UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0970

September Term, 2014

EDWARD HALL BELL

v.

STATE OF MARYLAND

Wright,
Graeff,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 7, 2016

In 2004, Edward Hall Bell, appellant, was convicted by a jury in the Circuit Court for Prince George's County of first-degree murder, second-degree murder, attempted first-degree murder, attempted second-degree murder, and two counts of use of a handgun in the commission of a crime of violence. The court sentenced Bell to life imprisonment without the possibility of parole for first-degree murder, a consecutive life sentence for attempted first-degree murder, and two consecutive twenty-year terms for the handgun offenses. The second-degree murder offenses merged. Bell appealed and this Court affirmed the convictions, but directed the circuit court to amend the docket entries to reflect that the sentence for attempted first-degree murder was life with the possibility of parole. *Edward Hall Bell v. State*, No. 2765, September Term, 2004 (filed August 3, 2006).

In 2014, Bell filed a *pro se* motion to correct an illegal sentence pursuant to Md. Rule 4-345(a). Bell asserted that his sentence for life without the possibility of parole was illegal because (1) he was not personally served with the State's notice of intent to seek a sentence of life without the possibility of parole, and (2) the conviction was not "properly enrolled" because only eleven of the twelve jurors were polled as to their verdict and, therefore, "no sentence could have been given." The circuit court denied the motion.

Bell appealed and raises the same contentions he made below. For the reasons to be discussed, we affirm.

BACKGROUND

Because the facts giving rise to Bell's convictions are not necessary to resolve this appeal, we shall not recite them. We focus initially on the announcement of the jury's verdict, which was transcribed as follows:

> THE COURT: All right. Madam Foreperson, I understand the jury has reached a verdict; is that correct?
>
> MADAM FOREPERSON: Yes.
>
> THE COURT: Madam Clerk, please inquire.
>
> THE DEPUTY CLERK: Ladies and gentlemen, **are you agreed of your verdict?**
>
> **THE JURY**: **Yes.**
>
> THE DEPUTY CLERK: Who shall say for you?
>
> * * *
>
> THE JURY: Our Foreperson.
>
> THE DEPUTY CLERK: What say you in Criminal Trial 04-1611X, the State of Maryland vs. Edward Hall Bell, as to Question 1: first-degree murder, premeditated, of Phillip Michael Beverly, not guilty or guilty?
>
> MADAM FOREPERSON: Guilty.
>
> THE DEPUTY CLERK: Second-degree murder of Phillip Michael Beverly, not guilty or guilty?
>
> MADAM FOREPERSON: Guilty.
>
> THE DEPUTY CLERK: As to Question Number 3, use of a handgun in the commission of a crime of violence against Phillip Michael Beverly, not guilty or guilty?

MADAM FOREPERSON: Guilty.

THE DEPUTY CLERK: As to Question Number 4, attempted first-degree murder, premeditated, of Vioncia Kalena Buckson, not guilty or guilty?

MADAM FOREPERSON: Guilty.

THE DEPUTY CLERK: As to Question Number 5, attempted second-degree murder of Vioncia Kalena Buckson, not guilty or guilty?

MADAM FOREPERSON: Guilty.

THE DEPUTY CLERK: As to Question Number 6, use of a handgun in the commission of a crime of violence against Vioncia Kalena Buckson, not guilty or guilty?

MADAM FOREPERSON: Guilty.

THE DEPUTY CLERK: **Ladies and gentlemen of the jury, harken to the your verdict as the Court hath recorded it, your Foreman sayeth that you find the Defendant guilty as to first-degree murder, premeditated, of Phillip Michael Beverly**, guilty of second-degree murder of Phillip Michael Beverly, guilty for use of a handgun in the commission of a crime of violence against Phillip Michael Beverly, guilty of attempted first-degree murder, premeditated, of Vioncia Kalena Buckson, guilty of attempted second-degree murder of Vioncia Kalena Buckson, and guilty of use of a handgun in the commission of a crime of violence against Vioncia Kalena Buckson, **and so say you all?**

THE COURT: You answer yes if your answer is yes or, no, if it isn't.

THE JURY: **Yes. Yes.**

(Emphasis added.)

Immediately after the verdict was hearkened, defense counsel requested that the jury be polled. The polling of the jury was transcribed as follows:

THE DEPUTY CLERK: Madam Foreman, Juror Number 3, you sayeth that you find the Defendant guilty of all charges alleged against him. Is this your verdict?

JUROR NUMBER 3: Yes.

THE DEPUTY CLERK: Juror Number 5, is the Foreman's verdict your verdict? Juror Number 5?

JUROR NUMBER 5: Yes.

THE DEPUTY CLERK: Juror Number 7, is the Foreman's verdict your verdict?

JUROR NUMBER 7: Yes.

THE DEPUTY CLERK: Juror Number 9, is the Foreman's verdict your verdict?

JUROR NUMBER 9: Yes.

THE DEPUTY CLERK: Juror Number 14, is the Foreman's verdict your verdict?

JUROR NUMBER 14: Yes.

THE DEPUTY CLERK: Juror Number 20, is the Foreman's verdict your verdict?

JUROR NUMBER 20: Yes.

THE DEPUTY CLERK: Juror Number 35, is the Foreman's verdict your verdict?

JUROR NUMBER 35: Yes.

THE DEPUTY CLERK: Juror Number 38, is the Foreman's verdict your verdict?

JUROR NUMBER 38: Yes.

THE DEPUTY CLERK: Juror Number 45, is the Foreman's verdict your verdict?

JUROR NUMBER 45: Yes.

THE DEPUTY CLERK: Juror Number 47, is the Foreman's verdict your verdict?

JUROR NUMBER 47: Yes.

THE DEPUTY CLERK: Juror Number 54, is the Foreman's verdict your verdict?

JUROR NUMBER 54: Yes.

THE COURT: Madam Clerk, you will record the verdict that has just been delivered by the jury.

The circuit court then thanked and dismissed the jury, ordered a pre-sentence investigation, remanded Bell to the custody of the sheriff, and engaged in a brief discussion with counsel regarding a sentencing date. There was no objection to or discussion about the polling of the jury.

DISCUSSION

I.
The Jury's Verdict

Bell points out that the transcript of the polling indicates that only eleven of the twelve jurors were polled as to their verdict. Because the polling was "defective," Bell maintains that "it is impossible to know if the jury was unanimous" and hence "the

verdict [was] defective as well." He concludes, therefore, that the life sentence was illegal because there was "no conviction warranting any sentence."[1]

Md. 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 [Md.] 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). "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).

[1] The State did not file an appellate brief.

Based on the totality of the circumstances, we are persuaded that the verdict in Bell's case was unanimous. When the jury returned to the courtroom to announce its verdict, the clerk inquired if they had "agreed" upon a verdict and the jury responded "yes." The foreman then announced the jury's finding of guilt on all six counts. Immediately thereafter, the clerk asked the jury to hearken to its verdict and the clerk repeated the finding of guilt on each of the six charges. The clerk concluded the hearkening with the traditional inquiry: "and so say you all?," to which the jury responded: "Yes. Yes."

Defense counsel then requested a polling, which was transcribed as set forth above. Although the polling of only eleven of the twelve jurors was transcribed, notably there was no objection to the poll which indicates perhaps an error in the transcription and not a failure to poll all twelve jurors. Indeed, the lack of any objection to the poll – or any action in response to the poll by any juror, the court, the prosecutor, or defense counsel – signifies that the poll was properly conducted, that the poll was in conformance with the verdict as announced by the foreman and hearkened to by the jury, and most significantly, that the poll was accepted by the defense. *See Brightwell v. State,* 223 Md. App. 481, 492 ("Even though the transcript does not reflect a response from the jury [to the hearkening], it is clear from the subsequent actions of the trial court, as well as the silence of defense counsel, that the jury either expressed their unanimous agreement in a non verbal way or failed to indicate any dissent to the announcement of the verdicts."), *cert. denied,* 445 Md. 5 (2015). *See also Colvin v. State*, __ Md. App. __, No. 2341,

Sept. Term 2014, slip op. at 16 (Nov. 30, 2015) (stating that failure of clerk to poll foreperson "does not render the verdict a nullity"); *McGhie v. State*, __ Md. App. __, No. 2540, Sept. Term 2011, slip op. at 12-13 (Nov. 24, 2015) (upholding conviction even where a transcript of the polling was not included in the record); *Rice v. State*, 124 Md. App. 218, 222 (1998) (if the defendant believed there was any ambiguity in the jury's verdict, it was "incumbent upon [him] to make that known" before the jury was discharged). In short, there is no indication that the verdict was anything but unanimous. Because the verdict was valid, the circuit court did not err in denying Bell's motion to correct his sentence.

II.

State's Notice of Intent to Seek Life Sentence Without Parole

Bell also contends that his sentence to life imprisonment without the possibility of parole was illegal because the State served its notice of intent to seek that sentence on his defense counsel, but not on him personally. Bell, however, complains of a procedural matter which does not render his sentence illegal for purposes of Md. Rule 4-345(a). *Tshiwala v. State*, 424 Md. 612, 619 (2012) ("A sentence does not become 'an illegal sentence because of some arguable procedural flaw in the sentencing procedure.'") (Quoting *State v. Wilkins*, 393 Md. 269, 273 (2006)).

Even if the matter was properly before us, Bell's contention has no merit. Section 2-203 of the Criminal Law Article ("CL") of the Md. Code (2002, 2012 Repl. Vol.), is set forth, in pertinent part, as follows:

> A defendant found guilty of murder in the first degree may be sentenced to imprisonment for life without the possibility of parole only if: (1) at least 30 days before trial, the State gave written notice to the defendant of the State's intention to seek a sentence of imprisonment for life without the possibility of parole[.]

The docket entries reflect that, on September 24, 2004, the State filed its written notice of intent to seek a sentence of life imprisonment without the possibility of parole and the certificate of service on the notice states that it was "hand-delivered" to Bell's defense counsel on that same date. Trial commenced on October 25, 2004. Thus, the State's notice was timely.

At sentencing, after the State urged the circuit court to impose a life sentence without the possibility of parole for the first-degree murder conviction, the following colloquy took place:

> THE COURT: Is there any issue, [defense counsel], with notice, form, or substance for the requested sentence?
>
> [DEFENSE COUNSEL]: [The prosecutor] filed - - served a copy on me, and I discussed it with the defendant and it was done within the time constraints.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Mr. Bell was asking me about the paper. I don't recall if I specifically gave him a copy or just discussed it, went over it with him. But it was served in a timely fashion.
>
> THE COURT: And form was not something that you're quarreling with?
>
> [DEFENSE COUNSEL]: No, Your Honor.

Md. Rule 1-331 provides that "[w]hen any notice is to be given by or to a party, the notice may be given by or to the attorney for that party." Thus, the notice was not

invalid because the State served it on Bell's defense counsel. In other words, service on his defense counsel was tantamount to service on Bell.

Bell's reliance on *Gorge v. State*, 386 Md. 600 (2005), is misplaced. In *Gorge*, defense counsel acknowledged that she had received "oral notice" of the State's intent to seek life imprisonment without the possibility of parole, but neither the court nor the parties could locate a written notice. *Id.* at 609. The trial court sentenced Gorge to life without the possibility of parole and Gorge appealed. *Id.* at 610. The Court of Appeals vacated the sentence after concluding that CL § 2-203 must be "strictly construed" and by its plain language requires "timely *written* notice" and provides for "no exception for oral notice." *Id.* at 613-14 (emphasis added). The Court did not address, much less hold, as Bell maintains, that the requisite written notice is invalid if served on defense counsel and not on the defendant himself.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.