UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1429

September Term, 2016

CALVIN FREEMAN

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: August 7, 2017

The appellant, Calvin Freeman,[1] was convicted by a jury in the Circuit Court for Baltimore City of second-degree assault, use of a handgun in the commission of a felony or crime of violence, possession of a regulated firearm after having been convicted of a disqualifying crime, and reckless endangerment. The jury acquitted him of other associated charges. On August 23, 2016, the circuit court sentenced him to an aggregate twenty years of incarceration with all but ten years suspended and three-years post-release probation. This timely appeal followed.

Freeman raises three questions for our review which we have rephrased and reordered to present them in the chronology of the trial.

> 1. Whether the circuit court abused its discretion by limiting the scope of the defendant's cross-examination of a State's witness;
>
> 2. Whether the circuit court abused its discretion by allowing the prosecution, during its rebuttal closing, to state as a fact a matter not in evidence; and
>
> 3. Whether the circuit court abused its discretion by giving a coercive instruction to the jury in response to receiving a juror's note indicating that the jury was deadlocked because the note's author was unmovable in her decision.[2]

---

[1]Appellant's brief and the transcript use "Freedman." We use the spelling in the indictment.

[2]The questions as presented by the appellant were:

> "1. Did the circuit court err in responding to a jury note received during deliberations by giving a coercive instruction?
>
> "2. Did the circuit court err by allowing impermissible rebuttal argument and by denying a related motion for mistrial?
>
> "3. Did the circuit court err by limiting the cross-examination of a witness for the State?"

Background Facts

On the date of the offenses, December 13, 2015, Freeman was the current boyfriend of Tanyekia Cure. The victim, Samuel Hunter, was the former boyfriend of Cure and the father of two of her seven children, ages five and three at the time of trial in June 2016. In December 2015, Cure was living at 2545 Ashton Street in Baltimore City.

At about 6:00 a.m. on the thirteenth, Hunter suspected that Cure was out late and was concerned about who was watching his children. He was waiting outside Cure's home when he saw her returning from a night out. He approached her, they argued, and he "plucked" her on the lip. Then he saw Freeman and another man walking toward him. That man swung at Hunter but missed. Freeman fired a gun either at Hunter or in the air.[3] Hunter ran, got in his car, and left.

At Freeman's trial, Hunter testified that he retrieved a handgun from his sister's home in Rosedale and returned to Ashton Street with the intent to shoot Freeman. Neither Cure nor Freeman was there. After waiting most of the balance of the morning, Hunter left, but returned around noon after receiving a telephone call from Cure. At Cure's home, Hunter asked for Freeman. Freeman then came out, produced a gun, and fired at Hunter. Hunter drew his gun, but it did not fire although he twice pulled the trigger. Hunter was hit in the shoulder by a gunshot as he was running away from Freeman. Hunter stashed his gun in his car and took a "hack" to Harbor Hospital.

[3]That is not the assault that is the subject of the instant indictment.

At the hospital, Hunter told the staff that he had been shot while walking in the nearby neighborhood of Cherry Hill. When the police arrived at the hospital to investigate the shooting on Ashton Street, Hunter told them that he had been shot by an unknown person who had come out of an alley.

Hunter testified that he had said that he was shot while walking in Cherry Hill to avoid being arrested for carrying a handgun. He also testified that, although there was a person in the alley at Ashton Street, that person did not have a gun. Hunter claimed he was "horse playing with the police" to avoid telling them about his gun. By 6:26 p.m., on December 13, 2015, Hunter had identified Freeman as his assailant from a photographic array.

Cure also identified Freeman as the shooter from a photo array on December 13, 2015, and in a statement to the police investigators. At trial, she denied that Freeman was present at the scene of the shooting.

Additional facts will be stated in the discussion of particular issues.

I

Appellant asserts that the circuit court erred by limiting the cross-examination of a State's witness. The State counters that the question at issue elicited irrelevant evidence, or, if marginally relevant, that the court properly exercised its discretion to prevent a "mini trial" on a collateral issue.

We review a trial court's decision to limit cross-examination for an abuse of discretion. *Pantazes v.* State, 376 Md. 661, 681, 831 A.2d 432, 443-44 (2003). Here,

however, the appellant failed to preserve the issue for appellate review. Furthermore, even if preserved, the court did not abuse its discretion.

A. Relevant Facts

On cross-examination Hunter was asked whether, during his audiotaped police interview, he had stated that the appellant fired a weapon at him between five and six o'clock on the morning of December 13, 2015. Hunter responded, "I don't recall." Thereafter, counsel sought to refresh Hunter's recollection about the statements he had made, using an uncertified, unsigned transcript of the interview, which had been created by counsel's law clerk. The court instructed Hunter to review the transcript and advise whether it appeared to be accurate. Hunter stated, "It's not accurate." Addressing counsel, the court responded, "Very well. Then you need to approach it in a different way." The court allowed counsel to play the recording for Hunter and the jury.

After playing a portion of it, counsel paused the recording, approached the witness with a copy of the transcript, and informed the court that he intended to ask Hunter what in the transcript Hunter believed to have been inaccurate. The court did not allow counsel to do so, explaining:

> "The transcript is not in evidence as you [sic] what your law clerk heard and prepared.
>
> "And Ladies and Gentlemen, that's why you don't get a transcript. A transcript is what someone else hears. The evidence is what you hear with your own ears. That's the evidence in this record. And that is the evidence before Mr. Hunter, his own voice answering questions."

Thereafter, counsel asked Hunter whether he had said, in the recorded statement just played, that the appellant had shot at him. Hunter answered, "At that point in time, no."

B. Issue Preservation

Generally, where a trial court excludes evidence by, *inter alia*, limiting cross-examination, a formal "proffer as to the substance and importance of the expected answers [i]s required in order to preserve the issue for appeal." *Conyers v. State*, 354 Md. 132, 164, 729 A.2d 910, 927, *cert. denied*, 528 U.S. 910, 120 S. Ct. 258 (1999). This general principle is subject to an exception "where the tenor of the questions and the replies they were designed to elicit is clear[.]" *Mills v. State*, 310 Md. 33, 46, 527 A.2d 3, 9 (1987), *vacated on other grounds*, 486 U.S. 367, 108 S. Ct. 1860 (1988) (citations and internal quotation marks omitted). *See also Waldron v. State*, 62 Md. App. 686, 698, 491 A.2d 595, 601, *cert. denied*, 304 Md. 97, 497 A.2d 819 (1985) ("When no proffer is made, the questions must clearly generate the issue -- what the examiner is trying to accomplish must be obvious. Thus, in the absence of a proffer, the clarity with which the issue is generated will determine whether the court's restriction of cross-examination constitutes an abuse of discretion.").

Here, the defense made no formal proffer. Before us, appellant claims that his inquiry was intended to impeach Hunter's credibility. However, because the defense was unable to establish that the clerk's transcript was an authentic reproduction of the words on the tape, we are unable to discern what conflicts, if any, between the tape and Hunter's testimony, Freeman sought to show.

C. Abuse of Discretion

As a general rule, defendants must be allowed "wide latitude to cross-examine a witness as to bias or prejudices[.]" *Smallwood v. State*, 320 Md. 300, 307-08, 577 A.2d

356, 359 (1990). That is subject, however, to the trial court's "wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Pantazes*, 376 Md. at 680, 831 A.2d at 443. *See also* Md. Rule 5-403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Under the circumstances in this case, the court did not abuse its discretion by denying cross-examination based on the clerk's transcript. "The appropriate test to determine abuse of discretion in limiting cross-examination is whether, under the particular circumstances of the case, the limitation inhibited the ability of the defendant to receive a fair trial." *Martin v. State*, 364 Md. 692, 698, 775 A.2d 385, 388 (2001). Here, the court had discretion to bar cross-examining from an unauthenticated transcript, because it ran the risk, on the State's objection or redirect, of having a mini-trial over the authenticity of the clerk's transcript. In any event, the appellant had the opportunity to impeach Hunter's credibility by playing for the jury the recording of his statements to the police. Hence, any error was harmless beyond a reasonable doubt.

II

Appellant next claims that the circuit court abused its discretion by allowing the State, during its rebuttal closing, to argue based on facts not in evidence. The State

contends that its remark was a proportional response to the "plainly inappropriate" final two sentences of defense counsel's closing.

"[W]hat exceeds the limits of permissible comment or argument by counsel depends on the facts of each case. … [A]n appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Mitchell v. State*, 408 Md. 368, 380-81, 969 A.2d 989, 997 (2009) (internal quotation marks and citations omitted).

A. Relevant Facts

The summation by the defense was an attack on Hunter's credibility. One of the arguments was based on a plea agreement between the State and Hunter involving the altercation that Hunter had with Cure around midday on December 13, 2015. Cure had complained to the police who charged Hunter. On the morning of June 8, 2016, the first day on which testimony was taken in *State v. Freeman*, Hunter entered into a written plea agreement in *State v. Hunter*, signed for the State by the same prosecutor who was representing the State in the *Freeman* case. Hunter then pled guilty that morning to a charge of wearing and carrying a handgun.

Testifying in the *Freeman* case, Cure said that, when Hunter confronted her on December 13, he pulled a handgun from his waistband under his shirt, but she grabbed his hands, and the weapon discharged. Cure said the bullet "breezed through [her] finger" and then Hunter "mushed" her.

Freeman argued that Hunter received favorable treatment because the State could have sought a conviction for second-degree assault. Counsel noted that the statement of

facts in the writing recited that "[d]uring the course of the confrontation, Mr. Hunter pulled out a handgun."

Counsel further argued:

> "[Mr. Hunter] could have -- he could have been found guilty of assault in the second degree. But that was taken off the table because of this plea.
>
> "In exchange for his plea -- and you're going to have this, because this is going to go back into evidence. And I ask you to take a close look at this. The State is going to recommend that he get a sentence of three years suspending all but the time he served and be placed on three years of probation for what he says he did.
>
> "But beyond that, the defense in his case is going to ask for what is known as 'probation before judgment,' which means -- and the State's not going to object to that -- which means he won't have a conviction on his record for this, for what he admits to on the stand.
>
> "So[,] talk about a benefit for changing your story[.]
>
> ….
>
> "What Mr. Hunter is is somebody who will do or say whatever he needs to to protect himself. And guess what? It worked; right? He said what he needed to say to get himself out of trouble.
>
> "Ladies and Gentlemen, *Mr. Freeman is not guilty of any of this. I know it, the State knows it, the detectives know it, and you all know it. Mr. Freeman is not guilty*."

(Emphasis added).

The State began its rebuttal closing by saying:

> "Ladies and Gentlemen, (Inaudible.) One, the State doesn't know that Mr. Freeman didn't do this. If the State knew that, we wouldn't be here right now. I've got stuff to do, you've got stuff to do. If there wasn't reason to believe he did it, we would all have been gone by now."

The State then briefly addressed the defense argument based on the false stories that Hunter initially had given the police, before saying:

> "Now, [defense counsel] also made reference to the plea agreement with the State[,] stating that Mr. Hunter changed his story after he received this great benefit from the State.
>
> "Ladies and Gentlemen, he pled guilty. That's not a great benefit at all. He has a record now. That is on his permanent record.
>
> "[Defense counsel] asks why he didn't plead guilty to assault in the second degree? Why weren't there more facts about the shooting in the statement that was read in relation to his plea? Because *he was pleading to the handgun charge because the victim in the assault didn't want to participate.*"

(Emphasis added).

Defense counsel objected to the italicized language on the ground that it was beyond the evidence. The court overruled the defendant's objection and overruled a motion for mistrial based on the same ground. In the presence of the jury, the court said:

> "You opened the door to that in your closing argument. You said, and I quote, 'He know -- I know the defendant's not guilty. You know this defendant's not guilty. And the State knows the defendant's not guilty.'
>
> ….
>
> "You said, you decided to use the plea agreement as substantive evidence when you know that the sole purpose of that plea agreement is to show benefit agreement [sic] by the witness. By opening the door to the intent and reason by what the State did and why they did it, I find that it was reasonable conjecture and summation[.]
>
> ….
>
> "You opened the door to all that. And all I did in rebuttal was allow the State the same opportunity you had.

> "You gave your personal opinion, and the State gave its. And there was no objection that was made. You got to say what you wanted to say. You're [sic] exception is duly noted to the State's closing argument, but I think the State's closing argument was fair, reasonable[,] and appropriate.
>
> "And, oh, by the way, *they know that nothing that you all say is in evidence, nothing*."

(Emphasis added).

B. Discussion

The trial judge recognized that Freeman had expressed a plainly improper conclusion in his closing argument. He said, in essence, that the prosecutor and the police had induced Hunter to give perjured evidence against Freeman by offering a plea agreement that ignored the evidence against Hunter that the State could have produced to support a more serious charge. The only point at which the activities of the police and the prosecutor coalesced on ultimate charges against Hunter was in the plea agreement. Thus, the trial court did not abuse its discretion in allowing the State to use a fact outside of the record to explain why it did not press a more serious count of the charges against Hunter.

The trial court used the label "opened door" to describe the doctrine underlying its ruling. Strictly speaking, the opened door doctrine is a rule of evidence. It is

> "a rule of expanded relevancy; it allows the admission of evidence that is competent, but otherwise irrelevant, in order to respond to evidence introduced by the opposing party during its direct examination. Whether the opponent's evidence was admissible evidence that injected an issue into the case or inadmissible evidence that the court admitted over objection, once the 'door has been opened' a party must, in fairness, be allowed to respond to that evidence."

Conyers v. State, 345 Md. 525, 545, 693 A.2d 781, 790 (1997) (citations omitted). This Court has recognized that it and the Court of Appeals have applied the opened door doctrine

to closing argument. *Sivells v. State*, 196 Md. App. 254, 282, 9 A.3d 123, 139 (2010), *cert. granted*, 418 Md. 397, 15 A.3d 298, *and cert. dismissed* 421 Md. 659, 28 A.3d 704 (2011).

In *Sivells,* we analogized the rules of evidence to closing argument to reject the State's contention that the door was opened to allow credibility vouching by the State where defense counsel described the prosecution's case as the weakest he had ever seen. We explained the doctrine.

> "The opened door doctrine, however, is limited to '"evidence that is competent, but otherwise irrelevant."' *Grier v. State,* 351 Md. 241, 260, 718 A.2d 211[, 221] (1998) (quoting *Conyers,* 345 Md. at 545, 693 A.2d [at 790]). The doctrine does not permit the admission of evidence that is incompetent, *i.e.*, evidence that is 'inadmissible for reasons other than relevancy.' *Id.* at 261, 718 A.2d [at 211]. Thus, in *Grier*, evidence of post-arrest silence, which 'was incompetent, not merely irrelevant;' was not admissible under the 'opening the door' doctrine. *Id. Accord Clark v. State*, 332 Md. 77, 8[7] n.2, 629 A.2d 1239[, 1244 n.2] (1993) (incompetent hearsay evidence inadmissible)."

Id. at 282-83, 9 A.3d at 140. Prosecutorial vouching, however, is inadmissible. There the prosecutor's comments were not only irrelevant, they were also incompetent and not permissible argument under the opened door doctrine.

Here, the conclusion of the defense's summation went off into space, out of the orbit of the evidence. Counsel declared his personal knowledge of Freeman's actual innocence, knowledge that he said was shared by the prosecutor and the police. But there was no evidence that defense counsel was in the 2500 block of Ashton Street around mid-day on December 13, 2015. Viewed most favorably to defense counsel, he sought an inference from Hunter's plea bargain and then stretched it beyond the breaking point.

What defense counsel thought about the strengths or weaknesses of the State's case against Hunter operated to expand relevance to include a brief explanation by the State of the factors influencing that agreement. The evidence showed that the same prosecutor represented the State in the *Hunter* case and in the *Freeman* case. He would have had personal knowledge, as of the time of the plea negotiation, of Cure's cooperation *vel non* as a witness against Hunter. His evidence about the reason for the charge selected in the plea agreement would have been competent, even if otherwise irrelevant. Thus, under the opened door doctrine the court did not err in overruling the defense objection and denying a mistrial.

If our holding that the opened door doctrine applies here is in error, the State's reference to a fact not in evidence does not warrant reversal, because the invited response doctrine applies. As this Court explained in *Sivells*:

> "The Court of Appeals has described the invited response doctrine as involving 'a prosecutorial argument ... made in reasonable response to improper attacks by defense counsel.' *Lee* [*v. State*], 405 Md. [148,] 163, 950 A.2d 125[, 134 (2008)] (quoting *Spain* [*v. State*], 386 Md. [145,] 157 n.7, 872 A.2d 25[, 32 n.7 (2005)])."
>
> "There are two important points to remember about the invited response doctrine. First, analysis pursuant to this doctrine is appropriate 'only when defense counsel first makes an improper argument.' *Mitchell* [*v. State*], 408 Md. [368,] 382, 969 A.2d [989,] 997 [(2009)]. *Accord Lee*, 405 Md. at 169, 950 A.2d [at 137]; *James v. State*, 91 Md. App. 233, 259, 991 A.2d 122[, 137], *cert. denied*, 415 Md. 338, 1 A.3d 468 (2010). *See also Marshall v. State*, 415 Md. 248, 267, 999 A.2d 1029[, 1039] (2010) (defense counsel's argument was 'not improper, or, at the very least, not sufficiently improper to justify the prosecutor's comments' under the invited response doctrine).
>
> "Second, the invited response doctrine does not condone an improper argument by the prosecutor when it is in response to an improper argument

> by the defense. Rather, it merely provides that, in the context of the arguments as a whole, reversal is not required."

196 Md. App. at 283, 9 A.3d at 140.

Freeman's attack on the prosecutor and the investigating detectives by asserting that they knew Freeman was not guilty had no basis in any legitimate inference from the evidence. The State's response was reasonable.

III

Appellant contends that the court gave a coercive supplemental instruction in response to a note (the Note) from Juror 12, declaring:

> "I am unmoveable in my decision on this case. I cannot be swayed. We will not be able to come to an [sic] unanimous decision under any condition. Absolutely not."[4]

We review for an abuse of discretion the court's decision supplementally to a charge rather than to declare a mistrial. *Nash v. State*, 439 Md. 53, 66-67, 94 A.3d 23, 31, *cert. denied*, 135 S. Ct. 284 (2014) ("[W]e review a court's ruling on a mistrial motion under the abuse of discretion standard."); *Kelly v. State*, 270 Md. 139, 143, 310 A.2d 538, 541 (1973) ("[D]ecisions as to whether to utilize an *Allen*-type charge, when to employ it, and what words should be selected are best left to the sound discretion of the trial judge."). Such decisions by the trial court are afforded "wide berth," *Nash*, 439 Md. at 68, 94 A.3d at 32, and "will be accorded great deference by a reviewing court." *Curtin v. State*, 165 Md. App. 60, 73, 884 A.2d 758, 766 (2005), *aff'd*, 393 Md. 593, 903 A.2d 922 (2006).

[4]Available to the jurors were preprinted pads for juror questions that included a space for the juror number of the questioner.

A. Relevant Facts

The *Freeman* trial commenced on Tuesday, June 7, 2016, with a full day of jury selection. Testimony and arguments proceeded for a full day on the 8th, a half-day on the 9th, and a full day on Monday, June 13.

Jury deliberations began at 4:09 p.m. that Monday and continued for about forty-five minutes. The jury resumed at 9:30 the following morning and broke for lunch between approximately 12:48 and 1:15 p.m. At 1:30 p.m. on June 14, the court received a note from Juror 12. The note posed two questions: "Does Assault in the First Degree or 2nd Degree involve a handgun??" and "What happens if the jury cannot come to a verdict and we are not unanimous??" At 2:20 p.m. that same day, the court received a note from Juror 10, stating, "We cannot come to a unanimous decision on the counts 3 through 8. We do have a decision on counts 1 and 2" (attempted first-degree murder and attempted second-degree murder, respectively).

After recalling the jury, the court read aloud both the content of the second note and Maryland Criminal Pattern Jury Instruction (MPJI-CR), § 2:01, the modified "*Allen*" charge.[5] The court further advised:

[5]"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 the 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." MPJI-CR § 2:01.

"I need you to continue with your deliberations. Please go into the jury room. If there's anything you need from me that you think would assist you in that effort, I am available and waiting to provide that if there is something that you need.

"For example, if you think it would be helpful to have the written instructions on the elements available to you to look at, rather than listen to, then that would be something that I would be prepared to provide. Please return to the jury room at this time."

At 2:50 p.m., the jury resumed deliberations. Approximately five minutes later, the court received the Note from Juror 12. The court discussed the Note with counsel outside of the presence of the jury.

"THE COURT: So, right after you left, we got that.

….

"THE COURT: And that's a problem. So we have a juror who's refusing to deliberate, which is a violation of the rules.

….

"[DEFENSE COUNSEL]: With this, I think we need to take a partial verdict, and a mistrial on the other counts.

"THE COURT: No. We're not going to do that.

….

"[DEFENSE COUNSEL]: Well, what's the alternative?

"THE COURT: There is an alternative.

"[DEFENSE COUNSEL]: And?

"THE COURT: You don't --

"[DEFENSE COUNSEL]: I'm just asking?

"THE COURT: You don't declare a mistrial just because you have a juror that's refusing to deliberate. There's something else that has to happen before you can declare a mistrial.

….

"THE COURT: … So first thing I'm going to do is direct them to honor their oath. Okay. And that requires them to deliberate.

….

"[THE COURT:] You can't say 'I'm not going to deliberate. I'm not going to.' You can't do that. That's a violation of the oath, to refuse to deliberate. So, that what he's -- that's what she's doing.

"[DEFENSE COUNSEL]: Well, --

"THE COURT [reading the Note]: 'I'm unmoveable in my decision on this case. I cannot be swayed, will [sic] not be able to come to any' (inaudible) 'under any condition. Absolutely not.' That's a refusal to deliberate.

"[DEFENSE COUNSEL]: I -- well, I see it differently, but I mean, I think she has deliberated. She's -- she has her decision. She doesn't -- that's her right. I don't know if it['s] a he or a she, I don't remember which one is Number 12.

"THE COURT: It's Number 12.

"[DEFENSE COUNSEL]: I know. I don't know which one it is.

"THE COURT: I don't know either.

"[DEFENSE COUNSEL]: But all she is saying is, 'This is my decision. I can't be swayed.' We hadn't -- you know, she didn't say 'I'm not going to deliberate about it, I'm just saying' --

"THE COURT: But this came not even five minutes after I told them to deliberate. And so that's not deliberation. In five or four minutes, she did not do what I asked and instructed her to do.

"[DEFENSE COUNSEL]: But that was after they've already been deliberating several hours today, and 40 minutes, roughly, yesterday. So --

….

"THE COURT: But I'm advising you that when a juror is instructed by a judge to go back and deliberate, to reconsider your point of view, not that you have to change it, but just to listen to your fellow jurors. And in less than five minutes, she responds, 'I'm not gonna do that.' That's not deliberations.

"[DEFENSE COUNSEL]: Okay.

"THE COURT: And so she's violating her oath. She needs to be advised and the rest of the jurors need to be advised that that is what we're asking.

"[DEFENSE COUNSEL]: Uh-huh.

"THE COURT: Now, after she's had an opportunity to listen to the other jurors and deliberate a fair -- not under five minutes -- then it may be -- you're right -- that we call or declare a mistrial.

"But that's not what this is. That's not what this is. And I -- I am concerned. And the other thing I am concerned about is because they previously asked a question about the elements of the charges, I'm concerned that that -- maybe that will convince the other jurors that she's right.

"[DEFENSE COUNSEL]: Okay.

….

"[THE COURT:] And your objection is duly noted.

….

"THE COURT: Now can you ask the jury to come back in?"

When the jury had reassembled, the court, without identifying its author, read the Note aloud. The court then instructed the jury as follows (the Supplemental Instruction):

"I need to remind you that that's not deliberations. And it's not deliberations particularly where I just instructed you to go back and revisit your case, look over the evidence again, talk to one another and deliberate. That requires not that you stand in the door and say, 'I'm not gonna do that,' but that you go in there, freely and fairly.

> "Let me remind you that your oath read[s] as follows: You were asked to stand and raise your right hands, and it said 'Do you and each of you, solemnly promise or declare that you will well and truly try the issues joined between the State of Maryland and the defendant, whom you shall have in your charge, and give a true verdict, according to the evidence presented. If so, and [so] say you all, please respond by saying, I do.' That was your promise. And I'm holding you to it.
>
> "Deliberation means talking it out, if it means sharing your point of view, if it means discussing the evidence, if it means going through the testimony, the exhibits, if it means looking at the videos or the tape recorded items that you have in your possession, if it means considering all of the elements of the crime as charged.
>
> ….
>
> "Ladies and Gentlemen, before I send you back, I'm just going to reiterate. You saw the jury selection process. Mr. Freedman [sic] and the State spent a lot of times [sic] going through that process. They['re] asking only one thing is that you honor your oath, your promise to deliberate.
>
> "I've read the oath to you. I've provided you with a copy of the elements of 3 through 8 for your ready reference, and if that will be helpful to you on the counts you['re] stuck on. I'm gonna direct you to return to the jury room and continue deliberations and honor your oath. Please go there now."

Freeman did not except to the Supplemental Instruction as given.

Almost immediately after the court addressed the jury, Juror 3 submitted a note to the court, which read: "We have a juror that has expressly stated that they [sic] refuse to vote either way, regardless of the opinions of others. In this case, I believe that it will be impossible to come to a unanomous [sic] decision" (emphasis in original). The court advised counsel of this note which it considered covered by its Supplemental Instruction.

The jury resumed deliberations at 3:24 p.m. At 5:13, the jury returned its unanimous verdict.

B. Issue Preservation

The court and counsel interpreted the note from Juror 10 to mean that the jurors were unanimous in finding Freeman not guilty on Counts I and II. After the *Allen* charge had been given and the Note received, Freeman's position was that a verdict should have been taken on Counts I and II and a mistrial declared on the remaining counts. Appellant interpreted the Note to mean that Juror 12 had deliberated and had reached a decision. This is simply an argument in support of a mistrial on Counts III through VIII.

In this Court, Freeman argues that the Supplemental Instruction was coercive of Juror 12. At trial Freeman never asserted that that charge was coercive. Maryland Rule 4-325(e) requires an objection to an instruction to state "distinctly the matter to which the party objects and the grounds of the objection." The appellate argument has not been preserved.

C. Juror Coercion

Even if Freeman's coercion argument had been preserved, we conclude that the trial court acted within its discretion in giving the Supplemental Instruction.

In his opening brief, Freeman asserts that this case is controlled by *Butler and Lowery v. State*, 392 Md. 169, 896 A.2d 359 (2006). In that case, after four and one-half hours of deliberation, the jury submitted a note stating that it was unable to reach a unanimous verdict. *Id*. at 174, 896 A.2d at 362. The court responded by allowing the jury to break for the evening. *Id*. at 175, 896 A.2d at 363. After the jury renewed deliberations the following morning, the court received another jury note stating "'We have one juror

who does not trust police no matter the circumstance.'" *Id*. at 176, 896 A.2d at 363. Addressing the jury, the court responded:

> "'Madam Forelady, ladies and gentlemen we received two notes from you. The first note occasioned lengthy legal research and argument.[6] The second note we're essentially going to ignore. It says we have one juror who does not trust the police no matter the circumstance. Anybody who had felt that way should have said so in voir dire so a challenge could have occurred, *and if anybody deliberates with that spirit now, I suggest they might be violating their oath*."

Id. at 178, 896 A.2d at 364 (emphasis in original).

It is noteworthy that the above-quoted response is the complete response to the second note in *Butler*. The court and counsel had agreed, the previous evening, that the court would give a modified *Allen* charge the next day, but that was not done as a result of the note.[7] *Id*. at 175, 896 A.2d at 363. Thus, there was nothing in the supplemental charge in *Butler* to counterbalance the starkly presented possibility of oath violation.

The Court of Appeals held that it was "possible that the trial judge's remarks improperly influenced the juror in question to put aside his or her views in fear of violating their oath and the unexplained consequences of such a purported violation." *Id*. at 188, 896 A.2d at 371. "Furthermore," the Court continued, "the judge's attempt to solve the problem created by the alleged juror bias ma[de] it impossible to determine whether the verdicts 'were a product of compulsion or represented the requisite unanimity.'" *Id*. at 188-

[6]The first jury note to which the court refers was a request that the jury be permitted to watch a videotape of counsel's closing arguments. *Id.* at 176, 896 A.2d at 363.

[7]The court had included MPJI-CR § 2:01 in its instructions prior to the jury's beginning deliberations.

89, 896 A.2d at 371. *Butler* concluded that the lone juror could have been coerced because, "[a]lthough it could be argued that the trial judge did not *per se* threaten the hold-out juror with perjury, that was a strongly implied message from the express assertion that such attitude may violate his or her oath." *Id.* at 192, 896 A.2d at 373.

In the case before us, the trial court used the jury oath in a positive fashion, not to threaten. The jurors had made a promise to deliberate and the court was holding them to it by having them continue deliberations.

The State submits that this case is much like *Hall v. State*, 214 Md. App. 208, 75 A.3d 1055 (2013). There, the jury, after one and one-half hours of deliberations, attempted to return a verdict but, due to confusion over the verdict on a handgun possession charge, resumed deliberations. *Id*. at 214, 75 A.3d at 1058. About six minutes later, the court received a jury note, which read: "'We have a juror who is holding out & it will be *impossible* [underlined twice] to come to a unanimous verdict.'" *Id*. The court recalled the jury, reminded the jurors of their "duty to decide the case[,]" read aloud MPJI-CR § 2:01, and proceeded to provide a colloquial explanation of that instruction. *Id.* at 214-15, 75 A.3d at 1058-59. The court explained:

> "So what that says, in addition to my having said, that you have a duty to decide the case. What that says it [sic] that you are as jurors and judges of the fact obligated to reach decisions in your own head so to speak, based upon the evidence and the law and no other standard. And at the same time, listen to one another and be prepared, if persuaded, to change your opinion, as I speak this to all 12 jurors and that's -- it's a really important element of the jury process, where the jurors speak to one another, you know. Civil juries are now six, not 12, but serious criminal cases are tried by 12 and there's a reason for that in addition to history. There is a reason, because it means that 12 people are listening to the evidence and listening to the facts and listening to those facts and listening to my instruction of law and then

> collaborating with an open mind to what everyone else is saying and opining about what they have seen and heard in this courtroom during this trial.
>
> "So it's my responsibility to send you back to the jury room, keeping that important direction in mind and that keeping in mind the importance of decision making as jurors. So, I know it's not something that you will receive with great pleasure but that's my duty and I send you back and ask you to continue to deliberate and remember what deliberate means? Expressing yourself and listening to one another. That's very important. Thank you very much. You're excused to continue your discussions."

Id. at 215-16, 75 A.3d at 1059.

Though the trial court in *Hall* instructed the jury that it had a "duty to decide the case," *id*. at 215, 75 A.3d at 1059, and encouraged the jurors to "deliberate with a view to reaching an agreement," *id*., we held that the court's instruction, "viewed in its entirety …, did not … result in coercion of the jury to reach a verdict." *Id*. at 225, 75 A.3d at 1065. In so holding, we emphasized that, unlike in *Butler*, where the court "singled out and criticized the view held by one particular juror," *id*. at 224, 75 A.3d at 1064, in *Hall*, the trial court uncritically addressed all twelve jurors, and emphasized the importance of their each reaching a decision based "on their own convictions and deliberation with other jurors." *Id*. at 222, 75 A.3d at 1063.

Two of the highest volume jurisdictions in the United States seemingly would find the subject supplemental instruction to be within judicial discretion. The Court of Appeals of New York in *People v. Morgan*, 28 N.Y.3d 516, 68 N.E.3d 1224 (2016), recently approved a supplement instruction under which the trial court had introduced a modified *Allen* charge by saying: "To reach a unanimous verdict, you must deliberate with the other jurors." *Id*. at 519, 68 N.E.3d at 1225. S*ee also People v. Pagan*, 45 N.Y.2d 725, 727, 380

N.E.2d 299, 300-01 (1978) ("[A] trial court may properly discharge its responsibility to avoid mistrials by encouraging jurors to adhere to their oaths and make one final effort to review the evidence and reach a verdict one way or the other."). California addresses the problem area by court rule. *See* California Rules of Court, Rule 2.1036(a) ("After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other.").

Freeman characterizes the Supplemental Instruction in his case as an "admonishment" and asserts that, by quoting the Note in full, the court caused that juror "surely" to believe that the court "was speaking directly to her." Appellant's Reply Brief at 5. A fair reading of the Supplemental Instruction demonstrates that it was not directed to any single juror.

It is clear that throughout the charge, the court is using "you" and "your" in the plural, not in the singular. The opening sentence is: "Ladies and Gentlemen, I received a note from you." Juror 12 wrote her note in the first person singular, but after reading it the court said, "I need to remind you that that's not deliberations." The court reminded the panel that it had "just instructed you to go back … talk to one another and deliberate." Nor is it clear that the impasse resulted solely from Juror 12's obduracy. The note received from Juror 10 indicated that the group had given up: "*We* cannot come to unanimous decision on Counts 3 through 8." (Emphasis added).

Freeman's reply brief next argues, seemingly inconsistently, that the supplemental charge erroneously prioritized "'collective judgment over individual principle and honest

conviction,'" quoting *Thompson v. State*, 371 Md. 473, 487, 810 A.2d 435, 443-44 (2002). In *Thompson*, the trial court had instructed in part: "Remember that you are not partisans or advocates but rather jurors. 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." 371 Md. at 479, 810 A.2d at 439.

Here, almost immediately after the court had given a modified *Allen* charge, the jury was brought back to the courtroom for the Supplemental Instruction of which Freeman complains. The *Allen* charge had instructed the panel, *inter alia*, that each member must decide for himself or herself, not to surrender an honest belief, and not to do violence to an individual judgment. For all practical purposes the *Allen* charge and the supplement were an instructional unit. Thus, the court here presented the same balance between the need for unanimity and individual judgment that was present in *Hall*.

The court acted within its discretion in giving the Supplemental Instruction and in denying a mistrial.

For all the foregoing reasons, we affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.