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.

REPLY BRIEF OF PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

LINDSAY BEYER PAYNE
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2120
lpayne@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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ARGUMENT

Defendant's arguments before this Court are refuted by a single truth: the lack of mitigating circumstances is not an element of first degree murder. *See* 720 ILCS 5/9-1(a) (2008). This is clear from the plain language of the first and second degree murder statutes. *See id.*; 720 ILCS 5/9-2 (2008). Were that not enough, legislative debate and articles by the drafters of the legislation reveal that the legislature intended the defendant to bear the burden of proving mitigation to qualify for second degree murder, and because jurors are not to consider second degree murder until first finding that the State has proved every element of first degree murder beyond a reasonable doubt, a defendant's failure to carry that burden results in a verdict of guilty of first degree murder.

Defendant's contrary construction — under which a lack of unanimity on mitigation results in a hung jury — leads to the absurd consequence that if a single juror believes the defendant has proved a mitigating circumstance by a preponderance of the evidence, the State can secure no conviction whatsoever, despite having already convinced twelve jurors beyond a reasonable doubt that the defendant is guilty of first degree murder. Under the proper construction of the murder statutes, the circuit court committed no error in its response to the jurors' question, or in its polling. Accordingly, this Court should reverse the judgment below.

I. The Circuit Court's Response to the Jurors' Question Was Not Reversible Error.

The plain language of the murder statutes, the expressed intent of the legislature, and common sense dictate that a lack of unanimity on second degree murder results in a verdict of guilty of first degree murder. The circuit court therefore did not abuse its discretion — indeed it was correct — when it declined to tell jurors that disagreement on second degree murder results in a hung jury. And even if the circuit court erred, any error would be harmless, invited, and forfeited.

A. Defendant's construction makes a lack of mitigation a new element of first degree murder.

Defendant denies that his construction of the murder statutes adds a new element to first degree murder, namely the absence of mitigating circumstances. But he acknowledges that under his construction, "a unanimous finding that the State had proved every element of first degree murder was not enough to convict the defendant of first degree murder." Def. Br. 9.[1] If to secure a conviction the State must not only prove every element of first degree murder beyond a reasonable doubt, but also convince all twelve jurors by a preponderance of the evidence that no mitigating circumstances existed at the time of the murder, then defendant and the Appellate Court have indeed added a new element to first degree murder.

[1] "Def. Br. __" refers to defendant-appellee's brief before this Court; "Peo. Br. __" refers to the People's opening brief before this Court.

Defendant disregards this Court's pronouncement that the State has no burden to disprove mitigation. *See People v. Shumpert*, 126 Ill. 2d 344, 351-52 (1989). He fails to grapple with the logical consequence of this Court's conclusion that "the mitigating circumstances are not elements of" second degree murder, *People v. Lopez*, 166 Ill. 2d 441, 447 (1995), or that "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"); *People v. Jeffries*, 164 Ill. 2d 104, 120-23 (1995) (second degree murder "lesser" than first degree murder only in that it is punished less severely). Defendant does not even cite this Court's construction of the murder statutes in *Shumpert*, *Lopez*, *Porter*, and *Jeffries* — precedents that this Court must overturn to rule in his favor. And he makes no attempt to explain what meaning the "burden" placed on the defendant by the second degree murder statute could possibly have if the State can secure no conviction at all unless it persuades all twelve jurors of the absence of mitigation. *See* 720 ILCS 5/9-1 (2008); 720 ILCS 5/9-2 (2008).

Nor could he, given that this Court recently reaffirmed that a lack of mitigation is not an element of first degree murder:

> [B]oth crimes have the same elements. First degree murder and second degree murder each require the same mental state: either intent or knowledge. When the State charges a defendant with second degree murder it must still prove all of the elements that comprise the offense of first degree murder. Because of the

> identity of elements, second degree murder is not a lesser included offense of first degree murder but rather "a lesser mitigated offense." The State must prove the elements of first degree murder beyond a reasonable doubt before the jury can even consider whether a mitigating factor for second degree murder has been shown, such as whether the accused acted under a sudden and intense passion resulting from serious provocation or whether his true belief in self-defense was unreasonable.

People v. Staake, 2017 IL 121755, ¶ 40 (internal citations omitted).

Defendant undermines his own proposed construction when he "freely concedes that the majority in [*People v.*] *Fort* may have erred by suggesting that the State must disprove a mitigating factor," Def. Br. 12 (citing *Fort*, 2017 IL 118966). To secure a first degree murder conviction, the State has no burden to disprove mitigation. *See Shumpert*, 126 Ill. 2d at 351-52. It follows that a lack of unanimity on second degree murder does not undermine the jury's unanimous determination that the State has proved every element of first degree murder beyond a reasonable doubt.

Defendant asks, "how can a verdict finding a defendant guilty of first degree murder be 'unanimous' when some jurors believe the defendant should be found guilty of second degree?" Def. Br. 13. That question is clearly answered by this Court's existing precedent: because the absence of mitigation — or the lack of belief that the defendant is guilty of second degree murder — is not an element of first degree murder. *See Porter*, 168 Ill. 2d at 213; *Lopez*, 166 Ill. 2d at 447. This Court should give effect to the plain

language of the murder statutes and hold that a lack of unanimity on second degree murder results in a verdict of guilty of first degree murder.

B. The legislature intended a lack of unanimity on second degree murder to result in a verdict of guilty of first degree murder.

Any ambiguity in the first and second degree murder statutes is resolved by examining the legislature's expressed intent and considering the consequences of defendant's alternative construction. The rule of lenity simply does not apply here, for "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what [the legislature] intended." *People v. Gutman*, 2011 IL 110338, ¶ 43 (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997)) (internal quotation marks and alterations omitted). No guesswork is required in this case. Even if this Court were to find the plain language of the statutes ambiguous (and it should not), the legislature made its intent clear.

The State's opening brief detailed the history of the legislature's enactment of second degree murder, including statements made during legislative debate and by the drafters of the legislation, Peo. Br. 10-13. This history is not "long but irrelevant," Def. Br. 10, as defendant suggests; rather, it leads to the inevitable conclusion that the legislature intended as "a matter of legislative grace" to make a less severe punishment available to those murderers who could meet their burden of proving that they acted under

mitigating circumstances. Robert J. Steigmann, *First and Second Degree Murder in Illinois*, 75 Ill. B.J. 494, 496 (1987); *see also* Timothy P. O'Neill, *An Analysis of Illinois' New Offense of Second Degree Murder*, 20 J. Marshall L. Rev. 209, 222 (1986). Should the defendant fail to carry that burden, the verdict of guilty of first degree murder — already found unanimously by the jury — would stand. *See, e.g.,* 84th Gen. Assembly, House Debates, May 14, 1986, at 40-45 (remarks by Rep. McCracken). Far from treating the Court as a "handmaiden for the executive" as defendant suggests, Def. Br. 16, the State merely asks this Court — in its own judgment — to confirm the intent of the legislature by construing the first degree murder statute to include no more than the elements enumerated by the General Assembly.

The conclusion that the legislature intended a lack of unanimity on second degree murder to result in a verdict of guilty of first degree murder is further bolstered by considering the practical consequences of defendant's alternative construction, including greater numbers of hung juries and retrials. As this Court recently emphasized in *People v. Hunter*, the Court has "an obligation to construe statutes in a manner that will avoid absurd, unreasonable, or unjust results that the legislature could not have intended." 2017 IL 121306, ¶ 28. And "the process of statutory construction should not be divorced from consideration of real-world results." *Id.* (internal quotation marks and citation omitted).

Here, the General Assembly drafted the first degree murder statute to include three elements: (1) killing another; (2) without lawful justification; and (3) with the requisite mens rea. 720 ILCS 5/9-1(a) (2008). A mitigating factor for second degree murder negates none of these elements. *See Staake*, 2017 IL 121755 at ¶ 40; *Shumpert*, 126 Ill. 2d at 351-52; *Porter*, 168 Ill. 2d at 213; *Lopez*, 166 Ill. 2d at 447; *Jeffries*, 164 Ill. 2d at 111. Thus, it would be absurd to find that the legislature intended a hung jury any time at least one, but fewer than twelve, jurors found mitigation. The legislature prescribed only three elements of first degree murder, and a first degree murder conviction requires no more than that the State prove those three elements beyond a reasonable doubt to the satisfaction of twelve jurors. *In re Andrew B.*, 237 Ill. 2d 340, 352 (2010) (It is a "fundamental principle of statutory construction that this court cannot read into the statute additional elements not intended by the legislature.").

Defendant counters that it would be equally absurd for a hung jury to result, rather than a verdict of guilty of second degree murder, when eleven of twelve jurors find mitigation. Def. Br. 19-20. The State agrees: it is absurd that *any scenario* in which the State has met its burden of proving every element of first degree murder beyond a reasonable doubt should result in a hung jury. Defendant misses the point that under the statute it is *his* burden to persuade all twelve jurors of mitigation by a preponderance of the evidence. 720 ILCS 5/9-2(c). If he fails to satisfy that burden, then he has

not established any entitlement to the "legislative grace" of second degree murder. Steigmann, *First and Second Degree Murder in Illinois*, 75 Ill. B.J. at 496.

The prediction that hung juries, costly retrials, special verdict forms, and burdensome jury polling would increase under defendant's construction is more than "speculative and exaggerated scare tactics." *See* Def. Br. 17. They would be the inevitable and illogical result of a scheme in which proving every element of first degree murder beyond a reasonable doubt no longer sufficed to secure a conviction. And these highly undesirable outcomes themselves are evidence that the legislature did not intend a lack of unanimity on mitigation to result in a hung jury. *People v. Minnis*, 2016 IL 119563, ¶ 25 ("a court presumes that the legislature did not intend to create absurd, inconvenient, or unjust results"). Indeed, had the General Assembly so intended, it could have achieved that result in a much more straightforward way by explicitly placing the burden on the State to disprove mitigation. That it did not is further proof of the legislature's intent.

C. The circuit court's response to the jury's question did not prejudice defendant.

The circuit court's response to the jurors' question — reminding them that their verdict must be unanimous and directing them to continue deliberating — did not prejudice defendant. Defendant faults the State for not citing *People v. Childs*, 159 Ill. 2d 217 (1994) (finding that trial court

reversibly erred by giving ex parte response to jury question). Def. Br. 4. But *Childs* is inapposite, because the *Childs* jury was confused in a way that prejudiced Childs (leading them to believe that if they found him guilty of robbery, they must also find him guilty of murder). *Childs*, 159 Ill. 2d at 229-30. Here, using the proper construction of the murder statutes, the trial court's response to the jury's question, even if susceptible to multiple interpretations, could only have been misunderstood by the jury in a way that helped defendant.[2]

Defendant acknowledges that the jury was properly and adequately instructed that (1) a lack of unanimity on the elements of first degree murder results in a verdict of not guilty; and (2) a unanimous finding of mitigation results in a verdict of guilty of second degree murder. Def. Br. 8. Defendant complains that the jurors were not told that a lack of unanimity on mitigation results in a hung jury, but such an instruction would have misstated the law. As discussed, a lack of unanimity on mitigation results in a verdict of guilty of first degree murder because the defendant bears the burden of proving mitigation and the jury has already unanimously found that the State has proved every element of first degree murder beyond a reasonable doubt. *See*

[2] Defendant also criticizes the State for not citing *People v. Raue*, 236 Ill. App. 3d 948 (3d Dist. 1992) (finding no plain error where court provided similar answer to similar question), Def. Br. 26-27. But *Raue* is persuasive authority supporting this Court's construction of the murder statutes in *Staake*, *Shumpert*, *Porter*, *Lopez*, and *Jeffries*.

Staake, 2017 IL 121755 at ¶ 40; *Shumpert*, 126 Ill. 2d at 351-52; *Porter*, 168 Ill. 2d at 213; *Lopez*, 166 Ill. 2d at 447; *Jeffries*, 164 Ill. 2d at 111.

Thus, the trial court's response to the jury's question — "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?" — could not possibly have prejudiced defendant. R.1586, C590. The court's answer to the question was, "Your verdict must be unanimous. Continue deliberating." R.1588. If this answer led the jury to mistakenly believe that a lack of unanimity on mitigation should result in a hung jury, then the jurors must have unanimously found a lack of mitigation because they returned a verdict of guilty of first degree murder — and when polled, every juror confirmed agreement with this verdict. If the jury correctly understood that a lack of unanimity on mitigation results in a verdict of guilty of first degree murder, then petitioner has also suffered no harm, because it is irrelevant how many jurors (short of twelve) were persuaded of mitigation.

Nor can the State be faulted for failing to request a flat response of "yes," as defendant suggests. *See* Def. Br. 14. To succeed in this appeal, the State need not convince the Court that the trial judge's response was the clearest possible response, only that it was not an abuse of discretion. *People v. Averett*, 237 Ill. 2d 1, 24-25 (2010) (court's response to jury question reviewed for abuse of discretion). And although a "yes" would have been technically correct, the court's more cautious response was prudent to avoid

the appearance that the court was directing a verdict. *See People v. Kellogg*, 77 Ill. 2d 524, 529 (1979) (judge "must carefully avoid the possibility of influencing or coercing" jury). Because the circuit court's response to the jury's question could not have prejudiced defendant, it was not reversible error.

D. Any error was harmless, invited, and forfeited.

In any event, any error in the court's answer to the jury's question would be harmless, invited, and forfeited for the reasons set forth in the State's opening brief. *See* Peo. Br. at 21-23; *see also People v. Dennis*, 181 Ill. 2d 87, 107 (1998) (incorrect response to jury question not reversible error if harmless beyond a reasonable doubt); *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."); *People v. Cruz*, 2013 IL 113399, ¶ 20 (failure to object and raise issue in post-trial motion forfeits issue). This Court should reject defendant's attempt to avoid the consequences of his procedural missteps by bootstrapping his unpreserved jury question claim onto his preserved jury polling claim.

II. The Circuit Court Did Not Abuse Its Discretion When It Denied Defendant's Request for Additional Jury Polling.

As set forth in Section I, *supra*, the belief of any fewer than twelve jurors that defendant had proved mitigation results in a verdict of guilty of first degree murder. There was thus no reason for the circuit court to individually poll the jurors on mitigation. *People v. Johnson*, 35 Ill. 2d 516, 520 (1966) (jury polling reviewed for abuse of discretion). The confirmation that the jurors' verdict was guilty of first degree murder provided an adequate safeguard that defendant was convicted by a unanimous jury. *See People v. Kliner*, 185 Ill. 2d 81, 166-67 (1998). And the circuit court made the prudent choice to avoid polling that could have reopened deliberations or influenced jurors' decisions. *See People v. Mack*, 167 Ill. 2d 525, 536 (1995); *Kellogg*, 77 Ill. 2d at 529. Accordingly, the circuit court did not abuse its discretion in declining further polling.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Illinois Appellate Court, Second District.

December 20, 2017

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

LINDSAY BEYER PAYNE
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2120
lpayne@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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 thirteen pages.

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

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 December 20, 2017, the foregoing **Reply Brief of 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:

Thomas A. Lilien
Paul Alexander Rogers
Office of the State Appellate Defender
One Douglas Avenue, Second Floor
Elgin, Illinois 60120
2nddistrict.eserve@osad.state.il.us

Joseph H. McMahon
Christy DeChristopher
Kane County State's Attorney's Office
37W777 Rt. 38, Ste. 300
St. Charles, Illinois 60175
dechristopherchristy@co.kane.il.us

Patrick Delfino
Lawrence M. Bauer
Victoria E. Jozef
State's Attorneys Appellate Prosecutor
2032 Larkin Avenue
Elgin, Illinois 60123
2nddistrict.eserve@ilsaap.org

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
LINDSAY BEYER PAYNE
Assistant Attorney General