Circuit Court for Prince George's County
Case No. CT151005X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1551, September Term, 2016
No. 1105, September Term, 2017

Consolidated Cases

WARREN PIERRE DAVIS

v.

STATE OF MARYLAND

Woodward, C.J.,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: October 23, 2017

*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.

Appellant, Warren Pierre Davis, was indicted in the Circuit Court for Prince George's County, Maryland, on charges of sexual abuse of a minor, second-degree rape, second-degree sex offense, second-degree assault and contributing to a condition rendering a child delinquent or in need of supervision. The latter two counts were dismissed prior to trial. As will be discussed in more detail, appellant's jury trial ended in a mistrial after the jurors submitted several notes to the trial judge, indicating that further deliberations would not result in a unanimous verdict on all counts. Appellant then filed a motion to dismiss on double jeopardy grounds, which the court denied without a hearing. This Court granted appellant's motion to stay trial pending resolution of the appeal.[1]

Appellant presents two questions for review, both of which question the trial court's decision to declare a mistrial on the grounds of manifest necessity.[2] For the following

[1] At the June 7, 2017 oral argument in Case Number 1551, September Term 2016, it was determined that, notwithstanding a circuit court docket entry indicating that the circuit court denied appellant's motion to dismiss on September 7, 2016, the record on appeal did not include a signed order to that effect. Therefore, on June 23, 2017, the case was remanded to the circuit court, without affirmance or reversal. The circuit court signed a written order denying the motion, that was entered by the clerk on July 6, 2017. Appellant timely appealed the denial of that written order to this Court on August 2, 2017. The parties informed the Clerk of this Court that there was no need for additional briefing following entry of the July 6, 2017 order in the circuit court. By order of this Court dated September 1, 2017, the instant appeals were consolidated and are to be decided on the briefs filed in Case Number 1551, September Term, 2016.

[2] The appellant presents the following questions:

> 1. Did the trial court err in failing to enter a not guilty verdict on the second-degree rape charge where the jury clearly and repeatedly notified the trial court that it had reached that verdict?

reasons, we hold that double jeopardy prohibits the retrial of appellant on the count of second-degree rape but does not prohibit retrial on the counts of second-degree sexual offense and sexual abuse of a minor.

BACKGROUND

Because appellant does not question the sufficiency of the evidence, we need not recite the underlying facts in detail. *See Kennedy v. State*, 436 Md. 686, 688 (2014) ("The circumstances leading to the charges against Petitioner in this case are largely irrelevant to this appeal, and a brief recitation of those facts are included only to provide context"). Briefly, the victim, who was fifteen-years-old at the time of trial, testified that appellant, who was her mother's ex-boyfriend, sexually assaulted her on two prior occasions in 2014 when he lived with the family in Upper Marlboro, Maryland. On one occasion, the victim testified that appellant came downstairs when she was sleeping in the living room, pulled her pants down, and put the "tip of his penis in [her] vagina." And, on another occasion, appellant called the victim to his bedroom and, while the victim's mother was asleep on the bed, appellant "had [her] sucking his penis."

After two days of trial concerning these two incidents, the jury was instructed on the third day on the law of sex abuse of a minor, second-degree rape, and second-degree sex offense. Following instructions and closing argument, the jury began deliberations at

2. Was it manifestly necessary for the trial court to declare a mistrial on the remaining counts under the circumstances of this case?

Because they ultimately concern the same subject matter, we shall address these questions together, but will delineate our discussion accordingly.

2:46 p.m. The court reconvened at 4:11 p.m. and instructed the jurors to return the next day to resume deliberations at 9:00 a.m.

The next day, deliberations resumed at around 9:16 a.m. Approximately an hour and a half later, at 10:52 a.m., the court convened to address a jury note with the parties. That note sets forth both the jury's question and the court's response, as follows:

> #5
>
> - Don't agree on questions
> #1 Sexual Abuse
> #3 Second Degree Sexual Offense
>
> -Not guilty
> #2 Second Degree Rape
>
> 10:03 a.m.
>
> Please continue deliberations and advise once you have reached a decision as to <u>all</u> questions. [signed by Trial Judge]

(Emphasis in original)[3]

Discussion about the note prior to the court's response was as follows:

> THE COURT: I have been handed out a note that the jury sent to the Court. I have written in what I proposed to answer.
>
> Any objection to the Court's action?
>
> [DEFENSE COUNSEL]: Your Honor, I ask to take a partial verdict.
>
> THE COURT: There is no such thing as a partial verdict.
>
> [DEFENSE COUNSEL]: I would like for you to take the verdict on the count of second-degree rape.

[3] Although not entirely clear, we presume that the notation "#5" refers to the jury foreman's jury number.

THE COURT: That request is denied. There is no verdict until they have reached a decision as to all counts. Those are their instructions.

[PROSECUTOR]: Your Honor, would you like us to sign the note?

THE COURT: It's not necessary. But let me sign it though.

Does anybody think I should do anything else, anything short of taking a partial verdict?

[DEFENSE COUNSEL]: No.

The court recessed until 11:20 a.m. when another note from the jury was received. That note, and the court's response, provided:

#5

- Don't agree on questions
#1 Sexual Abuse
#3 Second Degree Sexual Offense
We need more evidence – may [sic] transcripts
We are not agreeing

-Not guilty
#2 Second Degree Rape

11:07 am

May we get the transcripts?

No. [Trial Judge]

When the court showed the note and the response to the parties, the following colloquy ensued:

THE COURT: Do you want to see my answer or should I tell you? It's the same.

[DEFENSE COUNSEL]: I will just take a copy.

I do want to speak to that, if you give me a second or two. Your Honor, if I may speak. Maryland Rule 4-327, subsection D, allows you to take partial verdicts.

THE COURT: I know.

[DEFENSE COUNSEL]: I thought you said you were not permitted to do that.

THE COURT: As far as I'm concerned, I don't because I believe it's a corruption of the process. I personally cannot do it myself, because I believe it's a corruption of the process.

[DEFENSE COUNSEL]: I thought you said you were not permitted.

THE COURT: No. Legally, you can do it. I have seen it done several times. Judges made me eat that as a prosecutor often. I didn't like it.

[DEFENSE COUNSEL]: I'm of the other ill [sic], unfortunately.

THE COURT: I know. I understand.

[DEFENSE COUNSEL]: Because what it does is it deprives my client of an opportunity to be found not guilty.

THE COURT: There is no verdict. Their instruction is to let us know when they have reached a verdict as to all counts. They have not followed the instructions.

* * *

[DEFENSE COUNSEL]: That's the reason, I think virtue of due process, he is entitled to have that done. If there is a mechanism you can do it. I understand you have a personal diversion [sic] to doing that because it distorts the process, I guess, is what you said. But I would ask you to do it again.

THE COURT: I will not do that. But in the meantime, bring them in, because they do say we are not agreeing, so I'm going to give them the Allen Charge[4]. Even though I already said it before.

[4] Defense counsel objected to the giving of the *Allen* instruction, noting that the jury had only been deliberating for approximately three hours. "We have long held 'that the

Over objection, the court instructed the jury as follows:

> All right. Good morning, ladies and gentlemen. I have received your notes. And I am going to, in response, repeat two things I said earlier. Number one is, you're not getting any transcripts.
>
> Number two, the verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement if you can do so without violence to your own individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors.
>
> During deliberations, do not hesitate to reexamine your own views. You should change your opinion, if you are convinced you are wrong. But do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.
>
> You may resume.

The jury resumed deliberations from 11:30 a.m. until 12:41 p.m. when the court received another note stating "We still don't agree; may we take a break and go to lunch?" The court then directed a "working lunch" whereby the jurors could obtain lunch from the courthouse cafeteria and bring it back to the jury room to continue deliberations.

At 2:46 p.m., the court addressed another note, that asked: "Please define inappropriate touching according to the law of a minor?" The court's proposed response was: "1) Please use the instructions provided." Defense counsel asked the court to respond

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decisions as to whether the ABA recommended *Allen*-type charge should be used and 'when to employ it ... are best left to the sound discretion of the trial judge.'" *Nash v. State*, 439 Md. 53, 92, *cert. denied*, 135 S.Ct. 284 (2014) (citations omitted) (discussing *Allen v. United States*, 164 U.S. 492 (1896)); *see also* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 2:01, at 205 (2d. ed. 2016) ("MPJI-Cr").

that "you must use the evidence provided to you and other materials provided to you." The court declined counsel's request and gave the response it had indicated. The court then stood in recess from 2:51 p.m. until 4:04 p.m. when the court, after receiving a note from a juror about a personal matter, decided to send the jury home for the day, with instructions to return the next day.

The next day, at 10:52 a.m., the court convened the parties in the courtroom. The purpose was to address the following and final note:

#5

We do not agree on the following questions

#1 Sexual Abuse of Minor
11 Guilty 1 Not Guilty

#3 Second Degree Sexual Offense
1 Guilty 11 Not Guilty

#2 Second Degree Rape
Not Guilty

Hung Jury

After the court confirmed that all of the parties had had the opportunity to review the note, the jurors were brought into the courtroom and polled individually. The deputy clerk asked each juror the following question: "Juror Number [x], do you believe that further deliberations are likely to result in a unanimous verdict as to all counts?" Each juror responded to this question in the negative. When, the jury returned to the jury room, the following ensued:

THE COURT: All right. I will hear what you've got to say.

[DEFENSE COUNSEL]: Your Honor, I ask you to take a verdict as to the two not guilty verdicts.

THE COURT: Do you object?

[PROSECUTOR]: Yes, Your Honor.

[DEFENSE COUNSEL]: I'd ask you to take that based upon case law in the [S]tate.

THE COURT: Your request is denied.

[DEFENSE COUNSEL]: The case law in the [S]tate is rather clear.

THE COURT: It's rather clear that it's a matter of the Court's discretion. I do not wish to exercise it over the objection of the State in this case.

[DEFENSE COUNSEL]: Can I give the Court a citation of the case?

THE COURT: Talk to madam court reporter. She is taking everything down you say.

[DEFENSE COUNSEL]: State versus Fennell F-E-N-N-E-L-L, case number 431 Maryland 500, requires the Court to take a partial verdict when a note comes back as it did in this case.

THE COURT: All right. The Court finds a manifest necessity to declare a mistrial in this case given the jury's inability to reach a verdict unanimous decision as to all counts as they were instructed and directed to do.

[DEFENSE COUNSEL]: Please note our strenuous objection to declaring a mistrial, Your Honor.

THE COURT: You got that?

[DEFENSE COUNSEL]: I will spell it strenuous.

THE COURT: All right. You are free.

[PROSECUTOR]: Your Honor, the State does intend to go forward again.[5]

Appellant filed a Motion to Dismiss for Double Jeopardy. In that motion, and after restating the facts as set forth above, appellant argued that the trial court erred in granting a mistrial on all counts, over his objection. Appellant argued that the court should have taken a partial verdict on the second-degree rape count and that, generally, reasonable alternatives existed that did not require the declaration of a mistrial on the remaining counts of second-degree sex offense and sexual abuse of a minor.[6] The State, parsing the last jury note, responded that it was possible the jury's statement that they were unable to agree also applied to the second-degree rape count because there was no numerical breakdown indicating how many jurors voted to acquit on second-degree rape. Therefore, it argued that the notation "Hung Jury" might also apply to the second-degree rape count. And, because there was a genuine deadlock on the remaining counts, retrial on those counts was not prohibited by double jeopardy.

[5] The docket entries indicate that the case was "[t]o be reset for Jury Trial before [the trial judge]."

[6] In his motion, appellant also argued that the court erred in granting a mistrial because: (1) the trial "lasted approximately three days;" (2) various notes suggested the issues before the jury were complex; and, (3) the court gave a premature Allen charge after the jury had only deliberated for three hours and fifteen minutes. Appellant also asserted that the court erred by not inquiring "into the Jury's status of unanimity, or not, prior to its discharge, in light of the inconsistent division of the Jury in its last note prior to the declaration of the mistrial."

The court denied the motion to dismiss and appellant appealed. This Court granted appellant's motion to stay trial pending resolution of the appeal. We may include additional details in the discussion.

DISCUSSION

Appellant contends that the court erred in granting a mistrial as to all counts because a mistrial was not manifestly necessary under the circumstances. More specifically, appellant argues that the court should have granted a partial verdict on the second-degree rape count, and did not consider reasonable alternatives to a mistrial for the remaining counts charging second-degree sexual offense and sexual abuse of a minor. For these reasons, appellant argues that principles of double jeopardy bar retrial.

The State contends that the trial court acted properly within its discretion in ordering a mistrial because the notes from the jury do not reflect an "explicit, unambiguous indication of unanimity," and a partial verdict on the second-degree rape count was not required. With respect to the remaining counts, the State asserts that appellant never raised reasonable alternatives to a mistrial in the trial court, and that any such claim is unpreserved for appellate review. As to the second-degree sex offense and sexual abuse of a minor counts, the State counters that appellant's argument fails on the merits and the mistrial was not an abuse of discretion.

A.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const., Amend. V. This constitutional guarantee is made applicable to the states through the Due Process Clause of

the Fourteenth Amendment. *State v. Baker*, 453 Md. 32, 47 (2017) (citing *Benton v. Maryland*, 395 U.S. 784, 794 (1969). "Although the Maryland Constitution does not contain an analogous clause, Maryland common law protects similarly an accused against double jeopardy." *State v. Fennell*, 431 Md. 500, 514 (2013) (citations omitted). This protection prohibits "1) the second prosecution for the same offense after acquittal; 2) the second prosecution for the same offense after conviction for that offense; and 3) the imposition of multiple punishments for the same offense." *Taylor v. State*, 381 Md. 602, 610 (2004).

As a part of its protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a "'valued right to have his trial completed by a particular tribunal.'" *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). But, when a mistrial based on "manifest necessity" is declared, "retrial is not prohibited." *Fennell*, 431 Md. at 505 (citing *Hubbard v. State*, 395 Md. 73, 89 (2006)).[7] Determining whether there was a "manifest necessity" for a mistrial requires us to "review without deference, considering the totality of the circumstances, the legal conclusions of the trial court." *Fennell*, 431 Md. at 513. "The words 'manifest necessity' appropriately characterize the magnitude of the prosecutor's burden." *Simmons*, 436 Md.

[7] We note that, if a defendant consents to or requests a mistrial, double jeopardy generally does not apply and the defendant may be subject to retrial. *Oregon v. Kennedy*, 456 U.S. at 671-72; *accord Simmons v. State*, 436 Md. 202, 214 n.1 (2013). In this case, although there is some question whether appellant argued the same grounds at trial that he raises now as to the second-degree sex offense and sexual abuse of a minor counts, there is no dispute that appellant objected to the mistrial.

at 215 (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). But, that does not mean that we interpret the words "manifest necessity" literally. Instead, "we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Baker*, 453 Md. at 48 (quoting *Washington*, 434 U.S. at 506).

To declare a mistrial over defense objection, "the trial judge must engage in the process of exploring reasonable alternatives and determine that there is no reasonable alternative to the mistrial." *Simmons*, 436 Md. at 215 (quoting *Hubbard*, 395 Md. at 92). "If, however, the mistrial was not manifestly necessary, then the [court] abused [its] discretion in declaring the mistrial, and retrial is barred by double jeopardy principles." *Baker*, 453 Md. at 47. As the Court of Appeals recently summarized:

> [T]here exists "manifest necessity" for a mistrial only if 1) there was a "high degree" of necessity for the mistrial; 2) the trial court engaged "in the process of exploring reasonable alternatives" to a mistrial and determined that none was available; and 3) no reasonable alternative to a mistrial was, in fact, available.

Baker, 453 Md. at 49.

B.

Appellant, asserting that "the jury never wavered in its verdict on this count, or expressed any intention or desire to revisit that verdict," insists that the court should have entered a partial verdict on the second-degree rape count, and that the court's decision to order a mistrial amounted to reversible error. The Maryland Rules clearly permit a trial court to accept a partial verdict:

> When there are two or more counts, the jury may return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree may be tried again.

Maryland Rule 4-327(d); *see also Fennell*, 431 Md. at 520 (recognizing that partial verdicts are allowed in Maryland under certain circumstances).

Appellant relies primarily on *State v. Fennell*, *supra*. In *Fennell*, after approximately three hours of deliberations, the jury informed the trial court, via an "unsolicited, completed verdict sheet," that it had voted unanimously to acquit Fennell of the charges of first-degree assault, conspiracy to commit first-degree assault, and conspiracy to commit robbery, but it was unable to agree on the charges of robbery and second-degree assault. *Fennell*, 431 Md. at 505. After consulting with counsel, and at defense counsel's request, the court instructed the jury to "Please continue to deliberate regarding the counts as to which you are undecided." *Id*. at 508. A half hour later, the court called the jury into the courtroom and was informed by the foreperson that "there's a clear division on the amount of evidence, and how you read the evidence." *Id*. at 509. Defense counsel asked the judge to take a partial verdict on the counts where the jurors were unanimous in their decision. *Id*. at 510. The court declined this option, and instead declared a mistrial as to all counts. *Id*.

Fennell then filed a Motion to Bar Retrial Due to Double Jeopardy as to the three charges where the jury indicated they had unanimously voted for acquittal; he agreed that he consented to be retried on the remaining two charges. *Fennell*, 431 Md. at 510-11. The circuit court initially agreed to grant the motion, but later revised that decision and denied the motion. *Id*. On appeal, this Court reversed, concluding that the circuit court did not consider reasonable alternatives, and that no manifest necessity existed for the mistrial. *Id*.

The Court of Appeals granted the State's petition for writ of certiorari and affirmed our reversal of the circuit court. *Fennell*, 431 Md. at 526-27. The Court explained that:

> Viewing the record as a whole, however, we conclude that the jury's unsolicited submission of the completed verdict sheet, the trial judge's subsequent instructions, and the ultimate colloquy between the jury foreperson and the trial court reveals an ambiguity as to the jury's intent and resulting deadlock that was never resolved satisfactorily by the trial court. The jury's delivery to the court of the verdict sheet indicated facially that the jury agreed unanimously to acquit the defendant on the charges of first degree assault, conspiracy to commit first degree assault, and conspiracy to commit robbery, but was deadlocked as to the remaining two charges.

Fennell, 431 Md. at 524. *Cf. Caldwell v. State*, 164 Md. App. 612, 646-47 (2005) (holding it was error to accept partial verdicts where those verdicts "were defective, because they were not final decisions and therefore did not meet the requirement of unanimous consent").

The *Fennell* Court explained:

> Because the trial judge was on notice that the jury may have reached a partial verdict, an ambiguity as to unanimity persisted through the colloquy with the jury, defense counsel requested a partial verdict, and the specter of coercion was low due to the posture of the jury's deliberations, Maryland Rule 4-327(d) provided the trial judge with a reasonable alternative to the declaration of a mistrial. Thus, before a proper finding of manifest necessity for a mistrial could have been made, the trial judge should have inquired into the jury's status of unanimity prior to its discharge. Failure to do so was an abuse of discretion, and retrial on the charges of first degree assault, conspiracy to commit first degree assault, and conspiracy to commit robbery is barred by double jeopardy.

Fennell, 431 Md. at 526; *Simmons*, 436 Md. at 211-12 (observing that "before a proper finding of manifest necessity for a mistrial could have been made, the trial judge should have inquired into the jury's status of unanimity prior to its discharge. Failure to do so was an abuse of discretion") (discussing *State v. Fennell, supra*).

As to the second-degree rape, the jury consistently indicated, albeit through handwritten jury notes rather than a typed verdict sheet, that appellant was not guilty of second-degree rape by reflecting the specific counts it could not agree upon and excluding second-degree rape from those counts. That this was a unanimous decision is again reflected in the last note where the jury not only indicated that appellant was not guilty of second-degree rape, but reported the numerical split only on the two counts on which they could not agree.

The State seeks to distinguish *Fennell* based on, in our view, a strained reading of the court's polling of each individual juror, prior to declaring the mistrial. The jurors were asked whether "you believe that further deliberations are likely to result in a unanimous verdict as to all counts." This question, consistent with the court's clear dislike of partial verdicts, asked only whether they could reach a unanimous verdict as to *all* three counts, not an individual count. Indeed, as appellant points out, "[t]he polling did not address – let alone undermine – the fact that the jury had reached (and repeatedly expressed) its verdict on the Second Degree Rape count."

As part of the totality of the circumstances is the court's own earlier comments that "[t]here is no such thing as a partial verdict," and "[a]s far as I'm concerned, I don't because I believe it's a corruption of the process. I personally cannot do it myself, because I believe it's a corruption of the process." Although the court counseled that granting a partial verdict was within its discretion, these statements evidence an unwillingness to exercise that discretion and even consider a partial verdict as to the second-degree rape count. It is well settled that a failure to exercise discretion is tantamount to an abuse of discretion. *See*

101 Geneva LLC v. Wynn, 435 Md. 233, 241 (2013) ("It is well settled that a trial judge who encounters a matter that falls within the realm of judicial discretion *must* exercise his or her discretion in ruling on the matter") (emphasis in original); *Gray v. State*, 368 Md. 529, 565 (2002) (noting that "our cases hold that the actual failure to exercise discretion is an abuse of discretion"); *see also Hart v. Miller*, 65 Md. App. 620, 627 (1985) ("When, as in the present case, the trial court recognizes its right to exercise discretion, but then declines to exercise it in favor of adhering to some consistent or uniform policy, it errs").[8]

Accordingly, given the jurors repeated "not guilty" decision on the second-degree rape count, we are persuaded that the trial court abused its discretion in declining to take a partial verdict on that count without, at least, polling the jury on that count before declaring a mistrial. Therefore, we hold that retrial on that count is barred by double jeopardy.

C.

Appellant also asserts that the court erred in granting a mistrial as to the second-degree sex offense and sexual abuse of a minor counts, again on the grounds that there was no manifest necessity for a mistrial. Appellant concedes that the court is not required to take "specific steps" in considering reasonable alternatives to a mistrial, but contends that, here, the court failed to consider whether a mistrial could be avoided by providing

[8] We note that the court stated that it did not want to exercise its discretion because of the State's objection. We are not persuaded that its deferral to the State in this case constituted an actual exercise of discretion.

transcripts or defining "inappropriate touching" in response to two jury notes. Appellant also asserts the court did not "consider the facial inconsistency between the jury's apparent split between the sexual abuse and second degree sexual offense" counts.

The State responds that appellant never made these specific arguments at trial, therefore they are not preserved for our review. In addition, the State avers that providing transcripts, defining "inappropriate touching," or asking the jury to resolve factually inconsistent verdicts on the two remaining counts would not have been reasonable alternatives to a declaration of a mistrial.

Generally, Maryland Rule 8-131(a) provides, in pertinent part:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Under this rule, "review of arguments not raised at the trial level is discretionary, not mandatory." *Hartman v. State*, 452 Md. 279, 299 (2017); *see also Stewart-Bey v. State*, 218 Md. App. 101, 127 (2014) (limiting appellate review to "the ground assigned" in the objection during trial) (citation omitted). As has been explained, "'[a] party must bring his argument to the attention of the trial court with enough particularity that the court is aware first, that there is an issue before it, and secondly, what the parameters of the issue are.'" *In re Roberto d. B.*, 399 Md. 267, 311 (2007) (quoting *Harmony v. State*, 88 Md. App. 306, 317 (1991)). Furthermore, "[t]he trial court needs sufficient information to allow it to make a thoughtful judgment." *Id*. at 311-12 (citation omitted).

Here, appellant neither objected or voiced any suggestion when the jury asked for a copy of the transcripts. Likewise, when the jury asked for a definition of "inappropriate touching," defense counsel asked the court to respond that "you must use the evidence provided to you and other materials provided to you." Finally, when the jury issued a note indicating their precise numerical split on the second-degree sex offense and sexual abuse counts, defense counsel reiterated his request asking the court to take a partial verdict on the second-degree rape count. Although defense counsel made clear that he was objecting to the mistrial, he did not argue that further inquiry concerning any inconsistency in the 11-1 and 1-11 votes on the remaining counts was a reasonable alternative to consider before declaring a mistrial. *See generally*, *Givens v. State*, 449 Md. 433, 472-73 (2016) (maintaining that a defendant in a criminal jury trial by jury must object to the allegedly inconsistent verdicts). Thus, we agree with the State that this argument concerning whether the court adequately considered reasonable alternatives to a mistrial as to the second-degree sex offense and sexual abuse counts is not preserved for our review. *See Robinson v. State*, 209 Md. App. 174, 202 (2012) ("Because [appellant's] arguments were not raised below, they are not preserved for appellate review").

But, were we to address the merits, we would hold that the court did not abuse its discretion in declaring a mistrial as to these two specific counts. As the Court of Appeals recognizes, "[a] genuinely deadlocked jury is considered the prototypical example of a manifest necessity for a mistrial." *Fennell*, 431 Md. at 516 (citing *Blueford v. Arkansas*, 566 U.S. 599 (2012)); *see also Baker*, 453 Md. at 55 ("At the other extreme is the hung jury, considered to be the classic example of what constitutes manifest necessity for a

mistrial.") (citation and quotation marks omitted). And, the general rule is that "[i]t is within the trial judge's discretion to require an apparently deadlocked jury to continue deliberating or to declare a mistrial." *Browne v. State*, 215 Md. App. 51, 57 (2013) (citing *Mayfield v. State*, 302 Md. 624, 632 (1985)).

When presented with a possible deadlocked jury, the trial court should ordinarily consider: "the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement." *Thomas v. State*, 113 Md. App. 1, 11-12 (1996) (citation omitted). Nevertheless, Maryland courts have declined to set any "hard and fast rules limiting trial judges' discretion in allowing juries to deliberate[,]" or any specific limits on the number of times a jury can be sent back for additional deliberations. *Id.* at 9. A jury may be sent back "once, twice or several times." *Id.* at 9-10 (footnote omitted). As the *Fennell* Court explained:

> Consistent with the discretion vested in trial judges, the Supreme Court has declined repeatedly to require, as a matter of constitutional dimension, that trial judges undertake specific steps prior to declaring a mistrial. *Blueford*, [566] U.S. at --, 132 S.Ct. at 2052, 182 L.Ed.2d at 945; [*Renico v. Lett*, 559 U.S. 766, 775 (2010)]. As the Supreme Court stated recently in *Renico v. Lett*, it has "never required a trial judge, before declaring a mistrial on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse." [559 U.S. at 775]. Rather, the determination of whether there is manifest necessity for a mistrial - or, a "high degree" of necessity, [*Arizona v. Washington*, 434 U.S. at 507-08] - is a fact-specific inquiry not reducible to "a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." [*Id*. at 505-06, 509-10] (noting that deference to a trial judge's discretion guards against the possibility of trial judges otherwise "employ[ing] coercive means to break

> the apparent deadlock," which might create "a significant risk that a verdict may result from the pressures inherent in the situation rather than the considered judgment of all the jurors"); [*United States v. Perez*, 22 U.S. 579, 580 (1824)] (noting that trial judges must "tak[e] all the circumstances into consideration," "exercise a sound discretion," and use the power to declare a mistrial "with the greatest caution, under urgent circumstances").

Fennell, 431 Md. at 517.

Here, it was not a particularly long trial with a great number of witnesses, but the jury consistently maintained that they were unable to agree on all but the second-degree rape count and, their inability to agree was not ameliorated by the court's decision to give a modified *Allen* charge.

Concerning the request for transcripts, we note that before deliberations, the court advised the jury that they would not receive transcripts of the testimony. They were instructed that "it is your collective memory of the evidence which must guide you to the answers to the questions we are submitting to you." Cases from this Court and from the Court of Appeals have consistently held that "it is in the sole discretion of the trial judge to have portions of the transcript read to the jury when requested[.]" *Leach v. State*, 47 Md. App. 611, 625 (1981); *see Veney v. State*, 251 Md. 159, 173 (1968) ("The trial judge within his discretion may permit the reading to the jury of the official court stenographer's notes of the testimony at the trial, or may refuse permission to do so") (citation omitted), *cert. denied*, 394 U.S. 948 (1969); *see also Jackson v. State*, 164 Md. App. 679, 725-27 (2005) (holding that the decision whether to transcribe court reporter's notes and have them read back to the jury during deliberations was discretionary).

As for appellant's suggestion that the court failed to adequately address the jury note asking for a definition of "inappropriate touching," the record is not entirely clear as to what may have occasioned this question. The phrase is not part of the court's instructions on the three crimes charged, or included in the pattern instructions themselves. *See* MPJI-Cr 4:07.1 at 164 (1st ed. 1995), 4:29.3 at 788, 4:29.6 at 800. And, the term does not appear to have been used by either attorney during closing arguments.

A review of the record suggests that the jury's question may have arisen as a result of the testimony from the victim's mother, who testified to incidents where she saw appellant touch the victim's face, neck, lower body and legs. She also witnessed another incident where appellant came up behind the victim and grabbed her from behind. On cross-examination, the witness explained that she did not think so at first, but "after a while" she thought that this "touching was inappropriate."[9]

On this issue, we simply note that "[t]he decision of whether to give supplemental instructions is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion." *Sidbury v. State*, 414 Md. 180, 186 (2010). Furthermore, "[a]ny answer given must accurately state the law and be responsive to jurors' questions without invading the province of the jury to decide the case." *Appraicio v. State*, 431 Md. 42, 44 (2013). Under the circumstances presented, the "inappropriate touching" question borders on a request to resolve an issue of fact, and not one of law. Ordinarily, such issues are within the province of the jury. *See*, *e.g.*, MPJI-Cr 2:00 ("You are the ones

[9] In addition to this testimony from the victim's mother, we note that the court struck a question of the victim's brother, asking about "inappropriate behavior" between appellant and the victim.

to decide the facts and apply the law to those facts"); *see also Brown v. State*, 368 Md. 320, 328 (2002) (observing that "it is the exclusive province of the jury to decide on the credibility of witnesses, and to determine the weight of testimony") (citation omitted).

Finally, and to the extent that appellant is suggesting that the court should have delved further into the jury's numerical split on the remaining two counts, we question whether delving further into that split would even be a permitted alternative, much less a reasonable one. *See Tanner v. United States*, 483 U.S. 107, 127 (1987) ("[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry"); *see also Graham v. State*, 325 Md. 398, 413 (1992) ("[A] judge should not ask a jury to disclose its numerical division") (footnote omitted). But, in any event, we are not persuaded that failure to further inquire, *sua sponte*, amounted to an abuse of discretion.

In sum, we are not persuaded that the court abused its discretion in declaring a mistrial on the second-degree sex offense and sexual assault of a minor counts.

COUNT TWO OF THE INDICTMENT (SECOND-DEGREE RAPE) DISMISSED. ORDER DENYING MOTION TO DISMISS REMAINING COUNTS AFFIRMED.

CASE REMANDED FOR FURTHER PROCEEDINGS.

COSTS TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY PRINCE GEORGE'S COUNTY.