UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1774

SEPTEMBER TERM, 2014

DONALD STONE

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: September 3, 2015

A jury sitting in the Circuit Court for Frederick County convicted Donald Stone, the appellant, of first degree burglary; fourth degree burglary; theft (value $1,000 to less than $10,000); malicious destruction of property valued at less than $1,000; and possession of a rifle or shotgun with a disqualifying prior conviction. The court sentenced the appellant to 20 years' incarceration for first degree burglary, time served for malicious destruction of property, and 5 years for possession of a rifle, to run consecutive to the sentence for burglary. The convictions for fourth degree burglary and theft merged for purposes of sentencing.

The appellant appeals, presenting two questions for our review:

> I. Did the circuit court abuse its discretion in denying defense counsel's request to *voir dire* the twelve deliberating jurors and in denying defense counsel's motion for a mistrial after the two alternate jurors revealed that they and the other jurors had discussed the case before hearing all the evidence?
>
> II. Must the conviction and sentence for malicious destruction of property merge into the sentence for first degree burglary?

For the following reasons, we answer the first question in the negative and the second question in the affirmative. Thus, we shall vacate the appellant's sentence for malicious destruction of property and otherwise affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

The charges against the appellant were tried to a jury over two days in July 2014. We briefly summarize the evidence adduced at trial.

On December 31, 2013, between 6:30 a.m. and 2:30 p.m., Larry Knott's house on Stottlemyer Road in Myersville was burglarized. He returned home from work around

2:30 p.m. and discovered that the side door was "hanging wide open" and that the door jamb "was all busted up." His 30-30 Marlin rifle with a strap and a scope, three books of personal checks, and a large water cooler bottle where he collected spare change were missing. Knott estimated that he had between $350 and $600 in change in the water cooler bottle. The rifle had been purchased in 2003 for between $415 and $430.

The Frederick County Sheriff's Office ("FCSO") investigated the burglary and focused on the appellant as a suspect. While the appellant was incarcerated at the Frederick County Detention Center ("FCDC") on unrelated charges in January 2014, the FCSO monitored his phone calls. In one phone call between the appellant and his brother, Chester Stone ("Chester"), Chester mentioned a 30-30 rifle that the appellant had left at the house where Chester lived with their mother, Sandy Hargett, and stepfather, Martin Hargett.

Based upon that information, Detective Ronald Dement with the Investigations Division of the FCSO applied for a search warrant for the house located at 4528 Reels Mill Road. That house was owned by the Hargetts. At the time the FCSO executed the search warrant, only Martin was home. A 30-30 Marlin rifle with a scope was seized in a back bedroom of the home. The serial number on the rifle matched the serial number of the rifle stolen from Knott. Martin told the police that the rifle had been at his house for about a week and that it "arrived" at the same time as a visit by the appellant to the home.

The next day, the appellant called his mother from the FCDC. His mother told him that, the night before, the "SWAT Team came out [to her] house" because they had

received a "reliable tip" "about that gun." The appellant responded, "Are you serious, Mom? . . . Oh, my God." Later in the conversation, the appellant asked, "Did they get, did they get the gun?" His mother replied, "Yes, they got it." The appellant sighed and said, "Lord, oh my God, that's un-fucking believable."

On January 13, 2014, Detective Dement and another officer met with the appellant at the FCDC. The appellant was advised of his *Miranda* rights, signed a waiver, and eventually confessed his involvement in the burglary. He explained that he kept the rifle because it was a "pretty gun" and he'd been "looking for a 30-30 like that for a . . . long time." He told the officers that he didn't take any other guns from Knott's house because he "didn't want it." When one of the officers asked the appellant if he saw Knott's handgun, the appellant replied, "I didn't see no hand gun, I would have stole that." The officers asked the appellant what he did with the change he stole and he replied, "I gave it to the crack man," because "all [the appellant] was doin' was getting' high." When the appellant was asked about his recollection of Knott's house, he mentioned there being a "hole" "out back." This description was consistent with photographs of Knott's backyard showing a large hole surrounded by decking where an above ground pool used to be. The appellant told the officers that he took the gun to his mother's house "last weekend." At the end of the police interview, the appellant also told the police he only was confessing to ensure that his family members were not charged.

The audio recordings of both of the jail calls made by the appellant and the audio recording of his statement to the police were played for the jury.

The appellant's defense was lack of criminal agency. He testified that he did not steal the rifle from Knott. He explained that Bobby Lynch called him "right after the first of the year" and asked him if he wanted to purchase a 30-30 Marlin rifle. The appellant said that he wanted to buy it and agreed to give Lynch three and a half grams of crack cocaine in exchange for it. A few days later, the appellant took the gun to his mother's house after he got into a fight with his wife. He explained that he had been to Knott's house before with Lynch to sell Knott crack cocaine. According to the appellant, that was how he knew about the hole in Knott's backyard.

The State recalled Knott as a rebuttal witness. He denied that he had sold or traded his rifle to Lynch or that he ever had used or purchased crack cocaine. He said he did not even know Lynch. We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Shortly before 3 p.m. on the second day of trial, the court dismissed the two alternate jurors and the twelve regular jurors retired to the jury room to begin deliberating. The two alternate jurors remained in the courtroom, however, and the court instructed them that they were free to stay and wait for the verdict and to speak to counsel if they desired. The court went into recess at 3:03 p.m.

At 4:06 p.m., the court went back on the record and the following ensued:

> THE COURT: And good afternoon again everyone. Please be seated. We're back on the record in the matter of State v. Donald Leroy Stone, um,

and if I may, the Court's gonna summarize why we're back out here on the record. The, Counsel, [the prosecutor] received information after discussing the matter with the alternate jurors that prior to the jury instructions and the arguments of counsel and the jury retiring to deliberate that there had been some discussion of the evidence in this case prior to the jury being sent back to deliberate. And of course they're, the Court instructs the jury that they are not to discuss the testimony with each other or with any other person until the case is gone to deliberation. We interviewed the two alternate jurors in chambers. Both counsel for the State and counsel for Mr. Stone were present and those alternate jurors indicated that while members of the jury commented on the evidence what they described did not amount to a deliberation or a negotiation or any kind of decision-making as to the veracity of any fact or of any witness. It was more a comment about what had just been heard by that jury and, ah, that that was the essence of what discussions took place among the jurors in the juror room. There is not information that there were any outside sources, any discussion of anything other than the evidence that had just been heard in the courtroom, any other individuals involved, any outside source. [Defense counsel], would you agree that that is the substance of what the alternate jurors indicated in chambers?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: And [prosecutor]? Is that also your…

[PROSECUTOR]: Yes, Your Honor. I would just add and I think that, ah, the alternate jurors indicated that there were no judgments made by any of the members of the jury. That they simply stated, ah, what was said and there were no comments made in return or questions challenging those, ah, those statements, um, and just for the record purposes that they indicated this happened only one time and that it was prior to the State's rebuttal of the Defense case.

[DEFENSE COUNSEL]: That's also fair and accurate.

THE COURT: Okay.

[DEFENSE COUNSEL]: Your Honor, I would make a motion to *voir dire* the jurors individually to determine what the nature of the conversations were. The, one of the bedrocks of this particular endeavor is to make sure that jurors do not discuss the matter until the case is handed to 'em. In this case there is, ah, ah, I would say by a preponderance of the evidence there

is evidence that there was discussion by the jurors before the case had been handed to them and even before the last witness had testified, which was a rebuttal witness. Therefore with those factors in mind I would ask the Court to *voir dire* all the witnesses [sic] to make sure that they can continue and that the discussions did not affect their ability to be fair and unbiased in reaching a decision in the case of State v. Stone.

THE COURT: [Proscutor].

[PROSECUTOR]: Thank you, Your Honor. And I will just respond that the Court did I know have an opportunity to look at *Summers v. State*, which indicates that mistrial is not a necessary requirement, that it's in the discretion of the trial judge as to whether that would impact the jury and whether they would be able to have a fair, ah, fairly, ah, decide the verdict despite those conversations and I believe that the Court considered that and found that there was no prejudice in this case. I will defer to the Court onto, on the ruling of this matter but believe that based on the information we received the State has satisfied its, its burden that there was no, ah, no improper conduct warranting a mistrial.

THE COURT: I do not find that a conversation, um, dealing with what they just heard, ah, amounts to improper conduct sufficient to have the Court take the extraordinary step of interrupting the jury in their deliberations particularly where there is absolutely no hint of any improper evidence being discussed or considered. There's no hint that any interference by anyone outside of the courtroom or any information from outside the courtroom was being mentioned, and I also accept that the alternate jurors indicated that there was really no, no discussion or deliberation in the sense of the word. Therefore I, I am gonna deny the motion for mistrial and I, urn, am gonna deny the motion to …

[DEFENSE COUNSEL]: I was gonna –

THE COURT: Interview –

[DEFENSE COUNSEL]: -- ask for *voir dire* and then if you –

THE COURT: To *voir dire* –

[DEFENSE COUNSEL]: -- denied that then I would –

THE COURT: To *voir dire* the jury.

> [DEFENSE COUNSEL]: I, based on that I would ask for a motion for mistrial, ah –
>
> THE COURT: Got it –
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> [DEFENSE COUNSEL]: for failure to do so.
>
> THE COURT: To do so. Again, just so the record is clear that, um, I'm denying the motion to do an individual *voir dire* of the jury and I, I don't believe a mistrial is warranted. So that motion is denied.

The appellant contends the trial court abused its discretion by denying his motion to *voir dire* the twelve deliberating jurors. Moreover, he contends that the trial court abused its discretion by denying his motion for mistrial because without information gleaned from a *voir dire* of the twelve deliberating jurors, the trial court had "no basis upon which to conclude that [the appellant] was not prejudiced by the [the jurors'] premature deliberation, or discussion, of the case." For these reasons, he asserts that reversal is required.

The State responds that the trial court properly exercised its discretion by choosing to *voir dire* the two alternates about the nature of the discussions that took place and, based on the information they provided, the court also did not abuse its discretion in finding that there was no possible prejudice to the appellant warranting further *voir dire* or a mistrial.

"It is well-established in Maryland that in determining whether jury contact is prejudicial, a trial court must balance the probability of prejudice from the face of the extraneous matter in relation to the circumstances of the particular case." *Allen v. State*,

89 Md. App. 25, 46 (1991) (citation omitted). In a limited subset of "egregious cases," inappropriate contact between a juror and third party or inappropriate conduct by the jurors may give rise to a "presumption of prejudice." *Jenkins v. State*, 375 Md. 284, 319 (2003). If such a presumption arises, the court is required to conduct *voir dire* in order to determine whether the presumption has been rebutted. *Nash v. State*, 439 Md. 53, 69 (2014). This Court and the Court of Appeals have held that the presumption arose when a co-defendant had breakfast with an alternate juror, implicated himself in relation to the charges against the defendant, and the alternate juror reported the substance of the conversation to a regular juror during a break in the ongoing deliberations, *Allen*, 89 Md. App. at 47-48; when, during a weekend recess in deliberations, a juror asked her husband, who was an Assistant United States Attorney, about the admissibility of hearsay evidence, *Eades v. State*, 75 Md. App. 411 (1988); when a juror and a State's witness (a police detective) attended the same religious retreat during a recess in the defendant's trial, discussed details of the case over lunch, and failed to timely report the misconduct to the court, *Jenkins*, 375 Md. at 323-24; and when a deliberating juror conducted independent research into a mental health disorder that a State's witness testified the victim suffered from and reported the results of that research to the other jurors, *Wardlaw v. State*, 185 Md. App. 440 (2009).[1]

[1]In two of the above cited cases, the presumption was held to have been rebutted by evidence showing that the improper communications or contact did not give rise to actual prejudice. In *Eades, supra*, the trial court conducted *voir dire* of the juror who had

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In *Summers v. State*, 152 Md. App. 362 (2003), the trial court received a note during jury deliberations from an unidentified juror who reportedly felt "harassed" and "want[ed] off the jury because [he or she] disagree[d]." *Id*. at 372. After receiving the note, the court conducted *voir dire* of all twelve jurors. During *voir dire*, the court learned that Juror No. 4 was the "unidentified juror." According to Juror No. 4, another juror had "discussed the case with [him] for 20 minutes at lunchtime." *Id*. at 373. The court inquired as to whether Juror No. 4 believed the jury still could reach a fair and impartial verdict. The juror replied that he believed they could reach a fair and impartial verdict on two counts on which they already had reached agreement. At the conclusion of the *voir dire*, defense counsel moved for a mistrial. The court denied the motion and

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inappropriately asked her husband about hearsay evidence and determined that her question had been innocuous and that no prejudice flowed from it. We affirmed the judgment of the circuit court, concluding there had been no abuse of discretion by the court in denying the defendant's motion for a new trial. Likewise, in *Allen, supra*, the trial court conducted *voir dire* of the jurors who had learned about the alternate juror's conversation with the co-defendant and concluded that the presumption was rebutted based upon their answers.

In contrast, in *Wardlaw, supra*, we reversed the judgments of conviction because after the trial court learned of the improper internet research performed by a deliberating juror, it did not conduct *voir dire*, choosing instead to reinstruct the jurors about the evidence they could consider in rendering a verdict. We held that because the juror misconduct gave rise to the presumption of prejudice and the record did not contain any evidence rebutting that presumption, reversal was required. In *Jenkins, supra*, because the inappropriate contact between the State's witness and the juror did not come to light until after the verdict, the Court of Appeals held that the presumption could not be rebutted and reversal was required.

decided to take the verdicts on the counts the jury already had agreed upon. The jury found the defendant guilty on two counts: possession of heroin and possession of cocaine.

On appeal, this Court held that we did not need to decide whether a presumption of prejudice arose from the twenty-minute conversation between two jurors over lunch. Instead, we assumed that it applied, but held that it had been rebutted by the "*voir dire* responses to the trial court." *Id*. at 377. We rejected the defendant's assertion that the conversation between the two jurors was prejudicial because it was in violation of the court's instructions. Quoting with approval from *Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co.*, 163 Md. 401, 408 (1933), we opined:

> "Not every trivial act on the part of a juror during the course of the trial amounts to such misconduct as requires the withdrawal of a juror and the continuance of the case. A contrary holding would result in a multiplication of mistrials, with attendant additional expense and delay. There are many cases where the misconduct of the jury is sufficient to require an order of mistrial, but the misconduct must be such as to reasonably indicate that a fair and impartial trial could not be had under the circumstances."

Id. at 378. We reasoned, moreover, that communications between jurors (as opposed to between a juror and a third party or witness) did not give rise to the concern that the jury might "reach a verdict on the basis of [an] improper extrinsic communication rather than the evidence." *Id*. at 379. Finally, we emphasized that there was no evidence that conversation between the jurors was coercive or that either juror had made up his mind about the case prior to hearing all of the evidence. For all of these reasons, we held that the trial court had not abused its discretion by denying the motion for mistrial.

We return to the case at bar. The improper communication in this case occurred during a recess between the end of the defense case and the beginning of the State's rebuttal case. After the improper communication came to the attention of the court, the court *sua sponte* conducted *voir dire* of the two alternate jurors. The alternate jurors' answers to the court's questions revealed that during the recess, "members of the jury" had "commented on the evidence." The alternate jurors stated that there was no debate or deliberation. It was no more than a "comment about what had just been heard by that jury." This happened just once and no one responded to the comments that were made.

We think it plain that the improper communication was not the type of egregious misconduct giving rise to a presumption of prejudice. As this Court opined in *Abernathy v. State*:

> Jurors are not Sphinxes and, inevitably, they make comments to each other in the course of a trial. It is nothing more than an instinctive human reaction to the events unfolding around one, no more significant than the raising of an eyebrow or the taking of a deep breath. It does not constitute deliberation on the merits of the case and it is not evidence of bias. Bias or prejudice is what a juror brings to the trial before it even begins. The process of beginning to make tentative judgments as the trial progresses, by way of contrast, is something quite different and it is unavoidable.

109 Md. App. 364, 377 (1996). Like in *Abernathy*, the comments described by the alternate jurors did not "constitute deliberation on the merits" and were not evidence of prejudice. Moreover, as the *Summers* Court reasoned, communications between jurors during the course of a trial are not concerning in the way that third party contact with a juror might be. Finally, even if we were to agree with the appellant that information that jurors had discussed the evidence prior to the start of deliberations gave rise to a

presumption of prejudice, we would nevertheless hold that that presumption was rebutted by the *voir dire* of the two alternate jurors evidencing the inconsequential nature of the "discussion." For all of these reasons, the trial judge did not err by denying the appellant's request that he *voir dire* the twelve deliberating jurors or in denying the motion for mistrial.

II.

The appellant contends the trial court erred by not merging his "conviction and sentence" for malicious destruction of property into his sentence for first degree burglary under the principle of fundamental fairness. This is so because the conduct supporting the appellant's conviction for malicious destruction of property – the splintering of the door jamb – "was clearly incidental to the breaking and entering" of Knott's house. (Quoting *Marquardt v. State*, 164 Md. App. 95, 152-53 (2005)).

The State agrees that the appellant's sentence for malicious destruction of property should merge with the conviction and sentence for first degree burglary, but emphasizes that his conviction for that crime does not merge.[2]

[2] The State points out that while the prosecutor requested that the court merge the appellant's sentence for malicious destruction of property with his conviction and sentence for first degree burglary, the appellant's counsel did not raise this before the trial court. Citing *Pair v. State*, 202 Md. App. 617, 649 (2012), the State argues that this Court ordinarily should decline to consider the argument that a sentence should have merged under the fundamental fairness doctrine when it is raised for the first time on appeal. *But see Latray v. State*, 221 Md. App. 544 (2015). The State asserts that the facts of this case are so clear, however, that it represents an exception to the rule established in

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In *Marquardt*, as relevant here, the defendant was convicted of two counts of fourth degree burglary and three counts of malicious destruction of property. The malicious destruction of property convictions all pertained to the destruction of interior and exterior doors at the two locations where the burglaries had been committed. At sentencing, defense counsel argued that the malicious destruction of property counts should merge into the convictions for fourth degree burglary given that the "only destruction of property was the breaking, that was the necessary element of the fourth degree burglary." *Id*. at 146. The court merged one of the malicious destruction of property counts, but imposed separate sentences for the other two counts.

On appeal, the defendant argued that the court erred by imposing the two sentences for malicious destruction of property under the rule of lenity and the principle of fundamental fairness. This Court held that the offenses of malicious destruction of property and fourth degree burglary did not merge under the required evidence test or the rule of lenity, but that merger was required under the principle of fundamental fairness. We opined that "under the facts of the . . . case, the malicious destruction of property was clearly incidental to the breaking and entering of [the two apartments]" and that the counts for malicious destruction of property should have merged into the convictions and sentences for fourth degree burglary. *Id*. at 152-53.

(…continued)
Pair, and agrees with the appellant that this Court should grant the relief requested by the appellant.

We return to the case at bar. Like in *Marquardt*, the evidence established that the malicious destruction of the door jamb at Knott's house was "incidental to the breaking and entering" of that house. Accordingly, we shall vacate the appellant's sentence for malicious destruction of property (time served).

SENTENCE FOR MALICIOUS DESTRUCTION OF PROPERTY VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT AND FREDERICK COUNTY.