Circuit Court for Wicomico County
Case No. 22-K-16-000057

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2396

September Term, 2016

DOUGLAS WALTER SCHOOLFIELD

v.

STATE OF MARYLAND

Woodward, C.J.,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 4, 2017

*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.

A jury in the Circuit Court for Wicomico County convicted Douglas Schoolfield, appellant, of attempted second-degree murder, first-degree assault, second-degree assault, two counts of conspiracy to commit first-degree assault, two counts of conspiracy to commit second-degree assault, reckless endangerment, and possession of a firearm by a prohibited person. The court imposed an active period of incarceration of twenty years. Appellant's sole contention on appeal is that the court abused its discretion in accepting a partial verdict. For the reasons stated below, we do not perceive an abuse of discretion in the court's action, and we affirm.

BACKGROUND

Shortly after 11:00 P.M. on December 19, 2015, Darren Gayle spoke to his friend, Ashley Cannon, on the telephone. At the time of the conversation, Cannon was in her vehicle with appellant and Luquan Brittingham.[1] Gayle asked Cannon to tell the men to be quiet. Appellant said something in response, and the men began arguing. Gayle then asked appellant if he wanted to fight. Approximately five minutes later, in another phone call, Gayle told Cannon to bring the man to him if he wanted to fight. Appellant drove to his house where he and Brittingham retrieved a bookbag. Appellant then directed Cannon to drive to Gayle's house, which she did. Along the way, Cannon observed a gun that she described as a black rifle. At some point, Cannon told Gayle not to come outside because appellant had a gun.

---

[1] Various witnesses testified that Brittingham was either appellant's brother or friend. For purposes of this opinion, the exact nature of Brittingham's relationship to appellant is irrelevant.

Cannon stopped near Gayle's house in Salisbury in the early morning hours of December 20th. She waited while appellant and Brittingham exited the vehicle and walked toward Gayle's house. Gayle, meanwhile, was standing in front of his house. Initially, he observed two men walking toward him, but he believed they were out for a walk. Then, he saw one of the men retrieve a black rifle and fire a shot. The bullet hit Gayle in the side, and he ran to the back of his house. He heard "six or seven" more shots as he fled. From her vehicle, Cannon heard one shot, followed quickly by another loud noise. Appellant and Brittingham ran back to her car. They did not say anything about what had occurred, but they directed Cannon to drop them off near appellant's house.

Gayle, meanwhile, was transported to the Peninsula Regional Medical Center ("PRMC") and treated for his wound. At the hospital, he identified a photograph of appellant as the shooter. Cannon learned about Gayle's injury from his mother. Cannon decided to drive to her home in Delaware. Appellant directed her to delete "everything" on her phone and Facebook, which she did. Shortly afterward, police questioned Cannon, and she told investigators about the phone conversations, argument, and fight.

From the scene of the shooting, police recovered five bullet casings. Police were also able to retrieve the bullet from Gayle's body. In executing a search warrant at appellant's residence, police recovered a duffel bag from a shed in the backyard. Inside the duffel bag, police found a disassembled Smith & Wesson M & P 15, .22 caliber long rifle and a magazine containing nine unfired bullets. Susan Kim, accepted as an expert in the identification of firearms and tool mark identification, testified that she was able to assemble the rifle, and it was operable. Furthermore, she test-fired the weapon and

compared the fired bullets and shell casings to those recovered from the scene and Gayle. She testified that the casings found at the scene and the bullet from Gayle were fired by the rifle recovered from appellant's residence.

On the second day of trial, after hearing approximately a day's worth of testimony, the jury retired to deliberate at 3:30 P.M. At 4:05 P.M., the court received several questions from the jury, to which the court responded, and part of the response included the provision of a written transcript of the jury instructions addressing the charged offenses. At 4:10 P.M., the jury requested to see the taped interview of appellant. The jury viewed the recording at 4:45 P.M. and retired to renew deliberations at 4:55 P.M. Around 5:15 P.M., the court permitted one juror to retrieve a cell phone to make child care arrangements, and the court informed the jury about dinner options.

At 5:55 P.M., the court received a note from the jury which read: "Why is not the choice of conspiracy to attempted murder not available to us?" There was another question asking the court to inform the jury that Cannon "is not on trial and will suffer no additional charges from the jury decision on the Defendant[.]" While the parties considered the response to that note, the court received another, which read: "[I]f found guilty on [counts] 1, 5, 7, and 10, does 15 have to be guilty as well?" In response, the court informed the jury that the previously dismissed charges were "no longer a part of this case. You should not consider those charges or the reason they are not before you." Additionally, the court informed the jury that any possible consequences to Cannon should not be considered. As to the last question posed, the court instructed the jury to see page seventeen of the instructions.

At 7:06 P.M., the court received a note informing the parties as to a child care issue with one of the jurors: the juror explained that she needed to leave by 8:00 P.M. Defense counsel asked the court if it would be preferable to dismiss the jury for the night and continue deliberations the next day. The court stated that it would take up the issue if the need arose. At 7:35 P.M., the court received a note that asked: "[W]hat happens tonight if we can't come to a decision on [counts] 1 and 15?" After discussing the appropriateness of an *Allen* charge and whether further deliberations would be worthwhile, the court called the jury into the courtroom, and the following occurred:[2]

> THE COURT: All right. For the record the ladies and gentlemen of the jury are all present and seated in the jury box. And I have your most recent note, which reads, what happens tonight if we can't come to a decision on 1 and 15.
>
> So I infer from that that you're having difficulty coming to a decision on 1 and 15; is that right?
>
> (Jurors nodding in the affirmative.)
>
> THE COURT: They're nodding their heads in the affirmative.
>
> Ladies and gentlemen of the jury, the verdict must be the considered judgment of each of you. In order to reach a verdict all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations do not hesitate to examine your own views. You should change your opinion if convinced you

[2] "'The term *Allen* instruction is a legal eponym derived from a United States Supreme Court opinion approv[ing] the use of an instruction in which the jury was specifically asked to conciliate their differences and reach a verdict.'" *State v. Hart*, 449 Md. 246, 255 n.1 (2016) (quoting *Nash v. State*, 439 Md. 53, 90 (2014)). In Maryland, the giving of a modified *Allen* charge has been approved in certain situations. *See Nash*, 439 Md. at 93.

> are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.
>
> So I say that to determine whether, having been so instructed, whether further opportunities to deliberate will move you forward to being able to reach a verdict. And I'm going to send you back, and you can let me know whether that's the case, whether you think with additional time you'll make progress.
>
> And in addition, we do have one issue with one juror, and what I'm going to do is, from that juror, I understand that she needs to leave by 8:00.
>
> Is that right?
>
> JUROR: Yes, ma'am.
>
> THE COURT: And so, once I know from you all whether further deliberations would be productive, we'll have to figure out what to do about arranging for them if between now and eight o'clock you're not going to have adequate time to go through all of that, okay? So it's a two-part question, but if you just tell us the answers we will come up with a solution.

At 7:40 P.M., the jury retired to renew deliberations, and the court observed:

> Okay. So anyone go very far [sic], we'll see whether they believe further opportunity for deliberation will move them forward. And if it will, then we can make arrangements to have the juror leave and come back tonight or we can consider bringing them back tomorrow. The concern, of course, is that when you break the jury and you don't have an alternate, we may be doing this all over again.
>
> That's not my first choice, to have the last, you know, only the twelve that we have go home for an evening and risk the possibility that, you know, somebody may not be able to return for deliberations to continue tomorrow. But it may be the only option we have, and I recognize that fact. So worse things have happened in the history of jury discussions.

At 7:53 P.M., the court received a note from the jury, and the following colloquy ensued:

THE COURT: The note says, can't come to a decision on two charges. And judging from the last note I'm guessing that's 1 and 15.

[DEFENSE COUNSEL]: Would the Court be willing to bring them out and ask if they believe that if they were to resume deliberations tomorrow, whether they believe that that would be fruitful in reaching a decision?

THE COURT: No, because I basically already asked them that. What I said was, what I need to know from you is, with further time, would you be able to progress to reaching a verdict, and if so we will come up with a solution on how to provide you with further time. And their response is, they can't come to [a] decision on two charges.

So I'm inferring from that that further time would not assist them, or they would say we need further time.

[DEFENSE COUNSEL]: Okay.

THE COURT: How would you like to proceed?

[PROSECUTOR]: I've been deferring to [defense counsel] all night, because my concern with these issues is that, what the defense proposed seems to be the best on appeal, that if what they asked for they got, there always seems to be no issues on appeal, so with that I've just been deferring, letting [defense counsel] make every recommendation tonight. We can –

THE COURT: Do you want me to ask them whether they have a unanimous verdict on any charge?

[PROSECUTOR]: We can ask them that.

THE COURT: Do you want me to have them come out to ask them that question?

[PROSECUTOR]: Yes, because then we could, at that point I think determine if it's a hung verdict, or if it's a hung jury as to two counts.

THE COURT: I think it's a hung jury as to two counts, is what they're telling me.

[PROSECUTOR]: And then we could declare a mistrial and set it in for, or depending on the outcome, there might not be a need for a mistrial.

> THE COURT: So do you want to take a verdict on the charges that they aren't hung on if it's unanimous? Is that right or wrong, [defense counsel]?
>
> [DEFENSE COUNSEL]: This is always the debate at this juncture. I think I'm entitled to two things, I can either agree to take a partial verdict, or I could ask for a mistrial because it's not unanimous as to all counts.
>
> May I have one moment?
>
> [Defense counsel then conferred with appellant.]
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to ask for a mistrial on all counts.
>
> THE COURT: Okay. Under what authority do you have the right to ask for a mistrial on all counts if they have a unanimous verdict on some?
>
> [DEFENSE COUNSEL]: The only authority that I have and, quite honestly, I think the law is fairly scant in this area, but I'm not consenting to a partial verdict. If there is a partial verdict, the State has the option to come back and retry. So me not consenting to it, I would be arguing that if you take a partial verdict, there would be double jeopardy if they came back to retry the other counts. If they're hung, they're hung, and I would ask for a mistrial since they can't agree.
>
> THE COURT: [Prosecutor], what is your preference?
>
> [PROSECUTOR]: I do not believe that double jeopardy would trigger.
>
> THE COURT: So the question is, would you prefer that I take a verdict on the unanimous, if they have a unanimous verdict on some counts?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Okay. In which case we will parcel out later whether there is a double jeopardy claim, yes?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Okay. Ask the jury to return.

The jury returned to the courtroom at 7:55 P.M., and the following ensued:

> THE COURT: All right. For the record, the ladies and gentlemen of the jury are all present and seated in the jury box.
>
> I have a note that says, can't come to [a] decision on two charges. And the State and defense were given the opportunity to physically see it. It's been read into the record.
>
> * * *
>
> THE COURT: I'm inferring from your note that you don't believe with additional time you will be able to progress on those two charges.
>
> Is that right, Mr. Foreperson?
>
> FOREPERSON: Yes.
>
> THE COURT: Okay. Do you have a unanimous verdict on any counts?
>
> FOREPERSON: Yes, a couple of them.

The court then proceeded to take a partial verdict as to every count, except for attempted first-degree murder and the use of a firearm in a crime of violence. At sentencing, the State *nol prossed* those charges.

DISCUSSION

On appeal, appellant contends that the court abused its discretion in taking the partial verdict because the court could have dismissed the jury for the night and brought them back the next day to continue deliberations. Appellant points out that the jury had been deliberating for approximately four hours and had sent several notes to the court at the time the court accepted the partial verdict. Essentially, appellant maintains that the court never informed the jury of the possibility of returning the next day, and that the discussion of further deliberations should have been understood in the context of the jury's phrasing of its question, *i.e.*, "what happens tonight."

Rule 4-327(d) permits the taking of partial verdicts.[3] The Court of Appeals has observed that the decision as to whether to take a partial verdict "is largely an exercise of the trial judge's discretion[.]" *State v. Fennell*, 431 Md. 500, 524 (2013). We will, accordingly, reverse for an abuse of that discretion. A trial court abuses its discretion "'where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles.'" *Williams v. State*, 232 Md. App. 342, 356 (2017) (quoting *Webster v. State*, 221 Md. App. 100, 112 (2015)), *cert. granted*, 454 Md. 679 (2017). Stated another way, a court abuses its discretion where the ruling under consideration "'is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Lopez v. State*, 231 Md. App. 457, 476 (quoting *Patterson v. State*, 229 Md. App. 630, 639 (2016), *cert. denied*, 451 Md. 596 (2017)), *cert. granted*, 453 Md. 8 (2017).

Appellant relies primarily upon *Caldwell v. State*, 164 Md. App. 612 (2005). In that case, the trial court accepted a partial verdict on eleven counts and declared a mistrial on three others. *Id.* at 620. Prior to taking the partial verdict, in a colloquy at the bench, the court inquired of the jury foreperson as to the status of jury deliberations with the courthouse scheduled to close within an hour due to an incoming hurricane. *Id.* at 624. Furthermore, the courthouse likely would not reopen the following day, a Friday, and one of the jurors could not return after the weekend, and the defense would not consent to an

[3] The rule provides: "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."

eleven-person jury. *Id.* at 624-25. The jury foreperson informed the court that the jury was unanimous as to everything except for one count, but some jurors would potentially change their votes depending on the resolution of the other charge. *Id.* at 625-26. Because of the circumstances, the court proceeded to take a partial verdict, noting, however, that "the jury 'possibly could' reach verdicts on the undecided counts, if left to deliberate further[.]" *Id.* at 627. At that point, the jury foreperson advised the court that the jury had unanimous verdicts on all but two counts, but defense counsel noted that the jurors were talking amongst themselves – apparently deliberating. *Id.* The court took the partial verdict, and the jury acquitted Caldwell of attempted first-degree murder, convicted him of ten other charges, and returned no verdict on three. *Id.* at 627-29.

On appeal, Caldwell argued that the court had accepted tentative votes in taking a partial verdict. *Id.* at 633. This Court observed that a court commits legal error in accepting a verdict where the jury has not agreed. *Id.* at 635. Because "[a] verdict is defective for lack of unanimity when it is unclear whether all of the jurors have agreed to it[,]" and "a verdict does not satisfy the unanimity of assent requirement . . . when the decision of a juror or the jury as a whole is conditional[,]" we concluded that the court abused its discretion in accepting a partial verdict. *Id.* at 636. We cautioned:

> A verdict that is tentative, not being by unanimous consent, is defective and not valid. In deciding whether to accept a partial verdict, a trial judge 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 must not accept the verdict. It 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. Doubt must be

> resolved in favor of the defendant's constitutional right to a verdict by unanimous consent.

Id. at 643. We review *de novo* whether a verdict was unanimous, as a mixed question of law and fact. *See id.*

We are not persuaded that the jury's verdict was tentative in this case, and, we, therefore, do not perceive an abuse of discretion in accepting a partial verdict. Unlike in *Caldwell*, where the jury was deliberating while the partial verdict was taken, the jury in this case clearly stated that it had reached unanimous verdicts on every count except for two. The jury foreperson then agreed with the court's inference that further time for deliberation would not lead to a resolution of those two counts. There was no danger, therefore, that the court's acceptance of the partial verdict "transformed" a tentative decision into a final one. The jury had a final decision that was partial, and the court did not abuse its discretion in accepting the partial verdict.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.