UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1348

September Term, 2015

ANTHONY JOHNSON
A/K/A REGINALD FOWLKES

V.

STATE OF MARYLAND

Kehoe,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 3, 2016

In 1988, a jury in the Circuit Court for Baltimore City convicted Anthony Johnson, a/k/a Reginald Fowlkes, appellant, of first-degree murder, use of a handgun in the commission of a crime of violence, and wearing, carrying, and transporting a handgun. He was sentenced to life imprisonment for murder and to a consecutive twenty year term for the handgun offense. Johnson appealed and this Court, in an unreported opinion affirmed. *Johnson v. State,* No. 1518, September Term, 1988, *cert. denied,* 317 Md. 393 (1989).

In 2015, Johnson filed a motion to correct an illegal sentence in which he asserted that the convictions were null, and hence the sentences illegal, because the verdicts were not properly announced and the jury was not properly polled. The circuit court denied the motion and Johnson appealed. He presents four questions for our review, all which focus on whether the jury properly announced their verdicts. He phrased the questions as:

1. Did the jury fail to properly announce its verdict?
2. Did the court err in polling only eleven jurors?
3. Is appellant's verdict for murder defective due to jury's failure to specify in their verdict whether he was guilty in the first or second degree?
4. Did the court err in failing to poll the jury on each count of the indictment?

For the reasons to be discussed, we affirm.

Background

Because the only issue before us relates to the announcement of the jury's verdicts, we will provide only the facts necessary to address that issue. *Washington v. State*, 180

Md. App. 458, 461 n. 2 (2008). As reflected in the transcript, the jury returned their verdicts as follows:

THE CLERK: Members of the Jury, have you agreed on a verdict?

THE JURY: Yes, we have.

THE CLERK: Who shall speak for you, your Foreman? Mr. Foreman please stand. How say you as to Case No. 18736293 Count 1-A: First degree murder, that Reginald Fowlkes also known as Anthony Johnson feloniously, willfully and of deliberately premeditated malice aforethought did kill and murder one Kevin Jones, not guilty or guilty?

THE FOREMAN: Guilty.

THE CLERK: Count 2, that Reginald Fowlkes also known as Anthony Johnson unlawfully did use a handgun in the commission of a crime of violence, not guilty or guilty?

THE FOREMAN: Guilty.

THE CLERK: Count 3, that Reginald Fowlkes also known as Anthony Johnson unlawfully did wear, carry, and transport a handgun, upon or about his person, not guilty or guilty?

THE FOREMAN: Guilty.

THE CLERK: Poll request? Poll the jury?

[COUNSEL]: Yes.

THE CLERK: Juror Number 2 please stand. You have heard the verdict of your Foreman, is your verdict the same?

JUROR NO. 2: Yes.

The clerk continued the poll, successively asking Juror Numbers 3 through 12 the same question posed to Juror Number 2; each juror, in turn, responded "yes." Immediately following the response of Juror Number 12, the clerk asked the jury to hearken to their verdicts:

THE CLERK: Members of the jury, harken to the verdict as the Court has recorded it, your Foreperson says that you find Reginald Fowlkes also known as Anthony Johnson as to Count 1-A: First degree murder, guilty. As to Count 2, use of a handgun in the commission of a crime of violence, guilty. As to Count 3, wear, carry, and transport a handgun upon or about his person, guilty, and all say I do.

THE JURY: Yes.

The court then thanked and dismissed the jury.

Discussion

I.

Maryland Rule 4-327 states in pertinent part:

> (a) Return. The verdict of a jury shall be unanimous and shall be returned in open court.
>
> * * *
>
> (e) Poll of jury. On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict and before it is discharged. If the sworn jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached.

"The requirement of unanimity is, of course, a constitutional right set forth in Article 21 of the Maryland Declaration of Rights, which states that 'every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty,' and implemented through Rule 4-327(a)." *Jones v. State*, 384 Md. 669, 683 (2005). "A jury verdict that is not unanimous is defective and will not

stand." *Caldwell v. State*, 164 Md. App. 612, 635 (2005). "A verdict is defective for lack of unanimity when it is unclear whether all of the jurors have agreed to it." *Id.* at 636 (citations omitted). In other words, "to satisfy the unanimous consent requirement, a verdict must be unambiguous and unconditional and must be final – in the sense of not being provisional or tentative and, to the contrary, being intended as the last resolution of the issue and not subject to change in further deliberation." *Id.* at 642-643. "Whether a verdict satisfies the unanimous consent requirement is a . . . mixed question of law and fact, which we review *de novo*, considering the totality of the circumstances." *Id.* at 643 (citations omitted).

II.

Johnson asserts that the jury failed to properly announce the verdicts in his case. First, he contends that the jury "did not announce in their verdict the degree of murder for which they found him guilty," but rather relied on the "court clerk who suggested the degree of murder." Johnson maintains that this procedure was incorrect and thus the murder verdict was a "nullity."

Johnson bases his contention on Article 27, § 412(a) of the Maryland Code (1957; 1987 Repl. Vol.), which provided: "If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is

guilty of murder in the first degree or murder in the second degree." [1] Because the individual jurors deciding his case did not personally utter the words "first degree murder," Johnson asserts that this statute was violated. We disagree.

In *Jones, supra,* the Court of Appeals discussed the "protocol for the return of verdicts" following a jury trial in Maryland, summarizing it as follows:

> "When the jury have come to a unanimous determination with respect to their verdict, they return to the box to deliver it. The clerk then calls them over, by their names, and asks them whether they agree on this verdict, to which they reply in the affirmative. He then demands who shall say for them, to which they answer, their foreman. This being done, he desires the prisoner to hold up his right hand and addresses them: 'Look upon the prisoner at the bar; how say you, is he guilty of the matter whereof he indicted or not guilty?' **The foreman then answers guilty or not guilty, as the verdict may be.** The officer then writes the word 'guilty' or 'not guilty' as the verdict is, on the record and again addresses the jury: 'Hearken to your verdict as the court hath recorded it. You say that _____ is guilty (or not guilty) of the matter whereof he stands indicted, and so say you all.'"

384 Md. at 680-681 (quoting *Givens v. State*, 76 Md. 485, 487 (1893) (emphasis added)).

This is essentially the same procedure the clerk followed in Johnson's case. After confirming that the jury had agreed upon a verdict and determining that the foreperson would speak for them, the clerk asked the foreperson whether Johnson was "not guilty or guilty" of "first degree murder" and the foreman responded "guilty."

[1] This provision is presently codified as Md. Code (2012 Repl. Vol.) § 2-302 of the Criminal Law Article and provides: "When a court or jury finds a person guilty of murder, the court or jury shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree."

As we stated in *McGhie v. State*, 225 Md. App. 453, 463 (2015), *cert. denied,* 446 Md. 292 (2016), case law from the Court of Appeals "make[s] clear that, to support a first-degree murder conviction, the jury verdict must reflect that the jurors unanimously found the defendant guilty, not just of murder, but of murder in the first degree." But we noted that the Court of Appeals has concluded that "each juror need not utter those specific words." *Id.* In *McGhie* we held that, although the jury failed to announce the degree of murder when convicting the defendant of murder, it was clear from the circumstances that the jury unanimously found McGhie guilty of felony murder, which as a matter of law was first-degree murder, and hence the murder conviction was "not void or a nullity based on the failure of the jury to state the specific words 'first degree' murder." *Id.* at 465.

Here, the clerk specifically asked if the jury found appellant "guilty or not guilty" of "first degree murder." The foreman answered "guilty." Upon polling, the remaining jurors were asked if his or her verdict was "the same" as the foreman's verdict and each juror answered "yes." Moreover, when hearkening the verdict, the clerk intoned: "your Foreperson says that you find Reginald Fowlkes also known as Anthony Johnson as to Count 1-A: First degree murder, guilty." The jury responded "yes." Thus, there was no ambiguity in the jury's verdict – they found him guilty of murder in the first degree, thereby satisfying the statute requiring the jury to state whether the verdict was for first or second degree murder.

III.

Johnson next contends that the poll was defective because only eleven of the twelve jurors were polled. Specifically, Johnson complains that, because the foreman who had just announced the jury's verdict was not polled, the poll was "an illegal act affecting the verdict itself" because it "cannot be assumed that the one juror who was not polled assented to the verdict of the rest of the jury because even foremans have been known to dissent from the same verdict he has returned." We rejected a similar argument in *Colvin v. State*, 226 Md. App. 131 (2015), *cert. granted* (March 25, 2016), where, like here, the totality of the circumstances indicated that "there was no uncertainty as to the unanimity of the verdict." *Id.* at 147. In *Colvin* we concluded that, [a]lthough it is a better practice for the clerk to poll the foreperson in addition to each of the other jurors, the failure to do so," where there is no indication that the verdict was not unanimous, did "not render the verdict a nullity." *Id.* 147-148. The same rationale applies here. Johnson cannot point to anything that suggests that the foreman was not in agreement with the verdict he had just, without hesitation, announced.

IV.

Johnson next asserts that the murder verdict was defective because, when polled, the jurors did not, in their own words, state that they that they found him "guilty of first degree murder." Rather, when asked if their verdict was "the same" as the verdict just announced by the foreman, the jurors responded "yes." As discussed above, this practice

did not invalidate the murder verdict. *See Strong v. State,* 261 Md. 371, 374 (1971), *vacated on other grounds,* 408 U.S. 939 (1973) (When asked whether their verdict was "the same" as that of the forelady who had announced a verdict of guilty of first-degree murder, the response by the jurors upon polling was "yes." This "was the equivalent of each juror saying: 'I find the accused guilty of murder in the first degree.'").

V.

Finally, Johnson asserts that the court "failed to poll the jury on each count of the indictment." Johnson's complaint seems to be that, upon polling, the clerk merely inquired whether their "verdict" was the same as that of the foreman's, whereas he maintains that the clerk should have articulated each individual count. We do not agree. To the extent that there was any doubt as to whether the jury had found appellant guilty on all three counts after the completion of the polling—and we do not believe that there was—such doubt was resolved when the jury unanimously harkened to the verdict.

VI.

Finally, Johnson filed a motion for a default judgment. We will deny the motion for two reasons.

First, the motion is based on the premise that the State did not file its brief on a timely basis. This isn't correct; the State was granted an extension to file its brief on or before March 15, 2016 and its brief was filed on that date.

Second, appellant's argued is misplaced because the notion of a "default judgment" does not apply in the appellate context. If an appellant fails to file a brief on a timely basis, then he runs the risk of having the appeal dismissed. If an appellee files its brief too late, the appellee runs the risk that the Court will decide the case without consideration of any argument contained in the brief. An appellee's failure to file a timely brief does not mean that the appellant is entitled to a reversal on that ground alone.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.