And defendant’s phone calls from jail led the police to the location of the gun used in the shooting. R1395-97.

Defendant was charged with first degree murder for fatally shooting Estrada and with attempted armed robbery of Anaya. C57-75. A jury convicted defendant of first degree murder and attempted armed robbery, and further found that defendant personally discharged a firearm that was the proximate cause of Estrada’s death. Sec C34-36; R1799. The jury returned three verdict forms, each of which was signed by all 12 jurors. Sec C34-36. After prompting from the court, defense counsel asked that the jury be polled, and the trial court asked 11 of the 12 jurors to confirm their verdict. R1799-1801. Defense counsel neither objected to the court’s inadvertent failure to poll the remaining juror nor raised the issue in his post-trial motion.

The trial court sentenced defendant to 60 years in prison on the murder conviction and to a consecutive five-year sentence on the attempted armed robbery conviction. C471; R1926.

On appeal, the parties agreed both that the trial court had erred in failing to poll every juror and that defendant had forfeited the issue. *Jackson*, 2021 IL App (1st) 180672, ¶ 18. Notwithstanding this forfeiture, a majority of the appellate court held that defendant was entitled to a new trial because the trial court’s error in polling the jury constituted second prong plain error. *Id.*, ¶ 19. Relying upon *People v. Kellogg*, 77 Ill. 2d 524 (1979), the majority stated that “our supreme court considers a complete and proper jury poll as essential to a fair criminal trial.” *Id.*, ¶ 35. The majority concluded that “the failure to poll every juror at Jackson’s request challenges the integrity of the judicial process,” and that “[t]welve signatures on all the verdict forms without a complete poll of the jury means we will never know whether the form truly reflects the will of all the jurors.” *Id.*, ¶ 47 (citing *People v. Clark*, 2016 IL 118845, ¶ 42). The majority conceded that its decision was contrary to *People v. McGhee*, 2012 IL App (1st) 093404, and *People v. Sharp*, 2015 IL App (1st) 130438, *overruled in part on other grounds by People v. Veach*, 2017 IL 120649, which held that a jury polling error does not rise to the level of second prong plain error. *Id.*, ¶¶ 32-33. Given its vacatur of defendant’s convictions and remand for a new trial, the majority did not address defendant’s challenge to his sentence.

The dissenting justice would have followed *McGhee* and *Sharp*. The dissent emphasized that *McGhee* properly concluded “that some evidence that the verdict was not unanimous ‘other than the trial court’s failure to poll the

jury’ was necessary to justify reversal under second-prong plain error.” *Id.*, ¶¶ 54, 56 (Coghlan, J., dissenting). The dissent further noted that “the author of the majority opinion in *Sharp* has done an abrupt 180-degree turn to reach the opposite result here, despite the cases being nearly identical on their facts.” *Id.*, ¶ 58. As in *Sharp*, defendant here “has not offered any evidence that the verdicts were not unanimous.” *Id.* Thus, the dissent would have held, “[u]nder the factual circumstances of this case, where there is no evidence that the jury verdicts were not unanimous, the inadvertent failure to poll 1 of the 12 jurors did not prejudice Jackson’s right to a unanimous jury,” and did not amount to second prong plain error. *Id.*, ¶¶ 63-64.

STANDARD OF REVIEW

When a criminal trial error is forfeited, the defendant has the burden to show that his forfeiture should be excused as plain error. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010) (citing *People v. Herron*, 215 Ill. 2d 167, 187 (2005)). The ultimate issue of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed de novo. *Id.* (citing *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009)).

ARGUMENT

Defendant’s trial ended with unanimous guilty verdicts, as shown by the signatures of all 12 jurors on each verdict form. The trial judge polled the jury, but inadvertently failed to poll one juror. Defendant failed to raise this issue following the poll of the jurors and in his post-trial motion, which

resulted in forfeiture. Breaking with its own precedent, the appellate court held that the polling mistake amounted to second prong plain error — because it purportedly challenged the integrity of the judicial process — even though there was no evidence that the guilty verdicts were not unanimous. Because the integrity of the judicial process was not challenged by this inadvertent polling mistake, defendant’s convictions should be affirmed.

The Trial Court’s Inadvertent Failure to Poll One Juror Did Not Constitute Second Prong Plain Error.

The right of a criminal defendant to poll the jury after it returns its verdict is rooted in Illinois common law. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 15 (citing *Nomaque v. People*, 1 Ill. 145, 150 (1825); *see also Martin v. Morelock*, 32 Ill. 485, 487 (1863). Polling a jury helps the court determine whether the verdict accurately reflects the vote of each juror during deliberations and ensures that the vote was not the result of coercion. *People v. Kliner*, 185 Ill. 2d 81, 166 (1998) (citing *People v. McDonald*, 168 Ill. 2d 420, 462 (1995), and *People v. Kellogg*, 77 Ill. 2d 524, 528 (1979)). If a juror hesitates or is ambivalent, the trial judge must give the juror the opportunity to make an unambiguous statement about her state of mind. *McDonald*, 168 Ill. 2d at 462-63. And while a defendant must be afforded the opportunity to poll the jury after it returns its verdict, that right may be waived or forfeited. *People v. Wheat*, 383 Ill. App. 3d 234, 237 (2d Dist. 2008).

Here, because defense counsel did not timely object to the trial court’s failure to poll all 12 jurors and did not raise any issue about the jury poll in

his post-trial motion, R1799-1801; C373-74, the claim is forfeited, as defendant acknowledged below, *see Jackson*, 2021 IL App (1st) 180672, ¶ 20; *see also McDonald*, 168 Ill. 2d at 462 (“[a]ny objection to the polling of jurors should be made at the time of the polling”); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (“*Both* a trial objection *and* a written posttrial motion raising the issue are required for alleged errors that could have been raised during trial.”) (emphases in original).

In light of defendant’s forfeiture, the polling mistake may be reviewed only for plain error. The plain error rule is a “narrow and limited exception to the general [rule of procedural default].” *People v. Herron*, 215 Ill. 2d 167, 177 (2005). It is not a “general saving clause” that preserves for review all errors affecting substantial rights regardless of whether they have been brought to the attention of the trial court. *Id.*

Defendant bears the burden of establishing plain error. *People v. Birge*, 2021 IL 125644, ¶ 24; *Herron*, 215 Ill. 2d at 187. “A reviewing court will find plain error and grant relief only” if either ““(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error”; or ““(2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.”” *People v. Leach*, 2012 IL 111534, ¶ 60 (quoting *People v.*

Piatkowski, 225 Ill. 2d 551, 565 (2007)). Under the second prong of the plain error doctrine, “[p]rejudice to the defendant is presumed because of the importance of the right involved, ‘regardless of the strength of the evidence.’” *Herron*, 215 Ill. 2d at 187 (quoting *People v. Blue*, 189 Ill. 2d 99, 138 (2000)); see also *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

The trial judge’s inadvertent failure to poll one of the 12 jurors was, in retrospect, a clear or obvious error. However, because he did not raise it in the appellate court below, defendant has forfeited any argument that the evidence was closely balanced, see *People v. Washington*, 2012 IL 110283, ¶ 62 (“Where the appellant in the appellate court fails to raise an issue in that court, this court will not address it.”), and the inadvertent failure to poll one of the jurors did not rise to the level of second prong plain error because it did not affect the fairness of defendant’s trial or challenge the integrity of the judicial process.

In analogous circumstances, this Court has rejected arguments that the omission of safeguards of the right to an impartial jury constitute second prong plain error. For instance, Rule 431(b) requires the court to ask each potential juror whether that juror understands and accepts four particular principles crucial for a fair trial, and the Court has held that, when a court fails to comply with that rule, a reviewing court “cannot presume the jury was biased.” *Thompson*, 238 Ill. 2d at 614. As the Court explained, “[w]hile trial before a biased jury is structural error subject to automatic reversal, the

failure to comply with Rule 431(b) does not necessarily result in a biased jury,” because “Rule 431(b) questioning is simply one way of helping to ensure a fair and impartial jury.” *Id.* at 610-11 (citing *People v. Glasper*, 234 Ill. 2d 173 (2009)). Accordingly, in the absence of evidence of jury bias, Rule 431(b) violations are not subject to reversal as second prong plain error. *See id.* at 615 (defendant failed to establish that violation of Rule 431(b) resulted in biased jury and therefore failed to meet burden of showing error affected fairness of trial and challenged integrity of judicial process); *see also Birge*, 2021 IL 125644, ¶ 24 (reaffirming *Thompson*’s holding that violation of Rule 431(b) is not second prong plain or structural error); *People v. Sebbly*, 2017 IL 119445, ¶ 76-77 (same); *People v. Belknap*, 2014 IL 117094, ¶ 47 (same); *People v. Wilmington*, 2013 IL 112938, ¶ 33 (same).

Similarly, the Court has held that the mistaken denial of a peremptory challenge is not second prong plain error because peremptory challenges are only one way to ensure that a jury is unbiased. *See People v. Rivera*, 227 Ill. 2d 1, 26 (2009), *aff’d sub nom Rivera v. Illinois*, 556 U.S. 148, 161 (2009) (holding that mistaken denial of peremptory challenge was not second prong plain error); *see also United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (peremptory challenges reinforce right to trial by impartial jury, but such challenges are auxiliary; “unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension”).

And the Court has rejected the argument that reversal was required when a defendant forfeited a challenge to the trial court's failure to administer the statutory voir dire oath before questioning prospective jurors. *See People v. Towns*, 157 Ill. 2d 90, 99-100 (1993) (omission of voir dire oath did not warrant presumption that prospective jurors' statements were unreliable). Because the defendant failed to "point to any evidence which call[ed] into question the veracity of the answers given by the potential jurors[,]” and because “[t]he totality of the record . . . [otherwise showed] that the trial court conducted a meaningful and thorough voir dire and that the jurors who were ultimately selected fairly and impartially rendered a verdict[,]” the Court concluded that the defendant had not been denied fair trial or impartial jury. *Id.*

Likewise, in a different jury-related context, the Court rejected the argument that the failure to procure a written jury waiver, in violation of section 115-1 of the Code of Criminal Procedure, was second prong plain error. *See People v. Tooles*, 177 Ill. 2d 462, 464-65 (1997) . The Court declined to hold that the failure was error of such magnitude that it necessitated reversal because the written jury waiver requirement “seeks to insure that a defendant’s waiver of the right to a jury is made understandingly in that it is both knowing and voluntary” but “does not define or give substance to the constitutional right to a jury trial.” *Id.* at 468. *Tooles* reasoned that failure to comply with this “prophylactic” rule should

“not result in reversal so long as the defendant’s waiver was made understandingly.” *Id.*

Consistent with these cases, the trial court’s inadvertent failure to poll one of the jurors here cannot be considered second prong plain error. The majority below erred in finding that the error required automatic reversal, despite the absence of any suggestion that the verdicts were not unanimous. Noting that, “[i]n Illinois, parties to lawsuits and defendants in criminal cases have ‘an absolute right’ to poll the jury,” *Jackson*, 2021 IL App (1st) 180672, ¶ 27, the majority concluded that “[a] right that is ‘basic to our system’ sounds quite like a right whose denial would ‘affect[] the integrity of the judicial process,’” *id.*, ¶ 28.

But the majority’s approach is inconsistent with *Thompson*’s holding that “[w]hile trial before a biased jury is structural error subject to automatic reversal, the failure to comply with Rule 431(b) does not necessarily result in a biased jury.” 238 Ill. 2d at 610-11. The Court reiterated that a trial court’s failure to adhere to a procedural requirement designed to ensure selection of a fair and impartial jury does not “make it inevitable that the jury was biased,” particularly where the rest of the record demonstrates otherwise. *Id.* at 610 (quoting *Glasper*, 234 Ill. 2d at 200-01). Rather, the Court explained, courts should not “presume” that jurors will be biased or unfair simply because of some irregularity in jury selection. *Id.*; see also *People v. Lewis*, 165 Ill. 2d 305, 344 (1995) (“[E]ven assuming an irregularity in the

selection of jurors, reversal is not required unless it appears that the defendant has in some way been prejudiced.”). It follows that a trial court’s failure to poll a juror here does not make it inevitable that the verdict was not unanimous, especially when each verdict form contained the signatures of all 12 jurors and there was no indicia of lack of unanimity.

Indeed, until the decision under review, the First District had consistently declined to find reversible error simply because of an unnoticed mistake during jury polling. As long ago as 1979, the court declined to presume error stemming from incomplete jury polling. *See People v. Galloway*, 74 Ill. App. 3d 624, 627 (1st Dist. 1979) (holding that defendant forfeited challenge to court’s error in polling 10 of 12 jurors where defendant’s attorney did not object at time of poll). And, more recently, the court relied on this Court’s decisions in *Thompson* and *Glasper* to squarely hold that such error is not second prong plain error.

First, in *McGhee*, the defendant argued that his attorney rendered ineffective assistance by failing to raise a forfeited claim that the trial court erred by declining to honor the defendant’s request to poll the jurors after they returned their verdict. 2012 IL App (1st) 093404 ¶ 10. Relying on *Thompson* and *Glasper*, the appellate court rejected this argument, reasoning that “the requirement that the trial court poll the jury upon request is a common-law rule that is designed to help ensure that the jury’s verdict is unanimous, but it is not the sole means of ensuring [the right to] a

unanimous verdict”; that right is also protected by “the requirement that the jurors individually sign the verdict form.” *Id.*, ¶ 25. The appellate court analogized jury polling to questioning the venire under Rule 431(b), which, the court explained, “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.” *Id.*, ¶ 26. And, the court concluded, while “evidence that the verdict was not unanimous could potentially satisfy the second prong of the plain error doctrine,” without such evidence, “defendant cannot meet his burden of persuasion and the second prong of the plain error doctrine cannot excuse his failure to preserve this issue.” *Id.*

A few years later, in *Sharp*, the appellate court reached the same conclusion in a case where trial counsel failed to object to the trial court’s polling of only 10 of the 12 seated jurors. 2015 IL App (1st) 130438, ¶¶ 39, 48. The court held that the polling error “does not fall under the second prong of the plain error doctrine,” because “[t]he court’s failure to poll the jury on defendant’s request . . . does not affect the fairness of a defendant’s trial or challenge the integrity of the judicial process.” *Id.*, ¶ 112.

And not long after its decision in this case, in *People v. Flores*, 2021 IL App (1st) 192219, the appellate court returned to its reasoning in *McGhee* and *Sharp*. The court held that the failure to poll a juror did not rise to the level of second prong plain error, explaining:

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. 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.

Id., ¶ 15 (internal citations omitted). In reaching this conclusion, the court analogized jury polling to the “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.” *Id.*, ¶ 16 (citing *Tooles*, 177 Ill. 2d at 464-65 ; *Glasper*, 234 Ill. 2d at 179; and *Thompson*, 238 Ill. 2d at 609-11). Thus, the court in *Flores* expressly declined to follow the appellate court's reasoning below and instead adhered to *McGhee* and *Sharp*, finding “that those pre-*Jackson* decisions are more consistent with the proper scope of second-prong plain error review.” *Id.*, ¶ 17.

The reasoning of the appellate court in *McGee*, *Sharp*, and *Flores* is not only consistent with this Court's decisions declining to find second prong plain error following violations of other rules designed to safeguard the jury process, but it also makes sense from a practical perspective. As the court explained in *Flores*, a jury polling error is “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.” *Id.*, ¶ 20. Recently, the Court followed similar reasoning in *People v. Radford*, 2020 IL 123975, declining to find second prong plain error in the context of a failure

to challenge a courtroom closure and noting that an objection would have allowed the trial court to take corrective action. *Id.*, ¶ 37. The Court explained that the need to lodge a contemporaneous objection “prevents a defendant from potentially remaining silent about a possible error and waiting to raise the issue, seeking automatic reversal only if the case does not conclude in his favor.” *Id.*

To be sure, had defendant been able to point to evidence that the jury was not unanimous, reversal might have been appropriate. But, as the dissenting justice observed, defendant offered no such evidence. *Jackson*, 2021 IL App (1st) 180672, ¶ 58 (Coghlan, J., dissenting). Instead, all evidence pointed to jury unanimity. There was no indication that the jury was deadlocked or otherwise encountered difficulty reaching a unanimous verdict. *Id.* The verdict forms were signed by all 12 jurors. Sec C34-36. All jurors were present during the polling, and none of them voiced an objection or questioned the verdicts. R1798-1801. The trial court repeatedly instructed the jurors prior to deliberations that their verdicts must be unanimous, R1769, R1771, R1779, and the written instructions also stated that the verdicts must be unanimous, Sec C58-59. It must be presumed that the jurors followed those instructions, *Birge*, 2021 IL 125644, ¶ 40, and defendant bore the burden of overcoming that presumption, *In re Linda B.*, 2017 IL 119392, ¶ 43 (“the party claiming error has the burden of showing any irregularities that would justify reversal”). Defendant’s mere speculation

that the unquestioned juror might not have agreed with the others was insufficient. *See People v. Hopp*, 209 Ill. 2d 1, 14-18 (2004) (holding that trial court's failure to properly instruct jury did not amount to plain error where defendant simply speculated as to what jury might have believed).

The absence of any evidence calling into doubt the unanimity of the jury's verdict distinguishes this case from *Kellogg*, upon which the majority relied. During the jury poll in *Kellogg*, a juror asked, "Can I change my vote?" 77 Ill. 2d at 527. The trial court responded, "The question is, was this then and is this now your verdict?" *Id.* The juror did not respond. *Id.* The court then repeated, "Was this then and is this now your verdict?" *Id.* The juror answered, "Yes, Sir." *Id.* This Court found that the trial court had erred because it did not allow dissent from the verdict, and "[t]he record [did] not therefore reflect that the verdict of guilty was a unanimous verdict." *Id.* at 530. Here, by contrast, there is no indication that the trial court ignored a juror's statement suggesting that she was interested in changing her vote, or any other suggestion of a lack of unanimity.

McGhee, *Sharp*, and *Flores* were correctly decided. As the appellate court in *Flores* explained, the rule created by the majority below "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." 2021 IL App (1st) 192219, ¶ 21. Rather, it merely "serve[s] as an escape hatch to provide a basis for a new trial after an unfavorable result."

Id. Foreign jurisdictions addressing this issue agree. *See, e.g., Colvin v. State*, 150 A.3d 850, 856 (Md. 2016) (failure to include foreperson in poll of jury without contemporaneous objection “does not make a substantive allegation of a lack of juror unanimity without more”); *People v. Anzalone*, 298 P.3d 849, 856 (Cal. 2013) (in absence of request, failure to poll jury was not structural error where “there is no indication that the jury was not unanimous”).

In sum, the inadvertent failure to poll one of the 12 jurors did not threaten the fairness of defendant’s trial or challenge the integrity of the judicial process. Accordingly, the appellate court’s judgment should be reversed, defendant’s convictions should be affirmed, and the cause should be remanded to the appellate court to consider his unaddressed sentencing challenge.

CONCLUSION

The People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court, affirm defendant's convictions, and remand this matter to the appellate court so that it may consider defendant's challenge to his sentences.

December 14, 2021

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

JOHN E. NOWAK
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7958
eserve.criminalappeals@ilag.gov

*Counsel for Plaintiff-Appellee
People of the State of Illinois*

APPENDIX**Table of Contents to Appendix**

Index to the record on appeal	A1
Judgment appealed from: <i>People v. Jackson</i> , 2021 IL App (1st) 180672	A13

Common Law Record

Docket sheets	C7
Half-sheets	C26
Complaint for preliminary examination (01/08/2014)	C40
Order to place in protective custody (12/23/2013)	C46
Order for preservation of video or digital recording	C47
Appearance (12/23/2013)	C49
Demand for trial (12/23/2013)	C50
Criminal disposition sheet (01/08/2014)	C51
Orders (01/08/2014).....	C52
Indictment return sheet (01/14/2014).....	C54
Indictment (01/14/2014).....	C57
People's motion for discovery (01/23/2014)	C76
Defense motion for discovery (01/23/2014)	C78
Criminal disposition sheets (01/23/2014).....	C82
Transfer order to presiding judge (01/23/2014).....	C84
Criminal disposition sheets (01/23/2014).....	C85
Order: continuance (01/23/2014)	C88
Criminal disposition sheet (03/19/2014)	C89
Order: continuance (03/19/2014)	C90
Qualified protective order (03/19/2014)	C91
Criminal disposition sheet (04/22/2014)	C92
Order: continuance (04/22/2014)	C93
Criminal disposition sheet (06/03/2014)	C94
Order: continuance (06/03/2014)	C95
Criminal disposition sheets (07/24/2014).....	C96
Criminal disposition sheet (09/05/2014)	C98
Order: continuance (09/05/2014)	C99
People's motion for buccal swab standards (09/05/2014).....	C100
Criminal disposition sheet (09/15/2014)	C102
Order: continuance (09/15/2014)	C103
Criminal disposition sheet (11/03/2014)	C105
Order: continuance (11/03/2014)	C106
People's motion to allow consumptive testing (11/03/2014).....	C107
Criminal disposition sheet (12/29/2014)	C111
Order: continuance (12/29/2014)	C112
Criminal disposition sheet (01/12/2015)	C113
Order: continuance (01/12/2015)	C114
Criminal disposition sheet (03/12/2015)	C115
Order: continuance (03/12/2015)	C116
Defense motion to order shackles removed (03/12/2015).....	C118
Criminal disposition sheet (04/02/2015)	C121
Order: continuance (04/02/2015)	C122
People's answer to discovery (05/18/2015).....	C123

Criminal disposition sheet (05/18/2015)	C136
Order: continuance (05/18/2015)	C137
Order: continuance (07/01/2015)	C138
Criminal disposition sheet (07/01/2015)	C139
Criminal disposition sheet (08/18/2015)	C140
Order: continuance (08/18/2015)	C141
Criminal disposition sheet (10/13/2015)	C142
Order: continuance (10/13/2015)	C143
Criminal disposition sheet (12/09/2015)	C144
Order: continuance (12/09/2015)	C145
People's notice of disclosure (02/01/2016)	C146
People's answer to discovery (02/01/2016)	C147
Criminal disposition sheet (02/01/2016)	C160
Order: continuance (02/01/2016)	C161
Criminal disposition sheet (03/24/2016)	C162
Order: continuance (03/24/2016)	C163
Criminal disposition sheet (05/02/2016)	C164
Order: continuance (05/02/2016)	C165
Criminal disposition sheet (06/30/2016)	C166
Order: continuance (06/030/2016)	C167
Criminal disposition sheet (08/08/2016)	C168
Order: continuance (08/08/2016)	C169
Defense motion to quash arrest and suppress evidence (09/30/2016)	C170
Criminal disposition sheet (09/30/2016)	C173
Order: continuance (09/30/2016)	C174
Defense amended motion to quash arrest & suppress (11/10/2016)	C177
Criminal disposition sheet (11/14/2016)	C180
Order: continuance (11/14/2016)	C181
Defense motion to produce evidence (11/18/2016)	C183
Order: continuance (12/29/2016)	C184
Criminal disposition sheet (12/29/2016)	C185
Criminal disposition sheet (01/27/2017)	C186
Order: continuance (01/27/2017)	C187
Defense motion to reconsider denial of motion to quash (02/03/2017)	C188
Criminal disposition sheet (02/03/2017)	C197
Order: continuance (02/03/2017)	C198
People's response to motion to reconsider (03/09/2017)	C199
People's memorandum in support of response (03/09/2017)	C203
People's motion to advance and reset for trial (03/16/2017)	C216
Criminal disposition sheet (03/16/2017)	C217
Order: continuance (03/16/2017)	C218
Defense reply to response to reconsider (04/13/2017)	C219
Criminal disposition sheet (04/13/2017)	C226
Order: continuance (04/13/2017)	C227

Criminal disposition sheet (05/22/2017)	C228
Order: continuance (05/22/2017)	C229
Defense motion <i>in limine</i> to bar footwear impression testimony (06/26/2017)	C230
Criminal disposition sheet (06/26/2017)	C234
Order: continuance (06/2017)	C235
People's response to motion to bar footwear impression testimony (07/28/2017)	C236
Defense answer to motion for pretrial discovery (07/28/2017)	C239
Criminal disposition sheet (07/28/2017)	C240
Order: continuance (07/28/2017)	C241
Order: allow defendant to be measured for trial clothing (07/27/2017)	C242
Defense motion <i>in limine</i> re: use of "reasonable scientific certainty" (08/25/2017)	C243
Defense motion <i>in limine</i> re: judicial vouching (no date)	C256
Criminal disposition sheet (08/25/2017)	C266
Order: continuance (08/25/2017)	C267
People's response to motion re: judicial vouching (09/29/2017)	C268
People's motions <i>in limine</i> (09/29/2017)	C271
Defense motion <i>in limine</i> (09/2017)	C278
Defense motion <i>in limine</i> to bar gang evidence (09/29/2017)	C281
Defense motion <i>in limine</i> to bar State from arguing definition of reasonable doubt (09/29/2017)	C283
Defense motion <i>in limine</i> to control behavior in courtroom (09/29/2017) ..	C285
Defense motion <i>in limine</i> to bar use of phone calls from Piatt County Jail (09/29/2017)	C287
Defense motion <i>in limine</i> to bar use of videos and stills from VFW hall Videos (09/29/2017)	C299
Defense motion <i>in limine</i> to bar State from vouching for investigation, eliciting hearsay, or mentioning decedent being a Cook County Sheriff (09/29/2017)	C301
Defense motion <i>in limine</i> to bar photographic evidence (09/29/2017)	C303
Defense reply to response on judicial vouching (09/29/2017)	C315
Criminal disposition sheet (09/29/2017)	C318
Order: trial clothes for defendant (09/29/2017)	C319
People's response to motion to bar use of jail phone calls (10/06/2017)	C320
People's disclosure to defense (10/06/2017)	C323
People's amended answer to discovery (10/06/2017)	C324
Defense amended motion to bar photo evidence (10/06/2017)	C325
Defense amended motion to bar use of videos, stills (10/06/2017)	C334
Criminal disposition sheet (10/06/2017)	C338
Order: continuance (10/06/2017)	C339
Defense motion <i>in limine</i> to bar certain testimony (10/18/2017)	C340
Defense motion <i>in limine</i> to bar newly tendered video and stills	

(10/18/2017)	C343
Criminal disposition sheet (10/18/2017)	C345
Order BCX (10/18/2017).....	C346
Consolidated referral order (10/18/2017)	C347
Criminal disposition sheet (10/23/2017)	C348
Order: continuance (10/23/2017)	C349
Order to deliver report of BCX (11/02/2017).....	C350
Criminal disposition sheet (11/21/2017)	C351
Order: continuance (11/21/2017)	C352
Criminal disposition sheet (12/19/2017)	C354
Order: continuance (12/19/2017)	C355
People's motion to seal juror cards (01/16/2018)	C356
People's supplemental answer to discovery (01/16/2018)	C357
Criminal disposition sheet (01/16/2018)	C358
Order: continuance (01/16/2018)	C359
Criminal disposition sheet (01/17/2018)	C360
Order: continuance (01/18/2018)	C361
Criminal disposition sheet (01/18/2018)	C362
Order: continuance (01/18/2018)	C363
Criminal disposition sheet (01/19/2018)	C364
Order: continuance (01/19/2018)	C365
Criminal disposition sheet (01/22/2018)	C366
Order: continuance (01/22/2018)	C367
Criminal disposition sheet (01/23/2018)	C368
Order: continuance (01/23/2018)	C369
Order to allow sheriffs to feed defendant (01/23/2018).....	C370
Order social investigation (01/23/2018)	C371
Defense motion for judgment of acquittal or new trial (02/21/2018).....	C373
People's motion to return victim's property to family (02/21/2018)	C375
Criminal disposition sheet (02/21/2018)	C378
Order: continuance (02/21/2018)	C379
Order to return items to family (02/21/2018)	C380
Impounding order (02/21/2018)	C381
Mitigation materials (03/16/2018).....	C393
Victim impact statements (03/16/2018)	C439
Criminal disposition sheets (03/16/2018).....	C469
Sentencing order (03/16/2018).....	C471
People's motion for sanctions and response to motion for acquittal or new trial (03/16/2018).....	C472
People's response to motion to bar use of jail phone calls (10/06/2017)	C495
People's motion <i>in limine</i> to use newly tendered video and still photo evidence (10/18/2017).....	C523
Defense response to reply that defense counsel lied to court in motion for acquittal or new trial (03/16/2017).....	C525

Defense motion to reconsider denial of motion to quash (02/03/2017).....	C527
Defense reply to response to motion to reconsider denial of motion to quash (04/13/2017)	C534
Defense motion for judgment of acquittal or new trial (03/16/2018).....	C542
Defense motion to reconsider sentence (03/29/2018)	C566
Criminal disposition sheet (03/29/2018)	C568
Notice of appeal (03/29/2018)	C569
Notice of notice of appeal (04/03/2018)	C570
Transmittal of notice of appeal (04/04/2018)	C571
Certified statement of disposition 08CR1245101 (01/19/2018)	C576
Certified statement of disposition 09CR1678601 (01/19/2018)	C577

Secured Record

People's second motion for buccal swab standards (09/15/2014).....	Sec C4
Report of postmortem examination (03/06/2014)	Sec C18
Notification of need for additional standards for DNA (09/12/2014)	Sec C31
BCS exam results (11/20/2017)	Sec C32
Jury verdict forms signed	Sec C34
Jury instructions	Sec C37
Presentence investigation report (02/21/2018)	Sec C63

Exhibits

Impounding order (02/26/2018)	E7
People 1 LIFE PHOTO	E13
People 2 PHOTO - VFW ENTRANCE	E14
People 3 PHOTO - VFW ENTRANCE (2)	E15
People 4 PHOTO - HARD DRIVE	E16
People 5 PHOTO - HARD DRIVE (2)	E17
People 5A ARTIS POWERPOINT	E18
People 6A, 6B, 6C VFW FOOTAGE	E19
People 7 BAG FROM RCFL	E20
People 7A CD DVD FROM RCFL	E21
People 7B CD DVD FROM RCFL (2)	E22
People 8 PHOTO - CLOSE UP FORD TAURUS	E23
People 9 PHOTO - REVOLVER	E24
People 10 PHOTO - SKI MASK	E25
People 10A RIGOBERTO POWER POINT	E26
People 11 PHOTO - PARKING LOT	E27
People 12 DEATH PHOTO	E28
People 13 PHOTO - VIADUCT	E29
People 14 PHOTO - VIADUCT ENTRY	E30
People 15 PHOTO - VIADUCT END	E31
People 16 DANIEL POWERPOINT	E32
People 17 911 CALL	E33

People 18 CHRISTINA POWERPOINT	E34
People 19 MEDICAL EXAMINER POWERPOINT	E35
People 20 MEDICAL EXAMINER PHOTO - CLOTHING	E36
People 21 MEDICAL EXAMINER PHOTO - SWEATER	E37
People 22 MEDICAL EXAMINER PHOTO – LONG SLEEVE SHIRT	E38
People 23 MEDICAL EXAMINER PHOTO – UNITED STATES MARINE CORPS SHIRT	E39
People 24 MEDICAL EXAMINER PHOTO - VICTIM'S TORSO	E40
People 25 MEDICAL EXAMINER PHOTO - CLOSE UP ENTRY	E 41
People 26 MEDICAL EXAMINER PHOTO - CLOSE UP ENTRY (2)	E42
People 27 MEDICAL EXAMINER PHOTO – EXIT WOUND	E43
People 28 MEDICAL EXAMINER PHOTO - CLOSE UP EXIT	E44
People 29 MEDICAL EXAMINER PHOTO - PROBES	E45
People 30 MEDICAL EXAMINER PHOTO - STOMACH	E46
People 31 MEDICAL EXAMINER PHOTO - CLOSE UP STOMACH	E47
People 32 MEDICAL EXAMINER PHOTO – AORTA	E48
People 33 BLOOD CARD	E49
People 34 MEDICAL EXAMINER'S PROTOCOL	E50
People 35 GROUP OF CLOTHING	E60
People 36 STIPULATION	E61
People 37 PHOTO - HOUSE AT 238 30TH	E63
People 38 PHOTO - GAGE THORNTON	E64
People 39 PIATT COUNTY CALL WITH BRANDON JACKSON	E65
People 40 RON JONES POWERPOINT	E66
People 41 GRAND JURY TRANSCRIPT OF RON JONES	E67
People 42 PHOTO - CRIME SCENE WITH YELLOW TAPE	E121
People 43 PHOTO - WHITE FORD TAURUS	E122
People 44 PHOTO - OPEN DOOR ON TAURUS	E123
People 45 PHOTO - CLOSE UP OF OPEN DOOR ON TAURUS	E124
People 46 PHOTO - CLOSE UP OF BACK SEAT OF FORD TAURUS ...	E125
People 47 PHOTO - CLOSE UP OF GUN IN BACKSEAT OF FORD TAURUS	E126
People 48 PHOTO - CLOSE UP OF GUN IN BACKSEAT OF FORD TAURUS (2)	E127
People 49 PHOTO - CLOSE UP OF GUN IN BACKSEAT OF FORD TAURUS (3)	E128
People 50 PHOTO - GROUND LEVEL OUTSIDE FORD TAURUS	E129
People 51 PHOTO - CLOSE UP OF LIVE ROUND	E130
People 52 PHOTO - LIVE ROUND	E131
People 53 PHOTO - GUN IN BACKSEAT	E132
People 54 PHOTO - REAR OF TAURUS	E133
People 55 PHOTO - TRUNK OF TAURUS	E134
People 56 PHOTO - TRUNK OF TAURUS (2)	E135
People 57 PHOTO - TAURUS' WITH EXHIBIT MARKERS	E136

People 58 PHOTO - ROOF WITH EXHIBIT MARKER	E137
People 59 PHOTO - DOOR WITH EXHIBIT MARKER	E138
People 60 PHOTO - TRUNK WITH EXHIBIT MARKER	E139
People 61 PHOTO - FLOOR WITH EXHIBIT MARKER	E140
People 62 PHOTO - INTERIOR WITH EXHIBIT MARKER	E141
People 63 PHOTO - DRIVEWAY WITH EXHIBIT MARKER	E142
People 64 PHOTO - PT CRUISER	E143
People 65 ENVELOPE WITH RECOVERED FIBERS	E144
People 66 ENVELOPE WITH RECOVERED FIBERS (2)	E145
People 67 1 LIVE ROUND 40 S&W	E146
People 68 1 LIVE ROUND 40 S&W (2)	E147
People 69 .40 CALIBER BERETTA	E148
People 70 MAGAZINE	E149
People 71 ENVELOPE WITH TOUCH DNA EVIDENCE	E150
People 72 ENVELOPE WITH TOUCH DNA EVIDENCE (2)	E151
People 73 ENVELOPE WITH TOUCH DNA EVIDENCE (3)	E152
People 74 ENVELOPE WITH TOUCH DNA EVIDENCE (4)	E153
People 75 ENVELOPE WITH TOUCH DNA EVIDENCE (5)	E154
People 76 FLORES POWERPOINT	E155
People 77 REVOLVER	E156
People 78 2 SPENT AND 4 LIVE ROUNDS	E157
People 79 PHOTO - WHITE TAURUS	E158
People 80 REID POWERPOINT	E159
People 81 GEL PRINT	E160
People 82 STIPULATION (2)	E161
People 83 and 132 MAROON CASE WITH INSERT	E163
People 84 PHOTO - STAIRWELL	E164
People 85 PHOTO - BASEMENT ARE WITH CLOTHING	E165
People 86 PHOTO - CLOSE UP OF CLOTHING	E166
People 87 PHOTO - CLOSE UP OF CLOTHING (2)	E167
People 88 PHOTO - COUCH IN BASEMENT	E168
People 89 PHOTO - COUCH WITH MAROON BOX	E169
People 90 PHOTO - COUCH WITH MAROON BOX (2)	E170
People 91 PHOTO - MAROON BOX OPENED	E171
People 92 PHOTO - CLOSE UP OF AMMO IN MAROON BOX	E172
People 93 PHOTO - MULTI COLORED HOODED SWEATSHIRT	E173
People 94 PHOTO - RED JACKET WITH BLUE SLEEVES	E174
People 95 PHOTO - RED JACKET WITH BLUE SLEEVES (2)	E175
People 96 PHOTO - BASEBALL CAP	E176
People 97 PHOTO - MAROON HOODIE WITH GLOVES	E177
People 98 PHOTO - ELITE STAFFING ID CARD	E178
People 99 PHOTO - CLOSE UP OF ID CARD	E179
People 100 PHOTO - JEANS WITH A WALLET	E180
People 101 PHOTO - IDENTIFICATION CARD IN WALLET	E181

People 102 GATEWOOD POWERPOINT	E182
People 103 VIDEO OF CONVENIENCE STORE VIDEO	E183
People 104 PIATT COUNTY CALL #1	E184
People 105 PIATT COUNTY CALL #2	E185
People 106 PIATT COUNTY CALL #41	E186
People 107 TREVARTHEN POWERPOINT	E187
People 108 PHOTO - VIADUCT (2)	E188
People 109 PHOTO - EAST ALLEY	E189
People 110 PHOTO - UNIMPROVED ALLEYWAY	E190
People 111 PHOTO - FACING SOUTH ALLEYWAY	E191
People 112 PHOTO - ALLEYWAY OF 225 30TH	E192
People 113 PHOTO - GARAGE DECK AND GARBAGE CANS AT 225 30TH	E193
People 114 PHOTO - 229 30TH FACING NORTH	E194
People 115 PHOTO - FRONT VIEW OF 229 30TH	E195
People 116 PHOTO - CLOSE UP OF GARBAGE CANS 225 30TH	E196
People 117 PHOTO - OPEN GARBAGE CAN	E197
People 118 PHOTO - REVOLVER IN GARBAGE CAN	E198
People 119 PHOTO - REVOLVER IN GARBAGE CAN (2)	E199
People 120 PHOTO - REVOLVER UNLOADED	E200
People 121 PHOTO - CLOSE UP OF 4 LIVE ROUNDS	E201
People 122 PHOTO - CLOSE UP 2 SPENT ROUNDS	E202
People 123 SKI MASK	E203
People 124 SURVEILLANCE PHOTO - COLOR	E204
People 125 SURVEILLANCE PHOTO - BLACK & WHITE	E205
People 126 ID CARD	E206
People 127 MAIL	E207
People 128 BLUE JEANS	E208
People 129 WALLET W ID	E209
People 130 GREY MULTI COLORED HOODED SWEATSHIRT	E210
People 131 RED AND BLUE JACKET	E211
People 132 and 83 MAROON CASE WITH INSERT (2)	E212
People 133 AMMUNITION	E213
People 134 MAROON HOODED SWEATSHIRT WITH GLOVES	E214
People 135 BASEBALL CAP WITH STICKER	E215
People 136 MAP	E216
People 137 GAGE THORNTON BUCCAL SWAB	E217
People 138 BRANDON JACKSON BUCCAL SWAB	E218
People 139 DNA SWABS FROM GAGE THORNTON AND BRANDON JACKSON	E219
People 140 STIPULATION (3)	E220
People 141 T-MOBILE PHONE RECORDS	E222

Report of Proceedings

01/23/2014 SOJ	R3
01/23/2014 CONTINUANCE	R13
03/19/2014 STATUS	R17
04/22/2014 STATUS	R23
06/03/2014 STATUS	R27
07/24/2014 STATUS	R33
09/05/2014 STATUS	R36
09/15/2014 BUCCAL-SWAB-MOTION	R52
11/03/2014 STATUS	R61
12/29/2014 STATUS	R68
01/12/2015 STATUS	R79
03/12/2015 STATUS	R83
04/02/2015 STATUS	R90
05/18/2015 STATUS	R99
07/01/2015 STATUS	R105
08/18/2015 STATUS	R109
10/13/2015 STATUS	R120
12/09/2015 STATUS	R124
02/01/2016 STATUS	R128
03/24/2016 STATUS	R135
05/02/2016 STATUS	R139
06/30/2016 STATUS	R154
08/08/2016 CONTINUANCE	R159
09/30/2016 STATUS	R164
11/14/2016 MOTION	R169
12/29/2016 STATUS	R290
01/27/2017 STATUS	R295
02/03/2017 CONTINUANCE	R299
03/16/2017 STATUS	R305
03/29/2017 AFFIDAVIT	R309
04/13/2017 STATUS	R310
05/22/2017 STATUS	R356
06/26/2017 STATUS	R361
07/28/2017 STATUS	R371
08/25/2017 STATUS	R383
09/29/2017 MOTION	R387
10/06/2017 MOTION	R422
10/18/2017 CONTINUANCE	R444
10/23/2017 STATUS	R463
11/21/2017 STATUS	R473
12/19/2017 MOTIONS	R481
01/16/2018 TRIAL	R529
01/16/2018 JURY-SELECTION	R734

01/17/2018 JURY TRIAL	R941
Opening statement – People	R948
Opening statement – Defense	R953
People’s witnesses:	
Jeremiah Artis	
Direct	R956
Cross	R981
John Dziedzic	
Direct	R990
Cross	R1008
Paul Rettig	
Direct	R1017
Cross	R1025
Re-direct	R1066
Rigoberto Anaya	
Direct	R1068
Cross	R1098
Daniel Estrada	
Direct	R1102
Cross	R1145
Re-direct	R1160
Re-cross	R1166
Christina Estrada	
Direct	R1175
Cross	R1194
01/18/2018 JURY TRIAL (cont.)	R1206
People’s witnesses:	
Benjamin Soriano, M.D.	
Direct	R1214
Cross	R1245
Re-direct	R1247
Ronald Kenattay Jones, Jr.	
Direct	R1251
Cross	R1281
Re-direct	Sup R6
Jose Flores	
Direct	Sup R10
Cross	Sup R43
Re-direct	Sup R49
Jeanne Hutcherson	
Direct	Sup R55
Cross	Sup R72
Re-direct	Sup R74
Sgt. Colin Reid	

Direct.....	Sup R76
Commander Jack Bridson	
Direct.....	Sup R85
Cross.....	Sup R88
Re-direct.....	Sup R91
Sgt. Anthony Gatewood	
Direct.....	Sup R93
Cross.....	Sup R105
Re-direct.....	Sup R128
Re-cross.....	Sup R130
01/19/2018 JURY TRIAL (cont.)	R1328
People's witnesses:	
Sgt. John D. Russell	
Direct.....	R1331
Cross.....	R1348
Re-direct.....	R1356
Officer Hopkins	
Direct.....	R1362
Cross.....	R1366
Re-direct.....	R1369
Master Sgt. John Trevarthen	
Direct.....	R1376
Cross.....	R1427
Peter Brennan	
Direct.....	R1482
Cross.....	R1491
Gregory Bates	
Direct.....	R1493
Cross.....	R1504
Robert Berk	
Direct.....	R1507
Cross.....	R1532
Re-direct.....	R1545
01/22/2018 JURY TRIAL (cont.).....	R1549
People's witnesses:	
Joseph Sierra	
Direct.....	R1638
Ronald J. Tomek	
Direct.....	R1642
Cross.....	R1662
Brian Schoon	
Direct.....	R1665
Cross.....	R1680
People rest case-in-chief.....	R1689

Defense witness:	
David Martin	
Direct.....	R1551
Cross.....	R1556
Defense rests	R1557
Jury instruction conference	R1559
Exhibit discussion (outside of jury)	R1583
01/23/2018 JURY TRIAL (cont.).....	R1694
Closing argument – People	R1695
Closing argument – Defense.....	R1712
Rebuttal closing argument – People	R1731
Jury instructions	R1748
Jury question: legal definition of reasonable doubt	R1788
Jury question: request numbered evidence list or clarification	
if Ex. 38 is Thornton or Jackson.....	R1789
Jury question: asking to take break, stretch legs	R1790
Jury verdict and poll.....	R1798
02/21/2018 STATUS.....	R1809
03/16/2018 MOTION FOR NEW TRIAL & SENTENCING	R1826
Witness in aggravation	
Commander Ken Beres	
Direct.....	R1860
03/29/2018 MOTION TO RECONSIDER SENTENCE	R1932
 Supplement to the Report of Proceedings	
01/18/2018 JURY TRIAL (PM).....	Sup R4
[see above for witnesses on this date]	

Illinois Official Reports

Appellate Court



Digitally signed
by Reporter of
Decisions
Reason: I attest to
the accuracy and
integrity of this
document
Date: 2021.07.28
11:00:28 -05'00'

People v. Jackson, 2021 IL App (1st) 180672

Appellate Court
Caption

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v.
BRANDON JACKSON, Defendant-Appellant.

District & No.

First District, First Division
No. 1-18-0672

Filed
Rehearing denied

March 22, 2021
April 13, 2021

Decision Under
Review

Appeal from the Circuit Court of Cook County, No. 14-CR-00994(01); the Hon. Paula M. Daleo, Judge, presiding.

Judgment

Reversed and remanded.

Counsel on
Appeal

James E. Chadd, Douglas R. Hoff, and Deborah K. Pugh, of State Appellate Defender's Office, of Chicago, for appellant.

Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Noah C. Montague, and Matthew Connors, Assistant State's Attorneys, of counsel), for the People.

Panel

JUSTICE HYMAN delivered the judgment of the court, with opinion. Presiding Justice Walker concurred in the judgment and opinion. Justice Coughlan dissented, with opinion.

OPINION

¶ 1 A jury appears to have found Brandon Jackson guilty of first degree murder for the shooting death of Cuauhtemoc “Temo” Estrada and attempted armed robbery of Rigoberto Anaya. We say “appears” because, after the jury returned its signed verdict forms, Jackson’s counsel requested the trial court poll the jury. The trial court asked 11 of the jurors, “Was this then and is this now your verdict?” Of the 11 jurors the court polled, all responded “yes.” The court then dismissed the jury without polling the twelfth juror.

¶ 2 The parties do not dispute that the trial court erred by failing to poll the twelfth juror. Nor do the parties dispute that Jackson’s counsel forfeited review of the issue by (i) failing to object before the trial court dismissed the jurors and (ii) failing to include the alleged error in a posttrial motion. We address a narrow issue: Does the trial court’s error in failing to poll all 12 jurors constitute second-prong plain error, excusing Jackson’s forfeiture and requiring reversal of the trial court’s judgment?

¶ 3 We hold that leaving out of the poll of the jury even one juror calls into question the integrity of the judicial process and, so, constitutes second-prong plain error. We reverse and remand for a new trial.

¶ 4 We do not arrive lightly at the decision. The offense was violent; for the witnesses and Estrada’s family, the trial was a traumatic process. As the trial court pointed out, Estrada’s family regularly attended court for the four years this case progressed. The victim impact statements presented at sentencing reveal the deep emotional toll Estrada’s murder has taken on those who knew him. We acknowledge the difficulty in subjecting Estrada’s family and the other witnesses to a retrial for what may appear an oversight. Nonetheless, the inviolable right to be tried by an impartial jury of one’s peers stands as an uncontested cornerstone of our criminal law system. Failing to ensure that even a single juror’s verdict “was *** then and is *** now your verdict” damages that essential and durable cornerstone.

¶ 5 Background

¶ 6 We recount the facts of Jackson’s offense briefly because Jackson raises no issue concerning the sufficiency or the closeness of the trial evidence.

¶ 7 The victim, Cuauhtemoc “Temo” Estrada, rented out the hall at a Veterans of Foreign Wars (VFW) post for a Christmas party on December 20, 2013. Rigoberto Anaya, who was dating Temo’s daughter Christina, arrived at the VFW at about 7:40 p.m. Before the couple could make it inside, two men came up to them and demanded that Anaya “give [them] all [his] shit.” Anaya saw both men carried guns. Temo came over to find out what was going on and reached for his weapon, telling the offenders he was an officer. As soon as Temo reached for his gun, one of the men shot at him. Christina’s testimony was substantially similar to Anaya’s.

¶ 8 Temo’s son, Daniel, who had arrived at the VFW earlier that evening, had gone outside to help Temo. Daniel and Temo saw Anaya and Christina “being held up” by two men. Daniel watched as Temo walked up to the two men to “see what was going on,” and the next thing he knew, Temo had been shot. After the shooting, the two men ran from the scene. Temo did not survive.

¶ 9 The State introduced evidence that Jackson told a friend, Ronald Jones Jr., “he had tried to rob somebody at the bar” but that he “didn’t mean to shoot the person.” Jackson reportedly

said that someone had come out of the VFW with a gun and Jackson “shot [his] gun at the victim.” After listening to recordings of Jackson’s phone calls from the Piatt County Jail, officers eventually located the gun used in the shooting. Although no fingerprints were found on the gun, officers found the gun where Jackson had said “the unit was.”

¶ 10 After closing arguments, the jury retired for deliberation at 12:21 p.m. At 2:11 p.m. the jury sent out a question asking to “get the legal definition of reasonable doubt.” By agreement of the parties, the court answered, “Keep deliberating. You have all the instructions and the evidence.” At 3:42 p.m. the jury sent out another question: “Can we get a numbered evidence list? If not, can we get a clarification if Exhibit 38 is Gage Thornton or Brandon Jackson?” By agreement of the parties the court answered, “Exhibit No. 38 is Gage Thornton.” As deliberations continued, the parties agreed that, should the jury continue until 9 p.m., they would be excused to return the next day. But the jury came to a verdict.

¶ 11 The jury found Jackson guilty of first degree murder and guilty of attempted armed robbery. The jury also found the allegation that Jackson personally discharged a firearm during the offense had been proven. The verdict forms have 12 unique signatures. At counsel’s request, the court polled the jury using the question, “Was this then and is this now your verdict?” The court only posed the question to 11 of 12 jurors. All 11 responded, “Yes.” The court discharged the jury without any further comment from Jackson’s counsel.

¶ 12 Jackson’s counsel filed a motion for a new trial raising several claims of error but included nothing about the trial court’s failure to poll all 12 jurors. The trial court denied the motion.

¶ 13 The trial court conducted an extensive sentencing hearing where both parties presented substantial evidence in aggravation and mitigation. In imposing sentence, the trial court commented:

“What is the right sentence here for everybody? That is my job to try to determine, to try to balance what I have heard about the defendant, his upbringing, his experiences in life, his choices that he made to the life of Mr. Estrada who served this country—and I’m just making these comments. He served his country as a Marine. He serve[d] his country as a sheriff. He was a family man. He was a person who commanded respect from the people that he came into contact with.”

¶ 14 The court then juxtaposed Estrada’s family, whom the court characterized as “God-fearing people,” with Jackson’s family, who “tried [their] best” to prevent Jackson from “suffer[ing] the consequences” of his choices. Overall the trial court made extensive findings and sentenced Jackson to 55 years in prison for first degree murder and 5 years in prison for attempted robbery.

¶ 15 The State asked for clarification on whether the court’s 55-year sentence included the 25-year firearm enhancement. Both parties agreed the judge should make explicit the underlying sentence in addition to the enhancement, which would make Jackson’s sentence 30 years for first degree murder plus 25 years for the firearm enhancement. The court responded: “Then that’s not the appropriate sentence. It would have—okay. So it would have to be 35 years on the murder plus 25 years on the enhancement plus 5 years on the attempt robbery.” The sentencing order reflects a 60-year sentence for first degree murder to run consecutively with a 5-year sentence for attempted armed robbery for a total of 65 years in prison.

¶ 16 Jackson’s counsel filed a motion to reconsider his sentence, alleging the court had no basis to “change[] its sentence from 55 years to 60 years on the murder counts” without presentation

of additional aggravation or mitigation. The trial court denied counsel's motion.

¶ 17

Analysis

¶ 18

Jackson raises two arguments. First, he argues the trial court erred in polling less than all jurors. The State does not dispute that the incomplete polling was error; instead, the State argues Jackson forfeited the issue and claims the error was not serious enough to warrant a new trial under the second prong of the plain error doctrine. Jackson also challenges two aspects of his sentence, arguing (i) the trial court erred in considering the victim's characteristics as an aggravating factor and (ii) the trial court erred in "capriciously" increasing Jackson's sentence to 60 years after it had first imposed a sentence of 55 years.

¶ 19

We agree that failing to poll the entire jury constitutes error and, disagreeing with *People v. McGhee*, 2012 IL App (1st) 093404, we find the error serious enough to be considered second-prong plain error. We reverse and remand for a new trial.

¶ 20

At the outset, Jackson acknowledges he forfeited his claim by failing to object at the time of jury polling and failing to include the claim of error in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (both contemporaneous objection and posttrial motion raising issue required to preserve issue for appeal). By Illinois Supreme Court Rule, we can address forfeited errors "affecting substantial rights." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Under the rule, a defendant can show plain error one of two ways: (i) where the error is clear and obvious and the evidence is closely balanced such that the error alone threatened to tip the scales of justice against the defendant or (ii) when an error is clear and obvious and the error itself is "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." (Internal quotation marks omitted.) *People v. Sebby*, 2017 IL 119445, ¶ 48. Under the second prong, we assume prejudice because of the seriousness of the error. *Id.* ¶ 50. Jackson does not claim the evidence is closely balanced. He argues that the trial court's failure to poll all the jurors qualifies as second-prong plain error and requires reversal.

¶ 21

Traditionally, the first step of a plain error analysis involves determining whether a clear or obvious error occurred. *Id.* ¶ 49. The State does not dispute that polling only 11 members of a 12-person jury is error, nor is there much room for a dispute. Our supreme court has used mandatory language to describe the trial court's obligation to conduct a poll once requested. *People v. Williams*, 97 Ill. 2d 252, 307 (1983) (when trial court conducts poll, it "must determine that the jury verdict accurately reflects each juror's vote as reached during deliberations and that the jurors' votes were not the result of force or coercion" (emphasis added)). The court's obligation inheres to each juror individually. *Id.* True, we defer to the trial court on many aspects of the polling process. See *People v. Kellogg*, 77 Ill. 2d 524, 528 (1979) (trial court "may use its discretion" in formulating polling question); *People v. Cabrera*, 116 Ill. 2d 474, 490 (1987) (trial court's conclusion about voluntariness of assent to verdict will not be disturbed unless "clearly unreasonable"). But the failure to complete the poll does not fall within the trial court's discretion. Polling less than all jurors constitutes error.

¶ 22

The parties disagree, however, as to the nature of the error. Jackson argues the trial court's failure to poll all the jurors amounted to second-prong plain error; the State, relying primarily on *McGhee*, argues the error does not rise to the level required to excuse Jackson's forfeiture.

¶ 23

First, we need to explain *McGhee* in some detail. There, the defendant appealed a second-stage dismissal of his postconviction petition alleging, in part, that his direct appeal counsel

had been ineffective for failing to raise a claim about the trial court's failure to poll the jury at his request. *McGhee*, 2012 IL App (1st) 093404, ¶¶ 7, 14. After the jury found the defendant guilty of first degree murder, attempted murder, and aggravated discharge of a firearm, the trial court dismissed the jurors before polling them, despite counsel's request that the jury be polled. *Id.* ¶ 17. There, as here, the defendant's jury polling claim would have been forfeited on direct appeal, and appellate counsel could only have been ineffective for failing to raise the claim if it constituted second-prong plain error. *Id.* ¶¶ 18, 20.

¶ 24 The court began its analysis by "equat[ing] the second prong of the plain-error doctrine with structural error," which is described as "'systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *Id.* ¶ 20 (quoting *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010)). Because the application of second-prong plain error for failure to poll the jury had not yet been addressed in Illinois, the court looked for guidance in Illinois Supreme Court cases analyzing trial court error during *voir dire*. *Id.* ¶ 21 (discussing *Thompson* and *People v. Glasper*, 234 Ill. 2d 173 (2009)). In *Glasper*, for example, our supreme court found the failure to properly question the venire under Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) implicated only a supreme court rule, not a "fundamental right or other constitutional protection." *McGhee*, 2012 IL App (1st) 093404, ¶ 22 (citing *Glasper*, 234 Ill. 2d at 193). The court in *McGhee* used that reasoning to draw a distinction "between the procedural requirement of questioning the venire *** and the fundamental prohibition against a defendant being tried by a biased jury." *Id.* ¶ 23.

¶ 25 Extending the logic of *Glasper* to the context of jury polling, the court in *McGhee* separated the defendant's right into two discrete parts: (i) the "substantive" right to a unanimous verdict and (ii) the "procedural" right to ensure unanimity by jury polling. *Id.* ¶¶ 24-25. In the court's view, because jury polling was not the only mechanism by which to ensure a unanimous verdict, it embodied a "procedural device" and "not an indispensable prerequisite to a fair trial." *Id.* ¶ 25. Ultimately, the court held that, absent other evidence the jury's verdict was not unanimous, the trial court's failure to poll the jury was not enough to satisfy the second prong of plain error. *Id.* ¶ 26.

¶ 26 We disagree with *McGhee*'s conclusion. To start, the court in *McGhee* operated under a misconception about second-prong plain error. Early in its analysis, the court equated the second prong of Illinois's plain error doctrine with "structural error." *Id.* ¶ 20. In the federal system, the United States Supreme Court has limited structural errors to (i) the complete denial of counsel, (ii) trial before a biased judge, (iii) racial discrimination in grand jury selection, (iv) denial of the right to self-representation at trial, (v) denial of a public trial, and (vi) a defective reasonable doubt instruction. *Thompson*, 238 Ill. 2d at 609 (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006)). Our supreme court had tacitly recognized other second-prong plain errors that were not on the Supreme Court's list of structural errors and stated that "we did not restrict plain error to the types of structural error that have been recognized by the Supreme Court" in *People v. Clark*, 2016 IL 118845, ¶¶ 45-46. The supreme court's express clarification of the nature of second-prong plain error in *Clark* extensively undercuts *McGhee*'s precedential value.

¶ 27 As a matter of law, we find it difficult to reconcile *McGhee*'s holding with the language our courts have used to describe the right to jury polling, much of which *McGhee* itself quoted. In Illinois, parties to lawsuits and defendants in criminal cases have "an absolute right" to poll the jury. *People v. Rehberger*, 73 Ill. App. 3d 964, 968-69 (1979). Indeed that "absolute right"

is “basic to our system which requires unanimity among the jurors.” *Id.* at 968. *McGhee* notably did not quote, however, our supreme court’s decision in *Kellogg*, where the court explained at length:

“Jurors must be able to express disagreement during the poll or else the polling process would be a farce and the jurors would be bound by their signatures on the verdict. Before the final verdict is recorded, a juror has the right to inform the court that a mistake has been made, or to ask that the jury be permitted to reconsider its verdict, or to express disagreement with the verdict returned. ***

*** [A]n opportunity must be afforded for the juror to express his [or her] opinion free from coercive influences that may have dominated the deliberations of the jury room *** and a verdict cannot stand if the [trial court’s] interrogation precludes the opportunity to dissent or if the record reflects that the juror in the poll has not in fact assented to the verdict.” *Kellogg*, 77 Ill. 2d at 528-29.

The court used mandatory language, emphasizing that a verdict *cannot stand* if the trial court’s poll somehow prevents a juror from expressing assent (or dissent) to the written verdict. *Id.* at 529.

¶ 28 Older cases, some almost as old as the State of Illinois itself, use similarly strong language. In *Nomaque v. People*, 1 Ill. 145 (1825), which *McGhee* cites, the court held that the right of a criminal defendant to have the jury polled was so important that it belonged exclusively to the defendant, meaning counsel could not waive it on the defendant’s behalf by allowing the jury to be dismissed before polling. *Id.* at 148, 149-50. A right that is “basic to our system” sounds quite like a right whose denial would “affect[] the integrity of the judicial process.” See *Clark*, 2016 IL 118845, ¶ 45 (reciting standard).

¶ 29 We next confront *McGhee*’s reliance on our supreme court’s decisions in *Thompson* and *Glasper*, 234 Ill. 2d 173. In both cases, the court addressed the remedy for the trial court’s failure to comply with Rule 431(b). *Thompson*, 238 Ill. 2d at 608-11; *Glasper*, 234 Ill. 2d at 189-203. Like *McGhee*, the analyses in *Thompson* and *Glasper* find resonance in the concept of structural error. *Thompson*, 238 Ill. 2d at 608-09 (discussing remedy for Rule 431(b) violation using language of structural error under a point heading labeled “Structural Error”); *Glasper*, 234 Ill. 2d at 197-98. After *Clark*, their utility as guidance is diminished.

¶ 30 More to the point, however, the nature of the errors in *Thompson* and *Glasper* (Rule 431(b) violations) fundamentally differs from the trial court’s failure to poll every member of the jury after a verdict. Violation of Rule 431(b) is an instructional error occurring when the trial court fails to ask potential jurors if they “understand and accept” the four principles announced in *People v. Zehr*, 103 Ill. 2d 472 (1984). Our supreme court explained the reasons instructional errors like Rule 431(b) violations are better analyzed under the first prong of the plain error doctrine where the closeness of the evidence matters. *Seby*, 2017 IL 119445, ¶ 78. Failure to properly instruct potential jurors creates only the “potentiality” of bias. *Id.* The risk that faulty instructions contributed either to bias or the ultimate result “depends upon the quantum of evidence presented by the State against the defendant.” (Internal quotation marks omitted.) *Id.* In other words, a juror who has incorrect notions about topics covered in Rule 431(b) may be influenced by those notions in a close case; on the other hand, if the evidence against the defendant is truly overwhelming, a juror with incorrect notions about Rule 431(b) principles will not have to rely on those notions in reaching a verdict.

¶ 31 Errors in jury polling differ categorically. The purpose of jury polling has less to do with weeding out bias and more to do with corroborating the accuracy of the written verdict. See *Kellogg*, 77 Ill. 2d at 528 (jury polling required to give “opportunity for free expression unhampered by the fears or the errors which may have attended the private proceedings of the jury room.” (Internal quotation marks omitted.)); *Nomaque*, 1 Ill. at 150 (jury polling required because “the jury may vary from their first offering of their verdict”); *Rehberger*, 73 Ill. App. 3d at 968 (jury polling required to determine “whether the pronounced verdict is each individual juror’s verdict”); see also *Freeman v. City of Chicago*, 2017 IL App (1st) 153644, ¶ 61 (“purpose of polling a jury is to determine whether any individual jurors have been coerced by the other members of the jury into returning a certain verdict” (internal quotation marks omitted)). Even where evidence is not “closely balanced,” as applied to first-prong plain error, a juror who harbors reasonable doubt as to guilt may sign a guilty verdict as a result of fear or coercive pressure attending private jury deliberations. Regardless, once a poll has been sought, every juror must be afforded the opportunity to disavow the verdict form.

¶ 32 Given the purpose of jury polling, we reject the State’s argument, echoing the reasoning of *McGhee*, that polling the jury involves “merely a procedural device.” Setting aside the characterization of any procedural protections as “mere” protections, jury polling is not only a procedural device designed to ensure the unanimity of the jury’s verdict; it is *the* procedural device for accomplishing that goal. The State, again echoing *McGhee*, argues other measures exist like “the requirement that the jurors individually sign the verdict form.” *McGhee*, 2012 IL App (1st) 093404, ¶ 25. We find this reasoning impossible to square with the purpose of jury polling, which, as we said, protects a juror’s “right to inform the court that a mistake has been made, or to ask that the jury be permitted to reconsider its verdict, or to express disagreement with the verdict returned.” *Kellogg*, 77 Ill. 2d at 528. The signatures on the verdict forms do not serve as a stand-in for jury polling because polling gives jurors the chance to expressly disavow the signature they affixed to the form.

¶ 33 We also must address *People v. Sharp*, 2015 IL App (1st) 130438, which came after and relied on *McGhee*. *Id.* ¶¶ 112-13. We find *Sharp* unhelpful for several reasons. First, it appears the only issue the defendant’s counsel raised regarding jury polling was trial counsel’s ineffectiveness for failing to object to an incomplete poll. *Id.* ¶ 111. Nothing indicates that appellate counsel affirmatively argued that the failure to carry out a complete jury poll amounted to plain error. Second, and relatedly, it appears our discussion of plain error in the context of jury polling was no more than a device to show the lack of prejudice from counsel’s failure to object. *Id.* ¶ 113 (“Given that *** Sharp did not satisfy his burden under either prong of the plain error doctrine, Sharp’s trial counsel cannot be faulted for failing to object to the court’s polling of the jury.”). Third, in *Sharp* (unlike here) appellate counsel did not argue that *McGhee* was wrongly decided. By contrast, counsel here directly attacked the validity of *McGhee* in briefing and oral argument. Finally, to the extent *Sharp* can fairly be read as endorsing *McGhee*, we reject *Sharp* for the reasons explained.

¶ 34 The State also argues we should not rely on *Kellogg* because the trial court’s error was factually distinct from the trial court’s error here. In *Kellogg*, the trial court asked the jurors, “ ‘Was this then and is this now your verdict?’ ” *Kellogg*, 77 Ill. 2d at 527. After one juror asked, “ ‘Can I change my vote?’ ” the trial court simply repeated its initial question twice more without probing the juror’s answer further; the juror then answered, “ ‘Yes, Sir.’ ” *Id.* at 527, 529-30. The court found the trial court had failed to determine whether the juror wanted

to change her verdict or wanted to affirm her verdict. *Id.* As the State observes, and the dissent emphasizes, the failure to ask proper follow-up questions of one juror in *Kellogg* contrasts with the failure to ask the probing question of one juror here. But the result—the trial court’s inability to determine whether the one juror “desired to abide by the verdict [the juror] had signed” (*id.* at 530)—is identical. If anything, the error before us appears worse—the trial court had no chance to find out, let alone attempt to remedy, any possible equivocation from the unpolled juror.

¶ 35 The factual differences between the error in *Kellogg* and the error here are a smokescreen. *Kellogg*’s true import involves its discussion about the nature of a defendant’s right to a complete jury poll. The language we have discussed describing the importance of the right to a jury poll to the entry of the verdict shows that our supreme court considers a complete and proper jury poll as essential to a fair criminal trial.

¶ 36 For similar reasons, we reject the argument, alluded to in *McGhee* and endorsed by the dissent, that Jackson must prove prejudice. That line of reasoning conflicts with second-prong review, where we *presume* prejudice “ ‘because of the importance of the right involved.’ ” *Sebby*, 2017 IL 119445, ¶ 50 (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)). Stated another way, for second-prong error, the commission of the error is *itself* the prejudice because the right involved is so important. Our supreme court’s discussion of the right to jury polling in *Kellogg* and other cases convinces us it is an important right.

¶ 37 Requiring evidence of lack of juror unanimity dodges the question Jackson puts to us: What *kind* of error is failing to completely poll the jury? (Remember that no one disagrees that the trial court failing to poll all 12 jurors was error.) As we said, we only require proof of prejudice for first-prong plain error by asking whether the evidence was closely balanced such that the error alone threatens to tip the scales against the defendant. For second-prong errors, the error is the prejudice. The dissent’s requirement that Jackson show proof of prejudice from the trial court’s incomplete poll presupposes that failing to completely poll the jury does not constitute second-prong plain error.

¶ 38 Looking at examples from the United States Supreme Court’s list of structural errors illustrates the point. Think of courtroom closure. When the trial court improperly excludes spectators to all or portions of a trial, it will be “ ‘difficult, if not impossible, to require a defendant to prove, or the State to disprove, prejudice.’ ” *People v. Schoonover*, 2019 IL App (4th) 160882, ¶ 39 (quoting *People v. Revelo*, 286 Ill. App. 3d 258, 267 (1996)). This difficulty makes sense because, at least theoretically, a defendant could have a perfectly procedurally fair trial conducted in secret. But we value the right to a public trial so much that any deprivation warrants reversal. See *Weaver v. Massachusetts*, 582 U.S. ___, ___, 137 S. Ct. 1899, 1907-08 (2017).

¶ 39 The only question in the courtroom closure context is whether the trial court excluded spectators from the courtroom during a relevant portion of the proceedings. See, e.g., *People v. Radford*, 2020 IL 123975, ¶ 24. Here all agree that clear or obvious error occurred. For the reasons we have already explained, our supreme court’s discussion of the right to a jury poll shows it is a right central enough to the proper functioning of our criminal justice system that the error alone is prejudicial.

¶ 40 The dissent’s citations of *Herron*, 215 Ill. 2d 167, and *People v. Hopp*, 209 Ill. 2d 1 (2004), (*infra* ¶ 55) are not to the contrary. In *Hopp*, the court dealt with specific exceptions to waiver of jury instructional error found in Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013).

Hopp, 209 Ill. 2d at 7-8. Case law had interpreted that rule to require a “ ‘severe[]’ ” threat to the fairness of the trial. *Id.* at 8. We deal with the plain error rule rising out of Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). We acknowledge our supreme court has enunciated that Rules 451(c) and 615(a) be interpreted “identically” (see *People v. Durr*, 215 Ill. 2d 283, 296 (2005)), but the context of that pronouncement matters. The *Durr* court said the two rules arise in distinct factual situations. See *id.* at 296-97 (defendant who fails to object to instructional error at trial but includes error in posttrial motion “subject to” *Hopp* and Rule 451(c), whereas plain error under Rule 615(a) applies when defendant objects at trial but leaves instructional error out of posttrial motion (discussing *People v. Keene*, 169 Ill. 2d 1, 32 (1995))). *Keene* shows that applying Rule 615(a) to instructional errors secures a safety valve for errors not covered by Rule 415(c). *Keene*, 169 Ill. 2d at 32. The court did no more than confirm that instructional errors can implicate Rule 615(a)’s concerns for fundamental fairness even if the defendant did not meet the strictures of Rule 415(c). *Id.* at 31-32.

¶ 41 But quibbling over the interpretive differences under Rules 451(c) and 615(a) is, of course, a distraction. The dissent still cites no second-prong plain error case in which a court has required the complained-of error to be “severe” (see *Hopp*, 209 Ill. 2d at 8), to challenge the integrity of the judicial process. Even *People v. Allen*, 222 Ill. 2d 340, 353 (2006), does not use the word “severe,” merely restating the test for second-prong plain error. Moreover, our supreme court has clarified that the seriousness of the error refers to the error as a category, not in terms of the degree of prejudice a defendant experiences. The court recently reaffirmed, in the context of a different second-prong error, that “ ‘an error may involve a[n] *** unimportant matter, but still affect the integrity of the judicial process and the fairness of the proceeding.’ ” *People v. Birge*, 2021 IL 125644, ¶ 53 (quoting *People v. Lewis*, 234 Ill. 2d 32, 48 (2009)). The court in *Lewis* elaborated: “[W]e do not believe a *de minimis* exception can be placed on plain error review. The exception would be difficult to implement because it would require declaring when a dispute become significant rather than *de minimis*. The question would necessarily arise as to where the line should be drawn.” *Lewis* 234 Ill. 2d at 48.

¶ 42 The dissent seemingly draws that line by insisting we deal with “the inadvertent failure to poll 1 of the 12 jurors.” *Infra* ¶ 63. But the jury poll supplies the only method the trial court can use to confirm that the signatures on the verdict form reflect the true verdict. Inadvertent or not, for the reasons we have explained, the error affects the integrity of the judicial process. See *Lewis*, 234 Ill. 2d at 48 (“a *de minimis* exception is inconsistent with the fundamental fairness concerns of the plain-error doctrine,” which “focuses on the fairness of the proceeding and the integrity of the judicial process”).

¶ 43 As to *Herron*, it only reaffirms the principle that for second-prong plain errors “[p]rejudice to the defendant is *presumed* because of the importance of the right involved.” (Emphasis added.) *Herron*, 215 Ill. 2d at 187. As we have repeatedly said, our supreme court’s characterization of the right to a jury poll rules out the requirement of a specific showing of prejudice.

¶ 44 As further support for our conclusion, the United States Supreme Court recently reached the emphatic conclusion that the sixth amendment, incorporated against the states through the fourteenth amendment, requires “[a] jury [to] reach a unanimous verdict in order to convict.” *Ramos v. Louisiana*, 590 U.S. ___, ___, 140 S. Ct. 1390, 1395 (2020). Although we do not deal with a constitutional claim here, the context in which *Ramos* arose reveals the importance of each juror’s verdict.

¶ 45 *Ramos* involves the propriety of nonunanimous juries to convict criminal defendants in Louisiana and Oregon. *Id.* at ___, 140 S. Ct. at 1394. Louisiana allowed convictions to stand where 10 of 12 jurors believed the defendant was guilty. *Id.* at ___, 140 S. Ct. at 1394. The Court found 10-to-2 verdicts odious to the constitutional guarantee of a right to an impartial jury. *Id.* at ___, 140 S. Ct. at 1401. While no one disagrees that Jackson had a right to a unanimous jury, *Ramos* also stands for the proposition that this right is so central to our justice system it cannot be sacrificed on the altars of expediency or assumption. See *id.* at ___, 140 S. Ct. at 1401 (rejecting “breezy cost-benefit analysis” of unanimous versus nonunanimous juries espoused by plurality in *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion)).

¶ 46 Indeed, *Ramos* invalidates the State’s suggestion that we can excuse the court’s failure in the poll because the court missed just one juror. *Ramos* leaves beyond peradventure that unanimous means *unanimous*. As we have explained, the only way to ensure that all 12 jurors adhere to the signatures they affixed to the jury forms is to ask each one whether he or she remains resolute in the verdict.

¶ 47 We find the failure to poll every juror at Jackson’s request challenges the integrity of the judicial process. See *Clark*, 2016 IL 118845, ¶ 42. Twelve signatures on all the verdict forms without a complete poll of the jury means we will never know whether the form truly reflects the will of all the jurors. The right to jury polling has been “rooted deep in our common law.” *McGhee*, 2012 IL App (1st) 093404, ¶ 15. An incomplete poll prevents the trial court from accepting and recording the verdict. *Id.* (discussing *Rehberger*, 73 Ill. App. 3d at 968). Considering the nature of the right and of the error in Jackson’s jury poll, he established a second-prong plain error, which requires we reverse and remand for a new trial.

¶ 48 Counsel better serve their clients and help preserve judicial resources by objecting to errors in jury polling at the earliest opportunity. *Infra* ¶ 63 n.2. But that does not excuse our correcting a breakdown in the only mechanism available to ensure jurors remain steadfast in their written verdict.

¶ 49 Reversed and remanded.

¶ 50 JUSTICE COGHLAN, dissenting:

¶ 51 Although Jackson has offered no evidence that the guilty verdicts were not unanimous, the majority has chosen to ignore established precedent by reversing his murder and attempted armed robbery convictions,¹ granting him a new trial based solely on the trial court’s inadvertent failure to poll 1 of the 12 jurors as to her verdicts. Because I see no legitimate reason to depart from this court’s considered opinions in *McGhee*, 2012 IL App (1st) 093404, and *Sharp*, 2015 IL App (1st) 130438 (the latter of which was authored by the author of the majority in this case), I dissent.

¶ 52 Initially, as the majority concedes, Jackson forfeited review of this issue by failing to object and failing to raise the issue in his posttrial motion. Honoring Jackson’s forfeiture is particularly apt in this case because his lack of a timely objection deprived the trial court of the opportunity to poll the juror that it overlooked. As we have previously stated:

¹The jury also found defendant guilty of personally discharging a firearm that proximately caused the death of another person.

“[D]efense counsel should not be permitted to obtain a reversal of the defendant’s conviction simply by failing to object and by design depriving the trial court of the opportunity to prevent or correct the error. [Citation.] Here, the trial court may have been able to cure the alleged error had defendant raised an objection at trial or presented the issue in a posttrial motion.” *People v. Jackson*, 357 Ill. App. 3d 313, 328 (2005).

See also *People v. Galloway*, 74 Ill. App. 3d 624, 627 (1979) (although trial court polled only 10 out of 12 jurors, defendant forfeited the issue by failing to object and raise the issue in his posttrial motion; “[a]ny oversight could have been corrected immediately if defense counsel had made an objection at the time”); *People v. Black*, 84 Ill. App. 3d 1050, 1055 (1980) (“No objection was raised at the time that the jury had been improperly polled. If it had, any oversight in the question used for the purpose of polling could have been corrected immediately.”); *cf. People v. Radford*, 2020 IL 123975, ¶ 37 (expressing concern in the courtroom closure context that “‘defense counsel could secure a reversal simply by intentionally failing to object and, by design, depriving the trial court of the opportunity to prevent or correct the error’ ” (quoting *People v. Hampton*, 149 Ill. 2d 71, 100 (1992))).

¶ 53 Nor do I find that the trial court’s error rises to the level of second-prong plain error. In this regard, as discussed, I find *McGhee* and *Sharp* persuasive. The defense in *McGhee* requested that the jury be polled, but the trial court erroneously failed to poll any of the jurors—a significantly more egregious omission than in the present case. *McGhee*, 2012 IL App (1st) 093404, ¶ 17. The *McGhee* court found that, although a criminal defendant has a fundamental right to a unanimous jury verdict, polling the jury is “merely a procedural device that helps to ensure that the jury’s verdict is unanimous” and not itself a fundamental right. *Id.* ¶¶ 24-25. It further stated:

“Although some evidence that the verdict was not unanimous could potentially satisfy the second prong of the plain-error doctrine, defendant in this case has not offered us any evidence that the verdict was not unanimous other than the trial court’s failure to poll the jury. The record is bare of any indication to the contrary, and in fact not one but three separate guilty verdict forms, one for each count, were signed by all 12 jurors.” *Id.* ¶ 26.

Thus, under those facts, *McGhee* held that the mere failure to poll the jury did not constitute second-prong plain error. *Id.*

¶ 54 The majority argues that *McGhee* was wrongly decided because the court “operated under a misconception about second-prong plain error,” namely that second-prong plain error was limited to the six categories of structural error articulated by the United States Supreme Court. According to the majority, “[t]he supreme court’s express clarification of the nature of second-prong plain error in *Clark* extensively undercuts *McGhee*’s precedential value.” *Supra* ¶ 26.

¶ 55 On the contrary, long before its decision in *Clark*, our supreme court expressly clarified that “[w]e may determine an error is structural as a matter of state law regardless of whether it is deemed structural under federal law.” *People v. Averett*, 237 Ill. 2d 1, 13 (2010) (citing *Glasper*, 234 Ill. 2d at 199-200). Thus, our supreme court has never restricted structural error to the six categories alone; rather, the court has consistently considered the impact of the claimed error on the fundamental fairness of the trial. See, e.g., *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) (violation of one-act, one-crime rule was second-prong plain error); *People v. Walker*, 232 Ill. 2d 113, 131 (2009) (failure to grant continuance to defense counsel was second-prong plain error); *Thompson*, 238 Ill. 2d at 614-15 (Rule 431(b) violation was not

second-prong plain error because it did “not implicate a fundamental right or constitutional protection”). *Clark* did not expand the reach of second-prong plain error but merely reaffirmed the long-standing principle expressed in *Thompson*, *Glasper*, and many other cases that the second prong encompasses systemic errors affecting the fundamental fairness of the trial. *Clark*, 2016 IL 118845, ¶ 46 (citing *Thompson*).

¶ 56 In keeping with this well-established precedent, although *McGhee* correctly acknowledged that structural errors “include” the six categories (*McGhee*, 2012 IL App (1st) 093404, ¶ 22), it did not end its analysis there. Rather, it engaged in extensive discussion of whether “failure to [poll the jury] affects the fairness of a defendant’s trial and challenges the integrity of the judicial process” while recognizing that, “[a]lthough some evidence that the verdict was not unanimous could potentially satisfy the second prong of the plain-error doctrine, defendant in this case has not offered us any evidence that the verdict was not unanimous other than the trial court’s failure to poll the jury.” *Id.* ¶¶ 20-26. Contrary to the majority opinion, the *McGhee* court did not act under any “misconception about second-prong plain error” in concluding that some evidence that the verdict was not unanimous “other than the trial court’s failure to poll the jury” was necessary to justify reversal under second-prong plain error. *Supra* ¶ 26.

¶ 57 Moreover, we reached the same conclusion in *Sharp*, 2015 IL App (1st) 130438, in which all 12 jurors signed the verdict forms but the trial court only polled 10 of them, and defense counsel raised no objection. We found no second-prong plain error, explaining that “the error *** does not affect the fairness of a defendant’s trial or challenge the integrity of the judicial process.” *Id.* ¶ 112. We observed that none of the jurors objected when the verdict was announced. In particular, the two jurors who were not polled were present yet did not raise any objection. Thus, we concluded that “[t]he record shows a unanimous verdict.” *Id.*

¶ 58 Inexplicably, the author of the majority opinion in *Sharp* has done an abrupt 180-degree turn to reach the opposite result here, despite the cases being nearly identical on their facts. I see no reason to deviate from our well-reasoned decisions in *Sharp* and *McGhee*. As in those cases, Jackson has not offered any evidence that the verdicts were not unanimous. Prior to the jury beginning deliberations, the judge repeatedly instructed the jurors that their verdicts must be unanimous. The written instructions provided to the jurors also reflected that their verdicts must be unanimous. The record establishes that the jury never communicated that it was deadlocked or having any difficulty reaching unanimous verdicts. During deliberations, the jury sent out three notes to the judge. First, the jury asked for the definition of reasonable doubt. Second, the jury asked whether a certain exhibit showed Jackson or his codefendant Thornton. Third, the jury asked: “Hi, Judge. Can some of us use the other jury room to take a quick break, stretch our legs, and get a minute away?” The court assented but admonished them not to discuss the case until they were all together again. The court also ordered pizza for the jury’s dinner. None of these notes indicate that the jurors were having difficulty reaching a verdict. Furthermore, all jurors were present during the jury polling (which was conducted after the trial judge, not defense counsel, asked the parties whether they wished to have the jury polled), none of them voiced any objection to the verdict, and the three verdict forms were signed by all 12 jurors. Under these facts, 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.

¶ 59 Establishing second-prong plain error requires more than simply showing an error occurred at trial. As the author of the majority opinion in this case recognized in *In re R.H.*, 2017 IL

App (1st) 171332, ¶ 38, “[j]ust because an error implicates the constitution does not turn it into a ‘serious’ error.”

¶ 60

In *People v. Herron*, 215 Ill. 2d 167, 187 (2005), our supreme court has explained as follows:

“[T]he defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, *regardless* of the strength of the evidence. [Citation.] *** [T]he burden of persuasion remains with the defendant.” (Emphasis in original and internal quotation marks omitted.)

See also *Hopp*, 209 Ill. 2d at 12 (the plain-error rule requires the defendant to “show that the error caused a *severe* threat to the fairness” of the trial (emphasis in original)). Thus, before prejudice can be presumed, Jackson bears the burden of persuasion of demonstrating the error “was so serious that it affected the fairness of [his] trial and challenged the integrity of the judicial process.” *Herron*, 215 Ill. 2d at 187. In the absence of any evidence suggesting a lack of unanimity among the jurors, Jackson has failed to meet his burden in this case.

¶ 61

In an attempt to distinguish *Hopp*, the majority asserts that *Hopp* “dealt with specific exceptions to waiver of jury instructional error found in Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013).” *Supra* ¶ 40. The majority therefore claims *Hopp*’s analysis is inapposite to the present case involving plain error under Rule 615(a). In view of *People v. Durr*, 215 Ill. 2d 285, 296 (2005), in which our supreme court specifically noted that “the plain-error analyses under Supreme Court Rules 451(c) and 615(a) are construed identically,” this is a distinction without a difference. As to the majority’s concern that “[t]he dissent still cites no second-prong plain error case in which a court has required the complained of error to be ‘severe’ *** to challenge the integrity of the judicial process” (*supra* ¶ 41), in *People v. Allen*, 222 Ill. 2d 340, 353 (2006), our supreme court rejected a second-prong plain error claim on such grounds, stating:

“[W]hile defendant herein has proven a due process violation which amounted to error by showing that he was required to wear an electronic stun belt at trial without the court having first determined that it was necessary, defendant has failed to persuade this court ‘that the error was so serious that it affected the fairness of [his] trial and challenged the integrity of the judicial process.’ ” *Id.* (quoting *Herron*, 215 Ill. 2d at 187).

¶ 62

Kellogg, 77 Ill. 2d 524, upon which the majority relies, is readily distinguishable from this case. In *Kellogg*, during the jury poll, a juror asked the court, “ ‘Can I change my vote?’ ” *Id.* at 527. The judge did not answer her question but said: “ ‘The question is, was this then and is this now your verdict?’ ” *Id.* When the juror did not respond, the judge repeated, “ ‘Was this then and is this now your verdict?’ ” *Id.* Finally the juror answered, “ ‘Yes, Sir.’ ” *Id.* The *Kellogg* court found this colloquy provided evidence that the verdict may not have been unanimous, since the juror explicitly asked if she could change her vote, and her final response might have been influenced or coerced by the trial court’s “great influence over the jury” (*id.* at 529). By contrast, as discussed, there is no evidence indicating any lack of unanimity in the present case. More importantly, the *Kellogg* court did not consider the issue of plain error since

“the failure to object has not been raised by the State in this court” (*id.* at 531).² In contrast, the State vigorously argues forfeiture in the present case.

¶ 63

As our supreme court has repeatedly recognized, “[a] fair trial *** is different from a perfect trial. [Citation.] It is the fairness of the trial, not the perfection of the trial, that the two prongs of plain error aim to protect.” (Internal quotation marks omitted.) *People v. Ely*, 2018 IL App (4th) 150906, ¶ 19. The plain-error doctrine

“is not a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court. [Citation.] Rather, it is a narrow and limited exception to the general waiver rule [citation], whose purpose is to protect the rights of the defendant and the integrity and reputation of the judicial process.” (Internal quotation marks omitted.) *Herron*, 215 Ill. 2d at 177.

Under the factual circumstances of this case, where there is no evidence that the jury verdicts were not unanimous, the inadvertent failure to poll 1 of the 12 jurors did not prejudice Jackson’s right to a unanimous jury.

¶ 64

For this reason, the majority’s citation of *Ramos*, 590 U.S. at ___, 140 S. Ct. at 1395 (2020), for the proposition that a defendant is constitutionally entitled to a unanimous jury verdict, is inapposite. To be clear, there is no dispute that a jury verdict must be unanimous. That is exactly what Jackson received in this case. The record is devoid of even the suggestion of a lack of unanimity among the 12 jurors who signed three sets of verdict forms finding Jackson guilty of first degree murder and attempted armed robbery. Jackson’s right to unanimous jury verdicts has not been violated.

¶ 65

Accordingly, I respectfully dissent.

²The court further noted that “[c]ounsel’s failure to make a timely objection has necessitated a review by the appellate court, a review by this court, and a new trial in the trial court, all of which might have been avoided. We view this as a needless waste of judicial time.” *Allen*, 222 Ill. 2d at 530-31.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 17 pages.

/s/ John E. Nowak
JOHN E. NOWAK, Bar #6243584
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7958
eserve.criminalappeals@ilag.gov

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 14, 2021, the **Brief and Appendix for Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system, which provided service to the following:

Deborah K. Pugh
 Assistant Appellate Defender
 Office of the State Appellate
 Defender
 First Judicial District
 203 N. LaSalle Street,
 24th Floor
 Chicago, Illinois 60601
 1stdistrict.eserve@osad.state.il.us
Counsel for Defendant-Appellee

Kimberly M. Foxx
 State's Attorney of Cook County
 Richard J. Daley Center, 3d Floor
 Chicago, Illinois 60602
 eserve.CriminalAppeals@cookcountyil.gov

/s/ John E. Nowak
 JOHN E. NOWAK, Bar #6243584
 Assistant Attorney General
 100 West Randolph Street, 12th Floor
 Chicago, Illinois 60601-3218
 (773) 590-7958
 eserve.criminalappeals@ilag.gov