Circuit Court for Montgomery County
Case Nos. 132377, 132379, 132381

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Nos. 2794, 2797, 2798
September Term, 2018

ON REMAND FROM THE COURT OF APPEALS

KARON SAYLES
v.
STATE OF MARYLAND

DALIK DANIEL OXELY
v.
STATE OF MARYLAND

BOBBY JAMAR JOHNSON
v.
STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Berger, J.

Filed: May 12, 2021

This case is before us for a second time following a remand from the Court of Appeals. Karon Sayles, Dalik Daniel Oxely and Bobby Jamar Johnson (collectively, the "appellants") were each convicted of multiple offenses stemming from a home invasion and armed robbery that occurred in Silver Spring, Maryland on August 1-2, 2017. The appellants were tried together before a jury in the Circuit Court for Montgomery County and were convicted of numerous crimes, including home invasion, armed robbery, and kidnapping.

The appellants appealed to this Court, presenting the following six issues[1] for our review:

1. Whether the circuit court abused its discretion by denying the appellants' motion to recuse the Honorable Terrance J. McGann.

2. Whether the circuit court's jury instructions regarding jury nullification contained inaccurate statements of law.

3. Whether the circuit court's jury instructions regarding jury nullification were impermissibly coercive and violated the appellants' constitutional right to a fair trial.

4. Whether the circuit court abused its discretion by denying the appellants' motions for mistrial and by substituting one judge for another during deliberations.

[1] Each appellant filed a separate brief in this case and not all of the appellants presented argument on each of the issues. Sayles presented argument on all of the appellate issues. Oxely and Johnson each presented argument on some of the appellate issues, but, in addition, Oxely and Johnson adopted by reference any arguments asserted by co-appellants to the extent that those arguments could be asserted by and applied to each appellant.

5. Whether the circuit court erred by denying Sayles's motion to suppress photographic identifications.

6. Whether all but one of the appellants' convictions and sentences for conspiracy should be vacated.

On appeal, we held that the trial court's instructions regarding jury nullification contained inaccurate statements of law that prejudiced the appellants and vacated the appellants' convictions and remand for a new trial. *Sayles v. State*, 245 Md. App. 128, 373 (2020). We separately addressed the issue regarding Sayles's motion to suppress photographic identifications because it was likely to arise on retrial, holding that the circuit court did not err by denying the motion to suppress. *Id.* We did not address the remaining issues.

The State filed petitions for writs of *certiorari*, which the Court of Appeals granted. *See State v. Sayles*, 469 Md. 659 (2020); *State v. Johnson*, 469 Md. 658 (2020); *State v. Oxely*, 469 Md. 658 (2020). The Court of Appeals reversed, holding that the circuit court's instructions regarding jury nullification were not legally incorrect. *State v. Sayles et al.*, ___ Md. ___, No. 15, Sept. Term 2020 (filed Jan. 29, 2021).[2] The Court of Appeals remanded the case to this Court for consideration of the outstanding issues.

[2] The Court of Appeals did not grant *certiorari* on the photographic identification issue.

FACTS AND PROCEEDINGS[3]

At the time of the incidents forming the basis for the appeal, Aracely Ochoa resided in a two-bedroom apartment in Silver Spring, Maryland, which she shared with her husband, David Rivera, Ms. Ochoa's mother and stepfather, Blanco Armina Campos and Rolando Callejas, and Ms. Ochoa and Mr. Rivera's minor son, D.R. Ms. Ochoa worked as a manager at a nearby Cash Depot store, where customers would come to cash checks and send money orders. As a manager, Ms. Ochoa had keys to the store and a code to the store's safe, which typically contained more than $50,000.00 in cash.

On August 1, 2017, Ms. Ochoa worked until approximately 8:30 p.m., after which she took the bus home. She left shortly thereafter to pick up her son from her sister's home. When leaving for her sister's home, Ms. Ochoa observed a group of men outside her apartment who were dressed like maintenance workers. After Ms. Ochoa left, four men knocked on the apartment door. Mr. Rivera opened the door; the men claimed they were there for maintenance and insisted on entering the apartment. When Ms. Ochoa returned with D.R., the apartment door was open and four men were inside with Mr. Rivera. Mr. Callejas was also present in the apartment, but Ms. Campos was still at work. Ms. Ochoa took D.R. to a bedroom to put him to bed.

[3] The issues raised on appeal are largely unrelated to the evidence presented at trial. We present the following limited factual background in order to provide context. We do not endeavor to present the evidence adduced at trial in detail. We largely repeat the factual and procedural background as set forth in our previous opinion in this case.

When Ms. Ochoa returned to the living room, the four men asked her about remodeling the apartment. A fifth man entered the apartment shortly thereafter. Ms. Ochoa recalled that all five men were wearing gloves. Ms. Ochoa recognized one of the men, Younus Alaameri, as a regular customer at Cash Depot. Alaameri would come into Cash Depot to wire money to Iraq; Ms. Ochoa referred to him as "Iraq" or "the Iraqi." Alaameri asked the rest of the men if they were "ready," after which four of the men suddenly attacked Mr. Rivera while the man Ms. Ochoa identified as Bobby Johnson held her down. Mr. Rivera, Ms. Ochoa, and Mr. Callejas were bound with zip-ties and forced to lie face-down on the floor.

Alaameri asked Ms. Ochoa for the keys to the Cash Depot and for the alarm system code. Alaameri hit Ms. Ochoa in the head with a pocket knife and threatened to harm D.R. if Ms. Ochoa did not cooperate. Ms. Ochoa told Alaameri that the keys were in her purse and provided the code to the safe. Ms. Ochoa told Alaameri that she did not have the alarm system code. Ms. Ochoa explained at trial that the alarm system activated automatically at 10:00 p.m. and would always be deactivated by the time she arrived at work at approximately 7:30 a.m. the next morning.

Alaameri sent Johnson and Oxely to the Cash Depot. Alaameri told Ms. Ochoa that if the alarm went off at the Cash Depot and she received a telephone call from the alarm company, she should tell them that the two people were cleaning the store. Johnson and Oxely returned to the home and informed the other men that the alarm had sounded when

they attempted to enter the Cash Depot. Alaameri threatened to gouge Ms. Ochoa's eye if she did not provide the alarm code.

At approximately midnight, Mr. Callejas's telephone rang. Ms. Campos was attempting to call and tell her husband that she was on her way home from work. After the telephone rang, the men took Ms. Ochoa, Mr. Rivera, and Mr. Callejas into a bedroom and put them on the bed. When Ms. Campos arrived home at approximately 1:00 a.m., she was dragged through the door. One of the men took her purse and put a knife to her side. She was taken to the bedroom where the other family members were located and a blanket was thrown over her face.

Alaameri brought Ms. Ochoa to the living room and told her that she would be going to Cash Depot with some of the men. Alaameri threatened to kill D.R. if Ms. Ochoa made "any stupid step." Johnson and Oxely accompanied Ms. Ochoa to Cash Depot in Ms. Ochoa's family's van. When they arrived, Ms. Ochoa's boss was there, so they returned to the apartment. After they returned, Alaameri told Ms. Ochoa that the new plan was that Ms. Ochoa would go to work in the morning and retrieve the money then. On the morning of August 2, 2017, Ms. Ochoa was driven to Cash Depot again. This time, she was accompanied by Johnson only. When they arrived, they discovered a crossbar on the door preventing access.

At some point while Ms. Ochoa and Johnson were gone, Oxely put a knife to Mr. Rivera's neck and Mr. Rivera's neck began to bleed. Mr. Rivera and Oxely engaged in "a scuffle" and Oxely dropped the knife, after which Sayles handed Oxely another knife and

Oxely "slashed" Mr. Rivera. Mr. Rivera was able to gain possession of the knife and went out to the living room. Mr. Rivera yelled "police" repeatedly, and Oxely ran out the front door. Mr. Callejas broke a window and climbed out to seek help. Mr. Callejas went to a bus stop, where he found a telephone to call police. Ms. Campos also climbed through the window. When Ms. Ochoa and Johnson returned from the Cash Depot, Ms. Ochoa saw Ms. Campos running across the street. Johnson told Ms. Ochoa to make Ms. Campos go back into the apartment and threatened D.R.'s life. Ms. Ochoa, Ms. Campos, and Johnson returned to the apartment; Mr. Rivera opened the door and pulled Ms. Ochoa and Ms. Campos inside. Johnson "took off running." At this point, all of the assailants had left the apartment. Police were called. After the incident, several items, including a computer, watches, documents, and currency, were missing from the apartment. Police officers arrived at the apartment at approximately 8:00 a.m.

The appellants, Alaameri, and Ajeo were ultimately identified as the men involved in the home invasion and were each charged with forty-two offenses, including home invasion, kidnapping, armed robbery, assault, multiple conspiracy offenses, and other associated offenses. Ajeo entered a guilty plea and testified against the appellants at trial. His testimony described the agreement among the five men to make "quick money" by using Ms. Ochoa to rob the Cash Depot store. Ajeo further testified regarding the planning undertaken by the five men in the days preceding the home invasion.

Following a jury trial, Sayles was found guilty of home invasion, multiple counts of armed robbery, kidnapping, second-degree burglary, first-degree assault, multiple counts

of second-degree assault, multiple counts of false imprisonment, motor vehicle theft, and associated conspiracies. Sayles was sentenced to a total term of forty-two years in prison. Oxely was found guilty of home invasion, multiple counts of armed robbery, kidnapping, second-degree burglary, first-degree assault, multiple counts of second-degree assault, multiple counts of false imprisonment, motor vehicle theft, and associated conspiracies. Oxely was sentenced to a total term of fifty years' imprisonment. Johnson was found guilty of home invasion, multiple counts of armed robbery, kidnapping, second-degree burglary, multiple counts of second-degree assault, multiple counts of false imprisonment, motor vehicle theft, and associated conspiracies.[4] Johnson was sentenced to a term of forty years' imprisonment.[5]

Additional facts shall be discussed as necessitated by our consideration of the issues on appeal.

DISCUSSION

I.

On remand, we must address the following issues: (1) whether the circuit court abused its discretion by denying the appellants' recusal motion; (2) whether the circuit court abused its discretion by denying the appellants' motions for mistrial; (3) whether the circuit court erred by substituting one judge for another during deliberations; and

[4] Unlike his co-defendants, Johnson was found not guilty of first-degree assault and conspiracy to commit first-degree assault.

[5] The length of sentences set forth for each appellant includes multiple sentences that were ordered to be served concurrently.

(4) whether all but one of each of the appellants' convictions and sentences for conspiracy should be vacated. We shall begin by addressing the recusal issue.

In the circuit court, appellant Sayles was represented by Sean McKee from the Office of the Public Defender, while Oxely was represented by panel attorney Victor Del Pino and Bobby Johnson was represented by panel attorney Kevin McCants. Prior to the appellants' joint trial, multiple pre-trial hearings were held before the Honorable Michael Mason. The day before trial was scheduled to begin, Judge Mason advised the parties that he would be unavailable during the scheduled trial dates due to a medical procedure. Judge Mason explained that Judge McGann had become available after a previously scheduled four-day criminal case resulted in a guilty plea. Judge Mason explained that Judge McGann had previously recused himself in Mr. Del Pino's cases because Judge McGann's son, Terry McGann, was a member of Mr. Del Pino's law firm. Judge Mason explained, however, that Judge McGann had discussed the matter with his son and had determined that he was comfortable presiding over the case because Mr. Del Pino was representing Oxely as a panel attorney and, therefore, Terry McGann's law firm had no financial interest in the case.[6]

Judge Mason further explained that although "the attorneys suggested that they would rather continue [the case rather] than have it go to Judge McGann," the case would proceed to trial as scheduled. Judge Mason explained "we had waited to find out for

[6] We understand this statement to mean that the firm's compensation did not depend upon the outcome of the case.

approximately two weeks if this would be a trial or a plea," and because "it looked like it was going to be a trial," the court had "brought in . . . 150 to 200 jurors" and there was "a [j]udge who [wa]s available, notwithstanding the attorneys' reservations or objections." Judge Mason commented that Mr. Del Pino had mentioned that his brother-in-law clerked for Judge McGann, but Judge Mason explained "that to me posed no issue whatsoever." Judge Mason further explained that he "ran this by the Administrative Judge, Judge Greenberg, and he was fine with it." Judge Mason concluded that there was "no reason in my mind why under those circumstances this case should be continued," explaining that "[w]e have a [j]udge that was available to try it, we had the time set aside to try it, we brought jurors in to try it and it appears to me that there's no good reason" to continue the case.

Mr. Del Pino responded:

> As mentioned, Judge McGann's son is my law partner, has been for approximately the past eight years. Over the past eight years Judge McGann has been recused from every single one of my cases and our firm's cases. Early on, in my practice I handled many cases that were panel [cases] from the public defender's office and I'm sure that those cases if they were assigned to Judge McGann, he recused himself. I don't think, we don't think that inconveniencing the jurors or potentially having the civilians or the witnesses who technically probably would be called today anyway affects Mr. Oxely's rights for purposes of what we are doing today . . . [W]e are objecting to being sent over to Judge McGann."

Counsel for Johnson and counsel for Sayles joined Mr. Del Pino's arguments. Counsel for Johnson further argued that he believed that his client would be at "a disadvantage, an unfairly, overly prejudic[ial] disadvantage . . . to be in an adversarial litigation posture

when there's been a history of a recusal based upon . . . a relationship . . . between one of the attorneys and the judge."

Counsel for Sayles argued that "we don't think that Judge McGann is going to be fair to us." He emphasized that Judge McGann had a pattern of recusing himself in cases for the past eight years, including when representing clients through the Public Defender's Office. He further argued that Terry McGann had "been involved in discussions in this case" and had "appeared in this case on behalf of Mr. Del Pino and his client." Judge Mason responded that Terry McGann's appearance was limited to a status conference involving no substantive matters at which a trial date was confirmed. Counsel for Sayles further represented that Terry McGann had discussed the case with Judge McGann, but Judge Mason responded that "from my conversations with Judge McGann, Judge McGann did not indicate that he had discussed the case with this son." Judge Mason observed that "recusal is generally the person that thinks that they're going to be unfair to them, not going to bend over backwards to be good to them" and that "[i]t would be the State that you would anticipate would be objecting because of the familiar relationship to the [c]ourt . . . not the defense attorney."

Ultimately, Judge Mason denied the appellants' requests to continue the case rather than to have the case assigned to Judge McGann for trial. Judge Mason reiterated that he had discussed the matter with Judge McGann and Judge McGann "had no problem whatsoever with his ability to be fair." Judge Mason further observed that "Judge McGann

has a reputation as a much harsher sentencing judge than I think I enjoy." Judge Mason continued:

> I probably enjoy a sentencing reputation that is more moderate . . . probably not real lenient but more moderate. And [Judge McGann] doesn't have the reputation for being as moderate. So, that's frankly for the record, I think what all of this is being driven by.
>
> But, that does not mean that Judge McGann cannot be fair. Judge McGann, I think is a very fair judge, even though he may have a different sentencing philosophy than I have. But he has indicated to me that he is ready, willing and able to take the case and notwithstanding Mr. Del Pino's presence in the case.

Later that day, the parties appeared before Judge McGann. Counsel for Sayles reiterated the concerns he had expressed before Judge Mason and asked Judge McGann to recuse himself due to the familial relationship between Judge McGann and Mr. Del Pino's law partner. Counsel emphasized Judge McGann's past practice of recusing himself from any matter involving Mr. Del Pino during the past eight years and argued that there was "potential . . . for bias, for favoritism, or at least the appearance of bias or favoritism because Mr. Del Pino's firm includes Your Honor's son" in the event that "Mr. Sayles' representatives were at odds with Mr. Oxely's representatives because we're co-defendants in the same case." Counsel argued that "the practice of recusal for the past eight years does speak to the potential for conflict in those types of situations." Counsel for Sayles further asserted that Terry McGann had "been involved in the discussions about this case and actually has appeared on behalf of Mr. Ox[ely] in this case in a prior status hearing."

Judge McGann denied Sayles' recusal motion, explaining his reasoning in detail. Judge McGann explained that, in the court's view, Sayles had not "met a burden to show

any type of presumption of impartiality." Judge McGann further emphasized that there was "no financial interest that's changed in this case one way or the other based on the outcome." He further explained that "[t]he fact that Terry McGann might have negotiated or talked to [Mr. Del Pino] about . . . strategy and all that, I'm not privy to that and that wouldn't have mattered" and it would have "no import or effect on me." Judge McGann emphasized that he had not "discussed any potential evidentiary rulings or anything along those lines." Judge McGann further explained that "at some point," his secretary had "sent a notice down to the assignment office" asking them "not to assign us any cases" from Terry McGann's law firm because it was "an easier policy" and "an easy practice to do" when "there were enough judges that they could assign in advance." Judge McGann explained that it was not a situation in which he had determined that he could "never hear a case" and that after considering this particular case, he believed recusal was not warranted.

On appeal, Sayles asserts that Judge McGann's denial of the recusal request constitutes reversible error.[7] As we shall explain, we are not persuaded. We review a trial court's denial of a motion for recusal for abuse of discretion. *Surratt v. Prince George's Cnty.*, 320 Md. 439, 465 (1990) ("When bias, prejudice or lack of impartiality is alleged, the decision is a discretionary one, unless the basis asserted is grounds for mandatory

[7] Although all of the appellants join the arguments set forth by each other on appeal, we observe that the recusal request before the trial court was raised by Sayles only. Although the other parties argued that the case should not be assigned to Judge McGann, only Sayles specifically requested that Judge McGann recuse.

recusal."); *Scott v. State*, 175 Md. App. 130, 150, 926 A.2d 792 (2007) (explaining that this Court reviews a trial judge's decision on a motion to recuse for abuse of discretion). "A party attempting to demonstrate 'that a judge is not impartial or disinterested has a high burden to meet.'" *Chapman v. State*, 115 Md. App. 626, 631 (1997) (quoting *Scott, supra*, 110 Md. App. at 486.

"[T]here is a strong presumption in Maryland, and elsewhere, that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Jefferson-El v. State*, 330 Md. 99, 107 (1993) (citations omitted). "To overcome the presumption of impartiality, the party requesting recusal must prove that the trial judge has 'a personal bias or prejudice' concerning him or 'personal knowledge of disputed evidentiary facts concerning the proceedings.'" *Id.* at 107 (quoting *Boyd v. State*, 321 Md. 69, 80 (1990)). When a party moves for recusal on the grounds that a judge "does not have the appearance of disinterestedness or impartiality," the party "carries a 'slightly lesser burden.'" *Chapman, supra*, 115 Md. App. at 632 (quoting *Scott, supra*, 110 Md. App. at 487). We have explained:

> "Appearance of disinterestedness or impartiality is determined by 'examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.'" [*Scott, supra*, 110 Md. App.] at 487, 677 A.2d 1078 (quoting *Jefferson–El*, 330 Md. at 108, 622 A.2d 737 (citing *Boyd* v. State, 321 Md. 69, 86, 581 A.2d 1 (1990)). Finally, "[t]he recusal decision . . . is discretionary and the exercise of that discretion will not be overturned except for abuse." *Jefferson-El*, 330 Md. at 107, 622 A.2d 737.

Chapman, *supra*, 115 Md. App. at 632.

Based upon our review of the record, we conclude that Sayles has failed to overcome the strong presumption of impartiality. Judge McGann expressly explained that he believed that he could be fair and impartial in this case. The relationship between Judge McGann and Mr. Del Pino is insufficient to overcome the strong presumption of impartiality enjoyed by Maryland judges. Furthermore, Sayles emphasized before the trial court that he was requesting that Judge McGann recuse himself because he was concerned that Judge McGann might favor Oxely, who was represented by Judge McGann's son's law partner, thereby placing Sayles at a potential disadvantage. Sayles, however, has not identified any such instance in which he argues that he was, in fact, placed at any such disadvantage.

We further conclude that Judge McGann's decision to preside over this case did not create an appearance of impropriety. Although Judge McGann had previously not presided over trial trials in which his son's law partner represented one of the litigants, Judge McGann expressly explained that the practice of assigning cases involving his son's law partners to other judges was undertaken because it was an "easier policy" than individually assessing whether it would be appropriate to preside over any particular case. In this case, however, given the other trial judge's medical procedure necessitating reassignment of the case after jurors had been obtained for trial, Judge McGann carefully considered whether it would be appropriate to preside over this case and concluded that the familial relationship would not affect his ability to be impartial in any way.

The Court of Appeals addressed a somewhat similar situation in *Marzullo v. Kovens*, 253 Md. 274 (1969), albeit in dicta. In *Marzullo*, the plaintiff in a personal injury action asked the trial judge to recuse himself because the defendant "was represented by the law firm in which the judge had once been a partner and by which [the judge's] son was employed." 253 Md. at 275. The Court dismissed the case as moot but commented that "[i]f disqualification had to be discussed, we would say that under the circumstances there was no constitutional, legal or practical need for the judge not to sit in the case" and the judge would "hav[e] been within his rights in not disqualifying himself." *Id.* at 276. In our view, Judge McGann similarly was within his rights in not disqualifying himself in this case.[8] Accordingly, we hold that the circuit court did not abuse its discretion in denying the request for recusal.

II.

The second issue we must address is whether the circuit court abused its discretion by denying three mistrial motions that were made during the course of the jury's deliberations. As we shall explain, we perceive no abuse of discretion by the trial court in its denial of the mistrial motions.

Sayles moved for mistrial three times during the jury's deliberations and was joined by his co-defendants as to certain of them. First, Sayles moved for a mistrial on August

[8] The State asserts in its brief that the actual motivation for the appellant's opposition to Judge McGann presiding over the trial instead of Judge Mason may have been due to Judge Mason's reputation as being more "moderate" in sentencing compared to Judge McGann. We take no position as to whether this may have been one of the underlying motivations for the recusal request.

30, 2018 after the jury had been deliberating for approximately eleven hours.[9] The jury had sent a note asking what it should do in the presence of guilty and non-guilty votes and had also inquired about jury nullification. While the court was crafting its response to a note inquiring about jury nullification, the jury sent a note asking, "What do we do in the case of the presence of guilty and non-guilty votes and we feel that further deliberations will not change these votes?" The trial court instructed the jury regarding jury nullification and gave the modified-*Allen* charge.[10] The jury resumed deliberations and sent an additional note at 3:40 p.m. stating that they were "agreed on the guilt of the defendant" and a note at 4:33 stating that "they were "not sure how to proceed, can you advise us." The jury also sent a note requesting permission to view the contents of the Toyota 4Runner manual in evidence, a note indicating that one juror was "no longer entertaining further conversations and input."

[9] Prior to and in between the mistrial motions, the jury had sent notes inquiring about jury nullification, and, in response, the court had instructed the jury, *inter alia*, that the jury "may not use, implement, or resort to jury nullification." In this opinion, we shall not discuss the details of the jury questions regarding jury nullification and the court's responses thereto. A discussion of this issue can be found in *State v. Sayles et al.*, ___ Md. ____, No. 15, Sept. Term 2020 (filed Jan. 29, 2021) (holding that the circuit court instructions regarding jury nullification were proper).

[10] The term "*Allen* charge" derives from a jury instruction, approved by the United States Supreme Court in *Allen v. United States*, 164 U.S. 492, 501 (1896), to be given to a deadlocked jury in a criminal case. Although the Court of Appeals has disapproved of the use of the traditional *Allen* charge in Maryland courts, it has endorsed a similar jury instruction, referred to as a "modified *Allen* charge," which is considered less coercive than a traditional *Allen* charge and "encourages all of the jurors to deliberate and reconsider their respective positions while not surrendering individual honest convictions." *Armacost v. Davis*, 462 Md. 504, 519 n.9 (2019).

The court proposed sending the jury home for the evening and having them return the next morning to resume deliberations. Counsel for Sayles moved for a mistrial at this time arguing that the jury should not continue to deliberate. The circuit court denied the mistrial motion, emphasizing that there were "42 counts on each defendant to go through, so it's a rather lengthy process." The court also considered the length of the trial and reasoned that the jury needed "a break." The court also considered the fact that the jury had made some progress given that they had sent a note indicating some level of agreement as to at least one of the defendants.

The next morning, Sayles again moved for a mistrial, joined by both appellants. At this time, Judge Nelson Rupp, Jr., had been substituted for Judge McGann, an issue we shall discuss *infra* in Part III of this opinion. Sayles argued that "at this point to instruct them to continue deliberating would be coercive." Johnson added that "although there are a number of charges," the case involved "an identification issue . . . So, the issues are straightforward here." The court denied the motion for mistrial, instructed the jury that it was permitted to open and view the Toyota 4Runner manual, and instructed the jury to "please continue to deliberate."

The third motion for mistrial came later the same day after the jury sent a note stating, "We need to let you know we have made significant pro[gr]ess." Sayles moved for a mistrial, arguing that the significant progress "might be a symptom of the coercion that they are feeling as a result of the previous response." The court denied the motion.

Appellate courts review a trial court's denial of a mistrial motion for an abuse of discretion. *Nash v. State*, 439 Md. 53, 66-67 (2014). The trial court's decision whether to grant a mistrial is "afford[ed] generally a wide berth." *Id.* at 68. We have described the trial court's broad discretion when considering whether to grant a mistrial in the context of a deadlocked jury as follows:

> A trial judge's discretion when considering whether to declare a mistrial when the jury is deadlocked is broad, and the trial judge's decision will be accorded great deference by a reviewing court. *Thomas v. State*, 113 Md. App. 1, 9, 686 A.2d 676 (1996) (quoting *Mayfield v. State*, 302 Md. 624, 490 A.2d 687 (1985)). There are no "hard and fast" rules limiting a trial judge's discretion in allowing juries to deliberate, and there is no rule that the jury may not be sent back to deliberate "once, twice, or several times." *Id.* at 9–10, 686 A.2d 676. Generally speaking, a mistrial should be declared where, after "taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.* at 10–11, 686 A.2d 676 (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824)).

Curtin v. State, 165 Md. App. 60, 73 (2005), aff'd, 393 Md. 593 (2006).

The Court of Appeals has explained that "[a] genuinely deadlocked jury is considered the prototypical example of a manifest necessity for a mistrial," but "[t]he term 'genuinely deadlocked' suggests . . . more than an impasse; it invokes a moment where, if deliberations were to continue, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *State v. Fennell*, 431 Md. 500, 516-17 (2013) (quotations and citations omitted). Indeed, we have recognized that "declaring a mistrial when a jury is not hopelessly deadlocked

undermines judicial efficiency" and "it is essential that deadlocked jurors be allowed to continue deliberating when the deadlock may properly be broken, but not when it is likely that the deadlock will be broken by coercion of a holdout juror (or more than one holdout jurors)." *Browne v. State*, 215 Md. App. 51, 73 (2013).

Having considered the totality of the circumstances surrounding the mistrial motions, we are persuaded that the trial court did not abuse its discretion by denying the appellants' mistrial motions and permitting the jury to continue deliberating. Although the jury at times indicated that it was having difficulty reaching unanimity and referred to jurors who were unwilling to engage further, the jury also submitted questions asking permission to view certain evidence. Furthermore, the jury submitted questions inquiring about whether it was permitted to engage in jury nullification, which the circuit court answered appropriately. *See State v. Sayles et al.*, ___ Md. ____, No. 15, Sept. Term 2020 (filed Jan. 29, 2021). After the first motion for mistrial, the jury was permitted to break for the evening, and at the time of the second motion for mistrial, the jury had not yet had time to meaningfully deliberate following the modified-*Allen* charge. Furthermore, the jury made more progress toward a verdict after the circuit court clarified that the jury was not permitted to engage in jury nullification. Under these circumstances, we perceive no manifest necessity requiring a mistrial, nor are we of the position that the ends of public justice were defeated by the trial judge asking the jurors to continue deliberating. We hold, therefore, that the circuit court did not abuse its broad discretion by denying the appellants' motions for mistrial.

III.

The next issue before us is whether the circuit court erred by substituting the judge in the midst of deliberations. Jury deliberations began on Wednesday, August 29, 2018. On the same day, Judge McGann informed the parties that he was "scheduled to be off on Friday." Judge McGann explained that he would have his phone with him and could "handl[e] any notes" from the jury via telephone. On Thursday, August 30, after the jury had been deliberating for a full day, Judge McGann decided to send the jury home for a break after a "long day." Judge McGann reminded the parties that he would not be present the next day and that Judge Rupp would "preside over the jury tomorrow . . . hopefully with a verdict." Judge McGann explained that he had "talked to [Judge Rupp] about the case" and that Judge Rupp had "familiarized [himself] with the case."

Counsel for Sayles objected to the substitution in the following exchange:

> [COUNSEL FOR SAYLES]: Your Honor I want to do a very quick motion, I just want to object to substituting a different judge for tomorrow.
>
> THE COURT: Thank you [defense counsel,] give me a reason for that and your basis, your case law and your rule on that.
>
> [COUNSEL FOR SAYLES][11]: Yes, Your Honor, it's Rule 4-361 and the rule --

[11] The transcript reflects that Mr. McKee, Sayles's defense counsel, raised this objection to the substitution. Based upon the transcript, it appears that the trial court accidentally referred to Mr. McKee by the name of Johnson's defense counsel, Mr.

> THE COURT: You're not reciting a rule on during the trial are you sir? The trial is over Mr. McKee. They're now in deliberations.
>
> [COUNSEL FOR SAYLES]: I would submit that this rule doesn't apply Your Honor and I defer further to the [c]ourt's wishes.
>
> THE COURT: I really don't need you here further, but if you cite that rule and this will be taking a verdict, this will not be ruling at evidentiary matters, this won't be ruling on any type of objections, this will simply be a decision made on notes[.] Judge Rupp has been familiarized with the case and he'll also call me by cellphone tomorrow if we get any notes. I will be in the country and an adjoining state, so he will be able to reach me but I put in for leave before I inherited this case from Judge Mason [who] had a medical problem and I think the attorneys knew . . . that I was going to be off last Friday and again this Friday and I took it for Judge Mason because the medical situation. And this is a practice that has been done since I've been practicing law since 1976. It would be a different story -- that rule is designed for a judge who's disabled during a trial and he or she, whoever succeeding in must familiarize themselves with the record and that's what it's designed for because you can't have somebody come in that's cold. This there's [(sic)] not a rule addressing a situation of taking the verdict and I consider the trial, everything that's happened up until they go out to deliberate.
>
> Now it hasn't been finalized because we don't have a verdict, but I'll deny your or . . . overrule your request, thank you.

When the trial proceeded the next morning, Sayles raised the substitution of counsel issue once again before Judge Rupp in the following exchange:

> [COUNSEL FOR SAYLES]: Your Honor, before we get started I do have a preliminary motion to make . . . I notified Judge McGann that I'd be saying this today. I would object to the -- of course, nothing personal to the [c]ourt -- the change of

McCants. The transcript also appears to identify the wrong attorney at one point during this exchange.

> judges under Rule 4[-]361, and I just want to put my objection on the record.
>
> THE COURT: All right. All right, well, Judge McGann is unable to be here today. I have conferred with Judge McGann about this case and the posture of it, and I am familiar with the record of the trial, and so, I am prepared to go forward and I'll overrule your objection.

On appeal, Sayles asserts that the substitution of judges in this case violated Maryland Rule 4-361.[12] Rule 4-361 provides, in relevant part:

> If by reason of termination of office, absence, death, sickness, or other disability, the judge before whom a jury trial in circuit court has commenced is unable to proceed with the trial, any other judge authorized to act in that court upon certifying that he or she has become familiar with the record of the trial, may proceed with and finish the trial.

The Court of Appeals has explained that "Rule 4-361(b) is intended to operate when there is a true mid-trial substitution of judges with the contemplation of substantive decisions thereafter being made by the succeeding judge." *Gibson v. State*, 334 Md. 44, 51 (1994) (citing *Hood v. State*, 334 Md. 52, 57 (1994)). When "the substitution is temporary and the function of the substitute judge is intended to be, and is, that of a caretaker performing only ministerial duties, this Rule is not implicated." *Id.*

Similar to this case, *Gibson* involved a substitute judge presiding over jury deliberations. 334 Md. at 46. In *Gibson*, *supra*, the Court of Appeals held that any Rule 4-361 issue was waived when counsel did not object to any of the instructions given by the

[12] The State asserts that the substitution issue is waived and/or not preserved. We disagree. Our review of the record demonstrates that Sayles made his objections to the substitution clearly known to the trial court and that the trial court issued rulings on the objections.

substitute judge to the jury. *Id.* at 50-51. The Court further explained, however, that "even if not waived, the claim of error would not be upheld under the circumstances of the case" because Rule 4-361(b) is not applicable when "the function of the substitute judge is intended to be, and is, that of a caretaker performing only ministerial duties."

The specific acts undertaken by Judge Rupp when presiding over the jury deliberations in this case were informing the jury that it was permitted to view the contents of a Toyota 4Runner manual that was in evidence, informing the jurors that they could have water, and telling the jury to "please continue to deliberate." In addition, Judge Rupp denied a motion for mistrial based upon the length of time the jury had been deliberating as well as the notes the jury had sent expressing difficulty reaching unanimity. When denying the motion, Judge Rupp expressly referenced having "reviewed the trial, and discussed it with Judge McGann." Notably, the prior evening, Judge McGann had denied a mistrial motion that was made on virtually identical grounds. Based upon our examination of the record as a whole, we conclude that Judge Rupp did not engage in substantive decision-making that renders his participation a "true mid-trial substitution of judges" as discussed by the Court of Appeals in *Gibson*. We hold, therefore, that Rule 4-361(b) was not implicated in this case.

IV.

The final issue before us on appeal is whether the circuit court erred by imposing multiple separate sentences for conspiracy for each of the appellants. Each of the appellants was convicted of and sentenced for multiple counts of conspiracy. Specifically,

Sayles and Oxely were each convicted of twenty counts of conspiracy: one count of conspiracy to commit home invasion, five counts of conspiracy to commit armed robbery, one count of conspiracy to commit kidnapping, one count of conspiracy to commit second-degree burglary, one count of conspiracy to commit first-degree assault, five counts of conspiracy to commit second-degree assault, five counts of conspiracy to commit false imprisonment, and one count conspiracy to commit motor vehicle theft. Johnson was convicted of the same conspiracy counts as his co-defendants except that he was found not guilty of conspiracy to commit first-degree assault. The appellants assert that the circuit court erred by convicted each appellant for multiple counts of conspiracy and by sentencing each appellant separately for each separate counts of conspiracy.[13] The State concedes error, and we agree.

As the parties agree, "[i]t is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit. The unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Tracy v. State*, 319 Md. 452, 459 (1990). A conspiracy "remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy." *Martin v. State*, 165 Md. App. 189, 210 (2005) (citation omitted). If the State seeks to establish multiple conspiracies, it "has

[13] Both Sayles and Oxely present argument on this specific issue in their briefs. Johnson adopted by reference any argument asserted by his co-appellants, including this argument.

the burden of proving a separate agreement for each conspiracy." *Savage v. State*, 212 Md. App. 1, 15 (2013) (quotation and citation omitted).

The determination of whether a defendant may be convicted of multiple conspiracies "turns on whether there exists more than one unlawful agreement." *Id.* at 13. "[W]hen there are agreements among several parties," the critical determination is "whether there was one overall agreement to perform various functions to achieve the objectives of the conspiracy, or separate conspiracies." *Id.* (quotation and citation omitted). The State can prove multiple conspiracies when "the agreements are distinct" and when "each agreement has its own end, and each constitutes an end in itself." *Id.* (quotations and citations omitted).

In this case, the State concedes that it did not advance a multiple conspiracy theory to the jury. In its closing argument, the State referred to "the agreement" and argued that there was an "ongoing conspiracy" that "evolve[ed]" throughout the commission of the crime. Because the State argued only a single "ongoing" conspiratorial agreement, not multiple separate and distinct agreements, the State concedes that only one conviction and sentence can stand for each appellant. We agree and shall vacate all but one conspiracy conviction for each appellant.

We must next determine which conspiracy conviction and sentence shall remain. When faced with such a scenario, we generally vacate the conviction carrying the least serious penalty. *E.g.*, *Jordan v. State*, 323 Md. 151 (1991) (vacating a conviction for conspiracy to commit robbery and leaving the conviction for conspiracy to murder

undisturbed, explaining that "murder is the crime that carries the more severe penalty and consequently is the guideline offense."). In this case, the offense that carries the most severe penalty is conspiracy to commit kidnapping, which carries a potential sentence of up to thirty years' imprisonment. *See* Md. Code (2002, 2012 Repl. Vol.), § 3-502(b) of the Criminal Law Article ("CL").[14] We, therefore, shall vacate all of the appellants' conspiracy convictions other than conspiracy to commit kidnapping. As a practical matter, we observe that because all of the sentences for the conspiracy convictions were imposed concurrent to the related non-conspiracy offenses, vacating all but one of the conspiracy convictions will not change the appellants' active period of incarceration. Accordingly, a remand for resentencing is not warranted. Otherwise, we affirm the remaining judgments of conviction.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND VACATED IN PART. ALL CONSPIRACY CONVICTIONS OTHER THAN CONSPIRACY TO COMMIT KIDNAPPING VACATED; JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID THREE-QUARTERS BY APPELLANTS AND ONE-QUARTER BY MONTGOMERY COUNTY.

[14] The State contends that the guideline offense is conspiracy to commit home invasion, which carries a potential twenty-five-year sentence. CL § 6-202(c). Kidnapping carries a longer potential sentence and, therefore, conspiracy to commit kidnapping is the most serious conspiracy offense of which the appellants were convicted.