

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1969

SEPTEMBER TERM, 2013

CARLTON RAY SMALL

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Kehoe,
Bair, Gary E.
(Specially Assigned),

JJ.

Opinion by Bair, Gary E., J.

Filed: February 9, 2016

*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.

Carlton Ray Small, the Appellant, was convicted of first degree assault, second degree assault, use of a handgun to commit a felony, and reckless endangerment, following a jury trial that took place in the Circuit Court for Prince George’s County in 2008. Before this Court, Appellant presents two questions for review:

1. Did the trial court err by failing to notify Appellant of a juror communication as required by Maryland Rule 4-326(d) when it failed to place the entirety of that communication on the record?
2. Was Appellant deprived of his right to effective assistance of counsel when trial counsel failed to protect Appellant’s right to be present at all stages of his trial and right to an impartial jury?

For the reasons that follow, we shall reverse the circuit court’s judgment, and remand this matter for a new trial. Because we reverse on Appellant’s first claim, there is no need to address his second claim.¹

¹ Initially, we note that ineffective assistance of counsel claims ordinarily are not appropriately addressed on direct appeal, in any event. *See Moseley v. State*, 378 Md. 548 (2003). Moreover, this case is before the Court on a belated appeal, which was granted following a post-conviction proceeding that took place in 2013. In that proceeding, this same claim of ineffective assistance of trial counsel was raised, but not decided. The post-conviction court concluded that the record was insufficient to evaluate this claim of ineffective assistance of counsel. It is worth noting, however, that there was some discussion of a stipulation regarding trial counsel’s potential testimony. At footnote 3, the post-conviction court stated:

“[C]ounsel for the Petitioner and the State placed a “stipulation” on the record that if trial counsel (Robert H. Silberman) were called to testify at the hearing he would testify that he does not recall the conversation which took place on the record with respect to a juror communication. The parties further stipulated that trial counsel would also testify that if he had known about a juror communication he would have made a further inquiry in the form of either a voir dire examination

FACTS AND PROCEEDINGS

Appellant’s jury trial took place from January 30 to February 1, 2008. On April 4, 2008, the trial court (Woodard, J.) sentenced Appellant to the following: Ct. 1 First Degree Assault – 20 years with all but 15 suspended; Ct. 2 Second Degree Assault - merged with Ct. 1; Ct. 4 Use of a Handgun in the Commission of a Felony - 20 years with all but 5 suspended (concurrent to Ct. 1), and Ct. 11 Reckless Endangerment - 3 years (consecutive to Ct. 1). The sentencing judge, however, did not impose any period of probation to follow Appellant’s release from executed prison time.

On April 17, 2008, Appellant filed a timely notice of appeal to this Court and an application for review of sentence pursuant to Maryland Rule 4-344. The request for review of sentence was denied without a hearing on December 2, 2008. In response to that denial, Appellant’s trial counsel, Robert H. Silberman, filed a motion for reconsideration. On December 2, 2008, that motion was also denied. Appellant withdrew

(...continued)

of that juror on the record or an in camera interview of that juror with the trial court to find out what the juror knew.”

Although this stipulation could potentially provide a basis for analysis under the first prong of *Strickland*, deficiencies in the stipulation itself render such an analysis moot. Not only was the stipulation never reduced to writing, but there are significant concerns regarding whether it was in fact a stipulation. Of particular note is the fact that the State, during its argument, asserted that while it agreed with the stipulation, it did not concede that trial counsel’s stipulated testimony was “accurate.” Based on the questionable accuracy of this “stipulation,” and the fact that even if accepted, trial counsel’s statement provides little insight into whether his decision was “objectively reasonable,” the record is insufficient to address Appellant’s claim regarding ineffective assistance of trial counsel.

his appeal to this Court on November 18, 2009, based on appellate counsel’s advice that his appeal contained no meritorious claims.

On February 4, 2011, Appellant filed a pro-se petition for post-conviction relief, which was amended on April 8, 2013, upon entry of counsel. The petition alleged ineffective assistance of appellate counsel for advising the withdrawal of his appeal, failure of the trial court to impose a proper split sentence, violation of Maryland Rule 4-326(d), and ineffective assistance of trial counsel for failing to object to the handling of a jury communication, failing to object to an inconsistent verdict, and failing to file post-trial motions. The post-conviction court (Alves, J.) heard the petition on July 31, 2013, and issued its ruling on November 7, 2013, granting Appellant post conviction relief in two respects. First, the post-conviction court remanded the case for re-sentencing based on the failure of the trial court to impose a proper split sentence under *Cathcart v. State*, 397 Md. 320 (2007).² Second, the post-conviction court granted Appellant leave to file a belated appeal based on ineffective assistance of appellate counsel in advising Appellant to withdraw his initial appeal.

That belated appeal was timely filed on November 21, 2013, which brought the present matter before this Court. Given the issues on appeal, a brief recitation of the facts

² Appellant was resentenced by the Honorable Beverly J. Woodard to the following: Ct. 1 - 15 years; Ct. 2 - merged with Ct. 1; Ct. 4 - 5 years (concurrent to Ct. 1); and Ct. 11 - 3 years (consecutive to Ct. 1). Appellant then also filed a Pro Se Motion for Modification or Reduction of Sentence on March 26, 2014, which was granted on January 21, 2015. Appellant’s sentence for Ct.1 was thus reduced to 9 years, while the sentence on the remaining counts remained the same.

is all that is necessary. On August 1, 2007, Michael Simms, the victim in this case, was outside his home at 8101 Bellefonte Lane in Clinton, Maryland, when he received two calls. The first was from an individual named Jasper John Boone, and the second was from Appellant. Mr. Simms testified that Mr. Boone and Appellant told him they were coming to fight in 15 minutes. Mr. Simms did not call the police in response to these threats, but instead, went inside his home and told his mother, Dawn Simms, about the phone call. Shortly thereafter, Mr. Boone, Pernall Demetrius Barnett (“co-defendant”), and another individual arrived at Mr. Simms’s home, exited their vehicle, and began accusing Mr. Simms of “snitching” on Appellant. Around this time, Ms. Simms exited the residence with a stick in an attempt to protect her son. Mr. Simms then climbed over the front gate to fight the co-defendant, as Ms. Simms’s boyfriend, James Smith also became involved in the altercation.

While Mr. Simms was fighting the co-defendant, Appellant drove up to the house in a black Ford Explorer. He then crashed the car into a trash can and drove back down the street, before returning on foot and firing a gun in the air. At that point, Mr. Barnett, Mr. Boone, and the third individual ran back to their vehicle. Mr. Simms testified that Appellant then pointed the gun toward himself and Mr. Smith, and fired several shots. After hearing the gunshots, Ms. Simms called the police.

Upon receiving notification of the shooting, officers pulled over a white Pontiac that was being driven by Mr. Barnett, and the individuals in the vehicle were identified as participants in the altercation. The black Ford Explorer registered to Appellant was also

searched, but no items or fingerprints were found. Mr. Simms, Ms. Simms, and Mr. Smith all identified Appellant as the shooter that night. However, the co-defendant's ex-girlfriend, Ashley Wells, who was outside of the house during the shooting testified that it was dark, she did not have her glasses, and did not see who was firing the shots. Additionally, Appellant's sister, Xzandria Barnhill, testified as an alibi witness at trial, claiming that Appellant spent the entire night at her home.

DISCUSSION

Appellant's first claim centers on a juror's oral communication to a bailiff that occurred after the close of the first day of trial, and that took place outside the presence of Appellant and his counsel. The matter was brought to the attention of the court by the prosecutor on the second day of trial. That morning, the following exchange occurred prior to the jury entering the courtroom:

MS. LEWIS [ASSISTANT STATE'S ATTORNEY]: Your Honor, remember at the end of yesterday the bailiff mentioned that one juror.

JUDGE WOODARD: She didn't provide us a note. You are talking about somebody who said she recognized someone?

MS. LEWIS: I didn't know what it was about –

MR. BATES [COUNSEL FOR CO-DEFENDANT]: Know witnesses or Appellant?

MR. SILVERMAN [COUNSEL FOR APPELLANT]: I don't remember that.

JUDGE WOODARD: You had left. She was not clear. If she writes me a note, fine.

There was no objection raised by Appellant and no further discussion of the juror’s communication. Moreover, the record is silent on whether the court expressed to the juror that the communication would not be addressed unless it was reduced to writing.

Based on this exchange, Appellant asserts on appeal that the trial court erred by failing to notify Appellant of a juror communication as required by Maryland Rule 4-326(d) when it failed to place the entirety of that communication on the record. In particular, Appellant argues that the Court erred by not providing timely notification of the juror communication and by failing to respond. The State contends that the issue is not preserved for appeal, and in any event, has no merit.

As a threshold matter, we address whether to review Appellant’s unpreserved claim as plain error or pursuant to Maryland Rule 8-131(a). Looking first to an analysis of plain error review, the process involves four steps:

First, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant’s substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

McCree v. State, 214 Md. App. 238, 271 (2013) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

Focusing on the first prong of this analysis, there was a clear deviation from Maryland Rule 4-326(d) when the trial court failed to disclose the full contents of the jury communication to all parties. It is Appellee’s position, however, that Appellant affirmatively waived any claim on that issue by failing to object at trial, and therefore cannot meet this first prong of the analysis. Looking to the Court of Appeals discussion of plain error review in *State v. Rich*, 415 Md. 567 (2010), the Court finds Appellee’s argument unpersuasive. The affirmative waiver prong under plain error review refers to instances where a defendant knowingly and voluntarily waives a right (such as through a plea) rather than where counsel fails to object. The Court explained, whereas “forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Id.* at 580 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). In this case, although Appellant’s failure to object at trial may have resulted in a forfeiture, it was not an “intentional relinquishment or abandonment of a known right.” Furthermore, given that the Appellant was unaware of the full contents of the jury communication, it would be impossible for him to have intelligently assessed the potential impact of the note. Therefore, Appellant’s claim related to the mishandling of the jury communication meets the first prong of plain error review.

Moving to the second prong, this Court finds that the error in question is not “subject to reasonable dispute.” Maryland Rule 4-326(d) requires the full disclosure of a jury communication so that both parties may have input into the response and be made aware of any potential bias. The importance of maintaining an impartial jury can hardly

be overstated, and failing to properly investigate a jury communication related to potential bias constitutes clear error not subject to reasonable dispute. Furthermore, the Court of Appeals has explicitly held that failing to provide notification and full disclosure of a jury communication “is presumably prejudicial unless the State can affirmatively prove otherwise.” *State v. Harris*, 428 Md. 700 (2012).

The trial court’s failure to properly handle the jury communication further satisfies the third and fourth prongs of plain error analysis, as it not only implicates Appellant’s right to an impartial jury, but also his right to be present at all stages of trial. While Appellant’s notification of the jury communication the following morning may satisfy his right to be present at all stages of trial, it is difficult to dispute that Appellant’s right to an impartial jury was violated by the court’s failure to investigate a potential source of bias. In light of the fundamental importance of that right, the Court further finds that such a failure “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[,]” thereby satisfying the fourth prong of the analysis. *Puckett v. United States*, 556 U.S. at 135. Given that Appellant’s claim meets all four prongs of plain error review, this Court finds that appellate review is appropriate in this case.³

Focusing now on the merits of Appellant’s allegation of error, the Court finds that the trial court erred by failing to fully disclose the contents of the jury communication pursuant to Maryland Rule 4-326(d). At the time of Appellant’s trial, the rule stated:

³ Thus, we have no occasion to address Appellant’s Rule 8-131(a) argument.

The court shall notify the defendant and the State’s Attorney of the receipt of any communication from the jury pertaining to the action as promptly as practicable and in any event before responding to the communication. All such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action. The clerk of the court shall note on a written communication the date and time it was received from the jury.

As a threshold matter, it is clear that the rule applies to this case, as the record reflects that the court received a jury communication pertaining to the action via the bailiff. Once such a communication was received, the court was required to disclose the full contents of that communication to the defendant and prosecutor.

In *Allen v. State*, 77 Md. App. 537 (1989), this Court established a “bright-line” rule that requires a trial judge to read the full contents of any jury communication to both the State and defense before allowing a defendant to accept a majority verdict. *Id.* at 546. The Court went on to explain that this “bright-line” rule was designed to “avoid the uncertainties which would arise were we to hold merely that the substance of jury communications be revealed.” *Id.* Based on this language, we envisioned precisely this type of situation when establishing the *Allen* rule, such that the trial court’s handling of the jury communication here cannot be found to satisfy Maryland Rule 4-326(d).

Appellee, however, maintains that the trial court satisfied its duty by communicating to counsel that a juror had stated that they recognized someone. Appellee argues that the rule only requires that the court (1) notify the defendant and the State’s attorney before responding and (2) if the court responds, that all such communications

between the court and the jury be on the record in open court or reduced to writing and filed. However, Appellee's position is directly at odds with this Court's ruling in *Allen*.

Merely providing vague information that a juror may have recognized someone hardly gives notice of the full contents of the jury communication and affords virtually no protection to a defendant's right to an impartial jury. Without exploring who the juror recognized, if it would affect the juror's ability to be impartial, and whether the juror may have disclosed information about the individual to other jurors, it would be impossible to evaluate potential bias. The rule itself was designed to protect the absolute right of a criminal defendant to be present at all stages of trial and to ensure an impartial jury. Without providing full disclosure of jury communications, such protections would be largely ineffective. Under Appellee's interpretation, the trial court may simply provide the general content of a jury communication and refuse to respond, provided that it notifies the parties that a communication was received. Without a requirement that the contents of such a jury communication be fully disclosed, any protections afforded by Rule 4-326(d) are rendered largely ineffective.

It is also worth noting that the language of Rule 4-326(d) was amended following Appellant's trial. Although the Court's analysis in this case is based on the language of the rule at the time of trial, under the amended version our ruling would remain the same. Current Rule 4-326(d)(2) Notification of Judge; Duty of Judge, provides:

- (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.

(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.

Comparing the two versions, it is clear that both require jury communications pertaining to the action be relayed to the parties and responded to in writing or orally on the record. Furthermore, the additional specificity reflected in the amended rule further supports the importance of the procedural protections afforded by Rule 4-326(d).

Based on the above analysis, this Court finds that the trial court erred when it failed to fully explore, and place on the record, the substance of a jury communication as required by Maryland Rule 4-326(d). Although the parties were notified that a communication had taken place between a juror and the bailiff, and that the communication pertained to the juror recognizing “someone,” this alone was insufficient. In order to effectuate the underlying protections provided by the rule, a juror communication must be fully disclosed to the parties and the entirety of that communication placed on the record. In this case, the trial court failed to provide Appellant these protections under Rule 4-326(d) and his conviction must be reversed.

**JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE’S
COUNTY REVERSED. COSTS TO
BE PAID BY THE APPELLEE.**