UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2071

September Term, 2014

MICHAEL JOHN

v.

ST. JOSEPH MEDICAL CENTER, INC.
ET AL.

Krauser, C.J.,
Nazarian,
Reed,

JJ.

Opinion by Krauser, C.J.

Filed: February 4, 2016

Appellant, Michael John, brought a medical malpractice action, in the Circuit Court for Baltimore County, against appellees: St. Joseph Medical Center, Inc.; Catholic Health Initiatives, Inc.; Osler Drive Emergency Physicians Associates, P.A.; Gary S. Anderson, P.A.; and Courtney Rosenthal, M.D. When a verdict was rendered, by a jury, in favor of appellees, Mr. John moved for a new trial, claiming that the trial court had committed reversible error by "inadvertently" substituting an "alternate" juror for a "regular juror" before deliberations commenced. In so moving, however, he did admit that he had chosen not to raise this issue before a verdict had been entered.

After that motion was denied, Mr. John noted this appeal to this Court, raising the same issue, but, in these words:

> Does the inadvertent substitution by the trial judge of an alternate juror for a "regular" juror at the commencement of deliberations mandate a new trial, where the issue is raised by the losing party for the first time in a timely motion filed pursuant to Rule 2-533, even if the issue could have been raised during the jury's deliberations?"

Because we hold that this issue has not been preserved for appellate review, we shall affirm.

Background

Specifically, Mr. John alleged, in his medical malpractice complaint, that the negligent failure of appellees to timely diagnose and then properly treat an infection to his right foot had led to a below-the-knee amputation of his right leg. A trial of this matter began on October 6, 2014, with jury selection. At the start of those proceedings, the court announced that it would seat nine jurors—six regular jurors and three alternates. Then, shortly after jury selection had commenced, counsel for both sides suggested to the court

that it not inform the selected jurors which of them were regular jurors and which of them were alternates. Although no specific reason for this request appears on the record, we assume that it was made to ensure that all members of the panel, including those who were only to serve as alternates, paid close attention to what transpired at trial. The court granted that request, and jury selection resumed.

After a number of prospective jurors were struck for cause, counsel exercised their peremptory challenges as to those that remained.[1] The courtroom clerk then instructed the remaining prospective jurors, "[w]hen your juror number is called, please gather your belongings and proceed to the jury box," and called, in the following order, jurors 35, 37, 39, 45, 93, 119, 131, 146, and 154. Neither the courtroom clerk nor the court gave any indication that the order in which jurors were called to the jury box reflected their status as either regular jurors or alternates.

The trial then proceeded with opening statements by counsel. Then, following the presentation of evidence and closing arguments, the court made the following statement:

> Our alternates, you would never know you are alternates. We thankfully have not had to call upon you, but you have been just as diligent in your duties as all of your fellow jurors, and I do appreciate that as well.
>
> The time has come for me to discharge you from your duties, the three alternates, and I ask that you not discuss the case with any of your fellow jurors, and there are six jurors. Please don't begin deliberating until the alternates have collected their belongings from the jury room.

[1] Rule 2-512(e)(2) provides that, in a civil case, each side is "permitted four peremptory challenges plus one peremptory challenge for each group of three or less alternates to be impanelled." The parties "shall simultaneously exercise their peremptory challenges by striking names from a copy of the jury list." *Id*.

> What I'd like to suggest is that, perhaps that you might want to bring your lunches back if you haven't already brought them in and maybe begin your discussions or deliberations while you lunch. That's just a suggestion.
>
> We do need to bring the exhibit or exhibits back to the room. So perhaps while the alternates gather their belongings and the rest of you situate yourselves for lunch, we will bring the exhibits back, bring my instructions back and everything that you need to do your jobs.

The court did not identify the jurors who were to serve as alternates, and the record does not reflect which jurors were discharged. Nor does the transcript indicate at what time the jury retired for lunch and then for deliberations. The court later informed the parties, however, that the jury did not begin deliberations "until quarter of 2:00 because they all went out and got lunch and brought it back."

We glean what happened next from affidavits that were filed in connection with Mr. John's motion for a new trial. Two of those affidavits were from Juror 119, who had been the sixth juror called by the courtroom clerk to the jury box. In her first affidavit, Juror 119 averred that she was "one of the first six jurors to be called" when the jury was seated; that "at the conclusion of the trial, the Judge and Court staff informed [her] that [she] was discharged because [she] was an alternate juror"; and that she then "left the courthouse and did not participate in the deliberation of the case." Her second and subsequent affidavit added that she, Juror 119, was given, on the first day of trial, a notebook labeled "Alternate #1"; and that, upon leaving the courthouse after being released by the court she spoke to Mr. John's attorneys, who told her "they had assumed [she] was an actual juror," as did counsel for appellees.

Mr. John's trial attorneys, Jon Stefanuca and Mary McNamara Koch, also provided the court with affidavits in which they described their encounter with Juror 119 after her discharge as a juror. Mr. Stefanuca's affidavit stated that, when the jury retired to deliberate, he "did not know that the [c]ourt dismissed or would dismiss Juror 119"; that he "exited the courthouse in an attempt to meet the dismissed alternate jurors"; and that "approximately 10 minutes" later Juror 119 approached him, whereupon he "[i]mmediately" informed her that he could not speak to her because he believed that she was a regular juror. Juror 119 responded that the court had discharged her as an "alternate," a representation that Mr. Stefanuca accepted because he was "not certain about whether she was, in fact, an actual juror."

Ms. Koch's affidavit stated that, after the jury retired to deliberate, she exited the courthouse and met with Mr. Stefanuca, who was discussing the case with "Juror 119 and two alternate jurors." Juror 119 informed her that she had been discharged as an alternate. "At that time," Ms. Koch asserted, she "did not have a specific recollection that Juror 119 was one of the first six jurors to be impaneled," but "suspected that Juror 119 was an actual juror," and, some time later, she "ordered a copy of the trial transcript to confirm Juror 119's status."

But, despite this encounter with Juror 119, and their growing belief that the court had mistakenly discharged her and that, consequently, one of the six deliberating jurors might be an alternate, Mr. John's attorneys failed to bring this matter to the court's attention. In fact, although presented with four opportunities to alert the court to the purported error, they chose, instead, to say nothing until after a verdict was rendered. Three

of those four opportunities to raise the issue arose when the court and counsel met to discuss notes from the jury,[2] and the fourth arose when court reconvened just before the jury returned with its verdict.

When, after almost seven hours of deliberations, the jury found in favor of appellees, Mr. John asked that the jury be polled. A poll was conducted, confirming that the verdict was unanimous, and the jury was thereafter released.

Six days later, Mr. John filed a motion for a new trial, in which he asserted that Juror 119 "was erroneously discharged as an alternate juror" and in her place "an alternate juror was improperly permitted to deliberate" with the other five members of the jury. The circuit court denied both Mr. John's motion for a new trial and his subsequent motion for reconsideration. This appeal followed.

Discussion

Mr. John contends that the "inadvertent substitution" of an alternate juror for Juror 119, a "regular" juror, and the alternate's subsequent participation in deliberations, deprived him of his right to a fair trial. He asserts that he was entitled to be tried by a jury

[2] The first two notes, which came two hours and three hours, respectively, into deliberations, asked factual questions. After conferring with counsel, the court responded that the jury was to rely on its own recollection of the evidence. The third note was sent four hours into deliberations, at approximately 6:15 p.m., and stated that the jury could not agree on a verdict. After discussing the matter with counsel, the judge went to the jury room to tell the jurors that the court would order dinner for them if they wished and that "everyone is willing to wait for you to take as much time as you need" to reach a verdict.

"comprised of not less than six members"[3] and that he was deprived of that right because the alternate, who participated in deliberations in place of Juror 119, was "not a juror" as a matter of law. He further urges that the alternate's presence in the jury room during deliberations created a "presumption of prejudice" that entitled him to a new trial. He thus maintains that the court abused its discretion in denying his motion for a new trial.

The threshold issue is whether this issue has been preserved for our review. Mr. John asserts that he has preserved this issue, notwithstanding his failure to object to the allegedly inadvertent substitution of an alternate juror for a regular juror at any point before the jury rendered its verdict. We conclude, however, that his claim of error has not been preserved.

Generally, we will not decide an issue that was not "raised in or decided by the trial court." Rule 8-131(a). It is undisputed that no objection was ever made, in the circuit court, regarding Juror 119's discharge and the possible participation of an alternate in the deliberation process. And, although Mr. John asserts that the error "could not have been corrected" even if he had objected, Mr. John nonetheless was required to raise an objection to preserve this issue for appellate review. Indeed, it is well settled in Maryland that, even where an error may, in fact, be incurable, a timely objection is required to secure appellate review of that error. *See, e.g., Ramirez v. State*, 178 Md. App. 257, 277 (2008). The reason

[3] Civil litigants, in Maryland, are entitled to a trial by a jury of no less than six members in all causes of action where the amount in controversy exceeds $15,000 and a jury trial could have been demanded at common law. *See* Md. Decl. of Rights, Art. 5, 23; Md. Code § 8-421(a) (1973, 2013 Repl. Vol.) of the Courts and Judicial Proceedings Article; Md. Rule 2-511(a)–(b).

for requiring an objection to even an incurable error is so the "sin [may] be avoided" of a party "sitting back and waiting to see what the verdict is going to be before deciding whether to play its 'trump' card" in an attempt to get "two bites out of the apple." *Williams v. State*, 131 Md. App. 1, 41 (2000).

Moreover, the principle, that the failure to timely object to the presence of a particular individual on a jury, or to his or her participation in deliberations, waives that issue on appeal, is deeply embedded in Maryland law. As early as 1883, the Court of Appeals in *Johns v. Hodges*, 60 Md. 215 (1883), held that a plaintiff had waived his claim—that two of the jurors, who participated in deliberations in his case, were under the age of twenty-five and thus not legally permitted to serve on a jury—by failing to raise that issue before the trial court. *Id.* at 221–22. To wait until "after [a] verdict to avail of a defect in these respects," observed the Court, would "offer an inducement to suitors to await the verdict before questioning the qualification of the juror, that, if favorable, the objection may be suppressed, and if adverse, that it may then be called into requisition. No such lottery is to be encouraged." *Id.* at 222.

Almost a hundred years later, the Court of Appeals reaffirmed this principle in *Lee v. Coulson*, 277 Md. 599 (1976). In that case, a juror whom the plaintiff believed he had struck during jury selection was nevertheless seated on the jury and subsequently participated in deliberations. When the jury returned a verdict in favor of the defendant, the plaintiff filed a motion for a new trial and, for the first time, "advised the court of its inadvertent failure to strike the juror's name from the list of those called to be sworn." *Id.* at 600. The circuit court denied the motion and Maryland's highest court affirmed, holding

that the plaintiff had "waived any possible error" by failing to raise the matter before the trial court. *Id.* at 600–01. And, in so holding, the Court of Appeals noted that the plaintiff had offered "no explanation for his decision not to raise the matter with the trial judge prior to filing his motion for new trial" and pointed out that "[w]hile the jury deliberated, at least one convenient opportunity to request timely action by the court was presented, since a bench conference was required to deal with a communication from the jury." *Id.* at 601. At that point, said the Court of Appeals, the "dismissal of the juror" could have been considered, although the Court "prefer[red] not to indulge in any speculation regarding what the outcome might have been" had the matter been raised. *Id.* In any event, the Court held that the failure "to inform the court that a challenged juror had been inadvertently sworn constituted a waiver of the error." *Id.*

Thus, under Maryland law, it was incumbent upon Mr. John to bring to the court's attention the alleged discharge of a regular juror and her replacement by an alternate, as soon as practicable. And his failure to do so waives this issue on appeal.

Mr. John, interestingly enough, admits that he did not bring this matter to the court's attention because he was waiting to see if the jury—whose composition he now questions—would render a verdict "within a range that both parties [could] 'live with.'" Despite openly admitting to the sort of conduct that the non-preservation rule was intended to prevent, he nonetheless maintains that this was of no matter, as the presence of the alternate juror in deliberations was presumptively prejudicial and the only possible remedy the court could have granted, had the issue been raised, was the declaration of an immediate

mistrial. It was "completely understandable," he reasons, to want to avoid a mistrial, in light of the length of the trial and the expenses the parties had incurred.

Maryland law is clear that it is "unfair to the trial court and opposing counsel" for an appellate court "to review on direct appeal an un-objected to claim of error under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent." *Robinson v. State*, 410 Md. 91, 104 (2009). Indeed, "if the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages . . . gamesmanship." *Id.* In light of Mr. John's own admission that he realized that Juror 119 might have been erroneously discharged soon after the jury had retired to deliberate but decided not to raise the matter with the court in the hope that the jury would return a verdict he could "live with," we view his failure to object as an exercise in "gamesmanship."

Moreover, Mr. John's failure to object to the allegedly mistaken discharge of Juror 119 and her replacement with an alternate juror has had other troubling consequences. As the issue was not raised below, the record[4] is unclear as to whether Juror 119 was, in fact,

[4] When the record in this case was transmitted to this Court, it included a copy of a document titled "Juror Profile," which was in a sealed envelope that was only to be opened by "court order." The "Juror Profile" appears to be a list of the prospective jurors in this case and includes the names, addresses, and other personal information of each prospective juror. Several of these names were crossed out, with notations suggesting that the prospective juror was struck for cause or by the exercise of a peremptory challenge. Other names were marked with numbers 1–6 or the designation of "Alt." 1–3. We do not know who made these notations. Moreover, Rule 2-512(c) provides that a "jury list . . . [u]nless marked for identification and offered in evidence . . .is not part of the case record." In this case, the "Juror Profile" was not admitted as evidence, and no explanation has been given for why this document was included in the record on appeal. As the "juror (cont.)

a regular juror; whether the circuit court intentionally or inadvertently replaced Juror 119 with an alternate before the jury retired to deliberate; or whether any remedy other than a mistrial could have been fashioned if, for example, the parties had agreed, after the fact, to the substitution of the alternate for Juror 119.

Finally, Mr. John contends that, despite his failure to object, he nonetheless preserved his claim of error by filing a timely motion for a new trial under Rule 2-533(a). In support of his contention, Mr. John cites this Court's opinion in *Ramirez v. State*, 178 Md. App. 257 (2008). His reliance on *Ramirez* is misplaced.

Edinson Ramirez was tried before a jury on numerous counts related to a home invasion and armed robbery. *Id.* at 260. At the time the jury retired to deliberate, the circuit court did not formally discharge the alternate juror. *Id.* at 262. The alternate instead "accompanied the jurors into the jury room" and "remained there for a few minutes, until removed by the bailiff." *Id.* The parties were not immediately told of what had occurred. *Id.* Rather, the court informed counsel "as the jury was about to return with a verdict," that the alternate had briefly been present in the jury room. *Id.* Neither the prosecutor nor defense counsel objected at that time, nor did defense counsel move for a mistrial. *Id.* The jury then entered the courtroom, announced that it had found Ramirez guilty on a number of the charges against him, was polled, and then discharged, without comment from

(cont.) profile sheet" is, by rule, not part of the record, and as the notations on the document cannot be authenticated, we will not consider that document in our analysis.

counsel. *Id.* at 260 n.1, 262. Defense counsel thereafter failed to file a motion for a new trial within ten days of the verdict, as required by Rule 4-331(a).[5] *Id.* at 279.

Three months later, defense counsel, for the first time, moved for a mistrial or, in the alternative, for a new trial. *Id.* at 263, 269. The circuit court "assume[d], without deciding," that Ramirez's motions were timely and then denied them. *Id.* at 271. The court concluded that deliberations "had not as yet begun" at the time the alternate was removed from the jury room and that Ramirez was not prejudiced by the alternate's brief presence. *Id.* Ramirez then noted an appeal from that ruling. *Id.* at 261.

We subsequently held that Ramirez had waived any claim of error with respect to the alternate's presence in the jury room by failing to object when he was made aware, by the court, of the alternate's presence in the jury room. *Id.* at 275, 286. Although we recognized that "the alleged error was not one that lent itself to a cure, even if [Ramirez] had objected" and that "a prompt objection may well have been futile," we nevertheless determined that Ramirez was required to object to the incurable error to preserve his claim for appellate review. *Id.* at 277–78 (citing *Williams*, 131 Md. App. at 40–41). Having failed to do so, Ramirez's claim, we avowed, was not preserved. *Id.* at 286.

Then, "assuming, *arguendo*, that, under the circumstances of this case, [Ramirez] was relieved of an obligation to object immediately," we turned to the timeliness of the motions. *Id.* at 278. We concluded that Ramirez's request for a mistrial or a new trial was untimely, as his request for a mistrial was not made until after the verdict was rendered and

[5] Rule 4-331(a) is the criminal counterpart to Rule 2-533(a). Both rules address motions for a new trial and contain timing provisions for the filing of such motions.

his demand for a new trial was not made within the ten-day time period prescribed by Rule 4-331. *Id.* at 279–82.

But what we did not hold, in *Ramirez*, was that a timely motion for a new trial would suffice to preserve an issue for appellate review when there was no objection at the time an objection should have been made. Indeed, we made it clear that Ramirez had not preserved his challenge to the presence of the alternate in the jury room because he had failed to object once he was made aware of that error. Thus, Mr. John's reliance on *Ramirez* for the proposition that his motion for a new trial preserved his claim of error for our review, despite his failure to object before the circuit court, is misplaced.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.