

Circuit Court for Montgomery County
Case No. 129521, 130050

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2788

September Term, 2018

KIA DIVBAND

v.

STATE OF MARYLAND

Leahy
Shaw Geter,
Vitale, Cathleen M.
(Specially Assigned)

Opinion by Vitale, Cathleen M.

Filed: March 5, 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.

On September 7, 2019, a jury sitting in the Circuit Court for Montgomery County found appellant, Kia Divband, guilty of involuntary manslaughter, first degree child abuse, first degree child abuse resulting in death, and first degree child abuse causing physical injury. The court sentenced appellant to 40 years of incarceration. On appeal, Appellant presents the following question for our review:

Did the trial court act within its discretion when it denied appellant's motion for mistrial based on alleged juror misconduct?

For the reasons discussed below, we find no abuse of discretion and we shall affirm the judgment.

FACTS AND LEGAL PROCEEDINGS

A. *The Death of Infant L.*

Appellant and his wife were the owners and operators of a day-care, Little Dreamers Creative Learning Center, in Montgomery County, Maryland. On March 7, 2016, Infant L began attending Appellant's day-care center. The child was not quite 6 months old. On April 19, 2016, several hours after her parents dropped her off at Little Dreamers, Infant L., unconscious, not breathing, and with no pulse, was rushed from the day-care center to Shady Grove Hospital by ambulance and then air-lifted to Children's Hospital with severe life-threatening injuries. Appellant contended that Infant L. died from choking on breast milk.

Infant L.'s ribs were broken in 23 places, had metaphyseal and buckle fractures to her legs and arms, deep bruises in her neck, head, and tongue, a torn frenulum, a subdural hemorrhage, retinal hemorrhages, and damage to the nerves in her spine. She was declared

brain dead on April 22, 2016. Her death was ruled a homicide caused by multiple blunt force injuries.

B. *The Juror's Note*

On September 5, 2018, the seventh day of trial, prior to the beginning of the Defendant's case, the trial court received a note submitted by Juror 54, dated September 4, 2018. The note read,

Your Honor,

I and others on the jury have noticed that the defendant often stares directly at individual members of the jury, sometimes for substantial periods of time, including during detailed medical testimony. During the Skype session this morning, it was particularly prevalent.

I suppose he has the right to look wherever he wishes, but given that the staring can cause discomfort among us jurors, what is your advice to us?

Thanks,
#54

Although not implicit in the language of the note, the court was concerned about possible conversations between jurors, informing counsel that it was going to question Juror 54 at the bench regarding the note. Prior to inquiring of Juror 54, the court inquired of all counsel if they observed or noticed anything regarding where the Appellant was looking during the trial. Neither counsel nor the court noted any particular or peculiar "staring behavior" on the part of the Defendant. Defense counsel raised a concern that the juror note utilized the words "and others" which was underlined in the note, inferring that there had been multiple jurors in discussion of the Defendant and allegations of staring and possible discomfort of the jurors. The court commented, (referring to Juror 54), "He's not following my order about not discussing the case".

The court had Juror 54 brought into the courtroom and the following conversation took place:

THE COURT: Okay, you are Juror 54?

JUROR NO. 54: Yes.

THE COURT: Okay, I received this note from you. Did you write that?

JUROR NO. 54: I did.

THE COURT: Okay. I have shared it with the attorneys because I have to share by law every note. And they're aware of it. Personally, I haven't noticed anything. Again, I don't know where else to look but straight ahead, and I don't know what else I can tell you.

JUROR NO. 54: Okay, I just wondered if there is any advice because many have noticed it.

THE COURT: My concern is are you all talking about this case?

JUROR NO. 54: No.

THE COURT: Well, it sounds like you are when you talk about how the defendant is acting.

JUROR NO. 54: That was mentioned.

THE COURT: By how many people?

JUROR NO. 54: About three.

THE COURT: And who were the other ones?

JUROR NO. 54: I don't remember.

THE COURT: What was said?

JUROR NO. 54: He sees [sic] to stare for long periods, sometimes it feels creepy. I didn't say that. I heard that.

THE COURT: Well, I'm very concerned, because I said not to talk about anything to anyone –

JUROR NO. 54: I understand. That's why I wrote to you.

THE COURT: Who are the jurors that have said that to you?

JUROR NO. 54: Some of the women.

THE COURT: I need to ask them because I don't know if they can stay on the jury if they're discussing the case. I need to pursue it.

JUROR NO. 54: I don't remember exactly which ones.

THE COURT: Anybody have any questions?

DEFENSE COUNSEL: You heard someone use the word creepy?

JUROR NO. 54: I think I heard that, yes.

DEFENSE COUNSEL: You heard a juror use the word creepy with respect to my client?

JUROR NO. 54: The staring was creepy.

DEFENSE COUNSEL: All right, thank you. I have a requested suggestion, Your Honor?

THE COURT: State? All right, you go on back there. Don't discuss this at all with anyone.

DEFENSE COUNSEL: Your Honor, I think you have to bring all of them in and find out which ones of them are discussing it. Every one, one by one.

The court agreed. Each juror was asked several questions regarding conversations relating to the content of the Juror note. Jurors were asked who spoke during these conversations, if the topic of the defendant staring came up more than once, and many jurors were asked if they could be fair and impartial as a result of any conversations. From the voir dire, two jurors said they were involved in the conversation, all of the jurors stated

it only came up once and most of the jurors said the conversation was very brief. Many of the jurors stated that the conversation included people saying they felt “uncomfortable” because of Appellant’s staring and those who were asked if the word “creepy” was used, indicated it was not.

Counsel moved for a mistrial arguing that the conversation regarding Appellant’s staring was highly prejudicial. Expressing concern that based on the inquiry of Juror 54, and the responses from the jurors that Juror 54 instigated the conversation among jurors, the court dismissed Juror 54. The court instructed the remaining jurors not to discuss the case, and reserved on the Appellant’s motion for mistrial. The court continued with the trial until the noon break.

When the court reconvened, defense counsel argued its motion for mistrial, alleging Appellant could not receive a fair trial based on the jurors’ voir dire responses. The court, attempting to address counsels’ concerns, asked defense counsel if he wanted another juror removed. Defense counsel replied, “No.” The court also offered follow-up voir dire of any of the jurors or a jury instruction addressing the incident. Appellant declined additional voir dire, indicating a jury instruction might be in order. The court denied the motion for mistrial finding that Appellant could still get a fair and impartial trial. At the conclusion of the case, prior to instructions, the court again individually voir dired each juror.

Each juror, including alternates, was asked if he or she could still be fair and impartial and all but one, Juror 2, stated in the affirmative. Juror 2 said he was “not sure about it.” After voir dire of the remaining jurors, Juror 2 was excused. Appellant then renewed his motion for mistrial which the trial court subsequently denied.

STANDARD OF REVIEW

Criminal defendants are entitled to a fair and impartial jury under the United States Constitution and the Maryland Declaration of Rights. Be it the Sixth and Fourteenth Amendments of the Constitution or the 21st Article of the Declaration of Rights, the right to a trial conducted with impartiality and fairness, is the lynchpin of our entire judicial process. Appellate Courts review a trial court's denial of a motion for mistrial based on juror misconduct utilizing the abuse of discretion standard. *Dillard v. State*, 415 Md. 445, 454 (2010). The trial judge is generally afforded a wide berth of discretion in ruling on a mistrial motion. *Nash v. State*, 439 Md. 53, 68 (2014).

DISCUSSION

In order to determine whether the appellant can receive a fair and impartial trial, the Court must evaluate first whether the contact between the jurors violated the Court's instructions and if so, was the conduct of such an improper nature as to prevent a fair trial. The Court must then evaluate whether the actions by the trial court were sufficient to ensure a fair and improper trial. A motion for a mistrial or a new trial because of alleged jury misconduct *MUST* be granted if the evidence of misconduct indicates that a fair and impartial trial could not be had under the circumstances. *Summers v. State*, 152 Md. App. 362, 375 (2003).

Here, the trial court instructed the jury "not to talk to anyone about this case". The court acknowledged so during the first round of jury inquiry held on September 5, 2018. In response to comments by defense counsel that Juror 54's note implied that the jurors

were discussing the case, the court stated “...that’s exactly what I told my law clerk was my biggest concern”.

When a party moves for a mistrial based on conduct between jurors, the trial judge has an obligation to conduct voir dire sua sponte, prior to ruling on the motion. *Nash v. State*, 439 Md. 53, 69 (2014). The purpose of the voir dire is to ascertain if the alleged conduct by the juror is sufficient to raise a presumption of prejudice that must be rebutted before a mistrial motion may be denied. *See, Jenkins v. State*, 375 Md. 284 (2003).

In Maryland, trial courts have discretion in determining whether or not alleged juror misconduct based on improper contact warrants the granting of a mistrial. In *Jenkins*, the Court examined the process of analyzing juror misconduct in the context of a motion for new trial. In this case, the petitioner alleged that there had been improper contact between a State's witness and a juror during the trial causing prejudice to petitioner and thus precluding his right to a fair trial. *Jenkins*, 375 Md. at 288. The Court of Appeals held,

“Denial of petitioner's motion for a new trial was a clear abuse of discretion under the specific egregious circumstances in the case *sub judice*, where, during a recess in a criminal trial, both the juror and the State's detective witness clearly ignored the trial court's orders prohibiting interaction between jurors and witnesses, where the juror not only intentionally sought out interaction with the detective during a weekend religious retreat, but, after such retreat, went to lunch with the detective while the trial was still pending and where they discussed personal details of their lives, and the State's detective witness drove the juror to his car in her own personal vehicle.” *Id.* at 289.

The Sixth and Fourteenth Amendments to the U.S. Constitution and the Maryland Declaration of Rights guarantee a defendant’s right to an impartial jury. *Id.* at 300-01. Once misconduct or improper contact is found, sometimes it can reach a level of being

presumptively prejudicial to a defendant, thus placing the burden of showing harmlessness on the State. *Id.* at 301 (citing to *Remmer v. United States*, 347 U.S. 227, 229 (1954)).

Although the presumption of prejudice does not apply in all cases of juror misconduct, the Court noted in *Jenkins* that the non-incidental, intentional and personal nature of the conversations between the State's witness and the juror was "so egregious" and constituted a "gross violation" that fell within the "presumptively prejudicial" category of misconduct. *Id.* at 319. The conduct in that case was not merely casual and purely incidental contact, but clearly intentional, and therefore the presumption applied. "Condoning such conduct as occurred here as non-prejudicial would compromise the impartiality basis for jury trial process in our adversary system." *Id.* at 328.

Whether juror misconduct rises to the level of being "egregious" and creates a presumption of prejudice is a fact-specific inquiry. In *Wardlaw v. State*, 185 Md.App. 440 (2009), the issue was whether the trial court abused its discretion when it denied appellant's motion for mistrial after a deliberating juror conducted internet research on the credibility of a State's witness and published the results to the entire jury. The juror's internet research, and her subsequent reporting of her finding, rightly or wrongly, that lying is associated with a disorder, constituted egregious misconduct because the witness' credibility was directly in issue. *Id.* at 452. Not all juror misconduct necessarily implicates the defendant's right to a fair trial by an impartial jury. *Johnson v. State*, 423 Md. 137, 149 (2011). *See e.g., Abernathy v. State*, 109 Md.App. 364 (1996) (comments between two jurors about the lifestyle of a witness); *see also, Bruce v. State*, 351 Md. 387 (1997) (the presence of an

electronic bulletin board in a courthouse showing the Defendant's case information in another matter).

In 2010, the Court of Appeals, in *Dillard v. State*, once again had to determine whether a trial court abused its discretion in denying a motion for mistrial based on an improper communication by a juror. 415 Md. 445, 448 (2010). Following the testimony of the State's primary law enforcement witness, two jurors patted the witness on the back and commended him for doing a "good job." *Id.* The Court determined that the trial judge should have held voir dire to determine the intent and sub-text of the comments by the jurors to the law enforcement officer. *Id.* at 457. Without doing that, the trial court did not have the ability to determine whether a presumption of prejudice applied. Although the conversation between the jurors and the officer may have been brief, the Court stated that it still could have been egregious if the content was suspect and the officer was a key witness to the state. *Id.* at 458.

Unlike communications between a juror and third party which can be presumptively prejudicial, such is not automatically the case where the communication is between jurors on the same panel. In *Summers v. State*, 152 Md. App. 362 (2009), this Court considered the trial court's denial of a mistrial when two of the jurors discussed the case over lunch and in a separate instance in which one of the jurors felt "harassed" during the deliberations. The Court remarked that not every trivial act on the part of a juror during the course of the trial amounts to such misconduct as to require extreme measures to be taken. The Court differentiated the conduct in the case, which was between two jurors, from cases with conduct between a juror and a third party:

“This case differs from all of these cases we have discussed because the allegedly improper communication here occurred between two jurors, not between a juror and a witness, defendant, or third party. We find that distinction significant. Third party communication with a juror raises a concern that the juror may reach a verdict on the basis of the improper extrinsic communication rather than the evidence. That concern is greatly diminished when, as in this case, the improper extrinsic communication occurred solely between two jurors.” *Id.* at 379

As the Court noted in *Summers*, the participants to the conversation is important.

There is no allegation of communication with third parties, and the conduct of the involved jurors did not involve receiving additional evidence. Likewise, the discussion was short, likely only a minute or two. It is under this guise that the Court reviews the actions of the trial judge, evaluating the voir dire conducted by the Court.

In *Nash v. State*, 439 Md. 53, 57 (2014), the Court outlined the two times when a voir dire must be conducted prior to ruling on a motion for mistrial based upon conduct of jurors. The first circumstance occurs when a juror's actions constitute misconduct sufficient to raise a presumption of prejudice that must be rebutted before a mistrial motion may be denied. The second, ancillary circumstance occurs 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. *Id.* at 69. In the instant case, the court conducted voir dire not once, but twice.

During the initial voir dire, the trial court asked each juror about the conversation which occurred in the jury room. While there were several reports of what was said or the number of persons involved, all jurors who could recall the conversation indicated there was minimal conversation which ended almost as quickly as it began. It is clear from the voir dire that no substantive evidence was discussed and no opinions on guilt or innocence

were expressed. Several jurors indicated discussion was halted when other jurors admonished them. No additional conversation or discussion took place. The court removed Juror 54 determining that the juror was responsible for initiating the conversation regarding the Appellant and that the juror was less than candid with the court regarding his/her involvement. By removing the Juror the trial court removed the possibility of repeat occurrences. The court instructed each juror during independent questioning and again as a group not to have any conversation whatsoever until the conclusion of the trial. The court addressed the jury:

THE COURT: There's been quite the delay here today, but we're going to try to proceed. Again, there are to be no discussions at all, passing statements, anything about anything about this case. Again, I've said it a couple of times. Talk about the weather, talk about sports. Talk about your vacation – anything. But do not discuss any individuals in this case, don't talk about my ugly ties – don't discuss anything, okay? Nothing about any individuals here. Nothing about any issues here. If it's even close, stay away... So you want to share with somebody that's going through this process with you. I guess you could say it's hot in there. You know? But anything else –okay? I don't want anything else, anything about any witnesses or observations you make about anything whatsoever. All right? I want to make sure this is done by the rule and by the law. And I take that very seriously. Do you understand?

JURY: Yes.

At that point, the court was satisfied that any misconduct by the jury had been addressed without compromising the rights of Appellant. Prior to the jury being instructed, the court brought to the attention of the attorneys that it had failed to inquire of five of the jurors whether or not they could be fair and impartial. After discussing the matter with the attorneys, the court individually queried each juror. The following exchange took place regarding Juror 2:

THE COURT: Could you—what you heard discussed about the looking or – I think that’s how you were describing it, the defendant looking – would that discussion in any way prevent you from being fair and impartial in this case?

JUROR NO. 2: Maybe a little bit.

THE COURT: Okay.

JUROR NO. 2: But not that much. I just – I don’t pay attention to that.

THE COURT: Okay, why do you think it might affect your ability to be fair and impartial?

JUROR NO. 2: I’m sorry, your honor, can you repeat that question?

THE COURT: Why do you think it – why do you think it could be a little bit affecting you?

JUROR NO.2: Well, not affecting me. It can be like – well, it didn’t affect me at all, but sometimes I feel too, that he was looking a lot. But I tried to look at other things and don’t pay attention to that.

THE COURT: Okay. You were talking about him looking at you. My question was really about what other people said. Would what other people say affect your ability to be fair and impartial?

JUROR NO. 2: The other people – I’m sorry, Your Honor, can you repeat that question?

THE COURT: What other people said about him staring, would that prevent you from being fair and impartial?

JUROR NO.2: Fair and impartial? When you say fair and impartial, what do you exactly mean by that?

THE COURT: Decide the case based solely on the evidence in this case and the law that I will instruct you one, not have that considered in any way by you in your deliberation?

JUROR NO. 2: I’m not sure about it, Your Honor. I’m not sure. I don’t know about the answer.

THE COURT: Okay.

JUROR NO. 2: Yes.

After a brief discussion with counsel, the court completed voir dire of the remaining jurors. Upon conclusion, the defense asked that Juror 2 be excused. The court agreed and dismissed Juror 2. No other jurors were excused.

Not all juror misconduct necessarily implicates a defendant's right to a fair trial by an impartial trial. In some cases, the extreme remedy of a mistrial is not mandated, and the Court can cure any possible prejudice utilizing voir dire or replacing a juror. *Johnson v. State*, 423 Md. 137 (2011). In this case, the trial court did both. Utilizing voir dire and replacement, the court neutralized any negative effects which may have occurred as a result of the jurors discussing the looks by the Appellant.

In conclusion, the court took appropriate steps to develop facts related to the discussion between jurors and followed up by questioning each juror. The court dismissed the juror who initiated the discussion and in the end, a juror who indicated he/she could not be fair and impartial. As such, the actions of the trial court were proper. No prejudice was suffered by Appellant. There occurred no violation of his Constitutional rights. Accordingly, we hold that the trial court did not abuse its discretion in denying Appellant's motion for a mistrial.

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

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