UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0082

September Term, 2015

TERRELL MYERS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A.
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: December 28, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Terrell Myers, was convicted of felony theft by a jury sitting in the Circuit Court for Baltimore City. On appeal, he contends that the trial court erred when, on two occasions it responded to notes from the jury during deliberations. For the reasons discussed below, we shall affirm the judgement of the circuit court.

BACKGROUND

On September 28, 2014, Jerome Kossol parked his car in the parking lot adjacent to the Patapsco Light Rail Station. When he returned several hours later, his car was missing. In the missing car was an extra set of keys to the car in the glove compartment box. Detectives from the Baltimore City Police Department located his car two days later, unoccupied and parked in the 3500 block of 5th Street in Baltimore City. After conducting visual surveillance on the car for several hours, they observed appellant approach the car and, using a key fob, unlock the doors. He entered the passenger side of the car and was apprehended a short time later rummaging through the passenger compartment. He was subsequently charged with theft between $10,000 and $100,000, motor vehicle theft, and unauthorized use.

After a short trial, the jury retired to deliberate at 1:52 p.m. At 2:12 p.m., the court received the following note from the jury: "Can we receive written definitions of each count." At 3:57 p.m., the court received the following note from the jury: "We are not in agreement on any of the counts and do not believe our opinion will change. Please advise." At 4:03 p.m. the court reconvened on the record, and the following exchange occurred:

[DEFENSE COUNSEL]: Your Honor, I just wanted to object for the record. Mr. Myers doesn't know that the jury came saying that they couldn't reach a verdict.

THE COURT: Twice. The first time they came back –

[DEFENSE COUNSEL]: Right.

THE COURT: -- they just asked for the jury instructions.

[DEFENSE COUNSEL]: Right. We –

THE COURT: So we gave them written – the written instructions and the next time they came back they said, "We're not in agreement," which is recently, "We're not in agreement on any of the counts and do not believe our opinion will change. Please advise."

[DEFENSE COUNSEL]: And I am objecting, Your Honor. That would be to the sheriff to go up and tell the jurors to continue deliberating. I'm objecting, for the record, to the continuing of the deliberations, because I believe that would result in a coerced verdict, so I'm just thinking that.

THE COURT: Okay. All right.

[DEFENSE COUNSEL]: Thank you, Your Honor.

STATE: I assume that was just until –

[COURT]: All right.

STATE: -- they come back; right?

THE COURT: All right.

STATE: Or –

[DEFENSE COUNSEL]: Right.

[COURT]: Yes, because I didn't know how long it was going to be. It could be two minutes or 20 minutes or –

[DEFENSE COUNSEL]: Right.

THE COURT: That's why. Okay. Overruled. Now, I will give them the normal Allen charge . . .

After discussion between the court and the parties regarding the Allen charge, the Allen charge was given and the jury again retired to deliberate.[1] Approximately one hour later the jury was called back and asked whether it was close to a verdict. When the foreperson responded that the jurors were "getting close," the court excused the jury for further deliberations. The jury reached a verdict later that day.[2] Appellant was convicted of felony theft; he was acquitted of motor vehicle theft, and unauthorized use of a motor vehicle.

STANDARD OF REVIEW

Maryland Rule 4-231 entitles a defendant to be present at "every stage of his trial." *Midgett v. State*, 216 Md. 26, 36-37 (1958).The right to be present extends to the court's communications "with the jury in answer to questions propounded by the jury," and includes "any communication whatsoever between the court and the jury; unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury.*" Id.* As the Court of Appeals held in *Noble v. State*, "the harmless error principle is fully applicable to a defendant's right to be present during a stage of the trial. 293 Md. 549, 568 (1982). Prejudice will not be conclusively presumed. If the record demonstrates beyond a reasonable doubt that the denial of the right could not

[1] An "Allen charge," which derives its name from *Allen v. United States*, 164 U.S. 492 (1896), is an instruction given to a deadlocked jury after they have begun deliberations. The instruction encourages jurors to re-examine their opinions and continue deliberations until a verdict is reached.

[2] The record does not reflect the time at which the jury returned its verdict.

have prejudiced the defendant, the error will not result in a reversal of his conviction." *Id.* at 568-69.

DISCUSSION

We shall address each jury note separately.

The First Note

In the 2:15 p.m. note to the court, the jury asked, "Can we receive written definitions of each count?" It is not clear whether the court responded to that note with the input of the parties. The first on-the-record mention of this request occurred when the court reconvened in response to the jury's 3:57 p.m. note expressing its inability to agree on a verdict:

> [DEFENSE COUNSEL]: **Your Honor, I just wanted to object for the record. Mr. Myers doesn't know that the jury came saying that they couldn't reach a verdict.**
>
> [COURT]: **Twice. The first time they came back –**
>
> [DEFENSE COUNSEL]: Right.
>
> [COURT]: **-- they just asked for the jury instructions.**
>
> [DEFENSE COUNSEL]: Right. We –
>
> [COURT]: **So we gave them written – the written instructions** and the next time they came back they said, "We're not in agreement," which is recently, "We're not in agreement on any of the counts and do not believe our opinion will change. Please advise."
>
> [DEFENSE COUNSEL]: **And I am objecting, Your Honor. That would be to the sheriff to go up and tell the jurors to continue deliberating.** I'm objecting, for the record, to the continuing of the deliberations, because I believe that would result in a coerced verdict, so I'm just thinking that.

(Emphasis supplied.)

Ordinarily, we will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). To preserve an issue for appellate review, a party must notify the court of its objection at the time the ruling is made. Md. Rule 4-323(c). "The clear inference in § (c) is that, if there is an opportunity to object to an order or ruling when made, the failure to do so (and to inform the court of the relief requested) may constitute a waiver." *Hill v. State*, 355 Md. 206, 219 (1999). In *Graham v. State*, the Court of Appeals held that defense counsel's failure to object to the trial court's refusal to disclose the entire contents of a jury note amounted to waiver of the objection. 325 Md. 398 (1992).

The record in this case does not reflect an objection to the court's response to the first jury note. If anything, counsel's remarks imply awareness of the request for written instructions and that providing written instructions to the jury had been agreed to. Instead, counsel's objection and comments were clearly directed to the court's handling of the second note. Any issue as to the first note, therefore, is not preserved for our review.

But, even if we were to assume a timely objection to the trial court's notification of, and its response to, the first jury request, we perceive no reversible error. Maryland Rule 4-325(c) provides, that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally." Maryland Rule 4-325(a) allows the court to supplement the jury instructions "at a later time when appropriate." The trial court in *Mack v. State* supplemented its oral jury instructions with written instructions, over the defendant's objection. 69 Md. App. 245

(1986). Upon review, this Court held that Rule 4-325 does not require the consent of the accused when the oral jury instructions are supplemented with instructions in writing. *Id.*

If the court in this case erred in failing to notify the parties of the first jury note and the court's response to it in violation of Md. Rule 4-325(c), the record persuades us that there was no prejudice to appellant arising from the supplemental written instructions. He argues that the written theft instructions did not precisely match the oral instruction given by the court in that the written instruction included bracketed material which was not included in the oral instruction.[3] In pertinent part, the oral instruction was:

> [T]he State must prove . . . that he had the purpose of depriving the owner of the property and knowing [sic] and concealed the property in such a manner as to deprive the owner of the property or he knew and intended to make the property of his own.

The written theft instruction sent back to the jury nearly mirrored Maryland Criminal Pattern Jury Instruction 4:32B, and stated:

> [T]he State must prove:
> (2) [that the defendant had the purpose of depriving the owner of the property] [that the defendant willfully or knowingly abandoned, used, or concealed the property in such a manner as to deprive the owner of the property or knew that the abandonment, use, or concealment probably would deprive the owner of the property.]

To the extent that the written theft instruction was slightly different from the oral instruction, we do not view the differences as material or affecting the verdict in this case. In sum, any error, if there was error, was harmless beyond a reasonable doubt.

[3] Appellant also argues that the written instruction as to unauthorized use, differed slightly from the instruction read to the jury by the court. We need not consider this discrepancy as the jury acquitted him on that count.

The Second Note

The second jury note, was time stamped at 3:57 p.m., and reads as follows: "We are not in agreement on any of the counts and do not believe our opinion will change. Please advise." At 4:03 p.m., the following exchange occurred on the record:

> [DEFENSE COUNSEL] I am objecting, Your Honor. That would be to the sheriff to go up and tell the jurors to continue deliberating. I'm objecting, for the record, to the continuing of the deliberations, because I believe that would result in a coerced verdict, so I'm just thinking that.
>
> [COURT]: Okay. All right.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.
>
> [STATE]: I assume that was just until –
>
> [COURT]: All right.
>
> [STATE]: -- they come back; right?
>
> [COURT]: All right.
>
> [STATE]: Or –
>
> [DEFENSE COUNSEL]: Right.
>
> [COURT]: Yes, because I didn't know how long it was going to be. It could be two minutes or 20 minutes or –
>
> [DEFENSE COUNSEL]: Right.
>
> [COURT]: That's why. Okay. Overruled. Now, I will give them the normal Allen charge . . .

After the discussion regarding the contents of the Allen charge, the jury was brought back into the courtroom at 4:09 p.m., and was read the charge. The jury retired again to deliberate at 4:11 p.m., and was brought back again at 5:15 p.m. Asked by the court if they were close

to a verdict, the foreperson responded that they were "getting close." The jury was sent out to continue deliberations, and returned with a verdict later that day.

Appellant alleges that the court directed the sheriff to "advise the jury to continue deliberating while the attorneys were located." He contends that the communication "clearly was not harmless, given the jury's difficulty in arriving at its verdict, which moreover, was utterly inconsistent."[4]

The record, however, is not clear as to what, if anything, the sheriff said to the jury. Nevertheless, we will accept appellant's allegation that the sheriff told the jury to continue to deliberate while the attorneys and appellant were located, and treat it as a "communication" between the court and the jury under Md. Rule 4-231 without appellant's knowledge and presence. The question, then, is whether that communication prejudiced the appellant. We hold that it did not, and therefore any error was harmless beyond a reasonable doubt.

It took only six minutes from when the jury note was received to when the parties reconvened on the record. The jury had to wait only twelve minutes after submitting its question before it received a response from the court in the form of the Allen charge. We are not persuaded that any directive from the sheriff to the jury to "continue deliberating" during those twelve minutes, could in any way, be deemed coercive. That the jury, having

[4] The alleged inconsistencies relate to the theft conviction and the acquittals on the charges of motor vehicle theft and unauthorized use. We see no legal or factual inconsistency. No one saw appellant take or carry away the motor vehicle, but clearly he had obtained and was exercising unauthorized control over the vehicle.

been read the Allen charge, still needed more than an hour (and perhaps longer) to reach a verdict, suggests otherwise.

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