UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1836

September Term, 2015

WENDALL E. JONES

v.

STATE OF MARYLAND

Berger,
Reed,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: August 17, 2016

Appellant was tried and convicted by a jury in the Circuit Court for Prince George's County (Platt, J.) of murder in the first degree, use of a handgun in the commission of a crime of violence and carrying a handgun. On March 26, 2004, appellant was sentenced to life imprisonment without the possibility of parole for murder in the first degree and 20 years, consecutive, the first five years without parole, for use of a handgun. The conviction for carrying a handgun was merged. On April 2, 2004, appellant noted a direct appeal to this Court, which addressed (1) whether under the doctrine of plain error, this Court should review appellant's unpreserved complaints about the trial judge's jury instruction and (2) whether this Court should review on direct appeal, appellant's contention that trial counsel rendered ineffective assistance. In an unreported opinion, *Wendall Ernest Jones v. State,* No. 0486, Sept. Term, 2004, filed March 7, 2005, we answered the Questions Presented in the negative and affirmed the judgments of the Circuit Court.

On March 19, 2014, appellant filed a petition for post conviction relief and, pursuant to a hearing on September 24, 2015, the circuit court issued an Order, dated September 30, 2015, granting "leave to file a belated appeal on the sole issue of whether the trial court erred in coercing the jury into rendering a verdict." On October 15, 2015, appellant, through counsel, filed the instant appeal,[1] raising the following question for our review:

Did the trial court err in coercing the jury into rendering a verdict?

[1] Appellant also filed, *pro se*, an application for leave to appeal from the denial of other post conviction claims, received by this Court on October 30, 2015. An Application for Leave to Appeal the Denial of Post Conviction Relief has also been docketed separately by this Court as an Application for Leave to Appeal, No. 1837, September Term 2015.

We shall answer the question presented in the negative and, accordingly, affirm the judgment of the circuit court.

FACTS AND LEGAL PROCEEDINGS

On April 5, 2003, Prince George's County Police Corporal Charles Perry responded to a call for a shooting at 6521 Hilmar Drive. When he arrived, he observed a young African American man lying on the ground with "massive trauma" to his head and he had no pulse or "respirations." A crime scene investigator responded, photographed the scene, prepared a diagram and recovered a bullet fragment near the victim's body.

Appellant was charged in the Circuit Court for Prince George's County on July 8, 2003, by criminal indictment filed in Case No. CT-03-0792X. On January 12, 2004, a hearing was held on appellant's Motion to Suppress Out-of-court Identifications by two witnesses. Appellant elected to be tried by a jury and his trial took place January 13, 14, 15, 16, and 20, 2004.

Irnetta Long testified that she knew appellant from the neighborhood. On April 5, 2003, she had just driven home and she saw her son, Milton Long, with Sean Vincent in the parking lot. She knew Andre Vincent and Sean Vincent, who were like nephews to her. She heard four gunshots and saw Sean Vincent run past her in the direction of the sounds, whereupon, she saw Andre Vincent lying on the ground, covered with blood. She also saw appellant walking away. According to Long, appellant was wearing a gray hooded sweatshirt with the hood up. "I couldn't see his face, but I knew the build." Long testified that she was

sure that she saw appellant, but she did not report what she had witnessed to the police, however, "[b]ecause I didn't see his face," nor did Long see a weapon.

Sean Vincent, who was fifteen-years old at the time of trial, testified that he saw appellant shoot his brother Andre. He further testified that he was walking with Milton Long when he heard gunshots behind him. According to Sean Vincent, "When I turned around, shots was still going on." He heard five gunshots altogether. Appellant was wearing "all black" clothing, including a black coat without a hood. After the shooting, he proceeded down a hill.

Davone Brown testified that he knew Andre Vincent from school and from "hanging out" and he also knew appellant from the neighborhood. He told police detectives that he had witnessed appellant shoot Andre Vincent and he later identified appellant from a photo array. At trial, he denied that he had earlier identified appellant, stating that he did "not really" recognize who it was who did the shooting. Chevone Brown, the mother of Davone Brown, testified that she accompanied him when he met with police detectives on April 8, 2003. At that time, her son told Detective Gregory McDonald that appellant shot Andre Vincent. Detective McDonald testified that he met with Davone Brown and his mother, that Davone Brown told him that appellant shot Andre and he identified appellant from a photo array.

Vonciel Foggie, who lived in the 6500 block of Hilmar Drive, testified that she heard four or five gunshots at 3:30 to 4:00 p.m. She saw a man leaving the scene wearing "dark

clothing, jeans [and] a jacket." Joseph Hardy, III[2] testified that he knew appellant from seeing him in the neighborhood two to three times per week. He was in a carry out establishment on April 5, 2003 when he observed an exchange between the two "young men." Andre Vincent called appellant a "clown" and appellant replied: "We'll see, we'll see. I'm not a clown." He also admonished, "You will not be walking by tonight." Later in the afternoon, according to Hardy, "I saw Andre walking and I saw two guys run up on him. I heard gunshots. And then I saw the two gentlemen that walked up on him leave. Running." He recognized appellant, but not the other person. Later, Hardy selected appellant's photograph from a photo array as the person who had shot Andre Vincent. On cross examination, Hardy acknowledged that he did not voluntarily provide the police with this information until a month later, on May 6, 2003, after he had been arrested for drunk driving.

Detective Michael Straughan, assigned to the Prince George's County Police Department Homicide Unit, was the lead investigator in the case. He obtained a warrant for appellant's arrest on April 8, 2003 and, after his arrest, appellant was brought to the detective's office wearing blue jeans and a black hooded sweatshirt. On May 23, 2003,

[2] Appellant's brief notes that Joseph Hardy's last name is also spelled as "Harding" in the transcripts.

Detective Straughan met with Hardy and showed him a photo array that included appellant; Hardy responded, "This looks like Wendell."[3]

Terry Eaton, Forensic Firearm and Toolmark Examiner for the Prince George's County Police Department, testifying as an expert witness, recounted that he had examined three fired lead bullets submitted to him in connection with this case. He found all three to be "consistent with having been fired from the same barrel" because all three were the same caliber and showed "the same general rifling characteristics." He could not determine conclusively, however, that the bullets had been fired from the same gun.

The prosecution's final witness was Theodore King, Jr., M.D., Deputy Assistant Medical Examiner, who testified as an expert witness. Pursuant to an autopsy that he performed on Vincent, on April 6, 2003, he found that Vincent had sustained six gunshot wounds to his head and neck. Dr. King determined that the cause of death was multiple gunshot wounds and the manner of death was homicide.

After Dr. King testified, the prosecution rested its case. Appellant's counsel moved for judgment of acquittal, which was denied, and then the defense elected not to present evidence. Jury instructions were delivered at the end of the second day of trial and, on the third day of trial, the prosecutor and appellant's trial counsel delivered their closing arguments. Jury deliberations commenced at 10:20 a.m. and, at 11:55 a.m., the jurors sent

[3] Appellant's brief notes that appellant's name is misspelled as "Wendell" in the trial transcripts.

out a note asking, "When was the first time Sean [Vincent] talked with the police and gave his statement?" The trial judge's written response was as follows: "You have heard all of the evidence. Your recollection and perception of the evidence is controlling. The judge cannot tell you what the evidence is or was."

At 4:35 p.m., the court reconvened to consider a second note sent out by the jury, which read: "Jury unable to come to decision[.] Do we have all the exhibits? *i.e.* written statements[.]" The trial court addressed this note, delivering instructions, in open court:

> All right. Madam Foreperson, ladies and gentlemen of the jury, I have your most recent note and preliminarily what I'm going to do is I'm going to respond to your note in a minute. We are going to come back tomorrow. I'm going to have you come back—now the good news is when you come back, you won't be delayed. Because the only thing that will happen is when all twelve of you are here—the Bailiff will be watching. As soon as all twelve of you are here, he will take you to your deliberations. You wouldn't have to come in the courtroom. So the only thing holding you up is yourselves in the morning. Anybody have a problem being here by 9:00 a.m.?
>
> Okay. I have your note. One is a question, the other one's a statement. The question is do we have all of the exhibits and written statements. As I indicated to you the answer to your question is yes. You have all of the evidence that you are going to be considering. You have all of the statements, you have all of the—now you have heard statements. You have heard testimony and you consider that testimony. Your individual and collective memories of that testimony is what you consider. You have all of the exhibits. There is no other evidence that is admissible and that was admitted. It means that is all of the evidence that you consider in this case.
>
> As you know, the earlier note where you asked me a question, I can't do that, would be me telling you the facts. It's not my function. When you go home, take a break. You're not supposed to talk to anybody about it. The last thing you want to do is that. Okay. You want to talk to each o[th]er.
>
> When you come in tomorrow morning, as I told you, when you sit down to deliberate, as I indicated to you earlier, the verdict must be the considered judgment of each of

you. In order to reach a verdict, as I also told you, you apparently are having some trouble, it's not unusual. All of you must agree. That is, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement. If you can do this without doing violence to your individual judgment.

Each of you must decide this case for yourself, but you can't do that without an impartial consideration of the evidence with your fellow jurors which means[,] when you come in the morning, as you have been doing, listen to what people have to say. Listen to what people [who] are disagreeing with you have to say. It doesn't mean you change your mind because they are saying something different than you, but it does mean give them another listen. And, during deliberations don't hesitate to reexamine your views. You should change your opinion if you are convinced that you are wrong, but you are not to surrender your honest belief as to the weight or effect of the evidence only because the opinion of some of your fellow jurors is different or for the mere purpose of reaching an agreement to reach a verdict.

With that understanding, you take a break from the case. Go home. The Sheriff will escort you, as they have been, to your vehicles. You have parking passes for tomorrow. At 9:00 a.m. the Bailiff will come, get you from the main jury assembly room. You'll come in refreshed, hopefully. Think about the case when you get here tomorrow. Think about your fellow jurors and their views and reexamine yours, obviously, with the reservations as I said. You don't change your mind because someone else differs with you, but you do listen; okay. See you in the morning.

Defense counsel objected to the trial court's instruction and made a motion for a mistrial, arguing:

For the record I would at this time object to the instruction just given to the jury. They collectively, as I understand it, indicated to the court *via* the note that they were unable to reach a verdict, which I would assume was a collective decision presented to the court through their foreman as previously instructed to do. I, therefore, would submit that the language used by the court in requiring them to return and revisit their deliberation and their decisions suggests that they are mandated in some way to return with a verdict.

And I think the clear inference from the remarks on the record, remarks [by] the court are that they are compelled to reach a verdict one way or another in this case. That means by tomorrow morning or after considering the free evening, so to speak. *After*

> *expressing their inability to reach a verdict I think is clearly suggestive. I think the only inference they can think from the court's remark are they are to come to a verdict one way or another.* I would request a mistrial at this time and note an objection for the record.

(Emphasis supplied).

The trial court denied the motion for a mistrial, stating: "The note says the jury is unable to come to a decision. I think that means at this time. They are letting me know that[.] [T]hey then followed that statement with a question: [']Do we have all of the evidence and exhibits.['] I answered that as well. So your motion for mistrial is denied."

On the fourth day of trial, the jury resumed deliberations at 9:13 a.m., took a break for lunch at 12:00 noon and sent out a note, which the court and parties addressed on the record at 1:20 p.m. The jury note stated: "Your Honor: The jury is still unable to come to an unanimous verdict. It appears that ten continuous discussions of the evidence before us will not lead to a single verdict." Appellant's counsel again moved for a mistrial based on manifest necessity; however, the trial court denied the second motion for a mistrial. The note, which was signed by the trial judge, was returned to the jury with the message: "Continue to deliberate."

At 4:13 p.m., the jury sent another note to the judge, which read: "Your Honor, we have finished discussions for the day; however, new discussion topics have been raised and we request to continue on Tuesday. This will give the jury time to reconsider the new topics with a fresh mind." The trial judge addressed the jury, stating:

> I'm going to excuse you for the holiday weekend at this point. The same instructions when you go home. I think everybody needs a rest. It's been a long and stressful day. Go home, don't talk about the case with whoever, however []tempting it is, don't do it. Take a break from it. Be back here 9:00 a.m. Tuesday morning.
>
> I would like all twelve of you here. Once all twelve of you are here, the Bailiff will take you to the room you will deliberate in. Judge Allen Shepherd will assist me therein when I will not be here. Will be in communication with me. He will take care of any verdicts or communications. I don't want to delay you. Have a nice evening and the sheriffs will escort you to your vehicles. Your parking passes you have for next week. We'll see you at 9:00 a.m.

In response to appellant's third motion for mistrial, the trial judge denied the motion stating:

> "We did not get this note until now. Apparently they felt that they changed their mind about their ability to reach a verdict. Not only have they asked not to be excused, they have asked to come back. I see no manifest necessity to declare a mistrial due to the length of the weekend."

After the holiday weekend, on the fifth day of trial, at 11: 15 a.m., the jury delivered the verdict, finding appellant guilty of murder in the first degree, use of a handgun in the commission of a crime of violence and carrying a handgun.

As noted, *supra*, on March 19, 2014, appellant, through counsel, filed a petition for post conviction relief, in which he raised eight claims. Pursuant to the hearing held on September 24, 2015, the judge granted post conviction relief based on a claim of ineffective assistance of appellate counsel by virtue of the failure of counsel to include, as an issue on appeal, a claim that the trial judge coerced the jury into rendering guilty verdicts, *i.e.*, "the (sole) issue of whether the trial court erred in coercing the jury into rendering a verdict[.]"

STANDARD OF REVIEW

Judge Deborah Eyler, writing for this Court, in *Browne v. State*, 215 Md. App. 51, 57 (2013), succinctly set forth our task in the appeal before us:

> We review the denial of a mistrial motion for abuse of discretion. *Dillard v. State*, 415 Md. 445, 454 (2010)). It is within the trial judge's discretion to require an apparently deadlocked jury to continue deliberating or to declare a mistrial. *Mayfield v. State*, 302 Md. 624, 632 (1985)). Whether the trial judge abused his or her discretion in denying a mistrial motion in a deadlock situation depends on the circumstances of the particular case. *Mayfield*, 302 Md. at 632.

Furthermore, in determining whether a trial judge committed an abuse of discretion in providing supplemental instruction of an *Allen*-type[4] charge,

> The question to be determined is whether resort to the instruction forced or helped to force an agreement which would not otherwise have been reached except for the intimidating or coercive effect of the charge upon some jurors or whether it merely initiated a new train of real deliberation which ended the disagreement and enabled each juror conscientiously and freely to subscribe to the unanimous verdict.

Oliver v. State, 25 Md. App. 647, 652 (1975) (quoting *Fletcher v. State*, 8 Md. App. 153, 155–56 (1969)).

"'Abuse of discretion' . . . constitutes an 'untenable judicial act that defies reason and works an injustice.'" *Nash v. State*, 439 Md. 53, 67, *cert. denied*, 135 S. Ct. 284 (2014) (citing *North v. North*, 102 Md. App. 1, 13–14 (1994)).

[4] *See infra*, n. 3.

DISCUSSION

Appellant contends that the trial judge's instructions, after the jury indicated on three separate occasions that it was unable to reach a unanimous decision, coerced some members of the jury into changing their positions and joining the verdict reached by the majority. The State responds that the trial court's supplemental jury instructions were entirely proper, *i.e.*, uncoercive and "substantively indistinguishable" from the American Bar Association ("ABA") standards.

The Constitutions of the United States and of the State of Maryland provide for the right to trial by jury; both speedy and impartial. U.S. CONST., AMEND. VI; MD. CONST. DECL. OF RTS. art. 24. In Maryland, "[t]he underlying requirement of a final verdict is that it be unanimous." *Smith v. State*, 299 Md. 158, 163–64 (1984) (citing MD. CONST. DECL. OF RTS. art. 24). "The concept of unanimity . . . embraces not only numerical completeness but also completeness of assent, *i.e.*, each juror making his or her decision freely and voluntarily, without being swayed or tainted by outside influence." *Caldwell v. State*, 164 Md. App. 612, 635 (2005). A trial judge may require a jury to engage in further deliberations, under Md. Rule 4–327(e), "with the simple instruction that their verdict must be unanimous." *Bishop v. State*, 341 Md. 288, 294 (1996).

When a jury has indicated that it is unable to reach a unanimous decision, the Court of Appeals has held that giving an "*Allen*-type"[5] instruction is appropriate to aid the jury in

[5] The original term derived from *Allen v. United States*, 164 U.S. 492 (1896). However, the language in *Allen* has been held impermissibly coercive. *See Kelly v. State*, 270 Md. 139, 140–41 (1973). *Kelly* held that the pattern instruction approved by the American Bar Association ("ABA") was appropriate. The ABA Standards Relating to Trial by Jury, Standard 15–5.4 provides the following regarding the length of deliberations and a deadlocked jury:

> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after impartial consideration of the evidence with his fellow jurors;
>
> (iv) that, in the course of deliberations, a jurors should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, *the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a)*. The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(continued...)

reaching a unanimous verdict. *Kelly v. State*, 270 Md. 139, 142 (1973). Although an *Allen* charge has been described, *inter alia*, as the "shotgun instruction" because of its ability to bring an end to a deadlocked jury, *Burnette v. State*, 280 Md. 88, 92 n.2 (1977), there are instances where an *Allen* charge, due to the particular facts and circumstances of a case, is inappropriate and the trial judge is in the best position to weigh those "facts and circumstances" to determine if an *Allen* charge is appropriate. *Kelly*, 270 Md. at 142–43. "When the trial court does not adhere closely to the language of the approved instruction, we must review the court's instruction carefully to determine 'whether the province of the jury has been invaded and the verdict unduly coerced.'" *Hall v. State*, 214 Md. App. 208, 220 (2013) (quoting *Kelly*, 270 Md. at 144).

The Maryland Pattern Jury Instruction (Criminal) ("MPJI-Cr") § 2:01, which closely adheres to the ABA-approved instruction,[6] provides the following pattern instruction to a jury concerning its duty to deliberate:

[5](...continued)
(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

(Emphasis supplied).

[6] This instruction contains only stylistic changes to the ABA instruction approved in *Kelly*, 270 Md. at 139, *Burnette v. State*, 280 Md. 88 (1977), *Goodmuth v. State*, 302 Md. 613 (1985) and *Ruffin v. State*, 394 Md. 355 (2006). *See Graham v. State*, 325 Md. 398, 409 n.4 (1992) (expressly approving the modification of the ABA-approved *Allen*-type instruction).

> 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 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 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.

Although the Court of Appeals, in *Kelly*, recognized that a pattern instruction approved by the ABA would be adequately instructive to a jury without coercions, *see supra* n.3, the Court did not "imprison the trial judges of this State within the walls of foreordained verbiage[.]" *Kelly*, 270 Md. at 142. A trial judge may "personalize his *Allen*-type instruction, *Id.* at 144, but "deviations from the [ABA] permitted by *Kelly* are those primarily concerned with *form and style*." *Burnette*, 280 Md. at 100–01 (Emphasis supplied). "Deviations in substance will not meet . . . approval." *id.* at 98. Deviations of an "impermissibly coercive" nature demand reversal. *Oliver v. State*, 25 Md. App. 647, 652 (1975).

In *Burnette*, 280 Md. at 91, the Court rejected the following instruction: "It is your duty to decide this case if you can conscientiously do so, and you should listen with a disposition to be convinced to each other's arguments. *If your views are contrary to those of the vast majority you should consider whether your views, which make no impression on the minds of so many equally intelligent jurors, are correct.*" In holding that this instruction was impermissibly coercive, the Court noted that "[i]t is difficult to imagine a minority juror who

would not be placed in some discomfort on hearing this instruction. Criticism runs directly to him, and he might understandably conclude that proper 'deference' to the opinions of the majority demands that he abandon his conscientious position." *Id.* at 100.

In *Thompson v. State*, 371 Md. 473 (2002), the Court held that an instruction stating, "the final test of the quality of your service will lie in the verdict which you return to the Court, not in the opinions any of you may hold as you retire," emphasized "the primacy of collective judgment over individual principle and honest conviction" and constituted reversible error. *Id.* at 486–87. Specifically, the Court held that

> [t]his concept of a 'final test' implies that there is a standard of service to which a juror should aspire, one that requires a verdict to be reached rather than one that requires consideration of individual conviction and whether individual conviction thoughtfully can be reconciled with collective judgment. Because a verdict cannot be reached without unanimity, the 'final test' language logically implies that a 'good' juror acquiesces in a verdict rather than adheres to his or her own judgment. Such language is a deviation in substance from MPJI-Cr 2:01 and the ABA Standards . . . .

Id. at 486.

In the case *sub judice*, appellant argues that language employed by the trial judge in his supplemental instruction to the jury**,** after it first indicated that it was deadlocked**,** was "inherently coercive." The following is the language at issue: "All of you must agree. That is, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement." We find this language neither inherently or impermissibly coercive. First, as the State notes in its brief, the trial judge obtained a "jury instruction book," and his instruction was a "thoughtful recitation" based on the book. Second, after the

jury returned, the judge indicated that it was "not unusual" for a jury to have "some trouble" in reaching a unanimous verdict. We agree with the State that this language was "far from creating a coercive environment."

The trial judge, after receiving the first jury note indicating that the jury was unable to reach a unanimous verdict**,** instructed the jurors that they had a *duty* to reach a unanimous verdict. This instruction comported with the dictates of the MPJI-Cr 2:01, the ABA standards and Md. Const. Decl. of Rts. Art. 24. *See supra*. Additionally**,** the trial judge, *via* his instructions to the jury, relayed the substance of MPJI-Cr 2:01 and the ABA standards, *i.e.*, that the verdict "must be the considered judgment of each of you," that reaching a unanimous decision must not do "violence to your individual judgment" and that "each of you must decide this case for yourself." This did not serve to coerce the jury into reaching a unanimous verdict that it otherwise would not have reached; rather, it served to inform the jury of its duty to deliberate.

Furthermore, when the judge instructed the jurors to listen to one another, his instruction was accompanied by an emphasis on the juror's individual judgment: "Listen to what people [who] are disagreeing with you have to say. It doesn't mean you change your mind because they are saying something different than you, but it does mean give them another listen." Additionally, when the judge again counseled the jurors regarding a change of mind, he emphasized individual judgment: "You should change your opinion if you are convinced that you are wrong, but you are not to surrender your honest belief as to the weight

or effect of the evidence only because the opinion of some of your fellow jurors is different or for the mere purpose of reaching an agreement to reach a verdict."

We are not persuaded that the instruction, considered in context, constitutes a "mandate" compelling the jury to return a verdict. There was also no "admonishment" of the jurors, implying that jurors in the minority should consider changing their positions. The MPJI-Cr 2:01 and the ABA standards do not require that, once a juror reaches a decision, that all efforts must be taken to preserve that initial decision. A juror may change his or her mind; it is reversible error, however, when the change results from coercion to disregard individual judgment and defer to the majority opinion. *Goodmuth v. State*, 302 Md. 613, 618 (1985). No such change resulting from coercion occurred in the instant case.

Finally, appellant argues that the "coercive atmosphere worsened" when, after the jury indicated it could not reach a unanimous decision for the second time, the trial judge responded with a written instruction to "continue to deliberate." Appellant contends that "[d]oing so, unambiguously told the jurors that they would have to continue to deliberate until a unanimous verdict was reached." The court reasoned:

> I am not yet convinced that a verdict cannot be obtained in this case, particularly since that note was forthcoming immediately after lunch. And I don't know where the jury ate. I will certainly not hold the restaurant or the cafeteria responsible for the communication. Nonetheless I'm not prepared to abide by it quite yet.

Additionally, in noting the objection of appellant's counsel and, in denying counsel's motion for mistrial, the trial judge stated that he would "reevaluate in a few hours or another communication."

The ABA Standard 15–5.4(b), *supra* n.3, expressly permits a trial judge to allow a deadlocked jury to continue deliberations and to repeat an instruction that a decision must be unanimous. Maryland has refused to adopt "strict rules limiting a trial judge's discretion in permitting juries to deliberate," aligning Maryland with the majority of jurisdictions that "adhere to the rule that the jury may be sent back for further deliberations once, twice or several times." *Thomas v. State*, 113 Md. App. 1, 9-10 (1996) (citing WAYNE R. LAFAVE, CRIM. PROC. § 24.6 at 1044 (2d ed.1992) (prior version)).

In determining whether to exercise discretion to permit further jury deliberations or declare a mistrial, a trial judge, facing a deadlocked jury, may weigh "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 . . . ." LAFAVE, 6 CRIM. PROC. § 24.9(d) (4th ed.).

Declaration of a mistrial, however, is an extreme remedy and should be used rarely; "only where it is 'manifestly necessary,' or 'under urgent circumstances,' or 'only in very extraordinary and striking circumstances,' and declaring a mistrial is not 'to be lightly undertaken.'" *Mansfield v. State*, 422 Md. 269, 285 (2011) (citations and quotations omitted). Although there is not a "minimum time period" in which a trial judge must permit the jury

to deliberate, there must be an "adequate effort to ensure that the jury is *incapable* of reaching a verdict, [otherwise] the mistrial may not be justified by "manifest necessity," and double jeopardy may bar a retrial." LAFAVE, 6 CRIM. PROC. § 24.9(d) (4th ed.). Significantly, "the jury system rests in good part on the assumption that the jurors should deliberate patiently and long, if necessary[.]" *Oliver,* 25 Md. App. at 654–55.

In *Thomas v. State*, 113 Md. App. 1, 11–12 (1996), this Court held that a trial judge did not abuse his discretion in instructing the jury, which had advised the court on three occasions, over a period spanning several days, that it was unable to reach a unanimous decision to continue its deliberations. We held that there was nothing in the record to suggest "that the trial judge failed to acknowledge any circumstance or circumstances which gave rise to a 'manifest necessity' for him to declare a mistrial." *Id.* at 11. We, likewise, conclude that no circumstances that constitute " manifest necessity" are extant in the case, *sub judice*.

The conduct of the proceedings by the trial judge, neither created a "coercive atmosphere" nor constitute an abuse of discretion by ignoring "manifest necessity,"requiring declaration of a mistrial. In light of the legal and factual backdrop in the present appeal, we neither find the court's admonition, on two occasions, for the jury to reach a unanimous decision, an abuse of discretion nor that the Court's request was, "clearly untenable" in that it "unfairly deprived" appellant "of a substantial right and [denied him] a just result." Although appellant argues that "[t]his was not a long or complex trial, such that extended deliberations might be expected[,]" this was a murder trial where the State presented eleven

witnesses and 59 exhibits. The trial judge did not commit an abuse of discretion by permitting the jury to deliberate for three days.

Additionally, there was no numerical breakdown of the jurors or indication of a single hold-out juror to increase the risk that the judge's remarks would be coercive and, thereby, an abuse of discretion. *Browne,* 215 Md. App. at 62–63. In fact, when the jury was polled, not a single juror expressed any hesitation or misgivings about the verdict**.** Furthermore, there was no indication, from the record, that the trial judge ignored any circumstance that gave rise to "manifest necessity," requiring the grant of a mistrial as the only remedy to preserve public justice. Moreover, the trial judge did not require the jury to deliberate outside normal working hours; rather, the trial judge took into consideration juror breaks, evenings and the holiday weekend. *See ABA Jury Principle 15(c)(2)* (recommending that a jury not be required to deliberate after normal working hours unless the court, *inter alia*, determines it would not impose an undue hardship upon the jurors and is required in the interest of justice.).

Finally, as the State notes in its brief, the trial judge's instruction to the jury after receiving the second jury note "initiated a new train of real deliberation" and did not serve to coerce the jury. Significantly, the jury's third note to the court, three hours later, requesting more time to further deliberate on "new discussion topics" served to dispel the argument that the jurors sought to discontinue deliberations, but were coerced. In light of the jury's expression of its willingness to continue, in conjunction with the ABA Standards,

which expressly permit a trial judge to allow a deadlocked jury to continue deliberations, we conclude that the trial judge's instructions requiring the jury to continue its deliberations were not coercive. Accordingly, we hold that the trial judge, in so instructing the jury, did not abuse his discretion.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.