Circuit Court for Dorchester County
Case No. C-09-19-000063

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1588

September Term, 2019

SYLVESTER ELIJAH PARKER, II

v.

STATE OF MARYLAND

Arthur,
Leahy,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: March 18, 2021

Appellant, Sylvester Elijah Parker, II, was charged by criminal information in the Circuit Court for Dorchester County with various sex offenses including rape in the second degree and sexual abuse of a minor. The matter proceeded to a three-day jury trial that concluded with a hung jury and a declaration of a mistrial over Mr. Parker's objection. He subsequently filed a motion to dismiss on the ground of double jeopardy. Following the court's denial of that motion, Mr. Parker noted this interlocutory appeal raising one question:[1] "Did the circuit court err in denying [Mr. Parker's] motion to dismiss?"

We conclude that the trial court did not abuse its discretion in finding manifest necessity to declare a mistrial. Accordingly, we affirm the court's order denying the motion to dismiss and remand for further proceedings.

BACKGROUND

In January 2019, Mr. Parker lived in Vienna, Maryland with his girlfriend ("mother"), and her three children, T., D., and C.H. Mr. Parker had lived with mother and her children since approximately 2015 and was involved in caring for the children.

On the night of January 4, 2019, mother and Mr. Parker were "arguing" and "fighting," and Mr. Parker was drinking "a lot." Both mother and Mr. Parker stayed up until approximately 6:30 a.m. the following morning, January 5. Approximately one hour after falling asleep, mother awoke to find that Mr. Parker was not in the bed they shared.

[1] Proceedings in the circuit court have been stayed pending the outcome of this appeal. "Although the denial of a motion to dismiss is not ordinarily a final judgment that entitles a defendant to appeal, when the motion to dismiss is on double jeopardy grounds, defendants may appeal before trial." *Nicholson v. State*, 157 Md. App. 304, 309 (2004).

She then entered C.H.'s bedroom and noticed that he also was not in his bed. Finally, mother entered the living room and observed Mr. Parker, naked, in a "crouched down position" with his back to her and his hands on C.H.'s shoulders. C.H. had no pants on and Mr. Parker's head and face were near C.H.'s "private areas."[2] Mother said to Mr. Parker, "What the F are you doing to my son?" She then took C.H. into his room and asked him what had just occurred. C.H. told her that Mr. Parker "was sucking my D."[3]

Mother called the police, who responded shortly thereafter. C.H. was transported to a hospital, where a sexual assault forensic examination was conducted. Mr. Parker was arrested.

The following month, a criminal information was filed in the Circuit Court for Dorchester County charging Mr. Parker with Count 1: Rape in the Second Degree; Count 2: Sexual Abuse of a Minor; Count 3: Sexual Abuse of a Minor by a Household Member; Count 4: Sexual Offense in the Third Degree; Count 5: Sexual Offense in the Fourth Degree; Count 6: Assault in the Second Degree; and Count 7: Perverted Sexual Practice. The matter proceeded to a three-day jury trial on August 7, 8 and 15, 2019.

Trial before the Circuit Court for Dorchester County[4]

[2] Mother testified that she could not see Parker's face, but that C.H. looked "bewildered."

[3] C.H. testified similarly at trial.

[4] Because we remand the case for further proceedings, our summary of the trial record provides the necessary background for our discussion of the question presented by Mr. Parker, rather than a comprehensive review of the evidence presented.

Much of the first day of trial was consumed by jury selection. The State then presented the testimony of mother, C.H., several of the law enforcement officers who responded to the scene on the day of the alleged crimes, and the sexual assault nurse examiner ("SAFE") who examined C.H.

On the second day of trial, the State presented testimony of both a forensic social worker who interviewed the victim, and police Detective Sergeant Priscilla Rogers, who investigated the case. During cross-examination, Detective Rogers disclosed, for the first time, that she had conducted a recorded interview with the victim.[5] Because neither the defense nor the prosecution was aware of that recorded interview, the court granted a one-week continuance to afford counsel an opportunity to investigate and prepare.

On the third and final day of trial, mother and Detective Sergeant Rogers were recalled so that the defense could cross-examine them in light of the belated disclosure of the recorded interviews. The State then called: the investigator from Child Protective Services, who interviewed Mr. Parker; an employee of the Maryland State Police Crime Lab, who established the chain of custody of the forensic evidence; and the forensic scientist, Ms. Angela Spessard, who examined that evidence and testified as an expert in the fields of forensic serology and forensic DNA analysis. The defense called two witnesses: Mr. Parker and his sister.

[5] Detective Rogers also disclosed, for the first time, that she had recorded interviews of mother and Mr. Parker.

In addition to the testimony of C.H., mother, the various law enforcement officers, the SAFE nurse, and the forensic social worker, the State's case relied upon the forensic evidence analyzed by Ms. Spessard. Ms. Spessard testified that swabs taken from C.H.'s penile, scrotal, and thigh areas tested positive for amylase, a protein "that's found in various [] fluids in the body, but [is] found in much higher amounts in saliva." Ms. Spessard explained that the serology test for amylase is a "presumptive test for saliva," meaning that a positive test for amylase typically indicates the presence of saliva. Ms. Spessard also testified that the profile of the major DNA contributor from the penile, scrotal, and thigh swabs matched Mr. Parker's DNA.[6]

Mr. Parker's sister testified that mother purportedly told her that, on the morning of January 5, "[mother] could not see what was going on, [] didn't know what was going on," and that mother and Mr. Parker "had had a long night." Mr. Parker also testified on his own behalf. He testified that, on the evening of January 4, he had approximately five alcoholic drinks before leaving work, and more upon returning home. He also stated that he and mother had a long argument that evening and into the early hours of January 5, 2019. He further denied ever having any sexual contact with C.H.

After closing arguments, the jury retired for deliberations at 2:40 p.m. on the third day of trial. At 6:25 p.m., the court reconvened, with Mr. Parker present, to put on the record that, while the jury deliberated, the court received several notes from the jury. The

[6] Anal swabs also identified semen, but Ms. Spessard explained that she was only able to obtain a partial DNA profile from the sample obtained, and could not "make any conclusions concerning that DNA profile," because it was "missing too much information."

first note, received by the court at 3:50 p.m., asked, "What is the definition of amylase?" The court, after conferring with counsel, responded at 3:52 p.m.: "You must rely upon the testimony you have heard and the exhibits you have before you that were entered into evidence." The second note, received at the same time, asked, "Please explain in full: Transfer DNA (How is it transferred)" and "How important is DNA Evidence and How much attention should we give it?" After conferring with counsel, the court gave a very similar response to this note as to the first note: "You must rely upon the testimony you have heard and the exhibits that were entered into evidence."

Then, at "around 5:00 p.m.," the court received a third note, asking, "2 are leaning one way, the rest say the other. What can we do?" After conferring with counsel, the court responded at 5:04 p.m.: "You must continue to deliberate and try to reach a unanimous verdict. I refer you to the jury instruction regarding your duty to deliberate."

After another hour and fifteen minutes of deliberations, at 6:17 p.m., the court, over defense objection, gave a note to the jury, asking, "Do you believe if you were given additional time to deliberate that you would be able to reach a unanimous verdict? Please respond." The jury responded: "No, 11 to 1." The court then stated its intention to declare a mistrial, pending a jury poll confirming that the jury was deadlocked:

> The [c]ourt does intend to declare a mistrial in this matter, finding manifest necessity to do so. Obviously, this is within the [c]ourt's discretion.
>
> This is a case that had relatively few witnesses given the serious nature of the case. There were fact witnesses, there were some brief recordings, that I will note the jury never asked to listen to, and there were, there was one science expert regarding the DNA.

> This was essentially a who-do-you-believe case from a testimony standpoint. Plus the DNA. And the [c]ourt will note, and reference the findings of the DNA for the record, in that DNA swipes of the penis, scrotum, and inner thighs of the alleged victim in this case indicated to a degree of scientific certainty that it was the DNA of the Defendant.
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> So, I find that it's not a particularly complicated case from an evidentiary standpoint. The jury deliberated diligently for over two hours before I got the first note. I sent them back for another hour and about fifteen minutes before I, or actually an hour and seventeen or more, before I sent in the final note. And they still indicated they were deadlocked and they could not reach a verdict if given additional time to deliberate.
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> So my intent is, I'm going to bring them in and ask them each if they believe that if given additional time they would not be able to reach a unanimous decision, I'll essentially poll the jury on that. And if they all agree, then the [c]ourt will declare the mistrial.

Defense counsel objected, explaining that he objected in chambers to the court's decision to send the 6:17 p.m. note to the jurors and requested "the opportunity to make an argument on the record with [Mr. Parker present]." He argued that the court's note "kind of suggested an out, suggested . . . our impatience" even though "it was, you know, over the three-hour mark, which is not all that great a time." He also noted that the jury had not been given "a modified *Allen* charge or any of the typical procedures."[7]

[7] The term '*Allen* charge' is derived from the United States Supreme Court's decision in *Allen v. United States*, 164 U.S. 492 (1896). The instruction is given to a deadlocked jury and is intended to impress upon jurors the necessity of unanimity in their decision, as well as to encourage each juror to listen to the viewpoints of the other jurors. "The term 'modified *Allen* charge' or '*Allen*-type charge' is used to distinguish the jury instruction sanctioned by [the Court of Appeals] in *Kelly v. State*, 270 Md. 139, 140, n. 1, 310 A.2d 538, 539, n. 1 (1973), and its progeny . . . from the specific instruction given in *Allen v. United States*. That sanctioned instruction is now contained in Maryland Criminal Pattern Jury Instruction 2:01, and [the Court of Appeals] has required that MPJI-CR 2:01 be given to the jury, without deviation, in every instance where such an instruction is necessary." *Ruffin v. State*, 394 Md. 355, 360 n. 2 (2006). MPJI-CR 2:01 was included as Jury Instruction Number 2 in the case at bar.

The court stated that its response to the jury's 5:00 p.m. note was "essentially the *Allen* charge" and that it "referred them back to their duty to deliberate," because it "g[a]ve the *Allen* charge as part of the original instructions." It also pointed out that defense counsel did not "request [it] give [the jury] the *Allen* charge at that time." Defense counsel conceded that the court's responses to the jury's first three notes were appropriate, but explained that he objected to the court's intention to declare a mistrial, because he felt it was "just still too early in the process, and pushing towards a mistrial[.]"

The court then continued:

> All right. Well, this was within the [c]ourt's sound judgment this, particular judge has presided over hundreds of jury trials over the years, at least 200, maybe closer to 300, and I feel that I have a good grasp of when a jury is hung and when they're not. And especially given the amount of evidence in this case, we only had about eleven exhibits, none of those were voluminous, it wasn't like we had medical records. And I think it would be torture to put this jury through the paces, to make them wait some specific number of hours that we would arbitrarily select as being an appropriate amount of hours to deliberate.
>
> I asked the jury. They indicated they could not [agree]. And I have to rely upon their judgment.

At 6:36 p.m., the jurors were brought into the courtroom and polled. Before polling each juror individually, the judge explained that he wanted to "inquire where [the jury is]" and whether each juror "believe[d] if you were given additional time to deliberate, that you would be able to reach a unanimous verdict." He went on:

> So what I'm going to do is ask each of you that question, and if you believe that if you were given additional time, that you would not be able to reach a verdict, you would say no. If you thought that if I give you additional time that you could reach a verdict, you would say yes. Okay?

Each juror was then asked, "Do you believe, if you were given additional time to deliberate, you would be able to reach a unanimous verdict?" Each juror responded, "No." With that, the court concluded that "having heard from the jury, the [c]ourt finds that by manifest necessity this jury is deadlocked, they are unable to reach a unanimous verdict, and, therefore, I declare a mistrial."

Motion to Dismiss

Thereafter, on August 21, 2019, Mr. Parker filed a motion to dismiss, arguing that, over defense counsel's objection, the court declared a mistrial without manifest necessity and, accordingly, Mr. Parker could not be retried. In his Memorandum in Support of Motion to Dismiss, filed on September 25, 2019, Mr. Parker noted that, under the Double Jeopardy clause of the Fifth Amendment, when a "mistrial is declared without the consent of a defendant, the defendant cannot be retried unless there was manifest necessity that compelled the mistrial," such as when there is a "truly deadlocked jury." Mr. Parker argued that, in this case, the jury was not truly deadlocked and had only been deliberating for approximately three-and-a-half hours, which was not very long in the case of seven serious charges. Further, Mr. Parker insisted, while the jury's notes indicated that they were experiencing some disagreement, they did not indicate that there was "no possibility of any movement and that more deliberation was futile."

Mr. Parker contended that manifest necessity requires a high degree of necessity, that it does not exist where there are reasonable alternatives to a mistrial, and that a truly deadlocked jury only exists when there is a significant risk that any verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.

Here, Mr. Parker noted that, in the hour between the jury's third note and the court's 6:17 p.m. note, the vote breakdown shifted from 10 to 2 to 11 to 1, indicating some progress. He further suggested that, instead of sending its note, the court could have taken any of several alternative routes, such as offering a modified *-Allen* charge, excusing the jury for the evening, or simply leaving them alone. By sending the note, purported Mr. Parker, the court indicated impatience or gave the jury an improper "out" to stop deliberations. Additionally, he suggested that the court erred in sending the note to the jury outside of his presence when defense counsel offered no explicit waiver to Mr. Parker's right to be present for such a communication. In support of his arguments, Mr. Parker cited *State v. Hart*, 449 Md. 246 (2016), and a number of out of state cases.

The State answered, contending that the trial court did not abuse its discretion, and noting that, contrary to Mr. Parker's assertions, a genuinely deadlocked jury is a common example of manifest necessity for a mistrial. The State pointed out that the Supreme Court does not require a trial court to undertake any specific method of addressing or breaking a deadlock before declaring a mistrial. Therefore, concluded the State, retrial was not barred by the Double Jeopardy clause.

The court held a hearing on Mr. Parker's motion on September 30, 2019. After hearing the parties' arguments, the court denied Mr. Parker's motion, explaining that the "management of a jury is usually within the broad discretion of the judge" and that he had considerable experience with juries, having "presided over probably in excess of 200 jury trials[.]" The judge explained the logic behind his decision, pointing out that

> The first note we got . . . they asked, 'what is the definition of amylase'. Which had been discussed by the expert, as well as [the prosecutor] ad nauseam. The note was not long after the jury had retired and quite shocking to me, made me wonder where the jury had been during the three days of trial, the two days of actual testimony and other evidence.
>
> And my response after consulting with [c]ounsel was that the jury must rely upon the testimony they've heard, any exhibits they had before them that were entered into evidence.
>
> Now, at the same time I got a question from the jury, 'please explain in full transfer DNA, how is it transferred, how important is DNA evidence, and how much attention should we give it[.]' Again, this was fairly shocking to the [c]ourt, because I question what the jury had been listening to during the two days of testimony. Because that also was explained in great detail, both through direct and cross-examination. We had expert testimony. We had . . . arguments made on closing, both attorneys did an admirable job with respect to that.
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> Then I got the note at 5:04. So this would have been an hour and, about an hour and 12 minutes later, that said, "we are leaning one way, two are leaning one way, the rest say the other, what can we do", question mark . . . And I said, "you must continue to deliberate and try to reach a unanimous verdict, I refer you to the jury instruction regarding your duty to deliberate." That response was agreed to by Counsel, as indicated by their signature, and I sent that back about 5:04 p.m.

The court then noted that, after these notes were exchanged, more than an hour passed, and "no movement regarding a verdict [] was articulated to us." Accordingly, the court decided to send its 6:17 p.m. note to the jurors, which it advised counsel it was going to do. The judge explained that, although the juror's response showed that "in the hour or so, one person had moved to the other side, [] there was still one holdout," and the judge "wasn't sure where the jury was." The judge recounted that, in order to arrive at a decision about whether to "give [the jury] dinner, to keep them here, to bring them back the next

day if that was possible," it "brought the jury out [] and [] polled the jury." The court concluded by explaining that

> the exercise of jury trials that we go through is to reach a unanimous verdict, to bring resolution to the case, sometimes we can do that and sometimes we can't. This jury in my judgment seemed pretty cemented where they were. They affirmed that on the record in open court, that they could not move. And, frankly, it is not the [c]ourt's role to torture jurors with keeping them here until they capitulate because they want to go home.
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> We want jurors, as we tell them in the instructions, to make the decision based on their own judgment after certainly considering the arguments of others. It is not our role, when we go into a case, to force a jury to any particular verdict. It's our role to allow them to reach a unanimous verdict. And it was my considered judgment in this case that if they were given additional time they would not be able to do that. So I appreciate the Defense position, but the [c]ourt believes that my actions on that particular day were within my discretion. And the motion is denied.

On October 2, 2019, Mr. Parker noted this interlocutory appeal.

DISCUSSION

A "decision whether to grant a mistrial is reviewed under the abuse of discretion standard." *Hart*, 449 Md. at 263. "It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Id.* (quoting *Simmons v. State*, 436 Md. 202, 212 (2013)). This is largely because "'[t]he judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able . . . to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial.'" *Simmons*, 436 Md. at 212 (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)). Accordingly, while a reviewing court "should not simply 'rubber stamp' a trial judge's ruling of a mistrial, the trial judge is 'far more

conversant with the factors relevant to the determination than any reviewing court can possibly be' and, therefore, we review the trial judge's grant of a mistrial for abuse of discretion." *Id*. (quoting *Arizona v. Washington*, 434 U.S. 497, 514 (1978)) (cleaned up).

A reviewing court applies a de novo standard, however, when there is an issue as to whether a trial court properly interpreted and applied Maryland constitutional, statutory, or case law "when declaring a mistrial *sua sponte*." *Hart*, 449 Md. at 264. "[E]ven with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards." *Schisler v. State*, 294 Md. 519, 535 (2006) (quoting *LeJeune v. Coin Acceptors, Inc*., 381 Md. 288, 301 (2004)).

A. Parties' Contentions

Mr. Parker contends that the circuit court abused its discretion in denying his motion to dismiss. Relying largely on *State v. Hart*, 449 Md. 246 (2016), Mr. Parker asserts that the court abused its discretion when, only approximately three-and-a-half hours into jury deliberations, and "without [Mr. Parker] in the room," it "interrupted the jury's deliberations with the note that invited them to give up." He notes that, in *State v. Hart*, the Court of Appeals, relying on the common law and Maryland Rules 4-231 and 4-326, determined that the defendant in that case "had a right to be present when the court communicated with the jury regarding their ability to reach a verdict." *Id.* at 264-270.

Mr. Parker argues that three-and-a-half hours is not long to deliberate, especially because the trial took place over three days and involved a midtrial continuance of a week between the second and third day of the trial. Mr. Parker also points out that there was considerable evidence for the jury to consider, including the seven counts, the expert

testimony and report, the evidence of fourteen witnesses and approximately a dozen exhibits.

Based on the circumstances, argues Mr. Parker, the obvious alternative to declaring a mistrial was to "excuse the jury for the night and have them resume deliberations the next morning." Declaring a mistrial, insists Mr. Parker, is only appropriate when there is a genuine jury deadlock. Here, he contends, the judge was not required to rely on the jury's judgment that they would not reach a unanimous verdict, nor would it have been "torture" or impermissibly coercive to require the jury to keep deliberating the next morning. Finally, Mr. Parker purports that the judge's reliance on his own experience and judgment provided an insufficient basis for the declaration of a mistrial.

The State responds that the circuit court properly denied Mr. Parker's motion to dismiss the charges on double jeopardy grounds after the court declared a mistrial. The State argues that the trial court did not abuse its discretion in declaring a mistrial because it determined that it was unlikely that the jury would reach a unanimous verdict. First, the State contends that Appellant waived any objections about his presence during the conferences. The State points out that, unlike in *State v. Hart*, the record in this case does not reflect any objections to Mr. Parker's absence during the time the court was discussing how to proceed. Rather, the State asserts, the record reflects that "defense counsel objected to the court sending the note and [defense counsel] 'requested an opportunity to make an argument on the record with [his] client [t]here.'"

Second, the State maintains that there is no specific amount of time that a court must allow a jury to deliberate before declaring a mistrial, and no specific procedure that the

court must follow in assessing whether a jury is genuinely deadlocked. Furthermore, the State urges that the trial court is in the best position to assess all the factors and make a determination about whether the jury will reach a unanimous verdict, meaning that it was entirely appropriate for the judge to rely on his experience and judgment to evaluate whether the jury was genuinely deadlocked in this case.

B. Analysis

The Double Jeopardy clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 794 (1969), provides that "no person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."[8] Accordingly, "the State may not prosecute, for the same offense, a defendant who is either acquitted or convicted, if the conviction is upheld on appeal." *Nicholson v. State*, 157 Md. App. 304, 310 (2004) (citing *State v. Griffiths*, 338 Md. 485, 489 (1995)).

In addition to prohibiting retrial on any charge that is resolved either by a conviction or an acquittal, "the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). In other words, "'[i]n a

[8] Although the Maryland Declaration of Rights does not contain an express provision prohibiting double jeopardy, that prohibition is, nonetheless, deeply ingrained in our common law. *State v. Long*, 405 Md. 527, 536 (2008); *Taylor v. State*, 381 Md. 602, 610 (2004). Parker does not contend that Maryland common law provides greater protection than the Fifth Amendment and relies exclusively upon decisions interpreting the Fifth Amendment.

jury trial, the Double Jeopardy Clause generally bars the retrial of a criminal defendant for the same offense once a jury has been empaneled and sworn.'" *State v. Baker*, 453 Md. 32, 47 (2017) (quoting *Simmons*, 436 Md. at 213). However, whereas retrial is flatly prohibited on a charge for which a verdict has been returned (and, in the case of a conviction, sustained on appeal), *Nicholson*, 157 Md. App. at 310, that is not the case where, as here, the proceedings are aborted *prior* to the rendering of a verdict. *Washington*, 434 U.S. at 505. Thus, an accused's "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Id.*

Accordingly, when a mistrial is "granted over the objection of the defendant, double jeopardy principles will not bar a retrial if there exists 'manifest necessity' for the mistrial." *Simmons*, 436 Md. at 213. "The question of whether manifest necessity exists for the purposes of double jeopardy in the case of a mistrial depends on the unique facts and circumstances of the case." *Id*. at 214. There is no rigid test for determining manifest necessity, and the Supreme Court has stated that "it is manifest that the key word 'necessity' cannot be interpreted literally;" instead, courts "assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Washington*, 434 U.S. at 506. "To meet this 'high degree' of necessity, our cases establish that 'to determine whether manifest necessity to declare a mistrial over defense objection exists, the trial judge must engage in the process of exploring reasonable alternatives and determine that there is no reasonable alternative to the mistrial.'" *Simmons*, 436 Md. at 215 (quoting *Hubbard v. State*, 395 Md. 73, 92 (2006)).

The Supreme Court has held that a "mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict" has long been "considered the classic basis for a proper mistrial." *Washington*, 434 U.S. at 509. In fact, "without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial." *Id.*; *see also Ashe v. State*, 125 Md. App. 537, 545 (1999) (observing that "a hung jury is the 'prototypical example' of manifest necessity for a mistrial that would allow re-trial for the same charge without offending double jeopardy principles").

The Court of Appeals has stated that, while the "decision to declare a mistrial," upon a trial judge's finding of a hung jury, "is entitled to great deference by a reviewing court," even in the case of a hung jury, the "trial court must determine still that no reasonable alternative to a mistrial exists." *State v. Fennell*, 431 Md. 500, 516; 519-20 (2013). "In the context of a hung jury, . . . the trial court must determine ordinarily that genuine jury deadlock exists, such that further deliberations are unlikely to be productive." *Id.* at 520. "The term 'genuinely deadlocked' suggests . . . more than an impasse; it invokes a moment where, if deliberations were to continue, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Id.* at 516 (cleaned up).

Returning to the instant appeal, we hold that the circuit court did not abuse its discretion in concluding that there was manifest necessity to declare a mistrial because the court considered alternatives to mistrial and determined that, based on an examination of

the unique facts and circumstances of the case, there was no reasonable alternative to mistrial. Therefore, we affirm the circuit court's denial of Mr. Parker's motion to dismiss.

Although Mr. Parker relies heavily on *State v. Hart*, 449 Md. 246 (2016), we observe that the facts and circumstances in that case are quite different from those presented in the underlying case. In *Hart*, there was, to be sure, an apparent deadlock after several hours of jury deliberations, and the trial court declared a mistrial as to the deadlocked counts. 449 Md. at 255-56, 260. But the aforementioned similarities between *Hart* and the instant case are far exceeded by crucial factual distinctions. In *Hart*, the defendant had fallen ill and was transported to a hospital during jury deliberations. *Id.* at 256. When the jury sent the court a note indicating that they were deadlocked on one count, the court summoned the prosecutor, defense counsel and defendant, and then learned that the defendant was unable to join them. *Id*. With the agreement of counsel, the judge held a colloquy with the foreperson of the jury in order to get a sense of the nature of their deadlock. *Id*. at 257. After hearing from the foreperson, defense counsel asked that the jury be sent home for the night (by then it was nearly 11:00 p.m.) and that deliberations resume the following morning, which would have given the court an opportunity to determine whether Hart was able to be present at that time. *Id.* at 257-58. The court, however, took a partial verdict and declared a mistrial on the deadlocked counts without the defendant present. *Id.* at 260.

Mr. Hart appealed, and the Court of Appeals held that the trial court abused its discretion by declaring a mistrial, because, based on all the circumstances, manifest necessity to declare a mistrial did not exist when the defendant was "involuntarily absent,

and the court failed to grant a continuance to determine the expected length of [the defendant's] absence prior to its decision to proceed *in absentia*." *Id*. at 283. The Court noted:

> The unique facts and circumstances of this case are that the jury had only been deliberating approximately three and a half hours; the written note was given to the trial judge late in the evening, at 10:21 p.m.; [the defendant] was involuntarily absent and whether or when he would return to the trial court was unknown; and absent was a good reason why the jurors could not have returned after a short continuance for further proceedings.

Id. at 278. Given these circumstances, explained the Court, "the trial judge acted prematurely in determining that manifest necessity existed." *Id*. Critically, the Court explained, the defendant was absent due to a medical emergency and "did not have the opportunity to waive his right to be present or to consult with defense counsel; and defense counsel could not request a mistrial in his client's absence." *Id*. at 281

The trial court's error in *Hart* was predominately premised on the fact that the defendant was involuntarily absent and did not waive his right to be present during such a critical stage in the proceedings. *Id*. at 281. By contrast, in this case, Mr. Parker was present when the mistrial was declared.

Because Mr. Parker was present for the declaration of the mistrial, the facts and circumstances in this case, unlike the facts and circumstances in *Hart*, do not indicate that the trial court abused its discretion by declaring a mistrial. As the court observed, this case was predicated upon a straightforward credibility determination: whether the jurors believed Mr. Parker or his accusers. The court pointed out that the evidence presented was not particularly onerous; there were only "about eleven exhibits," none of which were

voluminous, and DNA evidence "indicated to a degree of scientific certainty that it was the DNA of the Defendant."

Additionally, the jury deliberated for over three and a half hours over the course of an afternoon, during which it asked numerous questions; was instructed on several occasions to rely on the evidence presented at trial; and was told at least once to continue deliberating until it reached a unanimous verdict. And, although there had been some movement among the jurors, the court explained that it was sensitive to the possibility that the lone holdout might well acquiesce in the verdict simply to end the proceedings. The court explained that it is

> not the [c]ourt's role to torture jurors with keeping them here until they capitulate because they want to go home. We want jurors, as we tell them in the instructions, to make the decision based on their own judgment after certainly considering the arguments of others. It is not our role, when we go into a case, to force a jury to any particular verdict.

Furthermore, in this case, the trial judge considered several alternatives before declaring a mistrial. In *Hart*, the Court of Appeals determined that, "[u]nder [the] circumstances, the declaration of a mistrial was premature . . . and the judge did not adopt any reasonable alternatives to the declaration." *Hart*, 449 Md. at 281. In other words, based on the facts and circumstances, including the defendant's involuntary absence, the time of day and the duration of the jury's deliberations, the Court determined that the judge's reliance on the foreperson's opinion that additional time for deliberations would not be beneficial "was not a reasonable alternative to a continuance." *Id*. at 278-279. Rather, the Court concluded that granting a short continuance would have been more appropriate, because this would have "permitted the jury to adjourn for the evening,

allowed time for defense counsel to ascertain [the defendant's] status and confer with his client, and it would have ameliorated, among other things, the court's error in receiving a partial verdict in [the defendant's] absence." *Id.*

Unlike the judge in *Hart*, the trial judge in this case did consider several alternatives before declaring a mistrial. After receiving the note stating that "2 [jurors] are leaning one way, the rest say the other" and asking "[w]hat can we do?," the judge, with the consent of counsel, informed the jury: "You must continue to deliberate and try to reach a unanimous verdict. I refer you to the jury instruction regarding your duty to deliberate." The jury instructions that the court asked the jury to review included a modified *Allen* charge.

After waiting approximately another hour and twenty minutes, the judge sent a note asking the jurors if they felt that additional time to deliberate would help them reach a unanimous verdict. When they responded "[n]o, 11 to 1," the court stated on the record that it "intended to declare a mistrial," but did so only after polling the jurors individually to determine whether each juror concurred in the view that more time would not help them achieve unanimity. This way, the court explained, it could get a sense of whether to "give [the jury] dinner, to keep them here, [or] to bring them back the next day if that was possible."

Mr. Parker claims that he preserved the issue he raised in his motion to dismiss and on appeal that he was not present when the court sent the fourth note to the jury stating "Do you believe if you were given additional time to deliberate that you would be able to reach a unanimous verdict? Please respond." It is difficult to discern, however, defense counsel's

exact objection.[9] The judge recounted on the record that, after he sent the third response to the jury,

> I gave it about another hour and fifteen, hour and twenty minutes. We're now approaching time we have to consider dinner. And I determined that I was going to send in a note that stated the following, and I dated it this date, 8/15/19, and the time was 6:17 p.m., at that point the jury had been deliberating more than three hours and 15 minutes.
>
> So the question was, do you believe if you were given additional time to deliberate that you would be able to reach a unanimous verdict? Please respond.
>
> And then the response I got to that note was, no, 11 to 1.
>
> **So the [c]ourt will note for the record that Mr. Moore on behalf of the [d]efense objected to me delivering that note.**
>
> **And that is correct, Mr. Moore –**
>
> [DEFENSE COUNSEL]: **Yes, Your Honor.**
>
> [COURT]: **-- right?**
>
> **So that will be preserved for the purposes of the record**.[10]

[9] The record reveals that several conferences with counsel were held regarding each of the four notes sent to the jury. Although the court entered a summary of these conferences on the record, each took place off the record. Defense counsel conceded that he made no objection to the court's response to first three notes from the jury, all of which were composed and sent after consultation with counsel.

[10] The court proceeded to explain that, if, after polling the jury, each juror agreed that more time to deliberate would not help them reach a unanimous decision, the court would declare a mistrial. The court then asked if defense counsel wished to "lodge [his] objection to that [decision]." Defense counsel responded, "Yes, Your Honor, if I could make a brief argument, Your Honor?" The court consented to defense counsel's request, and defense counsel stated, on the record before his client, that

> Your Honor in chambers indicated the intent to follow that procedure, and over my objection in chambers and requested the opportunity to make an argument on the record with my client here, so I objected to the note being delivered. Just briefly, I think the note kind of suggested an out, suggested the Court, suggested our impatience, it was, you know, over the three-hour mark, which is not all that great a time. I also don't think that, uh, the jury has not been given like a modified Allen charge or any of the typical

(continued)

We think the record aligns with the State's view—that, in chambers, defense counsel objected to the delivery of the fourth note. The record does not show that counsel objected to the fact that his client was not present in chambers at the time.[11] Rather, it

> procedures. So at this point I would, I think the procedure the Court intends to follow—
>
> [COURT]: Well, you would agree that my answer to them at 5:00 was essentially the Allen charge, and I referred them back to their duty to deliberate. Because I gave the Allen charge as part of the original instructions.
>
> [DEFENSE COUNSEL]: Yes, but I'm not—
>
> [COURT]: Nor did you, nor did you request I give them the Allen charge at that time.
>
> [DEFENSE COUNSEL]: No, I think the Court's response at that time was appropriate.
>
> [COURT]: Okay.
>
> [DEFENSE COUNSEL]: And I, I did not object to any of the responses for the first three notes, I think it was. But I would just object to the procedure at this time. I think it's just still too early in the process, and pushing towards a mistrial essentially, and I would just leave it at that, Your Honor.

[11] In general, for

> purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs.

Maryland Rule 4-323(c). But, "[i]t is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives (continued)

appears that counsel asked to put his objection to the fourth note, and to the court's proposed procedure for declaring a mistrial, on the record in front of his client. That request was granted.[12]

C. Conclusion

We hold that it was reasonable and within the court's discretion to declare a mistrial upon manifest necessity where: 1) Mr. Parker was present for the duration of the proceedings; 2) the jury deliberated for over three-and-a-half hours, sending the court several notes and struggling to agree; 3) the final count of 11 to 1, under the circumstances, suggested that a unanimous verdict might result from pressure from other jurors; and, 4) the judge polled each individual juror to ascertain whether the jury was indeed deadlocked.

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any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999).

[12] Although the parties' positions on the fourth note were not placed on the record until after the note was sent, unlike, for example, in *State v. Harris*, 428 Md. 700, 706 (2012), the parties in this case were clearly informed of and given the opportunity to discuss the note before it was sent. As the Court of Appeals has observed on multiple occasions, "[t]he 'very spirit' of Rule 4-236 'is to provide an opportunity for input in designing an appropriate response to each question in order to assure fairness and avoid error.'" *State v. Hart*, 449 Md. 246, 270 (2016) (quoting *Perez v. State*, 420 Md. 57, 64-65 (2011)); *see also Grade v. State*, 431 Md. 85, 87-88, 106 (2013). Though Mr. Parker did not agree with the court's decision to send the note, his counsel was clearly offered the opportunity to express his objection, and later allowed to make an argument on the record with his client present, as he requested.

Additionally, the record reflects that Mr. Parker was in the courthouse for all the jury notes and related conferences. Unlike in *Hart*, then, where the defendant was "absent from the proceedings," and "defence counsel did not have an opportunity to consult with [the defendant] regarding the content of the jury note," we have no evidence indicating that Mr. Parker was absent for any part of the trial and deliberations, or that his counsel's ability to consult with him, or represent his interest was hindered. 449 Md. at 272.

State v. Fennell, 431 Md. 500, 516, 519-20 (2013) (explaining that a deadlocked jury is one in which, if deliberations were to continue, there exists "a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors."); *see also Johnson v. State*, 248 Md. App. 157, 168-169 (2020) (holding that it was not an abuse of discretion to declare a mistrial after a juror expressed doubt that she could continue to remain fair and impartial in her deliberations). Although defense counsel suggested a continuance as a more appropriate solution, we observe that the Supreme Court "has 'never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse.'" *Johnson*, 248 Md. App. at 168 (quoting *Bluford v. Arkansas*, 566 U.S. 599, 609 (2012)).

JUDGMENT OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ASSESSED TO APPELLANT.