Circuit Court for Baltimore County
Case No.: K-18-0391 & K-18-0986

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED

No. 2804, September Term, 2018

and

No. 2671, September Term, 2018

WILLIAM JOHNSON AND DARRELL BURRELL

v.

STATE OF MARYLAND

Friedman,
Gould,
Wright, Alexander, Jr.,
(Senior Judge, Specially Assigned),
JJ.

Opinion by Gould, J.

Filed: July 9, 2020

*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.

William Johnson and Darrell Burrell appeal from a jury verdict in the Circuit Court for Baltimore County finding them guilty of attempted first-degree murder, first-degree assault, and related firearms charges. Their primary contention on appeal concerns an interaction between several jurors and a trial spectator.

During a break in jury deliberations, three or more jurors were exiting the courthouse when they encountered several trial spectators potentially associated with one or more of the defendants. One of the spectators cursed at the jurors. The next morning, one of the jurors reported the incident, noting that she believed it was an attempt to intimidate them. The trial court denied the defendants' motion for a mistrial and refused the defendants' subsequent request to voir dire the jury about the incident.

We shall vacate the trial court's decision and remand for a new trial. The court did not have enough information, based solely on the juror's note, to assess the incident's impact on the jury's ability to remain impartial and to otherwise confirm that the defendants' right to receive a fair trial had not been impaired. The court's failure to investigate the incident therefore constituted an abuse of discretion. Because we are vacating the court's decision, we need not address Mr. Johnson and Mr. Burrell's challenges to certain voir dire questions and testimony from the investigating detectives.

BACKGROUND FACTS AND PROCEEDINGS

On Christmas Eve 2017, a shooting occurred in the parking lot of Loafer's Lounge in Baltimore County. Within a month, Mr. Johnson and Mr. Burrell (the "Defendants") were arrested and charged with attempted first-degree murder (among other crimes), along with a co-defendant, Michael Sherman.

The defendants were tried jointly in the fall of 2018. Closing arguments occurred on the sixth day of trial, after which the jury was sent to deliberate. The next morning, "Juror 28" submitted a note to the court stating:

> This note is to inform you of an incident that took place yesterday while leaving court. A few of us were in the hallway with some of the guests that were sitting in the courtroom audience. I believe they were there to support one or more of the Defendants. As they left the double doors toward the elevator, I told [J[1]] it would probably be best if we let them go first and we could catch the next elevator. [J] agreed and we waited. Included in this group that witnessed was [J] and [D].
>
> There were others behind, but I can't remember who they all were. When I thought it was safe to exit the double doors, we went into the hallway and I pressed the button to go down. At that moment the guests looked out of the opened elevator and said, "we're still [here] you stupid bitch." I feel that this is an intimidation tactic. Although this incident happened . . . please be confident that it does not have any [e]ffect or change my opinion on the facts that I have heard in the courtroom.

At that point, Defendants and Mr. Sherman moved for a mistrial. The State opposed the motion because, it contended, the jury had properly brought the incident to the court's attention and the note stated it would not affect the jurors' deliberations. The court denied the motion, noting that the "letter from the juror was abundantly clear that it has no [e]ffect on her ability to be fair and impartial and to make a decision based on the evidence presented in the courtroom." The court also noted that it was declining to respond directly to the jury to avoid drawing attention to an incident of which some of the jurors might not have been aware. When Mr. Johnson's counsel noted that more than one juror had been involved in the incident, the court also noted that "if anybody wants to handle this further,

[1] The names of the jurors have been withheld to protect their privacy.

we can bring them out here and we can voir dire them, but I don't see the point in doing that. I'm not inclined to do that."

Later, the court received another, unrelated note from the jury about obtaining a copy of the jury instructions. Mr. Johnson's counsel took the opportunity to address the court and advised it that counsel for the three defendants had discussed the previous note and were jointly requesting to voir dire Juror 28 about the incident. He also requested that any jurors involved in the incident be subsequently voir dired to determine whether they could still be impartial.

The State objected to those requests because the jury had been deliberating for hours after the note was sent with no issue, and by bringing individual jurors out of deliberations, the court would be creating more questions than it answered. The court declined to voir dire the jurors, explaining:

> At this point what we have is a note from one juror who recounted the incident that happened yesterday. It does mention that there were one or two other jurors who were in the vicinity of that. Those other jurors did not decide to write a note to the Court about it. The interaction itself, while it's indicative of behavior that's rude to say the least, I don't think it necessarily impacts on any juror's ability to be fair and impartial and to make a decision based on the evidence presented in the courtroom, which is what they have been asked to do. So I'm going to deny the Defense'[s] request to do that.

The jury found Defendants guilty of attempted first-degree murder and first-degree assault, among other firearms charges. However, the jury acquitted Mr. Sherman of all charges.

After the verdict was entered, Defendants moved for a new trial, citing the court's refusal to grant a mistrial. The court denied the motion, noting first that there was no

purposeful misconduct on the part of the jurors. The circuit court then provided a detailed description of its rationale, explaining:

> Only one juror submitted a note and I've read that note. There was no indication in that note that the juror who submitted it knew which one of the Defendants or more than one Defendant the person who had this interaction was associated with. Either the other jurors did not witness the interaction or did not think it [warranted] submitting a note to the Court. The juror who wrote the note was unequivocal regarding her position that the interaction she had did not affect her ability to be fair and impartial and could decide the case based on the evidence presented in the courtroom. Again, she wrote, "Although this incident happened, please be confident that it does not have any [effect] or change my opinion on the facts that I have heard in the courtroom."
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> The Court finds that this is not presumptively prejudicial. The Court also finds that voir diring, as I did find when the request for a mistrial was made, that voir diring the jury would not have been the appropriate step to take at that time. Voir diring the jury would have resulted in questioning jurors one by one regarding an incident that they most likely did not have any involvement in and would have become aware of it through the voir dire process, which would have potentially created issues with respect to the ability of the jury to be fair and impartial.
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> The . . . necessity for a new trial is also belied by the length of the jury's deliberations. After closing arguments, they decided collectively to return the next morning to begin their deliberations. After deliberating for a full day, they reached a verdict. They asked questions throughout deliberations.
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> The . . . necessity for a new trial is also belied by the jury's verdict. They found two Defendants guilty and one Defendant not guilty. The length of the deliberations, coupled with the not guilty verdict for one of the Defendants supports the conclusions that the jury followed the Court's instructions regarding their deliberations and rendered fair and impartial verdicts based on the evidence presented in the courtroom.
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> The Court does not find that the interest of justice requires a new trial.

Both Defendants filed timely appeals, which this Court consolidated.

DISCUSSION

Defendants argue that the trial court erred by failing to either declare a mistrial or order a new trial (or at least conduct voir dire) after the juror revealed that she (and some other jurors) had an encounter with a trial spectator in the courthouse hallway. Defendants also contend that the trial court erred in propounding several compound questions regarding the prospective jurors' "strong feelings" about crime during voir dire.[2] Finally, Mr. Johnson argues that the court impermissibly admitted certain testimony regarding the police's investigation into other suspects.[3] Because we agree that the court erred by failing to at least voir dire Juror 28 about the incident, we need not address the latter two arguments.

JURORS' CONFRONTRATION WITH TRIAL SPECTATORS

The decision whether to deny a mistrial or a motion for a new trial is committed to the sound discretion of the trial judge. See, e.g., Dillard v. State, 415 Md. 445, 454 (2010); Jackson v. State, 164 Md. App. 679, 705 (2005). This is particularly true when the trial

[2] On a related note, Defendants also argue that their counsel were ineffective by failing to bring this error to the trial court's attention immediately.

[3] Specifically, Mr. Johnson notes that detectives testified for the State that, after analyzing historical cell phone records from an initial suspect (Dejuan McDuffy), they concluded that Mr. McDuffy was not at the scene of the crime and shifted their investigation to other individuals. Mr. Johnson contends that this testimony constituted inadmissible hearsay because it was based on out-of-court cell phone records and constituted impermissible lay opinion testimony by non-experts.

We recognize that there may be some potential value in addressing Mr. Johnson's hearsay challenge to the detectives' testimony. However, it would be inadvisable to do so here because we cannot predict *if* the issue of the detectives' investigation of Mr. McDuffy will be raised, and if so, in what context and with which evidence.

court is tasked with determining how to respond to a note from the jury. See Nash v. State, 439 Md. 53, 68-70 (2014). Nonetheless, a circuit court "has a duty to fully investigate allegations of juror misconduct before ruling on a motion for a mistrial, and that failure to conduct a *voir dire* examination of the jurors before resolving the issue of prejudice is an abuse of the trial judge's discretion" where it does not have enough information, on the face of the allegations, to determine whether impartiality has been compromised. Johnson v. State, 423 Md. 137, 151 (2011) (quotation omitted). This duty applies not only in cases of affirmative misconduct on the part of a juror, but also to any claim of possible "jury taint." See Dillard, 415 Md. at 461 (cleaned up) ("Where a colorable claim of jury taint surfaces before jury deliberations occur, the judge should investigate the allegation promptly, addressing whether the taint-producing event occurred, and if so, assessing the magnitude and extent of any prejudice caused."); see also Remmer v. United States, 347 U.S. 227 (1954) (requiring a hearing to determine circumstances of, and possible prejudice from, contact between third-party and juror, despite the absence of any claimed misconduct on the part of the juror).

Defendants argue that the trial court abused its discretion by failing to conduct a hearing to determine whether the jury's impartiality was compromised by the confrontation. Pointing to Johnson, Dillard, and Nash, among other cases, Defendants reason that a hearing was required because: 1) the conduct in question was egregious conduct warranting a presumption of prejudice; and 2) there was insufficient evidence before the court to determine whether the jury's impartiality was impaired. Because we find that the court needed more information before reaching conclusions about the incident,

we need not address whether the conduct was presumptively prejudicial. See Johnson, 423 Md. at 151.

In Johnson, the State admitted two battery-less cell phones into evidence, and sent them back to the jury. Id. at 141. One of the jurors inserted his own battery into the phones and found information that inculpated the defendant. Id. The circuit court declined to grant a mistrial based on the juror's improper action. Id. at 145. The Court of Appeals reversed, holding that the court had erred by failing to conduct a voir dire of the jury before denying the motion for mistrial. Id. at 141. The Court reasoned that, although it reviews the denial of a mistrial on an abuse of discretion standard, a circuit court must "fully investigate allegations of juror misconduct," including in some cases by conducting voir dire, when potential misconduct has come to light. Id. at 151 (quoting Dillard, 415 Md. at 461). The Court also explained that this duty arises regardless of whether the defendant makes a specific request for a voir dire because once the specter of juror misconduct arises, "the trial judge must conduct a meaningful inquiry that will resolve the factual questions." Id. (quoting Dillard, 415 Md. at 459).

In finding that the court did not have sufficient facts to exercise its discretion in denying a mistrial, the Court explained:

> Notwithstanding the obvious potential for prejudice to the defendant, the court took no steps to develop facts related to the effect the extrinsic information had on the jury. The court did not ascertain either the identity of the investigating juror who obtained the information from the cell phone, who among the remaining jurors was aware of what that juror had learned, or the degree to which the extrinsic and highly prejudicial information had upon some or all of the jurors. Much as we said in *Dillard*, individual voir dire of the jurors would have given the court insight into the degree to which the various members of the jury were touched by the misconduct of one of

> them and whether, ultimately, it was possible to have defendant's case be fairly decided.
>
> To be sure, there is no way of knowing whether further investigation would have supplied enough information to permit the court to remedy the juror's misconduct short of granting a mistrial. We are certain, though, that what the court opted to do in the present case fell short of what was necessary before the court could have properly exercised its discretion to deny the requested mistrial. Given the nature of the misconduct and the degree to which the extrinsic information obtained as a result could impair Petitioner's right to a fair trial by an impartial jury, the court could not reasonably rely simply on a general admonishment to the jurors that they must disregard the new, wrongly-obtained information. And the court's follow up question to the jury, as a group, whether anyone of them "is unable to comply with that instruction during deliberation?" was inadequate under the particular circumstances of this case to ensure that a mistrial was not warranted.

Id. at 153-54 (internal citations omitted).

Similarly, in Dillard, after one of the State's witnesses testified, two jurors encountered him in the hallway, patted him on the back, and told him "good job." 415 Md. at 448. The trial court, in denying the motion for mistrial, examined the witnesses in question but did not voir dire the jury. Id. at 452. The Court of Appeals, in reversing the decision and ordering a new trial, found that the court had "failed to resolve the factual questions" about the jurors' conduct that were raised by the encounter. Id. at 449. The Court noted that "the trial judge could not resolve the issue of juror misconduct without conducting a *voir dire* examination of the jurors to determine the intent or meaning of their contact with [the witness], whether they had reach a fixed opinion as to Dillard's guilt, and whether they had engaged in premature deliberations." Id. at 460. The Court observed that appellate courts from other jurisdictions have upheld cases in which the judge had

conducted a voir dire of the jury after a troubling incident, but have generally found an abuse of discretion where the court had failed to conduct a voir dire. Id. at 462-63.

On the other hand, in Nash, the Court of Appeals upheld the trial court's decision not to voir dire the jury when one juror, after five o'clock on the Friday of deliberations, commented that she was willing to change her position if it meant that she could go home. 439 Md. at 57, 85. Though the Court acknowledged that a trial court abuses its discretion in failing to voir dire a jury "when a material and relevant fact regarding a juror's conduct is unknown or obscure and must be resolved before a trial judge has sufficient information to determine whether the presumption of prejudice attached to the conduct or to rule on the motion for a mistrial," id. at 69 (cleaned up), it concluded that the trial court had sufficient information under the facts of the case to proceed without any voir dire. Id. at 85.

Specifically, the Court explained:

> We conclude that the trial judge had sufficient information before her to rule on the mistrial motion. She was not faced with the type of alarming factual issues arising from juror-witness contact that went unresolved in *Dillard*—i.e., what precipitated the contact between jurors and the witness, whether any of the jurors formed an opinion as to Dillard's guilt before he presented his case, and whether two or more jurors engaged inappropriately in discussions or conducted premature deliberation regarding Dillard's guilt or the credibility of the witness with whom the inappropriate contact was made.
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> Moreover, unlike in *Johnson*, the Subject Juror's alleged statement did not concern the introduction into deliberations of extrinsic "information . . . of central importance to what the jury ultimately had to decide." *Johnson*, 423 Md. at 153, 31 A.3d at 249. Nash argues that the Subject Juror's reputed statement concerned the issue of his guilt, and was, thus, of central importance to what the jury had to decide ultimately. His argument is misplaced. The information at issue in *Johnson* consisted of evidence not presented at trial that bore directly on the credibility of a key witness for the State. By contrast, the Subject Juror's supposed statement in the present case did not add to or otherwise affect the universe of evidence upon which the

> jury as a whole was to base its deliberation. Thus, the trial judge in Nash's case did not have essential factual issues to resolve before ruling on the mistrial motion.

Id.

This is a close case, but it tilts nearer to Johnson and Dillard than to Nash. First, the actual incident here was potentially more serious than the comment in Nash in which a juror expressed a desire to go home. In addition, the Court in Nash carefully differentiated those instances in which the jury's deliberation is tainted by extrinsic information, which would warrant further inquiry, from those that do not alter the "universe of evidence" on which the jury would decide the case, which may not warrant further inquiry. 439 Md. at 85. Here, unlike in Nash, the encounter was extrinsic to the deliberation and had the potential to alter the mix of information on which the jury decided the case. Most importantly, in Nash, the Court based its decision on the notion that there were no "essential factual issues to resolve" regarding the juror's conduct, id.; here, by contrast, the circuit court did not know the number of jurors involved in the incident, whether they associated the spectators with a single defendant, or whether other jurors interpreted the incident as an intimidation tactic, among other issues.

The State, acknowledging that a court generally has a duty to voir dire the jury where the relevant facts in question are unknown, nevertheless responds that the court had "the first-level facts of the interaction," and although it did not know how many jurors had witnesses the interaction and how those jurors perceived it, such information "had no potential to change the nature of the interaction itself."

We cannot dismiss those unknowns so easily. There was much that the trial court did not and could not know without further investigation, such as:

- Did the juror's note tell the whole story? That is, did the juror leave out any details that would shed light on what happened?
- How many jurors witnessed the encounter?
- Did the jurors involved mention the incident to any other jurors?
- Did the jurors discuss the incident as a group?
- How did the other jurors who witnessed the incident feel about it? Did they view it as simple rudeness, or an attempt at intimidation?
- Why did the other jurors who witnessed the incident not write a note?
- Did the jurors, or any one of them, associate the spectators with all the defendants, or one specific defendant?
- Did the interaction affect how the jurors viewed the evidence?
- Did the jurors believe that the interaction would affect their impartiality?

At best, the trial court knew only bits and pieces of the answers to those questions.

Further, we note that in Dillard, though the first-level facts—that jurors had patted a witness on the back and told him "good job"—were known, the Court nevertheless held that voir dire was necessary because the goal of such investigation is not merely to find out what happened, but more importantly, to "[d]etermin[e] whether there is prejudice" from the jurors' interaction. 415 Md. at 461. Similarly, here, because the trial court did not know whether the interaction affected the jurors' ability to be impartial, a further inquiry was necessary.

Even the court's conclusion that Juror 28 remained impartial rested on speculation. From this excerpt from the note—"[a]lthough this incident happened, please be confident that it does not have any [e]ffect or change my opinion on the facts that I have heard in the courtroom[,]"—the trial court drew this conclusion:

> The juror who wrote the note was unequivocal regarding her position that the interaction she had did not [e]ffect her ability to be fair and impartial and could decide the case based on the evidence presented in the courtroom.

The court's conclusion does not necessarily follow from the juror's cryptic note. It appears the juror was saying that the encounter did not change her assessment of the facts. She did *not*, however, say that it would not affect her ability to remain impartial. Her view of the facts may not have changed, but what about her ability to continue to deliberate with an open mind? Or her ability to listen in good faith to the perspectives of other jurors? Or to assess fairly a piece of evidence or point of view that cuts against her opinions? In other words, if the encounter stiffened her resolve to maintain whatever views she had immediately before the encounter, then it is possible that she did not remain impartial. Faced with the possibility of witness intimidation in this case, a further investigation was warranted.

The Trial Court's Reverse-Engineered Prejudice Assessment

Picking up on the trial court's statement denying Defendants' motion for a new trial, the State argues that the length of the jury's deliberations, the fact that the jury asked for written instructions during deliberations, and the fact that Mr. Sherman was acquitted all prove that the incident in question did not affect the jury's thinking.

Simply put, there is nothing, either empirically or logically, that suggests an untainted jury deliberates longer or asks more questions than a tainted one. Similarly, the fact that the jury acquitted Mr. Sherman reveals nothing about whether the incident affected the manner in which the jurors analyzed the evidence and listened to their fellow jurors' views. The jurors could have associated the spectators with Mr. Sherman and felt pressured to acquit him. Alternatively, they could have associated the spectators with Mr. Burrell and Mr. Johnson and, believing this type of behavior to be reflective of their character generally, concluded that it was likely that Mr. Burrell and Mr. Johnson were guilty of the crimes of which they were accused. We cannot dismiss the possibility that the results were impacted by the encounter.

THE REMEDY

The State argues that even if we determine that the trial court abused its discretion, the remedy should be a remand to the circuit court to convene a hearing at which the jurors could be interviewed. The State points to no Maryland case law for this proposition, which in fact appears to be contrary to established Maryland law. See Jenkins v. State, 375 Md. 284, 341 (2003) (reversing judgments and ordering a new trial where defendant was presumptively prejudiced by juror's interaction with witness); see also Johnson, 423 Md. at 155 (2011) (reversing judgments and ordering a new trial where court did not adequately voir dire jury about juror misconduct); Dillard, 415 Md. at 466 (same).

In Jenkins, the Court of Appeals reversed and remanded the case for retrial after holding that the circuit court erred in denying a motion for a new trial after it discovered that the jurors had extensive conversations with a witness during trial. 375 Md. at 289,

341. The Court reasoned first that such egregious misconduct raised a presumption of prejudice against the defendant and that such prejudice was not rebutted by anything in the record. Id. at 319, 329. Further, the Court explained that the presumption could not be cured by a post-trial hearing because after a verdict has been accepted and the jury discharged, Maryland Rule 5-606 bars a trial court from inquiring into the jurors' thought processes. Id. at 329-330.

Rule 5-606(b)(1) states:

> In any inquiry into the validity of a verdict, a juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict, or (C) the juror's mental processes in connection with the verdict.

Given these limitations, the presumed prejudice could not be rebutted, because "a specific inquiry into the thought process of [the juror], and an inquiry into his actions and language during deliberations, and the affect of his actions and language on the other jury members is necessarily the only method of ascertaining whether the improper conduct improperly influenced the jury's deliberative process in the case."[4] Jenkins, 375 Md. at 332.

[4] We are not persuaded by the State's reliance on Holmes v. State, 209 Md. App. 427 (2013), which it contends stands for the proposition that a post-verdict inquiry into whether a juror saw the defendant in handcuffs and whether it impacted his decision was permissible under Rule 5-606. In Holmes, the defendant and his attorney knew that the defendant had been seen in handcuffs before the jury returned its verdict, yet chose not to raise the issue. After the verdict was rendered but before the jury was excused, defense counsel raised the issue, and the court called the jury foreman to the bench for questioning. Id. at 453-54. The foreman admitted that he had seen the defendant, but had not noticed that the defendant was handcuffed. Id. The foreman also stated that the encounter had not impacted his verdict. Id. at 454. Rule 5-606 was not at issue; it was merely cited in a footnote stating that the court's limited questioning was appropriate. Id. at 455 n.17. Here, (continued)

Here, as in Jenkins, we cannot conceive of how the trial court, upon remand, could determine whether the jurors' interactions with the spectators in the elevator affected their impartiality without violating Rule 5-606. As such, we will follow Maryland precedent and order a new trial.

CONCLUSION

We want to be precise about what we are *not* saying, lest we, as the State suggests, "lower[] the bar" and provide a vehicle for trial disruption going forward. We are *not* saying that the interaction in question was necessarily prejudicial, let alone so inherently prejudicial that it required the court to grant a new trial.

Moreover, we are not saying that the court should have questioned *every* juror. It's possible that the investigation could have begun and ended with a brief discussion with the juror who wrote the note. We are only saying that, based on the facts of this case, the trial court should have at least questioned Juror 28; where it would have gone from there is anybody's guess. The failure to do so was an abuse of discretion because the trial court did not have sufficient information to determine whether further investigation was warranted and/or whether any remedy or corrective action was appropriate. Accordingly, we vacate the judgments and remand for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED. CASES REMANDED TO THAT COURT

in contrast, the inquiry that the State would have us conduct would be held over one year after the trial concluded. We would need more than dicta from a case with vastly different facts to convince us that a remand is the appropriate remedy under these circumstances.

FOR A NEW TRIAL. COSTS TO BE PAID BY APPELLEE.