Circuit Court for Prince George's County
Case No. CT-15-0042X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1080

September Term, 2016

PAUL RICARDO BARBOUR

v.

STATE OF MARYLAND

Meredith,
Reed,
Eyler, James R.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Eyler, James R., J.

Filed: September 15, 2017

After a jury trial in the Circuit Court for Prince George's County, Paul Ricardo Barbour, appellant, was found guilty of first-degree assault, use of a firearm in the commission of a crime of violence, illegal possession of a regulated firearm, and illegal possession of ammunition. For the use of a firearm conviction, he was sentenced to incarceration for a term of twenty years, with all but five years suspended, the first five years to be served with the possibility of parole. In addition, the court imposed a concurrent term of twenty years, with all but five years suspended, for the first-degree assault, a concurrent term of five years for illegal possession of a firearm, and a concurrent term of one year for illegal possession of ammunition. This timely appeal followed.

QUESTIONS PRESENTED

Barbour presents the following four questions for our consideration:

> I. Did the circuit court err in denying Barbour's motion to dismiss the charges because he was tried in violation of Md. Rule 4-271?
>
> II. Did the circuit court err in imposing separate sentences for possession of a firearm after having been convicted of a disqualifying crime and possession of ammunition after having been prohibited from possessing a regulated firearm?
>
> III. Did the circuit court err in denying Barbour's motion to suppress?
>
> IV. Did the circuit court abuse its discretion in accepting a partial verdict?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

In 2014, Jean-Robert Penn worked as a taxi driver in Prince George's County. On November 6, 2014, he received a call to pick up passengers at 4801 Addison Road. Shortly before he arrived at that address, he called the phone number that had been used to arrange

for the taxi, but no one answered. When he arrived at the Addison Road location, a man, whom Penn identified at trial as Barbour, and a woman entered the taxi. Barbour wore a long black coat and had his hair styled in dreadlocks. He told Penn he wanted to go to Seat Pleasant Drive and, on the way, he wanted to stop at Jerry's Carryout. Both Barbour and the woman exited the taxi and entered Jerry's Carryout. Shortly thereafter, they got back into the taxi, and Penn drove toward Seat Pleasant Drive. Barbour asked Penn to turn right onto Hedgeleaf Avenue and then to stop after about 200 yards. At that point, Barbour and the woman exited the taxi and began to walk away. Penn exited the cab and said, "excuse me, sir, you didn't pay me yet." Barbour ran back toward Penn with a silver gun in his hand and said, "give me all the money." Penn jumped into the taxi and drove off. Later, he stopped and called 911.

About two days later, police showed Penn two photographic arrays, each of which contained a photograph of Barbour, but Penn could not identify anyone as the man involved in the incident. Later, Barbour viewed surveillance video obtained from Jerry's Carryout and identified Barbour as the man who had robbed him.

The lead investigator on the case, Prince George's County Police Detective Corporal David Chandler[1], obtained from Penn the telephone number that had been used to call for the taxi. After obtaining information from the telephone service provider, Detective Chandler developed Barbour as a suspect. On November 13, 2014, Detective Chandler executed a search warrant at Barbour's residence located at 6700 Drylog Street

[1] In the record, the lead investigator is referred to both as Detective Chandler and Corporal Chandler. For consistency, we shall refer to him as Detective Chandler.

in Capitol Heights, Maryland. Barbour, his mother, and another man were in the house at the time of the search.

During the search of a bedroom in the house, police found a Maryland identification card and mail bearing Barbour's name, an Iphone that was charging, a long Helly Hansen trench coat, and a silver revolver that contained two bullets. Detective Chandler saw that the Iphone was powered on. Using his personal cell phone, Detective Chandler dialed the telephone number identified by Penn as having called for the taxi. The Iphone rang, and Detective Chandler's telephone number appeared on the screen. Test firing of the silver revolver recovered from a bedroom in Barbour's residence revealed that the gun was operational. At trial, the parties stipulated that Barbour had been previously convicted of a crime for which he was prohibited from possessing a regulated firearm.

DISCUSSION

I.

In Maryland, the State is obligated to try a criminal defendant within 180 days of the earlier of the appearance of counsel or the first appearance of the defendant in circuit court. This obligation is imposed by both Maryland Rule 4-271(a)[2] and § 6-103 of the

[2] Maryland Rule 4-271 provides, in relevant part:

> (a) **Trial date in circuit court.** (1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. When a case has been transferred from the District Court because of a demand for a jury trial, and an appearance of counsel entered in the District Court was automatically entered in the circuit court pursuant to Rule 4-

Criminal Procedure Article,[3] and is commonly referred to as the *Hicks* rule after *State v. Hicks*, 285 Md. 310 (1979), in which the Court of Appeals held that a violation of the rule

214(a), the date of the appearance of counsel for purposes of this Rule is the date the case was docketed in the circuit court. On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.

[3] Section 6-103 of the Criminal Procedure Article provides:

(a) *Requirements for setting date*. – (1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:

(i) The appearance of counsel; or

(ii) The first appearance of the defendant before the circuit court, as provided by the Maryland Rules.

(2) The trial date may not be later than 180 days after the earlier of those events.

(b) *Change of date*. – (1) For good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court:

(i) on motion of a party; or

(ii) on the initiative of the Circuit Court

(2) If a circuit court trial date is changed under paragraph (1) of this subsection, any subsequent changes of the trial date may only be made by the county administrative judge or that judge's designee for good cause shown.

(c) *Court rules*. – The Court of Appeals may adopt additional rules to carry out this section.

Md. Code (2008 Repl. Vol., 2016 Supp.), § 6-103 of the Criminal Procedures Article ("CP").

requires dismissal of the charges against the defendant. Barbour asserts that the trial court erred in denying his motion to dismiss the charges against him because his case was postponed past the *Hicks* deadline without any finding of good cause. We disagree and explain.

The record reveals some confusion as to when Barbour initially appeared in the circuit court. Barbour asserts that he first appeared on May 18, 2015, which resulted in a *Hicks* deadline of November 14, 2015. Barbour failed to appear at a February 6, 2015 hearing in the circuit court, and as a result, a bench warrant was issued. Subsequently, the suppression judge reviewed the record and found that on May 18, 2015, Barbour appeared before a District Court commissioner in response to the bench warrant. The commissioner prepared and signed a circuit court appearance form, presumably because the underlying criminal case had been filed in the circuit court. There is no other evidence in the record before us that Barbour's initial appearance in the circuit court occurred on May 18, 2015. Assuming, arguendo, that Barbour did not make his initial appearance in the circuit court on May 18, 2015, it is clear that he appeared in person without counsel on August 7, 2015. If August 7, 2015 constituted Barbour's initial appearance in circuit court, the *Hicks* deadline would have occurred on February 3, 2016.

The critical date for our analysis is the postponement that had the effect of moving the trial date past the 180-day deadline. *State v. Brown*, 355 Md. 89, 108-09 (1999). If Barbour's initial appearance in circuit court was May 18, 2015, the postponement that had the effect of moving the trial date past the *Hicks* deadline of November 14, 2015 occurred on September 3, 2015, when defense counsel appeared on behalf of Barbour,

waived arraignment, filed motions, and requested a postponement to prepare for trial. The court agreed to the postponement and asked the parties to provide new trial dates. The docket entries reveal that the parties proposed, and the court accepted, a trial date of January 11, 2016.

If Barbour's initial appearance in circuit court was on August 7, 2015, the critical postponement occurred on December 4, 2015, when the parties joined in requesting a postponement. Defense counsel explained to the motions judge, "what we have done is gone to the assignment office and gotten a new date for motions and a new date for the trial and we would ask the Court to continue both the motions and the trial date[.]" The court agreed, and the parties were given a new trial date of February 24, 2016, which was past the *Hicks* deadline of February 3, 2016. Thus, by any calculation, the trial date was extended past the *Hicks* date at the request of the defense. It is well established that "[t]he sanction of dismissal is unavailable to a defendant who, either individually or by his attorney, seeks or expressly consents to a trial date in violation of Rule 4-271." *Jules v. State*, 171 Md. App. 458, 475 (2006). *Accord*, *Hicks*, 285 Md. at 335; *Dyson v. State*, 122 Md. App. 413, 418-19 (1998), *rev'd on other grounds*, 527 U.S. 465 (1999); *Woodlock v. State*, 99 Md. App. 728, 738 (1994). As a result, the trial court did not err in denying Barbour's motion to dismiss.

II.

Barbour contends that the circuit court erred in imposing separate sentences for possession of a firearm after having been convicted of a disqualifying crime and illegal possession of ammunition. He argues that his conviction for illegal possession of

ammunition must be vacated under a unit-of-prosecution theory or, alternatively, pursuant to the rule of lenity or principles of fundamental fairness. These precise issues were raised and rejected in *Potts v. State*, 231 Md. App. 398 (2016).

In arguing that the court erred in imposing separate sentences for possession of a firearm after having been convicted of a disqualifying crime and possession of ammunition, Potts, like Barbour in the instant case, relied upon *Clark v. State*, 218 Md. App. 230 (2014). In *Clark*, we held that separate sentences were not warranted for possession of a regulated firearm after having been convicted of a disqualifying crime and possession of a regulated firearm by an individual under the age of 21 because those crimes were based on the same statute, § 5-133 of the Public Safety Article of the Maryland Code ("PS"), and Clark had violated three different sections of that statute by possessing a single firearm. *Clark*, 218 Md. App. at 252-53 (citing *Melton v. State*, 379 Md. 471 (2004) and *Wimbish v. State*, 201 Md. App. 239 (2011)(both concluding that when a defendant possessed a single regulated firearm, he committed only one violation of PS § 5-133)). Potts argued that his convictions for possession of a firearm after having been convicted of a disqualifying crime and possession of ammunition involved possession of the same regulated firearm, and because the firearm was the single unit of prosecution, his conviction for possession of ammunition should be vacated. *Potts*, 231 Md. App. at 412.

In rejecting that argument, we noted that Potts's convictions were not predicated upon possession of the same loaded firearm, but upon possession of a firearm under PS § 5-133(c)(1) and possession of ammunition under PS § 5-133.1. *Id.* We held that the enactment of PS § 5-133.1 as a separate statutory provision, the plain meaning of the

statutory language, and the legislative history revealed an intent on the part of the Legislature to punish possession of ammunition separately from a conviction for possession of a firearm under PS § 5-133(c)(1). *Id.* at 412-13. We also held that Potts's sentences did not merge under the required evidence test, the rule of lenity, or principles of fundamental fairness. *Id.* at 413-14. With regard to principles of fundamental fairness, we noted that because Potts did not make a contemporaneous objection, that issue was not preserved for our consideration. *Id.* at 414.

The same is true in the instant case. Barbour's convictions were predicated upon the possession of a firearm under PS § 5-133(c)(1) and possession of ammunition under PS § 5-133.1. As we held in *Potts*, the Legislature clearly intended to punish possession of ammunition separately from a conviction for possession of a firearm under PS § 5-133(c)(1). Barbour's sentences do not merge under the required evidence test or the rule of lenity. Further, because he did not make a contemporaneous objection based on fundamental fairness, that issue was not preserved for our consideration. *Potts*, 231 Md. App. at 414. Even if it had been, merger would not be required because the Legislature clearly intended to permit multiple sentences for the crimes at issue.

III.

Barbour contends that the circuit court erred in denying his pre-trial motion to suppress the items that were seized from his Drylog Street residence. He argues that the judge who issued the search warrant did not have a substantial basis for finding probable cause to search the residence and that the officer presenting the warrant application should

have recognized that the facts asserted in support of the warrant application did not establish probable cause for the search. We disagree and explain.

When reviewing the denial of a motion to suppress, we rely exclusively on the record of the suppression hearing. *Raynor v. State*, 440 Md. 71, 81 (2014); *Darling v. State*, 232 Md. App. 430, 445 (2017). We consider the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the party prevailing on the motion, in this case the State. *Barnes v. State*, 437 Md. 375, 389 (2014); *Grimm v. State*, 232 Md. App. 382, 396 (2017). We give great deference to the suppression court's factual findings, and we will not disturb them unless they are clearly erroneous. *Henderson v. State*, 416 Md. 125, 144 (2010). We review the suppression court's factual findings for clear error, but we make our own independent constitutional appraisal of the record, "reviewing the relevant law and applying it to the facts and circumstances" of the case at hand. *State v. Luckett*, 413 Md. 360, 375 n.3 (2010)(and cases cited therein).

At the suppression hearing, Penn testified that on November 6, 2014, he received a call for a taxi ride from 4801 Addison Road to Capitol Heights. On his way to that location he called the customer, but no one answered. When he arrived at the address, a man and a woman came out of the building, entered the taxi, and asked to go to Seat Pleasant with a stop at a carry-out restaurant. After stopping at the carry-out restaurant, Penn took the man and the woman to Birchleaf Avenue and Drylog Street, where they exited the taxi and walked away. Penn exited the taxi and said, "[y]ou owe me $13," to which the man replied, "[n]o, I don't owe you nothing." The police showed Penn two photographic arrays, both of which contained Barbour's photograph, but he did not identify anyone as the man

involved in the incident. Eleven days after the incident, Penn viewed a surveillance video from the carry-out restaurant and identified Barbour as the perpetrator. Barbour testified that the man in the surveillance video wore his hair in corn rows, whereas for the past seven to eight years, he had long dreadlocks.

Defense counsel argued that Penn's identification of Barbour on the video should be suppressed because it was suggestive. He asserted that the video was of poor quality, that the hairstyle of the person in the video was different from Barbour's, and that because the video was shown to Penn after he had twice failed to identify Barbour in the photographic arrays, it was "likely" that Penn felt he had "to pick someone." The suppression court rejected that argument and denied Barbour's motion to suppress the video identification.

The defense also argued that there was insufficient probable cause to obtain the warrant and that the warrant was overly broad. Detective Chandler testified that he applied for and executed the search and seizure warrant for 6700 Drylog Street. He requested subscriber information from the service provider for the telephone number used to call for taxi service, which had been given to him by Penn. From the information received, he learned that the telephone was linked to an alternate telephone number belonging to Barbour and his mother and an email address belonging to Barbour's mother. Defense counsel argued that "all the police had at the time was there was a service call from a telephone number and the telephone number came back to Mr. Barbour's mother's email account" and that there was no other evidence connecting Barbour to the crime.

The defense also argued that items listed in the warrant, such as locked containers, clothing, photographs, videos, strong boxes, safes, and records, were overly broad. Defense counsel asserted that there was "no evidence of a crime, other than a person said he got robbed and one of the phones that called the cab company that night happened to be a phone that was registered to Mr. Barbour. And from that, they're asking to basically search every crevice of the house." The court denied the motion to suppress on the ground that there was insufficient probable cause to support the search warrant and that the warrant was overly broad.

Barbour also sought to suppress a recorded statement he gave to police on the grounds that it was not voluntary because he was pressured by police to make a statement in violation of his *Miranda* rights.[4] Detective Chandler testified that in addition to developing Barbour as a suspect through the telephone number used to contact the taxi company and subscriber information obtained from the telephone service provider for that number, he also obtained information from an officer who had dealt with Barbour earlier that year. In addition, Penn identified Barbour in the surveillance video. After Barbour was taken into custody, Detective Chandler and another detective interviewed him. They explained to Barbour his rights under *Miranda* and obtained his signature on an advice of rights form. According to Detective Chandler, Barbour did not appear to be under the influence of drugs or alcohol, was not made any promises, was not threatened, and willingly chose to make the recorded statement. After reviewing the video recording, the

[4] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

suppression court commented that Barbour's statement consisted only of an "adamant" and "complete denial." The court denied the motion to suppress, finding that there was no *Miranda* violation and rejecting Barbour's argument that the statement was not voluntary.

On appeal, Barbour contends that the suppression court erred in failing to suppress the items recovered from the Drylog Street residence because the warrant application did not provide a sufficient factual basis to establish probable cause for the search and failed to establish a specific nexus between the alleged robbery and the place to be searched. Barbour also argues that the warrant was overly broad and that the good faith exception to the exclusionary rule does not apply. These contentions are without merit.

The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend IV. Probable cause has been defined as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238-40 (1983); *accord Agurs v. State*, 415 Md. 62, 75-76 (2010). Stated otherwise, probable cause to search "exist[s] where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found" in a particular place. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

In reviewing a motion to suppress evidence seized pursuant to a warrant, we must determine whether the issuing judge had a "substantial basis" for finding probable cause to issue the warrant. *Greenstreet v. State*, 392 Md. 652, 667-68 (2006); *State v. Faulkner*,

190 Md. App. 37, 46-47 (2010). A search warrant application need not aver that criminal activity actually occurred in the location to be searched; rather, the affidavit must establish a nexus between the objects to be seized and the place to be searched, from which a person of reasonable caution would believe that the objects sought might be found there. *Holmes v. State*, 368 Md. 506, 522 (2002). Ordinarily, we apply the "four corners rule" and "confine our consideration of probable cause solely to the information provided in the warrant and its accompanying application documents." *Greenstreet*, 392 Md. at 669 (citations omitted). In doing so, we apply a deferential standard of review. *Id.* at 667-68. The different tasks of an issuing court and a reviewing court in this context have been explained as follows:

> The task of the issuing judge is to reach a practical and common-sense decision, given all of the circumstances set forth in the affidavit, as to whether there exists a fair probability that contraband or evidence of a crime will be found in a particular search. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). The duty of a reviewing court is to ensure that the issuing judge had a "substantial basis for … conclud[ing] that probable cause existed." *Id.*

Id. at 667-68.

The "limited after-the-fact review" by a reviewing court "'requires that the reviewing judges transcend any personal opinion as to what they, …, might have decided on the merits and concern themselves exclusively with whether the warrant-issuing judge had some rational basis for reaching the decision he [or she] did.'" *Jenkins v. State*, 178 Md. App. 156, 169 (2008)(quoting *State v. Riley*, 147 Md. App. 113, 117-18 (2002)). We note that the "substantial basis" standard for the issuance of a warrant means something less than establishing probable cause in the context of reviewing warrantless police

activity." *Id.*, at 174; a*ccord*, *State v. Johnson*, 208 Md. App. 573, 586-87 (2012). We are also mindful that we must "assess affidavits for search warrants in 'a commonsense and realistic fashion,' keeping in mind that they 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation.'" *Faulkner*, 190 Md. App. at 47 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).

A. Search of Barbour's Home

Barbour contends that the warrant application failed to establish a specific nexus between the alleged robbery and the place to be searched, and as a result, the issuing judge lacked a substantial basis for issuing the warrant. We disagree. The warrant application explained that the assailant exited the taxi in an area near Drylog Street. As a result of their investigation, police determined that the assailant's telephone number was registered to both Barbour and his mother. It also detailed how police learned that Barbour and his mother resided at 6700 Drylog Street. Based on those facts and their training and experience, police requested a search warrant for evidence of the alleged crime including: "[a]ny firearms, to include rounds of ammunition, magazines, holsters, and documentation of firearms purchases, or sales," a "[c]ellular phone carrying the phone number (240) 667-6364," "locked containers, strong boxes, or safes which could hold" the items to be seized, "[a]ny and all cellular phones and their contents," "[a]ny documentation showing proof of address," and "[a]ny items subject to seizure under the laws of Maryland." The warrant application explained that cellular telephones "often have contact lists and call records[.]"

The affidavit in support of the application for the search warrant clearly tied the assailant to the home at 6700 Drylog Street and sought the weapon and the cell phone used

to place the call for taxi service. It was reasonable to infer that the items sought would be kept in the perpetrator's home. *See generally Agurs v. State*, 415 Md. 62, 87 (2010)("there is more likely to be probable cause to search a suspected drug dealer's home when the police have seen the suspect engage in a drug sale near his home"). As a result, the issuing judge had a substantial basis to find a nexus between the alleged crime and Barbour's residence.

B. Breadth of the Search Warrant

Barbour argues that the search warrant was overly broad because the request to search for "any and all cellular phones and their contents" and "locked containers that could hold firearms, paper, or phones" was not linked to a particular offense and contained no limit on the scope of the search. This argument is without merit.

Certainly, the Warrant Clause of the Fourth Amendment prohibits the issuance of any warrant except one that particularly describes the place to be searched or the person or things to be seized. *Walls v. State*, 179 Md. App. 234, 246-47 (2008)(and cases cited therein). The purpose of the particularity requirement is "to prevent general searches." *Id.* As we stated in *Walls*:

> "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."

Id. (quoting *Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987)).

In his brief, Barbour challenges only "the broad categories of locked containers and telephones," and does not raise any argument with respect to firearms or the cell phone

corresponding to the phone number (240) 667-6364. There is nothing in the record before us to suggest that locked containers or other telephones were seized. Even assuming, arguendo, that the portion of the warrant allowing for the search and seizure of locked containers and other telephones was partially invalid, "the 'objectives of deterrence and integrity may be served … by limiting suppression to the fruits of the warrant's unconstitutional component.'" 2 LaFave, *Search & Seizure* § 4.6(f) at 815 (West 5th ed. 2012). The police in the instant case seized only items that were particularly described in the warrant, and did not seize any item challenged on appeal. Accordingly, Barbour is not entitled to relief.

Moreover, even if the warrant lacked the requisite particularity, we would conclude that the police reasonably relied upon the warrant in objective good faith. As the Supreme Court has recognized, the exclusion of evidence is an "extreme sanction" that "has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). In the instant case, there is no assertion that the police were dishonest or reckless in preparing the warrant application. The only issue is whether the police had an objectively reasonable belief in the existence of probable cause and particularity in the warrant. In considering that issue, we apply an objective test and determine whether a police officer "'exercising professional judgment, could have reasonably believed that the averments in their affidavit related to a present and continuing violation of law, not remote from the date of their affidavit, and that the evidence sought would be likely found at [the place identified in the affidavit].'" *Patterson v. State*, 401 Md. 76, 107 (2007)(quoting *Connelly v. State*, 322 Md. 719, 735 (1991)). A "'bare bones' affidavit is one that contains 'wholly

conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause.'" *Id.* (quoting *United States v. Laury*, 985 F.2d 1293, 1311n.23 (5th Cir. 1993)). Once a warrant is issued, reliance on it is objectively reasonable if it contains any factual indicia of probable cause. *Id.* at 108.

The affidavit in the case *sub judice* was not "bare bones." It did not contain wholly conclusory statements devoid of factual support and did not fail entirely to particularize the items to be sized. Rather, it averred that an attempted armed robbery occurred a short distance from the house to be searched and that people who resided in that house were connected to the telephone number used to call for the taxi. The application sought the gun and cell phone used in the crime in a place they were reasonably likely to be found. These facts supplied "some indicia of probable cause" such that good faith reliance on the warrant was justified.

IV.

Barbour's final argument is that the trial court abused its discretion in accepting a partial verdict and denying his request for a mistrial. On the second day of trial, the jury retired to deliberate at 3:23 p.m. The jurors returned to the courtroom at 3:45 p.m., and at their request, the video recording from Jerry's Carryout restaurant and the 911 recording were re-played. At 4:09 p.m., the jurors returned to the jury room to continue deliberating. The jurors returned to the courtroom at 5:40 p.m. and advised the judge that they could not reach a unanimous verdict as to the charges of armed robbery and attempted robbery with a dangerous weapon. Defense counsel requested a mistrial and pointed out that the jury

had been deliberating almost as long as the testimony portion of the trial. The court denied the request for a mistrial.

When asked by the trial judge if further deliberation might result in a verdict, the foreperson responded in the affirmative. The judge then instructed the jurors to return to court the next day for further deliberations. At that point, one of the jurors stated that she was unable to return to court on the following day because she did not have a ride to the courthouse and also had an appointment at noon. Defense counsel again requested a mistrial, and the judge denied that request, stating that he "would take a partial verdict before [he] declare[d] a mistrial." The judge instructed the jurors to continue to deliberate, stating:

> I am going to suggest that you all go back and continue to deliberate. However, I want to be clear. You are not to reach unanimous verdicts on Counts I and II solely to try to get out of here or to avoid coming back tomorrow. This case is important to everybody, including yourselves. But, you should not come to a verdict solely to get out of here. Okay. All right. So, you are free to go back.

At 6:01 p.m., the jury returned to the jury room for further deliberations. At 6:30 p.m., the judge brought the jurors back into the courtroom and asked if they had reached a unanimous verdict. The jury advised that they had not reached a unanimous verdict on the charges of armed robbery or attempted robbery with a dangerous weapon, but had reached a unanimous verdict with respect to all of the other charges. Defense counsel again requested a mistrial, suggesting that the jurors felt rushed and noting that "a lot of kind of yelling and loud voices" could be heard in the jury room. The judge denied the request for a mistrial, stating:

> They've been out now more than two hours. I guess initially the note said they could not reach a verdict. I sent them back in and they still haven't reached a verdict. So, I am going to note your objection. I am going to deny your request for a hung jury and note your objection and take the verdict.

The court then took a partial verdict and declared a mistrial as to the charges of armed robbery and attempted robbery with a dangerous weapon.

Barbour argues that the trial court abused its discretion in failing to declare a mistrial and accepting a partial verdict because the trial was neither long nor complex. According to Barbour, the fact that the jury could not reach a unanimous decision on two counts after two hours of deliberation "cast serious doubt upon its ability to ever come to a unanimous decision." Barbour further maintains that a mistrial was warranted because the statement by one juror that she was unable to return to continue deliberating the next day might have had "a coercive effect" on other jurors who had advised the court that further deliberations might be helpful. According to Barbour, it was improper for the judge to inquire into the status of the deliberations because the jury note did not reveal that the jury had reached a unanimous decision on any count and the court's inquiry "may have interfered in a deliberative process that was still ongoing."

In reviewing a trial court's denial of a motion for mistrial, we are cognizant of the fact that a mistrial is "'an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Cooley v. State*, 385 Md. 165, 173 (2005)(quoting *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*,

382 Md. 218, 226 (2004)(quoting *Kosmos v. State*, 316 Md. 587, 594-95 (1989)). The decision to deny a request for a mistrial is committed to the sound discretion of the trial court. *Cooley*, 385 Md. at 173. That decision shall not be reversed absent an abuse of discretion. *Simmons v. State*, 436 Md. 202, 212 (2013). An abuse of discretion has been defined as a decision that is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *King v. State*, 407 Md. 682, 697 (2009)(quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)(internal citations omitted).

Partial verdicts are governed, in part, by Maryland Rule 4-327(d), which provides:

> (d) **Two or more counts.** When there are two or more counts, the jury may return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree may be tried again.

In *State v. Fennell*, the Court of Appeals explained:

> Where, however, the jury indicates to the court that unanimity was achieved, at some point, on one or more counts, Maryland Rule 4-327(d) points the way for a trial judge to a reasonable alternative to the declaration of a mistrial. Thus, prior to declaring a mistrial without consent on those counts, the trial judge generally should take steps to determine that genuine deadlock exists as to those counts. One reasonable alternative is an inquiry into the jury's status and intention to render a verdict regarding those counts as to which unanimity appears, self-reported, to exist. In making this inquiry, however, the trial judge treads a fine line …: he must neither pressure the jury to reconsider what it had actually decided nor force the jury to turn a tentative decision into a final one. As the Court of Special Appeals noted in *Caldwell* [*v. State*, 164 Md. App. 612, 643 (2005)], the trial judge may not accept a verdict that is tentative, and thus, in determining whether to accept a partial verdict, must guard against the danger of transforming a provisional decision into a final verdict. Just as when the total circumstances disclose an ambiguity or qualification in a verdict, when they suggest that the jury has made a tentative decision, the court … should inquire into the jury's intention *vel non* that the verdict be final, if such inquiry can be done non-coercively;

> return the jury for further deliberation; or, if that is not possible and there is manifest necessity, declare a mistrial.

Fennell, 431 Md. 500, 523-24 (2013)(internal quotations and citations omitted).

In the case at hand, the trial judge inquired into the status of the jury's verdicts and the genuineness of the deadlock. The judge instructed the jurors that they were to continue deliberating without rushing, specifically admonishing them that "[y]ou are not to reach unanimous verdicts on Counts I and II solely to try to get out of here or to avoid coming back tomorrow…. But, you should not come to a verdict solely to get out of here." Ultimately, even after additional deliberation, the jury's verdicts remained unchanged. In light of these facts, the trial court did not abuse its discretion in denying Barbour's request for a mistrial or in accepting a partial verdict in accordance with Maryland Rule 4-327(d).

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