No. 122081

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court
	) of Illinois, Second District,
Plaintiff-Appellant,	) No. 2-14-0930
	)
	) There on Appeal from the
	) Circuit Court of the
v.	) Sixteenth Judicial Circuit,
	) Kane County, Illinois
	) No. 08-CF-2729
	)
ARTHUR MANNING,	) The Honorable
	) Susan Clancy Boles,
Defendant-Appellee.	) Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

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NATURE OF THE ACTION

Defendant was convicted of first degree murder following a Kane County jury trial and sentenced to twenty-five years of imprisonment. R1592, 1643.[1] Defendant appealed, and the Illinois Appellate Court, Second District, reversed, holding that the trial court abused its discretion when it denied defendant's request to poll the jurors as to whether each found that defendant had not proved mitigation for second degree murder. A5-8. The People appeal from the appellate court's judgment. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether a lack of unanimity among jurors as to whether defendant had met his burden of proving factors that would mitigate his offense to second degree murder does not result in a hung jury where jurors unanimously agreed that the State proved defendant guilty beyond a reasonable doubt of first degree murder.

2. Whether the trial court appropriately exercised its discretion in denying defendant's request to poll jurors as to whether each found that defendant had not proved mitigation for second degree murder.

[1] "C" refers to the common law record; "R" refers to the report of proceedings; "A" refers to the appendix to this brief; and "Exh." refers to the State's trial exhibits.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On July 12, 2017, this Court granted the People's timely petition for leave to appeal (PLA).

STATEMENT OF FACTS

Following a second jury trial in the Circuit Court of Kane County, defendant was convicted of the first degree murder of Naromi Mannery. C592.

Evidence Presented

The evidence at trial showed that in September 2008, defendant lived in a house owned by Windy City Amusements, a carnival company that employed defendant and the other residents of the house. R1093-97. The main floor of the house served as Windy City's office; the basement apartment housed Windy City employees Darren Barnett and Philip "Dave" Lehrfeld; and the second floor apartment housed defendant, Guy Manning (defendant's brother), Willie Wimberly, and Richard Rusin. R1096-99, 1191, 1219-21. Windy City had a policy against visitors, and residents could be fired for allowing guests on the property. R1146-47.

Around 11:30 p.m. on September 21, 2008, after drinking with Mannery and another man for about an hour, Barnett headed home to the Windy City house and invited Mannery to walk with him. R1110-12. When they arrived at the Windy City house, defendant told Mannery and Barnett that Mannery

needed to leave because guests were not permitted at the house. R1116-17. Barnett and Mannery went to the porch to smoke and drink. R1118-19.

Lehrfeld came outside and smoked cigarettes on the porch with Barnett and Mannery. R1120, 1194-96. Defendant then came downstairs and asked Barnett why Mannery was still on the property. R1121, 1194-96. Barnett replied that he was trying to get Mannery to leave. *Id.* Defendant and Mannery exchanged heated words about Mannery's presence at the house. R1121-22. Then defendant told Barnett that Guy wanted to see Barnett upstairs. R1122. Lehrfeld stayed with Mannery. R1194-98.

Defendant and Barnett went to the second-floor apartment where they spoke with Guy and Wimberly. R1122-26. Defendant and Guy were angry about Mannery's presence at the house. *Id.* The men agreed that they would remove Mannery from the property, *id.*, and defendant armed himself with a knife, Exh. 4.

The four men returned to the porch where Mannery and Lehrfeld were sitting. R1127, 1198-99. Wimberly threw a punch at Mannery but witness accounts differ as to whether the punch landed. R1128-30; 1234-35. Defendant, Guy, and Wimberly surrounded Mannery. R1199. Mannery approached Guy, who hit him with a folding chair. R1131-32, 1234. Defendant then charged at Mannery, and the two men scuffled. R1133-34, 1235. Defendant stabbed Mannery three times: once in the chest, once in the back, and once in the right bicep. R1070-85. The two men separated, and

Mannery headed toward the street, noticeably bleeding from his torso. R1136-37, 1236. As he left, Mannery asked "why did you all jump on me?" and defendant replied that Mannery needed to leave before he got some more. R1138.

Mannery stumbled down Main Street where his cries for help caught the attention of several witnesses who called 911. R995-1002, 1012-35, 1205. When police and paramedics arrived, Mannery was unconscious. R1012-35. First responders transported Mannery to the hospital, but he died from his injuries. R1012-35, 1040-45. An autopsy later revealed that the stab wounds to Mannery's back and arm were not life-threatening, but the stab wound to his chest pierced his heart, causing him to bleed to death. R1070-85.

Meanwhile, within minutes of Mannery's departure, defendant, Guy, Wimberly, and Rusin (who had returned home just as the fight began), R1219-36, fled the scene in the Windy City bus — an old school bus that had been painted white. R1238-50. Defendant had a knife on the bus. *Id.* Barnett remained behind and attempted to clean blood off of the sidewalk outside the house. R1139.

Officers dispatched to the scene saw the bus driving away from the Windy City house. R1260-62. They also noticed a trail of blood leading away from Mannery's body. R1002, 1264-65, 1278. Officers followed the trail back to the Windy City house, where they noticed a larger area where it appeared someone had tried to clean up blood. R1264-65, 1280. Officers had begun to

form a perimeter around the house when the Windy City bus returned. R1282, 1265, 1273-74, 1278-82. When officers asked defendant whether anything had happened that night, he replied that a man had approached the house already bleeding, and he told the man to leave because he did not want any trouble. R1284-85.

The next day, police interviewed defendant. Exh. 4. The interview was video-recorded and that recording was admitted as substantive evidence at trial. R1396-97. In the video, defendant initially denied making physical contact with Mannery, swearing on his "right hand to Jesus" that he did not put his hands on Mannery. Exh. 4. But after police told defendant that they already knew what happened, he confessed to stabbing Mannery, explaining that he was angry that Mannery would not leave and "just went berserk." *Id.* Defendant claimed that Mannery hit him first, but that claim was contradicted by the other witnesses. In the video, unaware at that time that Mannery had died, defendant stated that he "tried to kill" Mannery. He stated "I stabbed him because I was angry," and "I just lost it." *Id.* He also stated that when he fights, "I don't like to stop until somebody's going to the hospital or somebody's going to the graveyard." *Id.* Defendant did not claim that he killed Mannery in self-defense. Defendant told officers that he threw the knife he used to stab Mannery out the bus window. *Id.* Police searched but did not find that knife. R1401. Later, defendant led police to a different knife in his living quarters at the Windy City house. R1403. On the way

back to the police station after retrieving the knife from the house, police recorded defendant stating "I guess I'm facing life in prison now." Exh. 7. In all, police collected four knives (one from defendant's living quarters, one from the bus, and two from the kitchen of the Windy City house), none of which tested positive for blood. R1371-82.

Defendant neither testified nor called any witnesses. At defendant's request, the trial court instructed the jury on self-defense and second degree murder predicated on imperfect self-defense and sudden and intense passion resulting from serious provocation. R1453-59, 1577-79. The court instructed jurors that they should consider second degree murder only if they had first unanimously determined that the State had proved defendant guilty beyond a reasonable doubt of first degree murder. R1578. Defendant did not object to that instruction. During closing argument, the prosecutor argued that the jury should return a verdict of guilty of second degree murder only if they all agreed that defendant had met his burden of proving mitigation; if all twelve did not unanimously agree that defendant had met his burden of proving mitigation, then the jury should return a verdict of guilty of first degree murder. R1565. Defendant did not object to that argument.

Jury Deliberations, Polling, and Post-Trial Motion

During deliberations, the jury sent a note to the court asking, "For approving mitigating factors to reduce charge to second degree murder, if vote on mitigating factor is not unanimous, does it revert to first degree

murder?" R1586, C590. The State proposed that the answer to that question was "yes," while defendant proposed that the answer to the question was "no." R1586. The State argued that because the jury was instructed not to consider second degree murder unless they had unanimously agreed that the State had proved first degree murder, and because it was defendant's burden to convince all twelve jurors of mitigation, a split vote on mitigation results in a verdict of guilty of first degree murder. R1587. The defendant countered that if some, but not all, jurors find mitigation, then the jury is hung. R1587-88.

The court proposed answering the jury question with, "Your verdict must be unanimous. Continue deliberating." R1588. The State and the defendant both initially assented to that response. *Id.* But the State then asked the court to allow time for research before providing that response. R1589-90. Defendant argued in favor of the court's proposed response. *Id.* The court denied the State's request for time to research the issue and answered the jury's question as proposed. *Id.*; C590.

The jury returned a verdict of guilty of first degree murder. R1592; C592. Defendant requested that the court poll the jury, and the court asked each juror, "Was this then and is this now your verdict?" *Id.* Each juror answered affirmatively. *Id.* Defendant then asked the court to also poll each juror as to whether he or she did not find a mitigating factor. R1593. The

court denied that request, stating that the polling conducted was sufficient. *Id.*

Defendant's motion for a new trial argued that the trial court had erred when it denied his request to "poll the jury on the issue of whether each jury member had found that a mitigating factor to reduce the charge to second degree murder existed." C596. He did not argue that the court erred in the manner in which it answered the jury's question. The court denied defendant's motion, stating that he had no right to poll the jury on specific factors. R1620-21. The trial court sentenced defendant to twenty-five years of imprisonment. R1643.

Defendant's Appeal

Defendant timely appealed, challenging both the trial court's response to the jury's question and the court's decision not to poll the jurors on mitigating factors. A2. The appellate court reversed, holding that (1) a split vote on mitigating factors results in a hung jury, but the trial court's response to the jury question was invited error because defendant agreed to the response, and (2) the trial court abused its discretion when it denied defendant's request to poll the jury on the specific issue of mitigating factors. A5-8.

STANDARDS OF REVIEW

The manner in which a trial court responds to a jury question is reviewed for an abuse of discretion. *See People v. Averett*, 237 Ill. 2d 1, 24-25 (2010); *see also People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 22. And,

where the trial court errs, a defendant's acquiescence to the trial court's response to the jury question is invited error that precludes appellate review. *Averett*, 237 Ill. 2d at 24-25; *People v. Emerson*, 189 Ill. 2d 436, 491-92 (2000) ("Where a defendant acquiesces in the circuit court's answer to the jury's question, the defendant cannot later complain that the circuit court abused its discretion.") (internal quotation marks and citations omitted). Additionally, the failure to object to the trial court's response to the jury question, and to raise the issue in a post-trial motion, will forfeit appellate review. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). Forfeited claims may be reviewed only for plain error. *Id.* at 175-78.

The manner in which the trial court polls a jury is reviewed for an abuse of discretion. *People v. Johnson*, 35 Ill. 2d 516, 520 (1966); *People v. Wheat*, 383 Ill. App. 3d 234, 238 (2d Dist. 2008). And the trial court's determination as to the voluntariness of a juror's assent to the verdict will not be set aside unless the trial judge's conclusion was clearly unreasonable. *People v. Kliner*, 185 Ill. 2d 81, 167 (1998).

ARGUMENT

I. A Lack of Unanimity on Mitigation for Second Degree Murder Properly Results in a Verdict of First Degree Murder and Not a Hung Jury.

The Second District wrongly concluded that a split vote on mitigating factors for second degree murder results in a hung jury. Second degree murder was created to allow defendants proved guilty beyond a reasonable

doubt of first degree murder to lessen their punishment upon proving the existence of a mitigating factor. Because jurors are instructed not to consider second degree murder until first unanimously finding the defendant guilty of first degree murder — and because the defendant bears the burden of proving a mitigating factor by a preponderance of the evidence — a defendant is guilty of first degree murder unless all twelve jurors find mitigation. Once the State has sustained its burden of proving the defendant guilty of first degree murder, no combination of votes on second degree murder should result in a hung jury.

A. The second degree murder statute permits defendants proved guilty of first degree murder to lessen their punishment by proving the existence of a statutory mitigating factor.

The presence of mitigating circumstances does not negate any element of first degree murder, and the State bears no burden to disprove mitigation. Prior to 1987, the Criminal Code included three homicide offenses: murder, voluntary manslaughter, and involuntary manslaughter. *People v. Jeffries*, 164 Ill. 2d 104, 111 (1995); *People v. Staake*, 2016 IL App (4th) 140638, ¶ 54 (appeal currently pending before this Court). Murder and voluntary manslaughter "were identical but for the inclusion of a mitigating circumstance — that the defendant acted under either a sudden and intense passion or an unreasonable belief of justification — that distinguished voluntary manslaughter from murder." *Staake*, 2016 IL App (4th) 140638,

¶ 54. The "act and basic mental state of [murder and voluntary manslaughter were] identical," making voluntary manslaughter "not a discrete crime, but merely a less culpable form of murder." Timothy P. O'Neill, *"Murder Least Foul": A Proposal to Abolish Voluntary Manslaughter in Illinois*, 72 Ill. B.J. 306, 306 (1984).

Problems with the murder/voluntary manslaughter scheme abounded, not least of all because the burden of establishing a mitigating circumstance to prove voluntary manslaughter was on the State, leading "to a paradoxical situation because the State bore the burden of proving beyond a reasonable doubt an element that benefitted the defendant." *Staake*, 2016 IL App (4th) 140638, ¶ 55. Several jurists — including Professor Timothy P. O'Neill and Judge Robert J. Steigmann (then a circuit court judge) — proposed amendments to the homicide statutes to remedy these problems. Ultimately, Judge Steigmann drafted legislation largely adopting Professor O'Neill's suggestions, and that legislation was passed by the General Assembly in Public Act 84-1450 (eff. July 1, 1987). *Id.* at ¶ 56.

The amendatory act abolished voluntary manslaughter and created two categories of murder: first degree and second degree. Under the new scheme, a person who kills another is guilty of first degree murder if he lacks lawful justification for the killing and either (1) "intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another," (2) "knows that such acts create a strong

probability of death or great bodily harm to that individual or another," or (3) "is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a) (2008).

"A person commits the offense of second degree murder when he commits the offense of first degree murder" and a mitigating factor — either serious provocation or imperfect self-defense — is present. 720 ILCS 5/9-2(a) (2008). Where the State has met its burden of proving a defendant guilty beyond a reasonable doubt of first degree murder, "the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder." 720 ILCS 5/9-2(c).

During debate on these amendments, lawmakers explained that the purpose of the change was to shift the burden of proving mitigation to the defendant, recognizing that second degree murder is merely a "less culpable form of murder" or "murder with extenuating circumstances." 84th Gen. Assembly, Legislative Day 132, June 23, 1986, at 73 (remarks by Rep. Cullerton). They further explained that under the new scheme, the jury would not consider second degree murder unless and until it had unanimously determined that the State had proved the defendant guilty beyond a reasonable doubt of first degree murder. 84th Gen. Assembly, Legislative Day 117, May 14, 1986, at 40-41 (remarks by Rep. McCracken). Once the jury had found the defendant guilty of first degree murder, it could

return a verdict of second degree murder only if the defendant convinced the jury by a preponderance of the evidence that a mitigating factor existed. *Id.* at 40-55.

Near-contemporaneous accounts by the architects of the legislation described second degree murder as "a matter of legislative grace," Robert J. Steigmann, *First and Second Degree Murder in Illinois*, 75 Ill. B.J. 494, 496 (1987), or "an act of mercy on the part of the fact-finder." Timothy P. O'Neill, *An Analysis of Illinois' New Offense of Second Degree Murder*, 20 J. Marshall L. Rev. 209, 222 (1986). Once proved guilty of first degree murder, "[e]stablishing the mitigating circumstances of second degree [murder] . . . does not change the fact that the person is still a *murderer*; it merely results in a less severe punishment. Thus, the mitigating circumstances do not establish 'guilt' as defined in the Illinois Code; they merely prove that defendant is less culpable than other murderers." *Id.* (emphasis in original).

This history makes clear that the General Assembly never intended that the State bear a burden to disprove mitigation.

B. Under a plain reading of the statutes, a split vote on second degree murder properly results in a verdict of first degree murder.

Consistent with the legislative intent, under a plain reading of the first and second degree murder statutes, the State has no burden to disprove mitigation. *People v. Shumpert*, 126 Ill. 2d 344, 351-52 (1989). And because the defendant bears the burden of proving mitigation only after the State has

proved the defendant guilty of first degree murder, the defendant's failure to carry that burden results in a verdict of guilty of first degree murder. *See* 720 ILCS 5/9-1 (2008); 720 ILCS 5/9-2 (2008). Indeed, this Court has recognized that "the mitigating circumstances are not elements of" second degree murder. *People v. Lopez*, 166 Ill. 2d 441, 447 (1995). Rather, "first and second degree murder have the same elements," and "[s]econd degree murder is simply a lesser *mitigated* offense." *Id.* (emphasis in original); *see also People v. Porter*, 168 Ill. 2d 201, 213 (1995) ("all of the elements of first and second degree murder are identical").

Significantly, a "lesser mitigated offense" is distinct from a "lesser included offense" or an "affirmative defense." Second degree murder is a "lesser" offense than first degree murder only in the sense that it is punished less severely. *Jeffries*, 164 Ill. 2d at 120-23; *see also Staake*, 2016 IL App (4th) 140638, ¶ 67 ("Second degree murder is not a separate crime from first degree murder; instead, it is a mitigated crime."); *cf. People v. Wilmington*, 2013 IL 112938, ¶¶ 47-48 (unlike lesser-included offense, second degree murder instruction may be requested by defense counsel against defendant's wishes; because State must first prove defendant guilty of first degree murder, instruction does not expose defendant to increased liability). And because the mitigating factors are distinct from the elements of first degree murder, second degree murder is not an "affirmative defense" that requires the State to disprove mitigation. *See* 720 ILCS 5/3-2 (2008) (defining

affirmative defense); *c.f. People v. Lee*, 213 Ill. 2d 218, 224-225 (2004) (affirmative defenses such as self-defense, once raised by a defendant, require State to disprove defense beyond a reasonable doubt).

Neither mitigating factor, if proved, negates any element of first degree murder. Rather, "second degree murder is first degree murder *plus* mitigation." *Porter*, 168 Ill. 2d at 213-14 (1995) (emphasis added). Second degree murder has neither a lesser mental state nor fewer elements than first degree murder. *Id.*; *Jeffries*, 164 Ill. 2d at 120-23; *see also People v. Mohr*, 228 Ill. 2d 53, 66 (2008) (explaining that "the elements of both offenses are identical; second degree murder differs from first degree murder only because of the presence of a mitigating factor"); *People v. Newbern*, 219 Ill. App. 3d 333, 345-58 (4th Dist. 1991) (rejecting argument that mental states for first and second degree murder are discrete and mutually exclusive); *People v. Jerome*, 206 Ill. App. 3d 428, 436 (2d Dist. 1990) ("The mitigating factor is a separate issue the existence of which the State is willing to recognize as a circumstance affecting the degree of culpability or the severity of punishment.").

This plain-language understanding of second degree murder is reflected in the Illinois Pattern Jury Instructions. Jurors are instructed not to consider second degree murder unless they have first unanimously found the defendant guilty beyond a reasonable doubt of first degree murder. *Lopez*, 166 Ill. 2d at 447; *Jeffries*, 164 Ill. 2d at 114-19; Illinois Pattern Jury

Instructions, Criminal No. 7.06 (4th ed. 2000) (instructing that jurors "may not consider whether the defendant is guilty of the lesser offense of second degree murder until and unless [they] have first determined that the State has proved beyond a reasonable doubt each of the previously stated" elements of first degree murder). Moreover, jurors are given just three verdict forms: not guilty, guilty of first degree murder, and guilty of second degree murder. Illinois Pattern Jury Instructions, Criminal No. 26.01 (4th ed. 2000). The pattern jury instruction committee considered and rejected the inclusion of a "not guilty of second degree murder" form, because "[u]nder the present statutory scheme concerning homicide offenses, there can be no such verdict as, 'not guilty of second degree murder.'" Illinois Pattern Jury Instructions, Criminal No. 26.01 Committee Note (4th ed. 2000). That is because it is "[o]nly after the State has first proved the defendant guilty of first degree murder [that the jury may] consider whether the defendant has met his burden of proving the existence of a mitigating factor to reduce his crime to the lesser offense of second degree murder." *Id.*

Despite the plain language of the statute, the clear legislative intent, and the text of the pattern jury instructions, defendant proposes that if twelve jurors believe that that the State has proved every element of first degree murder beyond a reasonable doubt, but one of those twelve jurors also believes that the defendant has proved a mitigating factor by a preponderance of the evidence, then the result should be a hung jury rather

than a verdict of guilty of first degree murder. Defendant is wrong. This argument turns the second degree murder statute on its head, effectively requiring the State to *disprove* mitigation to secure a first degree murder conviction. In other words, defendant's argument makes the absence of mitigating circumstances a new element of first degree murder. That notion is contrary to *Jeffries*, *Lopez*, *Shumpert*, and *Porter*, all of which recognized that the elements and mental states of first and second degree murder are the same and the State has no burden to disprove mitigation.[2]

The first and second degree murder statutes require the State to disprove justification (self-defense), but not mitigation. 720 ILCS 5/9-2(c) (2008) (providing that State bears burden of disproving justification as set forth in Article 7 of the Criminal Code); *see also* 720 ILCS 5/7-1 through 7-14 (2008) (setting forth categories of justification available as affirmative defense, which are distinct from mitigating factors for second degree murder). Recently, in *People v. Fort*, 2017 IL 118966, ¶ 33, this Court referred to the State's "burden of proof with respect to the absence of a mitigating factor" to sustain a conviction for first degree murder. But rather than overruling, *sub*

[2] A number of First District cases have held that once the defendant meets his burden of proving mitigation, the burden shifts back to the State to disprove mitigation beyond a reasonable doubt. *People v. Castellano*, 2015 IL App (1st) 133874, ¶¶ 154-56 (collecting cases). These cases conflict not only with holdings of the other districts of the Appellate Court, but also with *Shumpert*, 126 Ill. 2d at 351-52, which explicitly held that the State has no burden to disprove mitigation. This Court should reaffirm the holding of *Shumpert*, and reject the First District's approach.

silentio, decades of its prior precedents, it appears instead that the Court mistook the language in the second degree murder statute regarding the State's burden to disprove justification as a reference to mitigation for second degree murder. *Id.* And in any event, *Fort* turned upon the statutory construction of the Juvenile Court Act and *Fort*'s holding did not rely upon a determination that the State must disprove mitigation where it has otherwise met its burden of proving the elements of first degree murder beyond a reasonable doubt. *Id.* at ¶¶ 21-39.

Indeed, the dissent in *Fort* recognized the conflict between the majority's reference to the State's burden and this Court's precedents holding that the State has no burden to disprove mitigation. *Id.* at ¶¶46-50 (Karmeier, J., dissenting). The dissent noted that under this Court's precedents, "[s]econd degree murder is not a separate crime from first degree murder . . . it is a *mitigated* form of the same crime." *Id.* at ¶ 46 (emphasis in original). "The elements of the two offenses are the same. The only thing that distinguishes them is that for a defendant to be convicted of second degree murder, he or she must have met the burden of establishing a mitigating factor after the State has proven the charge of first degree murder beyond a reasonable doubt." *Id.* This Court should therefore follow *Jeffries*, *Lopez*, *Shumpert*, and *Porter* rather than the dicta in *Fort*.

Holding that a single juror's belief that the defendant has met his burden of proving a mitigating factor for second degree murder results in a

hung jury would, as a practical matter, place a burden on the State to *disprove* mitigation to the satisfaction of a unanimous jury. And that holding would not only require this Court to overturn *Jeffries*, *Lopez*, *Shumpert*, and *Porter*, it would contradict the legislative intent and the plain language of the first and second degree murder statutes. Under a plain reading of those statutes, if the jury cannot unanimously agree that the defendant proved the existence of a mitigating factor, then the verdict of guilty of first degree murder stands. Anything short of unanimity on second degree murder fails to call the first degree murder verdict into doubt.

C. The Second District's construction of the murder statutes will lead to more hung juries and requests for special verdict forms and specific jury polling.

The Second District's construction of the first and second degree murder statutes not only runs contrary to their plain meaning, but also would result in large numbers of hung juries (and, by extension, costly retrials) and the need for special verdict forms or specific jury polling in all murder trials. For decades, juries have been instructed that they should not deliberate on second degree murder unless they have first unanimously concluded that the defendant is guilty beyond a reasonable doubt of first degree murder. *Lopez*, 166 Ill. 2d at 447; *Jeffries*, 164 Ill. 2d at 114-19; Illinois Pattern Jury Instructions, Criminal No. 7.06 (4th ed. 2000). Those juries have been given only three verdict forms: not guilty, guilty of first degree murder, and guilty of second degree murder. Illinois Pattern Jury Instructions, Criminal No.

26.01 (4th ed. 2000). But if the Second District's new rule becomes the law of the State, it will be very difficult for the prosecution to secure murder convictions — even though it has proved every element of first degree murder beyond a reasonable doubt — because even a single juror's belief that a mitigating factor was proved by a preponderance of the evidence would result in *no verdict whatsoever*. A5. The legislature cannot have intended such an absurd result. *See People v. Minnis*, 2016 IL 119563, ¶ 25 ("a court presumes that the legislature did not intend to create absurd, inconvenient, or unjust results").

Moreover, the existing pattern jury instructions and verdict forms do not comport with the Second District's construction. *See* Illinois Pattern Jury Instructions, Criminal Nos. 7.06, 26.01 (4th ed. 2000). If the Second District's construction is allowed to stand, murder defendants will demand non-I.P.I. instructions and special verdict forms or polling to determine whether any juror believed that a mitigating factor was proved by a preponderance of the evidence. This circumstance will create additional strain on the circuit courts and increase the risk of improperly influencing juries' verdicts or reopening deliberations. *See People v. Kellogg*, 77 Ill. 2d 524, 529 (1979) (polling should not become "another arena for deliberations" and judge "must carefully avoid the possibility of influencing or coercing the juror"); *see also People v. Ruppel*, 303 Ill. App. 3d 885, 896 (4th Dist. 1999) (special interrogatories disfavored in criminal cases). Accordingly, this Court should reject the Second District's

construction of the first and second degree murder statutes for the additional reason that it will lead to a large number of hung juries in murder cases despite the fact that the jurors unanimously agree that each element of first degree murder has been proved beyond a reasonable doubt.

D. Any error in the trial court's response to the jury question was harmless, invited, and forfeited.

The most natural reading of the trial court's answer to the jury's question is as a restatement of the standard instruction to the jury that its verdict must be unanimous. Insofar as the trial court's answer to the jury's question can be read as error, it was erroneous only because it suggested that the State had to disprove mitigation to the satisfaction of all twelve jurors. But that is an error that helps the defendant. Additionally, to the extent that the court's answer could be read as an error to the benefit of the State, the error did not affect the outcome of the trial because the evidence — including defendant's own video-recorded admission that he stabbed Mannery because he was angry and wanted to kill him — demonstrated that no mitigating circumstance existed at the time of the murder. Accordingly, any error was harmless. *See People v. Dennis*, 181 Ill. 2d 87, 107 (1998) (incorrect response to jury question not reversible error if harmless beyond a reasonable doubt).

Moreover, although the Second District incorrectly concluded that a lack of unanimity on mitigating factors results in a hung jury, it correctly rejected defendant's challenge to the circuit court's response to the jury question

because any error was invited. When the jury asked its question during deliberations — "For approving mitigating factors to reduce charge to second degree murder, if vote on mitigating factor is not unanimous, does it revert to first degree murder?" — the State proposed that the answer was "yes," and defendant proposed that the answer was "no." R1586, C590. The judge proposed the answer "Your verdict must be unanimous. Continue deliberating." R1588. Defendant not only acquiesced in this response, but argued in its favor and against the State's request for time to research the issue. R1589-90.

Although the circuit court's response to the jury's question was not error and could not have prejudiced defendant in any way, any error was invited by defendant's agreement to the answer given. *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010) ("When a defendant acquiesces in the trial court's answer to a question from the jury, the defendant cannot later complain that the trial court's answer was an abuse of discretion."). The invited error goes beyond mere forfeiture, which also applies here because defendant failed to object to the response when it was given and also failed to raise the issue in his post-trial motion. *People v. Cruz*, 2013 IL 113399, ¶ 20. Because defendant argued in favor of the response given, the alleged error is not reviewable for plain error. *People v. Villarreal*, 198 Ill. 2d 209, 227-28 (2001) (plain error review unavailable for invited error because "[a]ctive participation in the direction of proceedings . . . goes beyond mere waiver" and allowing

defendant to object on appeal to that which he requested in trial court "would offend all notions of fair play").

II. The Circuit Court Did Not Abuse Its Discretion When It Denied Defendant's Request to Poll the Jury on Whether Each Juror Found that There Was No Mitigation.

The circuit court did not abuse its discretion by declining to poll the jury on whether each juror found that defendant failed to meet his burden of proving the existence of a mitigating factor. Each juror was properly polled regarding the returned verdict of guilty of first degree murder, with the circuit court asking "Was this then and is this now your verdict?" R1592. That polling satisfied defendant's right to question the jurors to ensure that he was convicted upon a unanimous verdict — no more was required. *See People v. Kliner*, 185 Ill. 2d 81, 166-67 (1998).

Defendant asserts that the circuit court's response to the jury question was incorrect and, notwithstanding his agreement to the response, this obligated the circuit court to conduct more specific polling. But as explained above, the circuit court's response to the jury question was not error. Rather, the polling as conducted necessarily revealed a unanimous finding of first degree murder and that the jurors did not unanimously find either of the factors that would have mitigated defendant's crime to second degree murder.

Moreover, even if the circuit court's response to the jury's question were error, the court's decision not to conduct additional polling was not an abuse of discretion. The circuit court may exercise discretion in selecting the

specific question asked during polling, so long as each juror is given the opportunity to express dissent. *Kellogg*, 77 Ill. 2d at 528. The double-barreled question of "Was this then and is this now your verdict?" has often been used in Illinois, and this Court has approved its use in jury polling. *Id.*

No Illinois court has ever required a circuit court to further question the jury where, as here, each juror has unequivocally concurred in the verdict. Defendant has not alleged that any juror's response expressed any hesitancy or ambivalence that would warrant further questioning by the court. And the circuit court's determination that the jurors' assent to the verdict was voluntary may not be set aside because there is no basis to find that the court's determination was clearly unreasonable. *Id.*

Indeed, the court's decision not to poll the jurors further was prudent, for this Court has cautioned that circuit courts should avoid turning jury polling into an opportunity for further deliberations or to influence the jury's verdict. *Id.* at 529. The circuit court here appropriately avoided that pitfall and properly exercised its discretion in declining to conduct additional polling. The jurors were correctly instructed on first and second degree murder, and they unequivocally returned a unanimous verdict of guilty of first degree murder. The appellate court should not have "venture[d] into the minds and deliberations of the jury" to interpret and disrupt a "straightforward, unambiguous verdict." *People v. Mack*, 167 Ill. 2d 525, 536 (1995) (internal quotation marks and citations omitted).

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court reverse the judgment of the Illinois Appellate Court, Second District.

September 18, 2017

Respectfully submitted,

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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) 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 twenty-five pages.

/s/ Lindsay Beyer Payne
LINDSAY BEYER PAYNE
Assistant Attorney General

Appendix

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Illinois Official Reports

Appellate Court

***People v. Manning*, 2017 IL App (2d) 140930**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ARTHUR MANNING, Defendant-Appellant.
District & No.	Second District Docket No. 2-14-0930
Filed	March 2, 2017
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 08-CF-2729; the Hon. Susan Clancy Boles, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	Thomas A. Lilien and Paul Alexander Rogers, of State Appellate Defender's Office, of Elgin, for appellant. Joseph H. McMahon, State's Attorney, of St. Charles (Lawrence M. Bauer and Victoria E. Jozef, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE BURKE delivered the judgment of the court, with opinion. Justices McLaren and Jorgensen concurred in the judgment and opinion.

OPINION

¶ 1 Following a second jury trial, defendant, Arthur Manning, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 25 years in prison. He timely appealed and now argues that "[t]he trial court reversibly erred where it: (a) failed to give a direct answer when the jury asked if non-unanimity regarding the mitigating factor meant that the charge would 'revert' from second degree murder to first degree murder; and (b) refused to poll the jury specifically to determine if any juror believed that a mitigating factor existed." For the reasons that follow, we reverse and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 In 2008, defendant was indicted on three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2008)), based on the stabbing death of Naromi Mannery. Following a jury trial, defendant was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 29 years in prison. Defendant appealed. We reversed and remanded for a new trial, finding that the trial court abused its discretion in refusing to instruct the jury on self-defense. *People v. Manning*, No. 2-09-0752 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 The evidence at defendant's second jury trial generally established the following. Defendant worked for Windy City Amusements (Windy City) and lived with other Windy City employees in a house owned by Windy City. Windy City had a no-guest policy; only Windy City employees were allowed on the premises. On the evening of the incident, Mannery, who did not live at the house, refused to leave the premises. Defendant, along with three other residents—Darren Barnett, Guy Manning (defendant's brother), and Willie Wimberly—approached Mannery. One of the residents asked Mannery to leave. A fight ensued, during which Mannery suffered a fatal stab wound to his chest. An autopsy revealed a blunt laceration to his forehead and three injuries that appeared to be caused by a single-edged serrated knife: one to his right bicep, one to his back, and one to the middle of his chest.

¶ 5 Barnett testified that Wimberly threw the first punch and struck Mannery. Mannery then charged Guy, who sidestepped Mannery and then hit Mannery on the back with a folded lawn chair. Mannery and defendant then charged each other simultaneously. Philip David Lehrfeld, a resident of the Windy City house, testified that Wimberly threw a punch at Mannery and that defendant and Guy also started fighting with Mannery. Lehrfeld stated that the fight was over quickly. Richard Rusin, a resident of the Windy City house, testified that the fight lasted no more than two minutes. He saw Guy hit Mannery with the chair, and he saw defendant punch Mannery. He did not see Mannery do anything during the altercation.

¶ 6 Defendant was interviewed and, although he initially denied fighting with Mannery, he admitted, after being told that others had implicated him, that he fought with Mannery and stabbed him with a small pocket knife that he had obtained from Guy. Defendant stated that Mannery refused to leave the premises, called defendant a "bitch ass," and punched defendant in the face. Defendant recalled stabbing Mannery only in the arm and in the back. Defendant showed the police where they could find the knife in the Windy City house.

¶ 7 At defendant's request, the trial court instructed the jury on self-defense. The trial court also granted defendant's request to instruct the jury on second degree murder, based on both statutory mitigating factors: an unreasonable belief in the need for self-defense and provocation with mutual combat being the requisite provocation. See 720 ILCS 5/9-2(a) (West 2008). Thus, the jury received instructions that are given when both first degree murder and second degree murder are at issue, namely Illinois Pattern Jury Instructions, Criminal, Nos. 7.06B and 26.01A (4th ed. 2000) (hereinafter, IPI Criminal 4th). In keeping with the second degree murder statute, IPI Criminal 4th No. 7.06B listed the elements of first degree murder and indicated that the State had to prove each element beyond a reasonable doubt. The same instruction told the jury: (1) if it found that the State had failed to prove each first degree murder element beyond a reasonable doubt, it should stop deliberating and return a verdict of not guilty; (2) if it found that the State had proven each of those elements beyond a reasonable doubt, it should then decide whether defendant had proven that a mitigating factor existed; (3) if it found that defendant had met that burden, it should find him guilty of second degree murder; but (4) if it found that defendant had failed to meet that burden, it should find him guilty of first degree murder. IPI Criminal 4th No. 26.01A instructed the jury that it would receive three verdict forms ((1) not guilty, (2) guilty of first degree murder, and (3) guilty of second degree murder), that its verdict must be unanimous, and that it should sign only one verdict form.

¶ 8 During the course of deliberations, the following occurred:

> "THE COURT: *** We received a question from the jury: For approving mitigating factors to reduce charge to second degree murder, if vote on mitigating factor is not unanimous, does it revert to first degree murder?
>
> Okay. Proposed responses?
>
> [THE STATE]: Yes.
>
> [DEFENSE COUNSEL]: My response would be no, Judge.
>
> THE COURT: Okay. I will listen to respective—
>
> [THE STATE]: The answer is yes and it's not no. I mean if—if they're unanimous, 12 to nothing for first degree murder, which either under a hypothetical they are or they are—and they're contemplating a second degree instruction, that has—or a charge—that has to be unanimous. If that's six to six or 11 to one, it's not found.
>
> THE COURT: And I don't disagree with that. That's assuming and we know that that's the instructions and that they have to find first degree before they even get to the mitigating factors. I understand that. I'm not sure that an answer is just simply that that is clear enough, for lack of a better term.
>
> [Defense counsel]?
>
> [DEFENSE COUNSEL]: Judge, I think if they are—if we use the language that they have found guilty on first degree murder, and now that they are on the second theory, if they are not unanimous, doesn't say, all right, you six are wrong since we can't agree, or you 11 are wrong since you can't agree so it's guilty of first degree murder; that's not correct at all. So simply answering that question yes is leading the jury to believe that if one says a mitigating factor exists and 11 state a mitigating factor doesn't exist, if [*sic*] guilty of first degree, that's not true at all, Judge.

[THE STATE]: To be honest, I don't know the answer to that question. If they found 12 to nothing for first degree murder, and they contemplate second degree murder, I don't know what the answer to that question is. I think it has to be 12 to nothing to find that mitigating factor, but if we get to a point in time that they are deadlocked on that, if it's six to six, I don't think that's a hung jury, Judge. I might be wrong about that. I would have to do some research on that. But what's the hung—what are they hung on at that point in time?

THE COURT: Here's what I'm proposing responding and willing to listen to either side, simply to say: Your verdict must be unanimous. Continue deliberating.

[THE STATE]: I have no problems with that.

[DEFENSE COUNSEL]: I believe that's correct, Judge.

THE COURT: Okay. It is 1:22.

[THE STATE]: Judge, before you send that back, can we do some research, because I want to know whether—I don't know that it has to be unanimous to not find that mitigating factor.

THE COURT: But it's fair to say that this is correct, State, that in essence your verdict must be unanimous?

[THE STATE]: Well, I don't know whether the verdict on the mitigating factor—I know the verdict of a mitigating factor to find it has to be unanimous, but to not find it, I don't know that. It probably does, but I don't know that.

[DEFENSE COUNSEL]: Judge, there are two different things. I don't see how there would be any case law out there stating otherwise, that if it was 12 people found unanimously, that the first degree murder was proven, and then they went on to deliberate about the mitigating factor, and six of them decided yes, it does exist, then they're not unanimous on first degree murder or second degree murder. They're still split on what the charge is.

[THE STATE]: They're unanimous on first degree.

[DEFENSE COUNSEL]: But they are not unanimous on first degree murder because there's people who say that there is a mitigating factor that exists, so they are not unanimous on first degree murder.

THE COURT: Well, I don't think this is an incorrect statement of law and a response to this. This is not going to say to you, [State], that you can't do some research with regard to this issue, but at this point in time I am going to send this response back, and obviously we will figure out and hopefully have more clarity. If you wish to do that research, that's fine, but right now what it's going to say is: Your verdict must be unanimous. Please continue your deliberations.

[THE STATE]: That's fine."

¶ 9 Thereafter, the jury found defendant guilty of first degree murder. After the verdict was read, the trial court asked the parties if either would like the court to poll the jury. Defense counsel responded: "I would, Judge, and I also ask to poll the jury on [*sic*] they found the mitigating factor did not exist." The clerk then asked each juror: "Was this then and is this now your verdict?" Each juror responded, "Yes." Thereafter, defense counsel stated: "I would like the specific question, if they found the mitigating factor did not exist, so—" The

court responded: "I think the sufficiency with regard to polling the jury with regard to this is sufficient. I think they answered the question."

¶ 10 Defendant filed a motion for judgment notwithstanding the verdict or for a new trial, arguing, *inter alia*, that "[t]he Court erred when it denied a defense request to poll the Jury on the issue of whether each jury member had found that a mitigating factor to reduce the charge to second degree murder existed." Following a hearing, the trial court denied defendant's motion. The court stated:

> "[T]he Court agrees with the Defense in that a Defendant who is denied an opportunity to poll the jury would be denied a substantial right; however, he was given that right and the jury was, in fact, polled. A question did come from the jury which you summarized, [defense counsel] for the record, and all—uhm—Counsel was in agreement with the response that was given to the jury—uhm—as a result of that question, which indicated that: 'Your verdicts must be unanimous, please continue your deliberations'. I don't believe that the Defendant has a right to have the jury polled as to specific factors, mitigating factors, or the like, so the Motion is going to be denied."

¶ 11 Following a sentencing hearing, the trial court sentenced defendant to 25 years in prison. Defendant timely appealed.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues that "[t]he trial court reversibly erred where it: (a) failed to give a direct answer when the jury asked if non-unanimity regarding the mitigating factor meant that the charge would 'revert' from second degree murder to first degree murder; and (b) refused to poll the jury specifically to determine if any juror believed that a mitigating factor existed." According to defendant, these errors warrant a new trial.

¶ 14 In response, the State argues that, because defendant acquiesced to the trial court's response to the jury's question, defendant cannot now complain that the trial court erred. Alternatively, the State argues that defendant forfeited the issue by failing to object to the court's response and raise the issue in his posttrial motion. The State further argues that the court did not abuse its discretion in the manner in which it polled the jury.

¶ 15 We first address the trial court's response to the jury's question. That question, again, was whether a split vote on the presence of a mitigating factor—essentially, a split vote on whether the defendant is guilty of second degree murder—"reverts" to a unanimous verdict that the defendant is guilty of first degree murder. The State initially proposed an answer of yes; defendant countered with no. Of those proposals, defendant's was right. To be sure, as indicated by IPI Criminal 4th No. 7.06B, the jury's consideration of the presence of a mitigating factor presupposes that the jury has unanimously found that the State has proven the elements of first degree murder. But a juror who goes on to vote to find the presence of a mitigating factor is voting to convict the defendant of second degree murder. Thus, if some jurors vote to find the presence of a mitigating factor, and if other jurors vote otherwise, the jury is not unanimous on the defendant's guilt of first degree murder.

¶ 16 However, in light of the parties' disagreement, the trial court proposed to instruct the jury simply that its verdict must be unanimous. Whatever the merits of that response, we agree with the State that defendant cannot challenge it. Under the invited-error doctrine, a party

cannot acquiesce to the manner in which the trial court proceeds and later claim on appeal that the trial court's actions constituted error. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004); *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). "Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d at 217. Here, after the trial court proposed its response, defense counsel, without argument or objection, stated, "I believe that's correct." In light of this acquiescence, we agree that defendant cannot now challenge the trial court's response. See *People v. Raue*, 236 Ill. App. 3d 948, 951-52 (1992) (although the defendant initially proposed an answer of " 'no' " to a similar jury question, "[w]hen the judge finally proposed [his own] response, he asked both attorneys if it was satisfactory; they both agreed that it was"); see also *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010) (defendant could not challenge on appeal the trial court's response to a jury question where defense counsel agreed with the trial court's response); *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 23 (defendant could not challenge on appeal the trial court's response where defense counsel "stood silent and did not object" when, after discussions, the trial court stated its proposed response); *People v. Pryor*, 372 Ill. App. 3d 422, 432-33 (2007) (defendant acquiesced when he failed to object to the trial court's proposed response).

¶ 17 Nevertheless, although defendant concedes that counsel in this case, like counsel in *Averett*, *Halerewicz*, and *Pryor*, agreed that the trial court's response was correct, he argues that, "unlike counsel in those cases, counsel here also argued that the court's response should include a more direct answer to the jury's question." The record does not support this claim. Although further discussion took place after defense counsel responded, "I believe that's correct," that discussion was initiated by the State and concerned its confusion as to whether the verdict on the absence of a mitigating factor must be unanimous. At no point during this discussion did defense counsel advocate for "a more direct answer to the jury's question" or object when the trial court restated its proposed response. See *Raue*, 236 Ill. App. 3d at 951-52.

¶ 18 Defendant also attempts to liken his acquiescence to a situation "where counsel loses an argument about whether an objection to certain evidence should be sustained." He asserts that "[a]t some point, counsel must stop arguing and at least passively accept the court's ruling, lest counsel risk being reprimanded by the court or even held in contempt." Here, however, defense counsel never objected to the trial court's proposed response or reiterated that a different response was warranted. The trial court noted as much when it denied defendant's posttrial motion. Moreover, counsel certainly did not "risk being reprimanded by the court or even held in contempt," given the trial court's explicit statement that it was "willing to listen to either side."

¶ 19 Accordingly, because any error was invited, we will not address the merits of the trial court's response. In addition, we note that the plain-error doctrine does not apply. See *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17 ("[P]lain-error review is forfeited when the defendant invites the error."). That said, however, we observe that the trial court's response did not directly address the jury's confusion. The jury's confusion was not as to whether its "verdict" must be unanimous. Its confusion was as to whether its finding that the State had proven the elements of first degree murder constituted a unanimous "verdict" of that offense, which would stand unless it reached a unanimous "verdict" of second degree murder. Thus, when the trial court instructed the jury only that its "verdict" must be unanimous, it did not

necessarily foreclose such a misguided—though still unanimous—verdict of first degree murder. Again, however, the extent to which a trial court must do so—and how best it should do so, if indeed it must—are issues that we leave for another day.

¶ 20 We turn now to the issue of whether the trial court's refusal to poll the jury to specifically determine if any juror believed that a mitigating factor existed was reversible error. Defendant argues that polling the jury as he requested would have disclosed whether the jury had unanimously determined that no mitigating factor existed. The State responds that the trial court's conduct in polling the jury properly satisfied defendant's procedural right to have the jury polled.[1] We agree with defendant.

¶ 21 A criminal defendant has an absolute right to poll the jury. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 15. One purpose of polling the jury is to determine whether a juror's vote was the result of coercion. *People v. Kliner*, 185 Ill. 2d 81, 166 (1998). However, polling the jury is also "the primary device for uncovering the doubt or confusion of individual jurors." *Crowder v. United States*, 383 A.2d 336, 340 (D.C. 1978). The specific form of the question to be asked is subject to the trial court's discretion. *People v. Kellogg*, 77 Ill. 2d 524, 528 (1979).

¶ 22 Polling should be done in a manner that elicits an unequivocal response from each juror. *People v. Beasley*, 384 Ill. App. 3d 1039, 1048-49 (2008). Although the trial court should not turn the polling process into an opportunity for further deliberations, the court also must not hinder a juror's expression of dissent. *People v. Cabrera*, 116 Ill. 2d 474, 490 (1987); *Beasley*, 384 Ill. App. 3d at 1049. If a juror indicates some hesitancy or ambivalence in his or her answer, then the trial court must determine the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his or her present state of mind. *Kliner*, 185 Ill. 2d at 166-67; *Kellogg*, 77 Ill. 2d at 528.

¶ 23 Here, we agree with defendant that the trial court abused its discretion by refusing to ask each juror whether he or she found the presence of a mitigating factor. The jury's question starkly revealed the jury's uncertainty as to whether a split vote on the presence of a mitigating factor should (or should not) produce a verdict of guilty of first degree murder. After the jury delivered that verdict, the trial court's use of the standard polling question—"Was this then and is this now your verdict?"—did not resolve the uncertainty. To be sure, as shown by the jurors' unequivocal responses, there was no uncertainty as to whether the jurors' verdict was that defendant was guilty of first degree murder. The uncertainty at issue, however, concerned whether that verdict was wrongly the product of a split vote on defendant's guilt of second degree murder. For all we know, the jury deemed itself required to convict defendant of first degree murder even though as many as 11 jurors voted to convict him of second degree murder. In an ordinary case, this would amount to mere speculation, and thus we do not hold that a trial court must poll the jury on this issue in every case that involves instructions on second degree murder. (Indeed, we do not hold even that the trial court here must do so with a different jury on remand.) Here, however, in light of the jury's question, this is not mere speculation; it is, rather, a distinct possibility, which undermines any reasonable confidence in the verdict.

[1]Although the State asserts that defendant "links this argument intrinsically to the trial judge's response to the jury's question about a unanimous vote on the mitigating factors," the State does not suggest that this argument is likewise foreclosed by the invited-error doctrine.

¶ 24 In so holding, we distinguish *Raue*. There, the jury asked virtually the same question: " 'If we have all agreed to first degree murder and some of us feel there is a preponderance of evidence that a mitigating factor is present so that he is guilty of a lesser offense of second degree murder instead of first degree murder, the question is: If we cannot unanimously agree that there is a preponderance of evidence that a mitigating factor is present, is the final verdict first degree?' " *Raue*, 236 Ill. App. 3d at 951. Finding that the instructions had been explicit, and fearing that a yes-or-no answer would effectively direct a verdict, the trial court responded by rephrasing IPI Criminal 4th No. 7.06B: " '[i]t is the burden of the defendant to prove the existence of mitigating factors by a preponderance of the evidence, and if that burden has not been met, the verdict is one of first degree murder. If that burden has been met, the verdict is one of second degree murder. Whatever verdict you reach must be unanimous.' " *Raue*, 236 Ill. App. 3d at 951. The defendant was convicted of first degree murder. In holding that no plain error had occurred, the appellate court noted, among other things, that the trial court had gone on to poll the jury by asking each juror only whether first degree murder "was his or her verdict." *Id.* at 952.

¶ 25 However, the defendant there, unlike defendant here, did not ask the trial court to poll the jury differently. Further, although there the trial court's response to the jury's question merely rephrased the pertinent instruction—and although we express no opinion on the merits of that response—that mere rephrasing might have been sufficient to alleviate the jury's confusion. Here, whatever its merits, the trial court's response was very unlikely to have done so. Thus, here, defendant's request to poll the jury was valid, and the trial court should have granted it.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we reverse the judgment of the circuit court of Kane County and remand the cause for a new trial.

¶ 28 Reversed and remanded.

INDEX TO THE RECORD ON APPEAL

Trial Court Record: *People v. Manning*, No. 2008-CF-2729 (Cir. Ct. Kane Cnty.)

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Report of Proceedings **Vol. 6 of 7**

Dec. 17, 2013: Second Trial Continued

Supplemental Report of Proceedings **Vol. 1 of 1**

Exhibits

One envelope containing:
People's Exhibit 4 – video recorded statement of defendant
People's Exhibit 7 – video clip of defendant in police vehicle
People's Exhibits 12-21, 23-53, 55-86 – photos
People's Exhibits 101-104 – stipulations
Defendant's Exhibit 1 – stipulation

One envelope containing:
People's Exhibits 9-11, 22, 54, 87-94 - photos

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

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 September 18, 2017, the foregoing **Brief of 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, and copies were served upon the following through email:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen (13) duplicate copies of the brief to the Clerk of the Supreme Court of Illinois at 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Lindsay Beyer Payne
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Assistant Attorney General

E-FILED
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