UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1637

September Term, 2013

LEROY SMALLWOOD

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: November 16, 2015

The appellant, Leroy Smallwood, was convicted in the Circuit Court for Prince George's County by a jury, presided over by Judge Philip C. Nichols, Jr., of the unlawful possession of a rifle after having been convicted of a crime of violence. Judge Nichols sentenced the appellant to eight years' imprisonment.

In considering the appeal now before us, we find the timing of the appeal to have some significance. The appellant's jury trial concluded with his conviction on July 10, 2013. He was sentenced on September 6, 2013. His notice of appeal to this Court was filed on September 27, 2013. Whatever the reason for the delay may have been we have not been told, but the transcript of the appellant's trial was not filed until February 18, 2015. It was in the course of preparing for this appeal in late June of 2015, almost two years after the conviction, that the assistant public defender discovered a note from the jury to the trial court in the record that had been forwarded to this Court. Her letter of June 25, 2015, triggered the key appellate contention now before us:

> Dear Judge Nichols, Attorney Mahdi, and Attorney Wilson:
>
> > I represent Mr. Smallwood on appeal from his conviction in the above-captioned case. The case was tried in the Circuit Court for Prince George's County on July 9 and 10, 2013. Mr. Mahdi was the prosecutor; the defense attorney was Mr. Wilson; and Judge Nichols presided over the jury trial at which Mr. Smallwood was found guilty of possession of a rifle after having been convicted of a crime of violence.
> >
> > While I was reviewing the record in the Court of Appeals, I came across a jury note sent to the court during the jury's deliberations. It appears to have been received by the court and docketed. However, there is nothing

> in the transcript or the file to indicate whether counsel were aware of the note. Nor is there anything to indicate whether or how the court responded to the jury's question. A copy of the jury note, P.G.C. Form #2294 indicating its receipt, and the relevant docket entries, which reference the jury note, are included with this letter.
>
> Because this may be one of the issues on appeal, I am writing to request that you provide me with an affidavit indicating: (1) whether you have any recollection of receiving a note or any other communication from the jury during their deliberations, and, if so, what your recollection is; and (2) whether your bench notes (or case files) contain any reference to the jury's question, and, if so, what they state in this regard."

The discovery of that note from the jury, and its sequelae, have given rise to the two-pronged contention:

> 1) That the trial court violated Maryland Rule 4-326(d); and
>
> 2) That, in the alternative, the record is inadequate to provide meaningful appellate review of this issue and a reversal is, therefore, required.[1]

Maryland Rule 4-326(d)

Rule 4-326(d) covers the subject of communication between the trial court and the jury. Subsection (d) provides in pertinent part:

> (d) **Communications with jury**. (1) Notification of Judge; Duty of Judge. A court official or employee who receives any written or oral communication from the jury shall immediately notify the presiding judge of the communication. If 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 (A) in writing, or (B) orally in open court on the record.

[1]We are not told what the basis for this appeal might have been, had the note from the jury not been discovered in the record.

Unlike the appellant, we do not take so gloomy a view of what took place during the final hours of his trial on July 10, 2013. Following jury instructions and closing arguments, the jury was dismissed for lunch but instructed to return at 1:15 P.M. As reflected on the daily docket sheet and in the docket entries, a "jury note [was] filed" at 2:07 P.M. The time and date was recorded on the jury note, along with the case number and the judge's name. It is labeled "Deliberating Jury Note #1". The note reads, "We would like to watch the DVD." It is signed "Foreperson". Unquestionably, the jury note was duly received and duly noted.

The only question is that of what Judge Nichols did in response to the note. Under Rule 4-326(d) his first responsibility was to notify counsel and to consider their thoughts on how to respond to the note. In response to the June 25, 2015 letter from the appellant's counsel, Judge Nichols on July 27, 2015, submitted his affidavit, which has been made a part of the record. In it, he avers:

> 2. I have been advised by appellate counsel for Mr. Smallwood, Elizabeth Rossi, Assistant Public Defender, that the record in this case contains the following question, sent by the jury to the trial court during the jury's deliberations: "We would like to watch the DVD." Ms. Rossi informed me that the jury note was docketed, and that there is no mention in the transcript as to how I handled the jury note. Ms. Rossi has forwarded me a copy of the note and the docket entries.
>
> 3. My best recollection is that I received the note, showed it to the attorneys, and that they initialed it, which would indicate that they agreed to whatever procedure we used to respond to the note. I am reasonably certain that, in response to the note, I sent the DVD back to the jury room so that the

> jurors could watch it. I believe neither party objected to the decision to respond in this way.

(Emphasis supplied).

In a subsequent memorandum that also was made part of the record, Judge Nichols clarified his previous affidavit:

> Pursuant to your request regarding clarification of a jury note received during trial ... I note that I, along with both attorneys in this matter ... signed off on the note, which indicates that I reviewed the note with them prior to filing the same in [the] case jacket.

(Emphasis supplied). The final verdict of guilty was returned at 3:07 P.M.

Both the prosecutor and the defense attorney at the trial also submitted responsive affidavits. Because of the lapse of almost two years and perhaps dozens, if not hundreds, of intervening trials, neither of the two attorneys had any independent recollection of the incident involving the jury note. Each, however, had appended his signature to the note itself and each acknowledged his signature as his own. We cannot help but note that the appellant's lack of diligence in pursuing his appeal more vigorously bears some responsibility for the fading memories. The signatures themselves, moreover, strongly corroborate Judge Nichols's recollection about notifying counsel about the note (they obviously were not blindfolded when they signed it.) and about getting their approval for his ultimate response to the jury.

In terms of his response to the jury's request, Judge Nichols's sworn statement was, "I am reasonably certain that ... I sent the DVD back to the jury room so that the jurors could

watch it." Appellant's counsel sternly admonishes us, "[t]his Court simply cannot conclude that the trial judge responded to the jury note at all." To the contrary, we not only can so conclude, we do so conclude. In assessing the relative reliability of witnesses' recollections, far more is involved than a squabble in a thesaurus over adjectives and adverbs. A familiar stereotype is the judgmental oracle who is invariably certain even though frequently wrong. An exemplar of this type, British historian and philosopher Thomas Babington Macaulay, was referred to by fellow historian George Trevelyan, "I wish I could be as certain about anything as Tom Macaulay is about everything." Conversely, there are others who are far more frequently correct but who express their conclusions in more modest and modulated terms.

In the configuration of this case, the responsive affidavits, after all, are aimed at us. It is we who must assess their adequacy. We are not about to say that the word "certain" might satisfy us but the phrase "reasonably certain" will not. If Judge Nichols's recollection did not abound with absolutes, it was nonetheless in the language of affirmation. It was, moreover, the considered conclusion of a trained and veteran trial judge. We do not hesitate to credit, "My best recollection," "I am reasonably certain," and "I believe."

Judge Nichols's affirmative recollection, let it be noted, will not be viewed by us in a vacuum. It is erected upon an already substantial predicate. That predicate was well described by Judge Eldridge for the Court of Appeals in Harris v. State, 406 Md. 115, 122, 956 A.2d 204 (2008):

> There is a presumption of regularity which normally attaches to trial court proceedings, although its applicability may sometimes depend upon the nature of the issue before the reviewing court. ... ("It is presumed that the [trial court] proceedings were correct and the burden rests on the [challenger] to show otherwise.")

(Citation omitted).

In the specific context of Rule 4-326(d) and a jury note, Judge Greene reaffirmed that strong presumption of correctness in Nicolas v. State, 426 Md. 385, 415, 44 A.3d 396 (2012):

> [T]here is a presumption of regularity in court proceedings, and Petitioner in this case has not produced a sufficient factual record on appeal to rebut that presumption by establishing that the jury note at issue was received by the trial court within the contemplation of Maryland Rule 4-326(d).

See also, Black v. State, 426 Md. 328, 337-39, 44 A.3d 362 (2012); Denicolis v. State, 378 Md. 646, 657, 837 A.2d 944 (2003); State v. Chaney, 375 Md. 168, 181-84, 825 A.2d 452 (2003) ("Continuing recognition of the presumption [that the trial judge was correct] has important implication for appellate review as well."); Mora v. State, 355 Md. 639, 650, 735 A.2d 1122 (1999) ("It is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed."); Fisher v. State, 128 Md. App. 79, 104-05, 736 A.2d 1125 (1999) ("[T]he most fundamental principle of appellate review [ ] is that the action of a trial court is presumed to have been correct and the burden of rebutting that presumption is on the party claiming error first to allege some error and then to persuade us that that error occurred.").

In any event, when we combine that strong presumption that Judge Nichols complied with Rule 4-326(d) with his affirmative recollection that he did, indeed, comply with Rule 4-326(d) and then add to it the ironclad corroboration that both the defense attorney and the prosecuting attorney had been shown the note and, by not objecting, implicitly concurred in Judge Nichols's response to the note, we hold that the appellant has failed to persuade us that any violation of Rule 4-326(d) ever took place.

There was yet an additional factor strengthening this conclusion. When the DVD that was the subject of the jury request was first played in the course of the trial, the prosecutor told Judge Nichols that "it appears some people were not able to hear" it. The judge replied that he himself,

> "had difficulty hearing it. But in any event, I don't know what else you can do. Perhaps, you know, if necessary we'll give it to them to listen in the room maybe. Maybe that would work better."

(Emphasis supplied).

That does show an inclination on the part of Judge Nichols to let the jury see and hear the DVD again, if necessary, in the privacy and quiet of the jury room. If, therefore, there remained any residual doubt as to what the judge later did in response to the request by the jury, it would seem more likely that he would have done something he was already inclined to do rather than that he did something he was disinclined to do. This additional small factor simply fortifies the conclusion we have already announced. A mosaic invariably yields a picture that each of its constituent pieces does not.

Adequacy of the Record

The appellant's second contention is that the record is inadequate to permit us to decide the case on its merits. We have, however, decided the case on its merits. The record, therefore, was adequate to permit us to do so.

An Alternative Holding of Harmless Error

Although it is by no means necessary for us to do so, we will, in arriving at a secondary and alternative holding, indulge in the consideration of harmless error. In this case, we do this simply to highlight the utter inconsequentiality of this appeal.

This brings us to the substance of the jury request reflected in the note. In the note, the jury asked that it be allowed to see again and to hear again the DVD that it had earlier seen and heard in the course of the trial. For purposes of harmless error analysis, we will assume, purely arguendo, that Judge Nichols did not grant the jury's request and that the jury was denied its desired chance to see and hear the DVD again.

In the world of possible 4-326(d) errors, sometimes the prejudice is that the jury may end up being exposed to potentially contaminating information that it should never have been permitted to know. At the far end of the spectrum, sometimes the prejudice is that the jury may be totally denied all opportunity to know of information it was fully entitled to know. In this case, by contrast, we would not, under our arguendo assumption, be dealing with anything remotely akin to either of those prejudicial extremes. We would be dealing simply with the denial of the chance to see and to hear for a second time what had already

been seen and heard an hour or two earlier. This is not to say, if we assume it to have occurred, that the denial of a request for a replay could not be characterized as a deprivation. It could be. It is simply to say that in the universe of all possible deprivations, it would be of a relatively lower order of deprivation than would be either an improper exposure or an improper total denial. The value of a replay and the prejudice of its denial can only be appraised in relation to other values and other denials.

In making a harmless error analysis, we are also concerned with the substance of what might have been seen again and what might have been heard again in the course of the requested replay. Who might be helped or hurt? Would a denial likely have made any difference in the particular case? The DVD in question was an audio-visual recording of an interrogation of the appellant conducted by Detective Tammy Irons. At trial, the appellant had testified in his own defense, offering a very far-fetched excuse for his possession of a rifle. The State introduced the DVD into evidence in its rebuttal case. In his statement to Detective Irons, the appellant had made several minor admissions that tended to contradict his self-serving trial testimony. In the most fundamental sense, the State introduced the DVD for the clear and obvious purpose of weakening the appellant's defense, not of helping it. To the extent, therefore, that the failure to give the jury the benefit of a replay of a partially inaudible tape had any impact, it was the State's impeachment effort that was diminished. By inverse proportion, the appellant's arguably unimpeached defense remained more convincing than it might have been without the hypothetical error.

If, arguendo, Maryland Rule 4-326(d) had not been literally complied with, the appellant would not have been harmed but helped. This anomaly goes to the core function of the adjective "harmless" in the phrase "harmless error." Possible harm is measured from the point of view of the defendant's case. The very purpose of a criminal trial is to protect the rights of a criminal defendant, not to vindicate the authority of the Rules Committee. For the appellant even to raise this contention, therefore, is bizarre. Without prejudice, there is no case of reversible error.

As we assess harmless error, the critical question is, "are we, the members of the reviewing appellate panel, persuaded beyond a reasonable doubt that even had the evidentiary item in question been handled differently, it would have made no difference in the jury's verdict?" Of some pertinence to that question is the brief exchange that occurred, at about 11:30 A.M., just before Judge Nichols delivered his instructions to the jury.

> MADAME FOREPERSON: Your Honor, we were wondering if we could skip lunch?
>
> THE COURT: If you could skip lunch? I'll get back to you on that one. All right. I'll see what I can do here.

The inference is clear that the jury did not think that its deliberations were going to take it long.

The appellant was convicted of the possession of a firearm by one prohibited from possessing such a firearm by virtue of an earlier conviction of a crime of violence. It was stipulated that the appellant had such a disqualifying conviction. It was, moreover, undisputed that when approached by three police officers in the Eastover Shopping Center

at approximately 8 P.M. on the evening of October 8, 2012, the appellant was carrying a rifle that was found to be operable.

Officer Joseph Lister of the Prince George's County Police Department testified that he and the other officers went to the shopping center in response to a call that a shot (or shots) had been fired and that an individual was walking around the shopping center with a gun. Officer Lister observed the appellant walking toward the CVS store and carrying a rifle in his hand.

> I drove down behind the stores to the edge of the stores where an AutoZone is. It's right at the edge, and at that time I was looking there was a bunch of foot traffic out there, some people walking around, when I observed an individual walking diagonal from my position, and he was walking towards the CVS and he had what appeared to be a rifle in his hands, and at that time I called out on it over the radio.

(Emphasis supplied).

The appellant was ordered to drop the gun and, after several commands to that effect, did so. He was then arrested and handcuffed. That testimony plus the stipulation was ipso facto the State's case.

The appellant testified in his own defense. Throughout his testimony, particularly in his exchanges with the Assistant State's Attorney and with Judge Nichols, he was consistently and overtly hostile and uncooperative. We note this because, as we subjectively assess what we believe would have been a likely jury reaction to his testimony, we believe this could have had an adverse influence.

The appellant testified that on October 8, he had gone to the Eastover Shopping Center and had met up with some of his friends and drank a beer with them. Announcing that, "I'm going to the bathroom," he retired to the alley side of the CVS to urinate against the wall. While urinating, he was set upon by two mountebanks whom he could not identify. One approached pointing a rifle at him and demanding, "Give it up." The appellant, by his account, reached out and grabbed the barrel and wrestled it from the hands of his assailant as the two of them fell to the ground. As the appellant lay prone on the ground with the rifle under his stomach, the second attacker slashed his hand with a knife. The two robbers then used the knife to cut the appellant's pocket loose from his pants and then fled with the $1,900 in cash that was in the severed pocket. The appellant, with the recovered rifle, was still stunned and just regaining his orientation when the police arrived.

The State's theory of the case, and the version the jury obviously believed, was that the appellant may, indeed, have suffered a robbery with a significant loss of cash, but that he was in the shopping center armed with a rifle to redress his grievance and was not just recovering his senses.

Various passing remarks made by the appellant to the police and during his cross-examination undermined his defense of mere victimhood. In closing argument to the jury, defense counsel sought to pass these remarks off as mere manifestations of testosterone-driven braggadocio:

> He's hard now. He's going to get revenge. I know, you know, I know who did it or I'm going to get them, all good stuff. Because he's from the

> streets and his mind – that's his masculinity, his preconceived notion is what is landing him here. Carrying that money around. I know, you might not trust who's at home, but you don't need to flash it to people and as I said, they didn't cut all his pockets, they cut one. So they knew where he had it.
>
> But he's from the streets. He's got to be hard. He just got robbed. Now he's embarrassed. He's talking about all the stuff he's going to do. "I'm going to take care of my shit. I don't need the police. I came out on top."

What counsel couched in the sardonic mood, we believe would have been quite accurate in the declarative mood as a description of true intent.

One brief snippet in the partially inaudible DVD indicates that, when arrested, the armed appellant was indeed where he was, bent on retribution. Compromising as it quite obviously did the appellant's theory of defense, its hypothetical failure to be heard loudly and clearly by a requested replay of the DVD would have helped the appellant's case rather than harmed it. This is why we have held that, even if arguendo error, it was demonstrably harmless error.

Amid all the other frailties of the appellant's case, this small piece of evidence, even if arguendo unheard if unrepeated, would have been not only harmless but redundant. Officer Ricardo Biddy, quite independently of anything on the DVD, quoted the appellant as having said:

> [W]e told him okay, well if you're the victim of a crime, did you call the police? And he said ... "I don't need the police, I'll handle it myself."

In this case, there was no error. Even if arguendo, there had been error, it would have been harmless.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.