Circuit Court for Baltimore City
Case No.: 116207007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 623

September Term, 2017

KELVIN MOORE

v.

STATE OF MARYLAND

Nazarian,
Reed,
Beachley

JJ.

Opinion by Reed, J.

Filed: October 29, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On December 13, 2016, Kelvin Moore ("Appellant") was tried before a jury in the Circuit Court for Baltimore City for (1) unlawful possession of a regulated firearm by a disqualified person; (2) unlawful wear, carry, or knowing transportation of a firearm on one's person; and (3) unlawful possession of ammunition by a disqualified person. Unable to reach a unanimous decision, the jury was instructed to report back the following day to continue deliberations. On the following day, the court declared a mistrial due to Appellant's unavailability. Appellant was later retried on the same charges.

After the second trial, Appellant was found guilty of unlawful possession of ammunition, sentenced to one year in prison, and ordered to pay a $1,000 fine. Appellant timely filed this appeal and presents two questions for our review, which we have reordered and rephrased for clarity[1]:

I. Did the circuit court err when it declared a mistrial and allowed the State to re-try Appellant on the same charges?

II. Did the circuit court err when it provided instruction to the jury outside Appellant's presence and without first notifying or obtaining consent of counsel?

[1] Appellant presents the following questions:

1. Whether the trial court violated Mr. Moore's right to be present when it instructed the deadlocked jury in writing to continue deliberations without first informing or obtaining consent from the parties.

2. Whether the trial court violated Mr. Moore's right to be free from being twice at jeopardy when it declared a mistrial absent manifest necessity and the State subsequently retried him on the same charges.

For the following reasons, we hold that the Appellant can be re-tried, but reverse the judgment below based on the trial court's mishandling of the jury note.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2016, Officers Barajas and Burch, of the Baltimore City Police Department, were dispatched to Pennsylvania Avenue to investigate a tip from a confidential informant regarding a black male displaying a handgun. The suspect was described as wearing a white tank top, black shorts, and black tennis shoes. The informant also stated that the man was with a child and would be carrying a black bag with stars on it.[2]

Officers Barajas and Burch spotted a man who fit the description provided in the tip on the 1700 block of Pennsylvania Avenue. The man, later identified as Appellant, was accompanied by his pregnant girlfriend, Dasha Owens ("Owens"), and the couple's son, D.M. At trial, Officer Burch testified that as he and Officer Barajas were driving behind the family, Appellant turned around and looked in the officers' direction. Appellant then handed the black bag to Owens and took D.M. from her arms. The officers exited their vehicle and advised Owens to hand over the black bag. Officer Barajas took the black bag, patted the bag down and felt a handgun. The officers retrieved a loaded Glock 19 handgun with live rounds and one magazine inside of the bag.

[2] The black bag with stars on it was later determined to be Owens' diaper bag.

Appellant was charged with (1) unlawful possession of a regulated firearm by a disqualified person; (2) unlawful wear, carry, or knowing transportation of firearm on one's person; and (3) unlawful possession of ammunition by a disqualified person.

A. Appellant's First Trial

On December 13, 2016, Appellant was tried before the Honorable Videtta Brown. Three and a half hours into deliberation, the jury sent out the following note: "After extensive deliberations, we have gone from 5/7 (not guilty/guilty) to 1/11 (not guilty/guilty). There does not seem to be any possibility of the 1 juror changing his/her mind. Please advise." Appellant's counsel requested a mistrial. Instead, Judge Brown adjourned for the evening, reasoning that the jury had not deliberated long enough to justify a mistrial.

The jury resumed deliberations the following morning in front of the Honorable Lynn Stewart Mays due to Judge Brown's unavailability. Shortly thereafter, the jury sent out a second note requesting clarification on the required standards of proof. The parties were called to review the note; however, Appellant was not present. Appellant had been injured the night before in a fight with another inmate. After inquiring into Appellant's physical condition, the court lacked assurance that Appellant would be available to appear before the court.

The State urged the circuit court to respond to the jury's note in Appellant's absence by providing a non-substantive response; however, Appellant's counsel opposed "any communication without [Appellant] or at least knowing that [counsel has] a waiver of his

appearance." The State implied that, by engaging in the fight, Appellant made himself unavailable to evade conviction; therefore, Appellant constructively waived his constitutional right to be present. The State insisted that the court provide "logistical communication" informing the jury that it could not respond to the jury's note at that time. Still, Appellant's counsel maintained that he objected to any communication without Appellant present.

Ultimately, Judge Mays declared that there was not enough information to determine if Appellant waived his right to be present and declared a mistrial stating:

> THE COURT: All right, at this point given the totality of the circumstances as they exist, the [c]ourt finds that it has no other choice and it is for manifest necessity that I grant a mistrial in this matter. We have no idea if or when [Appellant] would be able to be present and it has become apparent from the second – there was a verbal request from the jury. Wanted to know what was taking so long for the answer. So that indicates to the [c]ourt that they are not doing anything until they get an answer to this question. And answering this question would be – would require the presence of [Appellant].

The State refiled the charges against Appellant.

B. Appellant's Second Trial

The second trial commenced on April 27, 2017, in front of the Honorable Alfred Nance.[3] The jury returned to begin deliberations, April 28, 2017, at approximately 10:00 a.m. Around 10:30 a.m., the jury sent out its first note asking the circuit court "what is the legal definition of possession?" The circuit court consulted with the parties and reinstructed

[3] Appellant moved to dismiss the charges on double jeopardy grounds, arguing that manifest necessity did not support the dismissal of his first trial. The Honorable Sylvester Cox denied the motion.

the jury on the possession charge. The jury sent a second note asking for clarification of the definition of "knowingly." The circuit court consulted with all counsel for a second time and ultimately reinstructed them on possession. The jury sent its third note to Judge Nance asking, "what do we do if we are not unanimous on all counts?" Without notifying the parties of the third note, Judge Nance responded in writing, "[p]lease go to lunch, and return at 1pm and continue deliberation."

Immediately after lunch, the jury reconvened, sending a fourth note to Judge Nance that they had reached a unanimous verdict. Judge Nance informed the parties about the third note just before the jury reentered the courtroom. The jury convicted Appellant of possession of ammunition by a disqualified person and acquitted him of all other charges. Appellant was sentenced to a year in prison and was ordered to pay a $1,000.00 fine. On May 4, 2017, Appellant filed this timely appeal.

DISCUSSION

I. Double Jeopardy Clause

A. Parties' Contentions

Appellant argues that the first trial court erred in declaring a mistrial because there was no manifest necessity to support the court's ruling. Appellant maintains that the circuit court failed to explore other reasonable alternatives that would circumvent the declaration, such as, granting a short continuance to allow defense counsel to consult Appellant on how he would like to respond to the second note. Consequently, Appellant contends his

"conviction must be reversed because the subsequent retrial was barred by the Double Jeopardy Clause" of the United States Constitution.

The State counters that the mistrial was proper because Appellant's counsel requested a mistrial on two different occasions: (1) when Appellant learned that the jury was split (11 guilty/1 not guilty) and (2) when Appellant "was unavailable to continue the trial on the second day of deliberations." In light of Appellant's injury and the jury's disposition on the last day of trial, the State contends that the court properly established a manifest necessity to declare a mistrial. Furthermore, Appellant's argument that the State "goaded [Appellant's] counsel into requesting a mistrial" has no merit. The State maintains that "the exchange between counsel and the [circuit] court discussing the jury note, [Appellant's] status, and whether the court could/should respond to the note in [Appellant's] absence" cannot be characterized as an exchange that induced Appellant's counsel to make the request. We agree.

B. Standard of Review

"It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Carter v. State*, 366 Md. 574, 589 (2001) (citing *Wade v. Hunter*, 336 U.S. 684, 687 (1949)). The trial court's ruling will not be reversed merely because the appellate court would not have rendered the same ruling. *North v. North,* 102 Md. App. 1, 14 (1994). Rather, reversal is warranted only when the trial court made determinations without regard for the controlling law and is contrary to the facts and logic.

Wilson v. John Crane, Inc., 385 Md. 185, 198 (2005). "Thus, an abuse of discretion should only be found in the extraordinary, exceptional, or most egregious case." *Id*. at 199.

Conversely, "where an order involves an interpretation and application of Maryland constitutional, statutory or case law, [this Court] must determine whether the trial court's conclusions are 'legally correct' under a de novo standard of review." *Schisler v. State,* 394 Md. 519, 535 (2006) (internal citations omitted).

C. Analysis

1. Manifest Necessity

The Fifth Amendment Double Jeopardy Clause provides, "that no person shall be subject for the same offense to be twice put in jeopardy of life and limb." *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (internal marks omitted). This federal protection is enforceable against the States through the Fourteenth Amendment of the United States Constitution. *Id*. Ultimately, the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal… after conviction… [a]nd it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969).

However, the clause does not *per* se bar a subsequent trial when the case ends prematurely. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). Double jeopardy will not bar a new trial when a mistrial was declared out of manifest necessity. *Mansfield v. State*, 422 Md. 269, 282 (2011). Whether manifest necessity is present is a fact-sensitive determination, and "[a]lthough there is no clear test to determine whether a manifest

necessity exists, it has been held that there must be a '"high degree" [of necessity] before concluding that the mistrial is appropriate.'" *State v. Woodson*, 338 Md. 322, 329 (1995) (quoting *Arizona v. Washington*, 434 U.S. 497, 506 (1978)).

The Supreme Court defined "high degree" of necessity to mean that there is no other reasonable alternative outside of declaring a mistrial. *See Gori v. United States*, 367 U.S. 364, 368 (1961) ("Where … the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment."). This Court will consider the weighing of the "unique facts and circumstances of each case, exploring reasonable alternatives, and determin[ing] that no reasonable alternative exists." *State v. Hart,* 449 Md. 246, 277 (2016) (quoting *Quinones v. State*, 215 Md. App. 1, 17 (2013)).

The Court of Appeals has expressed that a continuance is generally accepted as a reasonable alternative to a mistrial. *State v. Baker*, 453 Md. 32, 57 (2017). The Supreme Court in *Arizona v. Washington*, 434 U.S. 497, 515–16 (1978), has noted another reasonable alternative is for a trial court to give counsel the opportunity to be heard before declaring a mistrial. However, the trial court is not obligated to raise other alternatives for the parties, especially when it is clear from the record that Appellant has waived other alternatives in pursuit of a mistrial. *See Thanos v. State*, 330 Md. 576, 587–88 (1993) ("Ordinarily, …when a defendant requests a mistrial, he waives his valued right to have his trial completed by a particular tribunal.").

In the case before this Court, Appellant argues that the circuit court prematurely determined manifest necessity existed before exploring reasonable alternatives, i.e. a continuance. Appellant relies on *State v. Hart*, 449 Md. 246 (2016), in which the jury continued deliberations as the appellant was taken to the hospital for a medical emergency. The jury sent out a note to the court indicating they had reached a verdict on all but one count, in which jurors took "unequivocal positions" on each side. *Id*. at 258. The following colloquy then took place:

> **[DEFENSE COUNSEL]: I think the only thing that I am in a position to request at this moment is that they be excused for the night and read the *Allen* charge first thing in the morning, start deliberations again.** If they pass a similar note suggesting that they're deadlocked, we can deal with it accordingly. But they haven't been read the *Allen* charge. And most importantly **I don't know what Mr. Hart's situation [is]. And without him to give me his input related to his desires, I would be I think delinquent in my duties if I requested a mistrial on his behalf.**
>
> [PROSECUTOR]: Your honor, I can just tell you from the State's perspective based on what I heard I don't think anything is going to change. The people who are set on their positions are going to, after coming back, anything actually going to change materially to make the posture change (sic)—so the State is not interested in that. But I'll defer to—in terms of coming back and letting them get the Allen charge and continue to deliberate, in light of what I heard.

Id. Despite defense counsel's request for a continuance and the State's willingness to agree to the request, the circuit court summoned the jury and received a partial verdict declaring a mistrial as to the "deadlocked" count. *Id*. at 260. On review, the Court of Appeals found that the circuit court—by failing to consider the reasonable alternatives given by the defense—abused its discretion when it declared a mistrial. *Id*. at 262.

The present case is distinguishable from *Hart*, because Appellant's counsel requested a mistrial and did not present any other alternatives for the court to consider. Judge Mays asked the parties how they wished to proceed. Still, Appellant's counsel did not ask for a continuance, but specifically requested a mistrial. The possibility of granting a short continuance was first mentioned in hindsight during counsel's motion to dismiss the second prosecution. Furthermore, the trial court was not obligated to raise other alternatives for Appellant, especially when Appellant has waived other alternatives in pursuit of a mistrial. *See Thanos*, 330 Md. at 587–88 (1993).

Accordingly, the circuit court did not abuse its discretion. Judge Mays made several calls to ascertain the extent of Appellant's injury and whether he was able to appear before the court. Instead, the court learned that the correctional staff, "[had] no idea when he would be mobile again." While the court verified Appellant's status, the jury made a verbal request, wanting to know why a response to their note was taking so long. This request indicated to Judge Mays that the jury was "not doing anything until they get [sic] an answer to this question." Accordingly, "given the totality of the circumstances as they [existed]" at the time, Judge Mays found there was a manifest necessity to declare a mistrial.

2. Bad Faith

Nonetheless, if a defendant moves for a mistrial, double jeopardy will not bar a retrial unless the request was a product of "bad-faith conduct by judge or prosecutor". *United States v. Jorn*, 400 U.S. 470, 485 (1971). "Bad-faith conduct" is conduct by the judge or prosecutor that amounts to "[h]arassment of an accused by successive

prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (citation omitted).

Appellant asserts that despite having asked for a mistrial, double jeopardy barred his second prosecution. Appellant's argument has no merit. As noted above, whether double jeopardy bars a retrial depends on the facts and circumstances of each case. *Id*. The Court of Appeals has confirmed that double jeopardy will not bar a second trial when the defendant has sought or consented to a mistrial. *Id*. In such instance, there is no need to examine the reasons for the mistrial. *Id*. However, where the record indicates that an appellant's request for a mistrial was not consented to, double jeopardy may be triggered to prevent any future prosecution on the same grounds. *Id*. at 509.

In *Jourdan v. State*, 275 Md. 495 (1975), the prosecutor became so severely ill during the trial that a different prosecutor temporarily stood in and asked the Court for either a continuance or for defense counsel's consent to a mistrial. *Id*. at 505. Defense counsel agreed to the prosecutor's request, yet the Court nonetheless determined that the defendant's subsequent retrial violated the double jeopardy clause. *Id*. at 509. The Court found that defense counsel's assent came after his initial refusal to take a position or comment on a mistrial. *Id.* Moreover, the trial court clarified on the record that the defendant did not voluntarily consent to a mistrial. *Id*. Based on these circumstances, the Court found that the defendant did not consent to a mistrial. *Jourdan*, 275 Md. at 509.

Contrary to defense counsel's actions in *Jourdan*, the record before this Court shows that Appellant sought a mistrial not once, but twice. The first request was after Appellant's first trial during the first day of jury deliberations**.** The jury sent their final note to the court indicating they had yet to come to a unanimous decision after more than three and a half hours of deliberation.[4] After reading the note to counsel, Judge Brown stated she would rather bring the jury back the next day to continue deliberation. Judge Brown asked if either party had any objections and the State replied "[n]o, Your Honor." After conferring with Appellant about the note, defense counsel responded by asking for a mistrial.

The second request for a mistrial came on the following day of deliberations. The jury sent out a note asking for clarification on the standard of proof.[5] However, Appellant was unavailable due to a back injury he sustained in a fight the night before. Defense counsel stated that he was unable to waive Appellant's appearance and "all [he] can do at this point is ask the court to declare a mistrial."

Appellant's counsel alleges that his call for a mistrial was induced by the State's repeated attempt to address the third note outside Appellant's presence. We are not persuaded. Only when a defendant's request for a mistrial is attributable to prosecutorial

[4] Juror Note # 9 12/13/16, 6:46 p.m.: "After extensive deliberations, we have gone from 5/7 (not guilty/guilty), to 1/11 (not guilty/guilty). There does not seem to be any possibility of the 1 juror changing his/her mind. Please advise."

[5] Juror Note # 10 12/14/16, 10:20 a.m.: "Please provide further clarification regarding required standards of proof to establish beyond a reasonable doubt. For instance: 1) what is "unreasonable doubt" compared to "reasonable doubt" 2) Examples of "reasonable doubt" vs. "unreasonable doubt".

or judicial overreaching intended to provoke a mistrial, will a motion by the defendant for a mistrial prevent re-prosecution. *United States v. Dinitiz*, 424 U.S. 600, 611 (1976). We find it difficult to believe that the State intended to coerce a mistrial when, the night before the declaration, 11 out of 12 jurors were in favor of Appellant's conviction. The State could not have benefited from a mistrial in which there would be no verdict or conviction, thus could not be said to have acted in bad faith. Accordingly, Appellant's argument that "defense counsel was pushed into the request for a mistrial" is unfounded.

Accordingly, we find that double jeopardy did not bar Appellant's retrial due to manifest necessity.

II. Right to Be Present

A. Parties' Contention

Appellant's final issue under review stems from his second trial before Circuit Court Judge Alfred Nance. Appellant contends that his right to be present at a material stage of trial was violated when Judge Nance considered a note from the jury and instructed said jury without first notifying and consulting the parties. Before recessing for lunch, Judge Nance received a note from the jury indicating a possible deadlock because the jurors could not reach a unanimous decision. Appellant argues that Judge Nance engaged in *ex parte* communication with the jury by responding to the note outside the presence of counsel. Relying on Maryland Rule 4-231, Appellant maintains that his constitutional right to be present at "all stages of a criminal proceeding where fundamental fairness might be affected by his absence," was violated.

The State concedes that the trial court was required to notify Appellant's counsel of the note and "invite and consider" counsel's position before responding to the note. However, the State counters that, upon learning about the note and the court's instruction, Appellant did not object to the way the court responded to the note. Accordingly, the State argues that Appellant failed to preserve his claim on appeal.

Standard of Review

In *Chapman v. California*, 386 U.S. 18, 24 (1967), the Supreme Court of the United States established that the appropriate standard of review for constitutional violations in criminal cases is the harmless error analysis. The Court later clarified in *Arizona v. Fulimente*, 499 U.S. 279, 307–08 (1991) that a trial error is an, "error [that] occurred during the presentation of the case to the jury, and [that] may therefore be quantitatively assessed in the context of other evidence presented to determine whether its admission was harmless beyond a reasonable doubt." The denial of defendant's right to be present at trial is a constitutional error subject to the harmless error analysis. *Id*. "Stated differently, it is error for a trial court to engage in a communication with the jury, or jurors, off the record, and without notification to counsel, and that error is presumably prejudicial unless the State can affirmatively prove otherwise." *See State v. Harris*, 428 Md. 700, 721 (2012). Although the State argues that Appellant did not preserve the issue at trial, Maryland Rule 8–131(a) gives this court "discretion to consider issues deemed to have been waived for failure to make a contemporaneous objection." *Abdul-Maleek v. State*, 426 Md. 59, 69 (2012). Accordingly, this Court will apply the harmless error standard of review to determine

whether the denial of Appellant's right to be present at trial was harmless. *See State v. Hart*, 449 Md. 246, 262 (2016).

"[U]nder the harmless error doctrine, not every error committed during a trial is reversible error." *Moore v. State*, 412 Md. 635, 666, (2010). To permit reversal, the error must be "both manifestly wrong and substantially injurious." *Lawson v. State,* 389 Md. 570, 580 (2005) (quoting *Rotwein v. Bogart*, 227 Md. 434, 437 (1962)). Conversely, an error is harmless in criminal cases where the appellate court decides, based on a review of the trial record, that the error was not prejudicial, having no effect on the rendition of the verdict. *Lawson*, 389 Md. at 581. Finally, the burden is on "the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Chapman v. California*, 386 U.S. 18, 24 (1967).

A. Analysis

A criminal defendant has a right to be present at all stages of a criminal trial. *Grade v. State*, 431 Md. 85, 95 (2013). "This well settled constitutional and common law right, as we have often recognized, is guaranteed by Article 5 of the Maryland Declaration of Rights." *Harris*, 428 Md. at 712–13; *see Bunch v. State*, 281 Md. 680, 683–84 (1978). This right is also provided under Maryland Rule 4-231(b): "A defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248."

The right to be present attaches to "[a]ny communication pertaining to the action between the jury and the trial judge during the course of the jury's deliberations." *Stewart v. State*, 334 Md. 213, 224–25 (1994); *see Bunch v. State*, 281 Md. 680, 685 (1978). In *Winder v. State*, 362 Md. 275, 322 (2001), the Court of Appeals cautioned against *ex parte* communications between the judge and jury in absence of the defendant:

> The rules governing communications between the judge and the jury are basic and relatively simple to adhere to in practice. If a judge receives a communication from the jury or wishes to communicate with the jury, he or she is required to notify the parties. *See* Md. Rule 4–326(c). The communication with the jury shall be made in open court on the record or shall be made in writing and the writing shall become part of the record. See Md. Rule 4–326(c).

Winder v. State, 362 Md. 275, 322 (2001) (emphasis added); *see Williams v. State*, 292 Md. 201, 211 (1981) ("a criminal defendant's right to be present at every stage of his trial is a common law right [and] is to some extent protected by the Fourteenth Amendment to the United States Constitution"). Furthermore, Maryland Rule 4-326 prescribes as follows:

> **(d) Communications With Jury.**
>
> (1) *Instruction to Use Juror Number.* The judge shall instruct the jury, in any preliminary instructions and in instructions given prior to jury deliberations that, in any written communication from a juror, the juror shall be identified only by juror number.
>
> (2) *Notification of Judge; Duty of Judge.*
> (A) A court official or employee who receives any written or oral communication from the jury or a juror shall immediately notify the presiding judge of the communication.
>
> (B) The judge shall determine whether the communication ***pertains to the action***. If the judge determines that the communication does not pertain to the action, the judge may respond as he or she deems appropriate.

> **Committee note:** Whether a communication pertains to the action is defined by case law. *See*, for example, *Harris v. State*, 428 Md. 700 (2012) and *Grade v. State*, 431 Md. 85 (2013).
>
> (C) If the judge determines that the communication pertains to the action, ***the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response***. The judge may respond to the communication in writing or orally in open court on the record.

Maryland Rule 4-326 (emphasis added).

In *State v. Harris,* 428 Md. 700, 716 (2012), the Court of Appeals discussed the type of jury communications that pertain to the action and require a judge to promptly notify the parties. The Court of Appeals stated the following:

> To be sure, a communication, from the court to a juror, passing along a phone message that the juror's grandmother had died, if that were all there was and when viewed in isolation, could be deemed to be a personal matter and, therefore, because it would not "pertain[ ] to the action," in the same way that "the failure to disclose the contents of a note from a juror requesting transmittal of a purely personal message to a member of the jurors' family or to a babysitter," *Graham v. State,* 325 Md. 398, 415, (1992), would not constitute error. On the other hand, it is important to remember that "the spirit of the Rule is to provide relevant information to those most vitally concerned with the trial...." *Id.* **Information that implicates, and may impact, a juror's ability to continue deliberation is relevant information that must be disclosed in compliance with Rule 4–326(d).** That is especially so, where, as here, the juror suggests that his or her ability to continue is dependent upon a speedy conclusion of the trial.

State v. Harris, 428 Md. 700, 716 (2012) (emphasis added). In *Grade v. State*, the Court of Appeals further stated: "[i]f the communication is not disclosed in a timely fashion or there has been no chance for input, then there has not been a 'valid trial or judgment.' Violation of this rule undercuts the defense's right to be present at all stages of trial."

Grade, 431 Md. at 97 (quoting *Midgett*, 216 Md. 26, 36 1958). In the case at bar, we find that Judge Nance's communication with the jury outside the presence of both parties was an *ex parte* communication that "pertained to the action." Like the note in *Harris*, the jury note contained "[i]nformation that implicates, and may impact, a juror's ability to continue deliberation." *Harris*, 428 Md. at 716. Here, the jury asked for guidance on what to "do if [they] are not unanimous on all counts." The instruction sought by the jury goes to the heart of their ability to continue deliberations in that the jury's discord likely stifled deliberations and the odds of reaching a verdict decreased.

The State agrees that the jury's note pertained to the action and that the trial court was required to notify Appellant's counsel about the note and "invite and consider" counsel's position before responding to the note. However, the State argues that such error was harmless because Appellant's counsel did not object to the way the court responded to the note. While it is true that Appellant's counsel did not object to Judge Nance's error, the communication between Judge Nance and the jury was not disclosed in a timely fashion to give the parties a chance to address their potential input. Maryland courts have long held that when the presiding judge determines that the required communication pertains to the action before the court, the judge shall promptly notify the parties and invite and consider each parties' position and response on the record before responding to the communication. *See, e.g.*, *Harris*, 428 Md. 700 (2012); *Grade v. State*, 431 Md. 85 (2013).

Here, Judge Nance failed to promptly notify the parties about the jury's note before dismissing the jury for lunch. The parties were notified about the note and the fact that

Judge Nance had already communicated with the jury just minutes before the jury was called to reenter the courtroom. Within fifteen minutes after the jury returned from lunch, the jury submitted a verdict, giving Appellant's counsel limited options in responding to the note. Because the note pertained to an issue at trial, Judge Nance was required to notify and consult both parties before communicating with the jury. Appellant had a right to be present at all stages of a criminal trial, however, that right was violated when Judge Nance engaged in *ex parte* communication with the jury. Judge Nance's failure to notify and consult with the parties resulted in reversible error; therefore, a reversal and a remand for a new trial is required.

Accordingly, the judgment of the Circuit Court for Baltimore City is reversed and remanded for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS REVERSED AND REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.