In the Circuit Court of Prince George's County

Case No. CT151125X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2372

September Term, 2016

AARON CHRISTOPHER WIMBERLY

v.

STATE OF MARYLAND

Eyler, Deborah S,
Wright,
Berger,

JJ.

Opinion by Wright, J.

Filed: March 15, 2018

Questions from a jury present delicate matters that must be handled with great caution. In *Nash v. State*, 439 Md. 53, 57 (2014), Judge Harrell highlighted this concern providing:

> In a trial court judge's management of a trial, few circumstances come fraught with as much peril as the receipt of a note from a deliberating jury. Whether to deal with it? How to deal with it? Some jury notes contain innocuous questions or statements to which a presiding judge may respond with ease. Other notes may pose, however, more problematic questions or statements that place a judge between a modern Scylla and Charybdis. Although the judge may want to be helpful in responding to the jury, he or she must take care not to be coercive or suggestive of an outcome. A quick response may be in the best interests of everyone involved, but rashness is rewarded with reversal oft-times. Always at the ready are the litigants and their attorneys, on edge after a hard fought trial, with motions, requests for curative instructions, or other proposed courses of action that may be influenced by their respective advocacy interests in the outcome of the trial. Looming too are we, the appellate courts, ready to swoop in from our high perch to scrutinize, in hindsight and with the benefit of briefs, every aspect of the decisions the trial judge had to make in real-time.

We remain cognizant of his caution as we address this appeal.

Aaron Christopher Wimberly, appellant, was charged in the Circuit Court for Prince George's County with second degree rape, third degree sexual offense, fourth degree sexual offense, and second degree assault. He was found guilty of third degree sexual offense, second degree assault, and not guilty of the remaining counts. During deliberation, the jury sent a note asking, "Do we have to agree on all charges? Would it be a hung jury if we can't agree on one count?" Wimberly requested that the judge instruct the jury that it had the option to return a partial verdict. The presiding judge denied the request. After the verdict and sentencing, this timely appeal followed.

Wimberly presents the following issue which has been rephrased for clarity:

> Whether the circuit court erred in failing to instruct the jury that it had the option of returning a partial verdict and gave a modified *Allen* charge in response to its note inquiring whether it must agree on all charges to avoid a hung jury?[1]

For the reasons below, we affirm the judgment of the circuit court.

BACKGROUND

When the victim ("J.G.") was 12 years old, her cousin helped her set up a profile on "hi5," a social networking site used "to meet people." J.G.'s profile included a picture of herself and indicated that she was 18 years old. At some point after J.G.'s account became active, an individual who introduced himself as "Henry," later identified in court as Wimberly, initiated conversation with J.G. The two messaged over various social networking and messaging sites and, at Wimberly's request, they eventually began speaking over the phone. During one of the phone conversations, J.G. revealed that she had just turned 13 years old. Wimberly, 34 years old at the time, responded that "he didn't mind." After "three or four" phone calls, Wimberly steered the conversations in a sexual direction and began asking questions such as "if [J.G.] was a virgin."

Wimberly then asked to come over to J.G.'s home, and she said "okay." When he arrived, they went "straight upstairs" to her bedroom and sat on her bed together. Wimberly took out a bag he brought containing "[a]lcohol and weed" and instructed J.G. to get some juice to mix with the alcohol. After she brought back two cups with juice, he

[1] Wimberly phrased the question as follows:

> Where the jury advised the trial court that it had reached unanimous agreement on all but one count, did the court err in refusing to instruct the jury that it had the option of returning a partial verdict?

added the alcohol and gave her a cup to drink. Wimberly took J.G.'s hand and placed it over his pants on his penis, and she quickly moved her hand away. He then pushed J.G. onto her knees, "unzipped his jeans and pulled out his penis." He "put his penis in [her] mouth" and moved "her head . . . back and forth." After some time, J.G. stopped and eventually left the room to brush her teeth. When she returned from the bathroom, he "laid next to [her] and tried to touch her "between [her] legs" and told her "he had a 13-year-old daughter." He also put his hands under her shirt and in her pants. Next, Wimberly "pulled off [her] leggings and underwear," "took off his boxers," and put his penis in her vagina. When she told him to "stop because it hurt," he told her to "shut up." After he changed his position, he pulled his penis out and "ejaculated on [her] back." Wimberly wiped off her back with a t-shirt, and she went to the bathroom at which point she noticed she was bleeding. When J.G. returned from the bathroom, she and Wimberly recorded a video on her bed together. Soon after, Wimberly left because her grandmother would be coming home.

J.G. and Wimberly continued to message and talk over the phone, and J.G. invited him over again at her cousin's recommendation. When Wimberly came over, J.G.'s aunt and aunt's boyfriend were in the basement, and J.G. and Wimberly went "straight to [her] room." Her cousin and cousin's friend initially sat in J.G.'s room with them, but then decided to stand in the hallway outside J.G.'s room. After hearing the noise J.G.'s cousin and her friend were making, J.G.'s aunt came upstairs and asked about the noise. At that point, Wimberly hid in J.G.'s closet. J.G.'s little brother came in the room and opened the closet to reveal Wimberly.

J.G. "tried to make up a lie" that Wimberly was "somebody from school," but J.G.'s aunt did not believe her and told Wimberly to leave. Wimberly left, leaving behind a bag of various items including a paystub in his name.

J.G.'s aunt's boyfriend called the police, and the police spoke with J.G. Though she denied it at first, she eventually admitted that she and Wimberly had "sexual contact." She went to the police station and then to the hospital where she was examined by a sexual assault forensic nurse. J.G. picked out Wimberly from a photo array and provided a written statement. After Wimberly was charged, J.G. explained to the prosecuting attorney that she had performed oral sex on Wimberly in addition to the other "sexual contact" she previously described.

The trial began on October 24, 2016. On October 26, 2016, at 1:57 p.m., the jury retired to deliberate. Around 4:15 p.m., the court sent the jury a note asking whether they would rather continue deliberations or return the following day; the jury chose the latter.

On October 27, 2016, at 9:54 a.m., the jury sent a note asking to see J.G.'s written statement to police, which had not been admitted into evidence. At this time, a substitute judge was sitting in for the presiding trial judge. The parties agreed that the judge would instruct the jury that it had all the admitted evidence.

At 11:34 a.m., the jury sent another note, asking:

> *Do we have to agree on all charges? Would it be a hung jury if we can't agree on one count?*

The defense counsel and the prosecutor came back into the court to discuss the note. The prosecutor stated she believed "that an *Allen* instruction[2] needs to be given" since "[t]hey have not been deliberating long enough . . . to accept a partial verdict." Defense counsel stated there had been "the equivalent of two full days of testimony with . . . about five hours of deliberations." The judge suggested that the court instruct the jury to "keep deliberating" until lunchtime. Defense counsel responded:

> It seems they have reached a verdict on something. By giving the *Allen* charge or by telling them do you think further deliberation you could reach a verdict, I think that deprives them of the knowledge that they may, in fact, reach a partial verdict on some of the others. And I think that would be spelled out, yes, you may, in fact, agree on some counts but not others but I ask you to go back and deliberate some more to see if you can resolve all of them.

After further discussion, both attorneys agreed that the jury should be sent to lunch, and they could reargue the issue in front of the presiding trial judge when he returned. The judge brought the jury out to instruct them orally and in writing that they should "go to lunch and we will address this after lunch."

At 1:17 p.m., defense counsel and the prosecutor appeared in front of the presiding trial judge. Defense counsel argued, again, that the jury's "reasonable question" should be addressed. The judge decided that he would "wait and see if they send another note." If the jury did so, then he would give the *Allen* charge.

[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.'" *Nash*, 439 Md. at 53 (citation omitted).

At 2:36 p.m., the court reconvened and advised counsel that it would be giving an *Allen* charge to the jury. Defense counsel renewed his argument that the jury be advised "of the correct answer" that a partial verdict is allowed before or after the *Allen* charge is given. The judge decided to simply provide the *Allen* charge as follows:

> All right. Good afternoon post-lunch folks. I heard that you-all had a question. And in response to things, what I'm going to do is give you one jury instruction and give you just another shot to see what can happen. Okay.
>
> The jury instruction is, 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 a verdict 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 reexamine your own views. You should change your opinion if convinced you are wrong but do not surrender your honest belief as to the weight or effect of the evidence only because the opinion of your fellow jurors [sic] or for the mere purpose of reaching a verdict.
>
> So that's the instruction that I'm going to give you. And I'm going to give you another opportunity to see what you can come up with. And thank you for your careful consideration in this matter.

At 3:17 p.m., the jury reached its verdict. It found Wimberly guilty of third degree sexual offense and second degree assault, and not guilty of second degree rape and fourth degree sexual offense.

Additional facts will be provided as necessary, in the relevant section, below.

STANDARD OF REVIEW

"A trial court's refusal or giving of a jury instruction" is reviewed under an abuse of discretion standard. *Stabb v. State*, 423 Md. 454, 465. Further, "[t]he decision of whether to give supplemental instructions is within the sound discretion of the judge and will not be disturbed on appeal absent a clear abuse of discretion." *Sidbury v. State*, 414 Md. 180, 186 (2010). "[A] clear showing of abuse of discretion" occurs when the discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Appraicio v. State*, 431 Md. 42, 50 (2013) (quoting *Atkins v. State*, 421 Md. 434, 447 (2011)).

DISCUSSION

I. Jury Note

A partial verdict, permitted by Md. Rule 4-327(d), is a "verdict on less than all counts in a multi-count case." *Caldwell v. State*, 164 Md. App. 612, 631 (2005). Md. Rule 4-327(d) states: "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."

Wimberly relies upon *Caldwell*, 164 Md. App. at 612, and *State v. Fennell*, 431 Md. 500 (2013), in support of his argument that a supplemental instruction should have been given in response to the jury note explaining that the jury may return a partial verdict. However, these cases are distinguishable from the instant case in relevant part.

In *Caldwell*, 164 Md. App. at 624, after the judge explained to the jury that the court was closing due to an impending hurricane, the foreperson informed the judge that

the jury had reached a "unanimous verdict on every count but one." After discussion with the attorneys, the judge decided to "take the verdict on the counts [the jury] reached a unanimous verdict on." *Id.* at 627. Defendant appealed and asked, in part, "whether the trial court erred by taking a partial verdict on the ten counts on which guilty verdicts were returned." *Id.* at 621. This Court stated that "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 "there is manifest necessity, declare a mistrial." *Id.* at 642. It held that the circuit court erred since the "partial verdicts were tentative and therefore not unanimous." *Id.* at 643.

In *Fennell*, 431 Md. at 505-507, "the jury gave the bailiff a completed verdict sheet to take to the judge" with unanimous verdicts on three of the five counts. After the judge and counsel for both parties discussed the matter, and the jury continued to deliberate for some time, the judge brought the jury out. *Id.* at 509. In response to the judge's inquiries about the status of its deliberations, the foreperson insisted no further progress could be made. Defendant requested a partial verdict, but the judge decided to declare a mistrial. Defendant appealed, and the Court of Special Appeals reversed. *Fennell v. State*, 205 Md. App. 768 (2012). The Court of Appeals granted *certiorari* and affirmed, noting that "[w]here . . . the jury indicates to the court that unanimity was achieved, at some point, on one or more counts . . . the trial judge generally should take steps to determine that genuine deadlock exists as to those counts."

In this case before us, the jury did not state in its note that it had reached a verdict on any of the four counts. What was absent was a statement by the foreperson that the jury had reached a verdict on all but one count as in *Caldwell*. The jury did not provide a completed verdict sheet to the bailiff on three of the five counts as in *Fennell*. Instead, the jury sent a note to the judge inquiring whether it must agree on all charges and whether it would be a hung jury if it did not. We agree with the discernment of the trial judge that the note stated nothing definite but merely posed a question. Because there is no indication that "unanimity ha[d] been achieved," the step to "inquire into the jury's intention," as suggested in *Caldwell*, or immediately "take steps to determine that genuine deadlock exists," as directed in *Fennell*, was not triggered. *Caldwell*, 164 Md. App. at 635; *Fennell*, 431 Md. at 523.

In *Nash*, during jury deliberations, the jury foreperson sent a note to the court which read literally: "I dont believe the defendant is being give a fair verdict based on one of the juror stating out loud that she will vote guilty because she want to go home and not return! When she previously said no guilty." *Nash*, 439 Md. at 58. After discussing the note with the prosecutor and defense counsel, the circuit court judge reminded the jury that its decision must be based on what was presented at trial and excused the jury for the weekend. *Id.* at 62. When the jury returned, it was instructed to resume deliberations, and it ultimately found the defendant guilty. *Id.* at 63. The defendant appealed, and the Court of Special Appeals affirmed the circuit court. *Nash v. State*, 211 Md. App. 766 (2013). The Court of Appeals granted *certiorari* and also affirmed, explaining that the circuit court judge's response was appropriate since she interpreted

the statement described in the jury note as "the result of exhaustion or frustration." 439 Md. at 96. Since "the note did not pose a question from the jury regarding applicable law that required specific clarification," the circuit court judge's decision not to provide a direct response, but instead "to recess for the day, with the original and additional instructions she provided" was appropriate. *Id.*

In *Sidbury v. State*, 414 Md. 180, 184 (2010), the jury sent a note asking: "If the jury is hung on the degree of murder (first or second), will the defendant go free?" The circuit court judge answered by stating, "That's not an issue for you to concern yourselves with" and provided a further instruction on the juror's duty to deliberate. *Id.* at 185. Upon conviction, Defendant appealed to this Court which affirmed the circuit court. *Id.* at 182. The Court of Appeals granted *certiorari* and also affirmed, asserting that "the trial judge did not abuse his discretion, because 'the jury's only task was determining [defendant's] guilt or innocence' and 'the consequences of a "hung" jury were irrelevant to accomplishing that task and therefore not a proper consideration' for the jury." *Id.* at 191. In *Sidbury*, the Court of Appeals went on to opine:

> According to our jurisprudence and that of many of our sister states, [the circuit court judge's] response was appropriate and not an abuse of discretion. *See Starr v. Arkansas*, 297 Ark. 26, 759 S. W. 2d 535, 539 (1988) (refusing to answer questions presented by the jury regarding "the meaning of life without parole" and "what a hung jury is," was not an abuse of discretion, because matters of parole are not a proper consideration for the jury and "stick[ing] to the standard instructions" is appropriate), *rev'd on other grounds by Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994); *People v. Hines*, 15 Cal. 4th 997, 64 Cal. Rptr. 2d 594, 938 P.2d 388, 439, 441 (1997) (declining to answer the jury's question, "[w]hat happens if the jury becomes hopelessly deadlocked," posed during deliberations in the penalty phase of a capital trial, was appropriate, because "an instruction explaining the consequences of a hung jury 'would have the potential for

> unduly confusing and misguiding the jury in their proper role and function in the penalty determination process'"); *see also State v. Cruz*, 218 Ariz. 149, 181 P.3d 196, 213-214 (2008) (instructing jurors during the penalty phase of a death penalty trial to continue their deliberations when asked, "If one person's decision remains unchanged against the other 11 jurors [i]s this a hung jury? If so what happens next?" did not constitute reversible error, because the instruction given did not improperly coerce or influence the jury); *State v. Gauthier*, 916 So.2d 314, 321-22 (La.Ct.App. 2005) (instructing jurors to continue their deliberations and endeavor to reach a verdict was not an abuse of discretion when the jury asked whether a "hung jury (or mistrial)" was an option, because the trial court did not attempt to coerce minority members of the jury or imply that it would not accept a mistrial); *State v. Thomas*, 2001 Ohio App. Lexis 4226, at *2-6 (Ohio Ct.App. 2001) (giving an instruction encouraging the jury to reach a verdict was not an abuse of discretion when the jury asked during its deliberations, "what happens on a hung jury," because the trial court may have concluded from the nature of the question that the jury was deadlocked).

Id. at 190-91.

Similarly, in *Mitchell v. State*, 338 Md. 536, 538 (1995), the jury sent a note asking: "If the decision of the group is a hung jury, will the case be dismissed and [the defendant] walk[s], or will he be retried?" The circuit court judge responded: "Ladies and gentlemen of the jury, you have sent out a question. The question is not going to be answered, it's none of your concern, but I want to give you this instruction again" and then proceeded to provide a modified *Allen* charge. *Id.* at 539. The Defendant appealed, and this Court affirmed, stating that "[a]s a general rule, a jury should not be told about the consequences of its verdict – the jury should be focused on the issue before it, the guilt or innocence of the defendant, and not with what happens as a result of its decision on that issue." *Id.* at 540. Unless the defendant "raises a [not criminally responsible] defense" or it is a "capital case when the jury is involved in determining the defendant's sentence," the general rule applies. *Id.* at 540-541.

In the instant case, the general rule in *Mitchell* applies in that this case neither involves "a not criminally responsible" defense, nor is it a capital case. Thus, the jury's note was "outside of its purview" and "risk[s] distracting juror[s]" from their task of focusing on the law. *Sidbury*, 414 Md. at 190. As a result, the judge in this case declined to give an immediate direct response to the jury like the judge in *Nash*. After the jury was allowed to deliberate further, the judge gave the modified *Allen* charge just as in *Mitchell* and *Sidbury*. Because "[t]he consequences of a 'hung' jury were irrelevant to accomplishing [the jury's task of determining guilt or innocence]," they were "therefore not a proper consideration" in the instant case. *Mitchell*, 338 Md. at 542. Therefore, the circuit court judge was within his discretion when he did not respond to the jury's note with an explanation of a partial verdict as Wimberly requested.

II. *Allen* Charge

We now move to the issue of the *Allen* charge which is part and parcel to our required analysis. A modified *Allen* charge is "administered to juries upon an indication that they are deadlocked . . . ." *Hall v. State*, 214 Md. App. 208, 218-219 (2013). "[T]he decisions as to whether to utilize [the modified *Allen* charge], when to employ it, and what words should be selected are best left to the sound discretion of the trial judge." *Id.* at 219 (citing *Kelly v. State*, 270 Md. 139, 143 (1973)). Nevertheless:

> When [a modified *Allen* charge] is given as the result of an apparent deadlock, the trial court "should closely adhere to the wording of the ABA recommended instruction." However, the court is not "imprison[ed] . . . within the walls of foreordained verbiage[,]" and the trial judge may personalize the charge. When the trial court does not adhere closely to the language of the approved instruction, we must review the court's

> instruction carefully to determine "whether the province of the jury has been invaded and the verdict unduly coerced."

Id. at 220 (citation omitted). "As a result, a trial judge's safest course of action when using the [modified *Allen*] charge is to adhere to the MPJI-Cr [Maryland Criminal Pattern Jury Instructions] 2:01."[3] *Butler v. State*, 392 Md. 169, 186 (2006).

In *Hall*, 214 Md. App. at 214, the jury conveyed that it had reached "a unanimous verdict on all counts," but when the foreperson started to announce the verdict, there was some "confusion" among the jurors, and they were sent back to continue to deliberate. Six minutes later, the jury submitted a note stating: "We have a juror who is holding out & it will be *impossible* [underlined twice] to come to a unanimous verdict." *Id.* (emphasis in original). Though defendant's counsel objected, because the jury had only been deliberating for less than two hours total, the judge decided to give a modified *Allen* charge to the jury. *Id.* Defendant appealed and asserted that "the [modified *Allen* charge]

[3] MPJI-CR 2:01, states as follows:

> 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 reexamine your own views. You should change your opinion if convinced you 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.

given to the jury deviated impermissibly from the approved pattern instruction, and was unduly coercive." *Id.* at 218. This Court affirmed the circuit court, stating:

> In its instruction, the trial court included the content of MPJI-Cr 2:01 in its entirety, adding some language before and after the pattern instruction, as well as one sentence within the pattern instruction. It is the added language that appellant contests. However, we do not believe that the added language altered the substance of the pattern instruction.

Id. at 221.

In *U.S. v. Burke*, 700 F.2d 70, 78 (1983), during jury deliberations, the jury sent a note to the Court asking: "Do we have to reach a verdict for all five defendants; that is, can some be guilty of one or more counts, and the other be undecided?" *Id.* at 78. The federal district court judge responded: "Well, it's the desire of the Court and of all parties that if possible you return veridct [sic] on all five defendants *if you can do so without violating your individual conscience*." *Id.* (emphasis added). The defendants appealed, and the U.S. Court of Appeals for the Second Circuit affirmed. *Id.* at 74. It held that "the appellants were not prejudiced, nor was the jury coerced by the court's instruction." *Id.* at 80. In reaching this conclusion, the Court noted that it had "recognized that the district court may instruct the jury in an evenhanded, noncoercive manner that it would prefer a unanimous verdict if accomplished 'without any juror yielding a conscientious conviction which he or she may have.'" *Id.*

In the instant case, the jury sent its note to the circuit court judge at 11:24 a.m. After the jury returned from lunch, it continued to deliberate. The jury note, coupled with the approximate hour and twenty minutes of further deliberations after lunch, provided sufficient indication to the judge that the jury was deadlocked. Satisfied by the passage

of time "that [the jury was] deadlocked," the judge then brought the jury back to the courtroom. He instructed the jury in an evenhanded manner with a modified *Allen* charge nearly identical to the MPJI-CR 2:01 "adding some language before and after the pattern instruction" as the judge did in *Hall. Id.* at 221. In this case, "the province of the jury" has not "been invaded," and the verdict has not been "unduly coerced" because the circuit court judge "adhere[d] closely to the language of the approved instruction." *Hall*, 214 Md. App. at 219. The jury came back with convictions for third degree sexual offense and second degree assault, thereby giving the appellant every reasonable doubt as to the more serious charge of second degree rape. What should be abundantly clear is that, by allowing the jury further time to deliberate and providing the appropriate language for the modified *Allen* charge, the circuit court judge acted within his discretion in responding to the jury note and took care not to be coercive or suggestive of an outcome.

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