Circuit Court for Baltimore County
Case No. C-03-CR-19-001306

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2012

September Term, 2019

SCOTT BARNETT

v.

STATE OF MARYLAND

Shaw Geter,
Gould,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: March 18, 2021

A jury in the Circuit Court for Baltimore County convicted appellant, Scott Barnett, of second-degree assault. The trial court sentenced him to three years in prison, suspending all but 18 months, after which he filed a timely notice of appeal.

Mr. Barnett presents us with a single question:

> Did the trial court err by denying Appellant's motion for a mistrial, after the jury twice stated that it was firmly deadlocked, twice revealed its numerical division, and stated that after reviewing all of the evidence in a brief and factually simple case, a unanimous verdict could not be reached?

Finding no abuse of discretion, we affirm.

FACTS AND LEGAL PROCEEDINGS

The Facts

At approximately 11:00 p.m. on March 18, 2019, Alyssa Nail and her fiancé Aaron Supik were leaving an apartment building on Wallford Drive in Dundalk, Baltimore County, when they heard a woman, later identified as Ashlie Batten, screaming that she needed help. Ms. Nail and Mr. Supik saw a man they identified in court as Mr. Barnett dragging a crying Ms. Batten by her hair across the ground. Ms. Nail and at least one other of several bystanders notified the police, while Mr. Supik attempted to assist Ms. Batten, who appeared to be bleeding from her nose and lip. Ms. Batten and Mr. Barnett were married.

Ms. Batten testified that on March 18, 2019, upset over the recent death of her father, she went to a bar called the Hubcap, got very drunk, and argued with a woman. As Ms. Batten left the bar, that woman, along with several others, "jumped" her, kicking and punching her and injuring her lip and head.

Ms. Batten further testified that, after she left the bar, she was angry with Mr. Barnett because he did not meet her at the bar and did not answer any of the numerous phone calls she made to him. Ms. Batten then went to Mr. Barnett's grandmother's apartment on Wallford Drive where he lived and started swinging her fists at him. She then exited the apartment building and started screaming; Mr. Barnett followed her out and tried to calm her down without success. She fell to the ground a few times and hit her head, so Mr. Barnett picked her up and tried to take her back inside. Ms. Batten, however, kept fighting with him, "wanting him to get in trouble, wanting him to hurt as much as [she] was hurting that day." Ms. Batten eventually reentered the apartment.

A short time later, the police arrived in response to Ms. Nail's call. Ms. Batten testified that she had wanted to get Mr. Barnett away from her and she believed the best way to do that was to get him locked up, so she told the police that he had assaulted her even though "he didn't do anything."

The responding police officers testified that when they arrived at the scene, Ms. Batten was crying and seemed scared. They observed a laceration above her left eye and marks on her neck. Mr. Barnett appeared nervous and fidgety, continually trying to get to the room where Ms. Batten was being interviewed and imploring her to tell the police he "didn't do it."

On the officers' body-worn camera video, which was played for the jury and entered into evidence, when the police questioned her, Ms. Batten initially denied an assault and explained that she and Mr. Barnett had been "wrestling around and just got too carried away." After one of the officers expressed disbelief at that version of events given her

obvious injuries and the blood on Mr. Barnett's hand, Ms. Batten admitted that she and Mr. Barnett had gotten into a fight because he thought she had stolen money from his wallet. Crying, she explained that an angry Mr. Barnett had screamed at her and called her a whore and a liar, which prompted her to try to leave the apartment. She said that he pushed her, and that she accidentally hit her eye on a wall.

Later, during the police interview, Ms. Batten denied that Mr. Barnett had pushed her. She did not tell the officers anything about being attacked at a bar but said the marks on her neck came from a fight with a woman "at the flea market."

At trial, Ms. Batten testified that some of the things she had told the police that night were not true, and she claimed full responsibility for the altercation. She said she started the fight with Mr. Barnett when she grabbed his wallet, wanting to take his money to get high. She denied that he had pushed her and claimed she purposely had not told the officers she had been attacked earlier because she "wanted to get [Mr. Barnett] in trouble."

The Jury Instructions: Pre-Deliberation

The trial court began reading the jury instructions to the jury at 1:10 p.m. on the second day of trial. The court told the jury that they would receive a written copy of the instructions. Following its introductory instructions, the court read Maryland Pattern Jury Instruction-Criminal ("MPJI-Cr.") 2:01 verbatim, which states:

> 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[1] do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to reexamine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

The trial court instructed the jury on the elements of assault, as follows:

> Assault is causing offensive, physical contact to another person. In order to convict the Defendant of assault, the State must prove, number one, that the Defendant caused offensive, physical contact with, or physical harm, to Ashlie Batten. That the contact was the result of an intentional act of the Defendant and was not accidental, and that the contact was not consented to by Ashlie Batten.

Towards the end of its instructions, the trial court reminded the jury that "[y]our verdict must be the considered judgment of each juror and must be unanimous. You must all agree."

The State and defense counsel then gave their closing arguments.

After closing arguments and before sending the jury to deliberate, the trial court informed the jury that it had left out part of the instruction on the elements of assault. The court then re-read the assault instruction, but this time tacked on at the very end the following clause: "or was not legally justified."

The trial court dismissed the jury to begin its deliberations at approximately 1:49 p.m. Just 30 minutes later, at approximately 2:22 p.m., the jury sent the court a note

[1] Pursuant to the transcript, the court said "cannot" instead of "can." As no one objected to the instruction, we assume that "cannot" is merely a typographical error or a misspeak that was disregarded.

requesting clarification on the elements of assault that the State had to prove, namely, whether the State had to prove all three elements, or if proof of just one of the elements would suffice. After consulting with counsel, the court sent its written answer back to the jury at 2:33 p.m.

Thirty minutes later, a juror sent the court a note asking for a cigarette break. This simple request prompted a thoughtful discussion among the court and counsel about the potential coercive effect that denying or granting the request could have on the two jurors who smoked. Ultimately, the court decided to give the jury a 10-minute break.

In the meantime, at approximately 3:30 p.m., the jury sent another note stating: "After much deliberation, we have arrived at a 10-2 verdict after voting on two separate occasions. We don't believe we will be able to change the minds of the two outlying jurors. What do you [advise] we do next?"

The court, noting that the jury had not "been out all that long" and had only voted twice, suggested giving an *Allen* charge.[2] Defense counsel objected, contending that with a 10-2 split, there "would be a lot of pressure for the other two to capitulate," and asking the jury to reconcile their differences so soon into deliberations "could pressure them to come to a conclusion." The prosecutor argued that the instruction would not unduly

[2] The term "*Allen* charge" derives from a jury instruction, approved by the United States Supreme Court in *Allen v. United States*, 164 U.S. 492, 501 (1896), to be given to a deadlocked jury in a criminal case. Although the Court of Appeals has disapproved of the use of the traditional *Allen* charge in Maryland courts, it has endorsed a similar jury instruction, referred to as a "modified *Allen* charge," which is considered less coercive than a traditional *Allen* charge and "encourages all of the jurors to deliberate and reconsider their respective positions while not surrendering individual honest convictions." *Armacost v. Davis*, 462 Md. 504, 519 n.9 (2019).

pressure the jury, as *Allen* charges "were designed [to be used] in a case where a jury indicated they were deadlocked."

The court ruled:

> . . . [T]his is not a complicated case. This is not where there are forty-seven, different Counts that they have to sift through. It's not complicated testimony. It's really one of credibility. And I don't know that, after an hour and 45 minutes, there's something that they really need . . . to parse through and be more technical about, so that I don't know that this is too early for this kind of case. . . So for that reason, I'm inclined, when all the jurors are back, I'm gonna . . . reiterate the Pattern Instruction 2:01 and ask them to return to continue deliberations. And I understand the Defense['s] position on that.

The court then brought the jury back to the courtroom and instructed:

> All right. Ladies and gentlemen, I have read the note that you have given me about where things stand at the moment. I've discussed them with counsel and I'm going to ask you to continue deliberating and . . . I'm gonna repeat one of the instructions I gave you earlier, which is appropriate for when this happens . . . in a jury trial. And that is [] the Pattern Instruction 2:01, . . . — A Jury's Duty to Deliberate. 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 consult with one another and deliberate with the view to reach an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to reexamine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellows or for the mere purpose of reaching a verdict. So, it is with that, I—repeating that instruction, I'm gonna ask you to return to the Jury Room and continue your deliberations at this time. Thank you.

After giving this instruction, the court went off the record at 3:50 p.m.

At 4:05 p.m., the court notified the parties that the jury had sent a fourth note, this time asking if the foreperson could be excused at 4:30 p.m. "so she can make it to class on

time."[3] To honor its promise to the juror, the court questioned whether to consider declaring a mistrial at 4:30 p.m. or bring the jurors back the next day to continue deliberations.

The prosecutor proposed returning the next day. Defense counsel initially suggested keeping the jury deliberating "if they think are close" and then suggested giving the jury the option of continuing its deliberations or returning the next day. As the jury had "not yet been deliberating for even 2 ½ hours," the court determined it would bring the jurors back close to 4:30 p.m. and give them the option of continuing deliberations that evening—with the consequence of the foreperson missing her class—or returning the next morning.

At 4:15 p.m., the court sent the jury a note explaining it could not excuse only one juror and detailing the options noted above.

At 4:20 p.m., the jury sent the court a note asking if it could see the police report. The court explained that the police report had not been admitted as evidence and reminded the jury that they had to decide the case based on the evidence presented.

At 4:30 p.m., the jury sent the following note:

> We are deadlocked at 11-1. We have [gone] through all available evidence and had thorough discussions. We truly believe further deliberations will not sway the dissenting juror, as they have made it clear that they firmly do not believe the burden of proof beyond a reasonable doubt has been proven by the State.

In response, the trial court stated to counsel that it had three options, which were: (1) compelling the jury to go forward with deliberations; (2) bringing the jury back the next

[3] The juror, during jury selection, had informed the court she had a 5:00 p.m. class, and the court had assured her it would make accommodation for her to attend, if necessary.

day; or (3) declaring a mistrial. Defense counsel requested a mistrial, because, despite the court's earlier *Allen* charge, it was clear the one holdout juror was "being held hostage" would "not be persuaded." The prosecutor disagreed, asking that, following "just shy of 3 hours of deliberation on the same day that we went out," the jury "be allowed to sleep on it and come back" the next day.

The trial court ruled:

> All right. I've heard, heard both of the arguments . . . It is a close call, frankly, one way or the other. Under the circumstances, everyone's devoted this much effort into it. I'm gonna ask them to sleep on it and to come back tomorrow. That's the only thing I can think of. So, Haley, if you'd bring the jury back in? So, ah, Defendant's Motion for Mistrial is denied at this time. . . [jury enters the courtroom] Ladies and gentlemen, you have, obviously, been working very hard. I've gone through those notes with counsel, all the ones that you have sent, including the last one, reporting on the—reporting that you believe you're, you're deadlocked, given the discussions and where you are now. Um, you have been deliberating for less than 3 hours, and despite the fact that you may feel at this point you can't go any further, it's my considered judgment that . . . I don't think it's appropriate to declare a mistrial at this point. So, then, . . . I'm gonna excuse you for the evening and ask you to return at 9:00 tomorrow morning to resume deliberations. . . . I know you're working hard and everybody's trying their best to come to a resolution of this. So, with that, I will excuse you, I'll see you back here at 9:00 tomorrow morning and we'll resume deliberations at that point.

The court then went off the record at 4:46 p.m.

When the jury arrived the next morning, the trial court sent it a note stating: "Ladies and Gentlemen, Now that all jurors are present, please resume your deliberations." The jury returned its guilty verdict less than one hour later.

DISCUSSION

Mr. Barnett contends that the trial court committed reversible error by denying his motion for a mistrial and instructing the jury to continue deliberating after the jury twice sent notes to the court advising that it was deadlocked and could not reach a unanimous verdict. Mr. Barnett maintains that the trial court "almost certainly coerced the jury into false unanimity, in violation of [his] right to a fair trial." In addition, Mr. Barnett finds fault with the wording of the deliberation instructions that the trial court gave the jury after reviewing the second note claiming it was deadlocked.

The State counters that the trial court acted within its discretion in denying Mr. Barnett's motion for a mistrial and sending the jury back to deliberate longer because the jury had deliberated for less than three hours in a "thorny domestic violence case." The State also requests that we decline to review the wording of the trial court's second and third deliberation instructions because Mr. Barnett did not object to those instructions at trial, thereby forfeiting his right to raise that issue on appeal. And, in any event, the State argues that the instructions were proper.

We review a trial court's determination as to a mistrial motion for an abuse of discretion. *Nash v. State*, 439 Md. 53, 66-67 (2014). A trial court's decision whether to grant a mistrial is "afford[ed] generally a wide berth." *Id.* at 68. Specifically, a trial court's discretion "when considering whether to declare a mistrial when the jury is deadlocked is broad, and the trial [court's] decision will be accorded great deference by a reviewing court." *Curtin v. State*, 165 Md. App. 60, 73 (2005), *aff'd*, 393 Md. 593 (2006). "There are no 'hard and fast' rules limiting a trial [court's] discretion in allowing juries to

deliberate, and there is no rule that the jury may not be sent back to deliberate 'once, twice, or several times.'" *Id*. (quotation omitted). Our analysis of a mistrial motion in a deadlock situation "depends on the circumstances of the particular case." *Browne v. State*, 215 Md. App. 51, 57 (2013) (citing *Mayfield v. State*, 302 Md. 624, 632 (1985)).

One of the requirements inherent in a defendant's right to a jury trial is a unanimous verdict. *Butler v. State*, 392 Md. 169, 181 (2006). The Court of Appeals has explained: "The verdict is the *unanimous* decision made by a jury and reported to the court, on the matters lawfully submitted to them in the course of the trial. *Unanimity* is indispensable to the sufficiency of the verdict." *Id*. (quoting *Smith v. State,* 299 Md. 158, 163-64 (1984)); *see also Caldwell v. State*, 164 Md. App. 612, 635 (2005) ("The concept of unanimity . . . embraces not only numerical completeness but also completeness of assent, *i.e*., each juror making his or her decision freely and voluntarily, without being swayed or tainted by outside influences.").

A trial court may declare a mistrial in an instance of "manifest necessity," and a "genuinely deadlocked jury is considered the prototypical example of a manifest necessity for a mistrial." *State v. Fennell*, 431 Md. 500, 516 (2013). The Court of Appeals has noted, however, that 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.* (quotation omitted). Recognizing that "declaring a mistrial when a jury is not hopelessly deadlocked undermines judicial efficiency," this Court has stated that "it is essential that deadlocked jurors be allowed to continue

deliberating when the deadlock may properly be broken, but not when it is likely that the deadlock will be broken by coercion of a holdout juror (or more than one holdout jurors)." *Browne*, 215 Md. App. at 73.

As in *Browne*, we find helpful the factors that the District of Columbia Court of Appeals in *Harris v. United States*, 622 A.2d 697, 705 (D.C. 1993) determined to be relevant in assessing the inherent potential for coercion of a verdict. These factors include: (1) the degree of isolation of a holdout juror; (2) whether the court knows the numerical breakdown of the deadlock and, more specifically, whether the holdout juror is the sole holdout; (3) whether the holdout juror has been identified to the court and knows that the court is aware of his or her identity; (4) whether the holdout juror has been identified in a note only or in open court; (5) whether the other jurors may feel they are bound to the positions they have taken; (6) whether a modified *Allen* charge has been given; and (7) if a charge has been given, whether it was given under circumstances where the potential for coercion is high. *Browne*, 215 Md. App. at 69 (quoting *Harris*, 622 A.2d at 705). An appellate court may also consider the length of the jury's deliberations, "the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement." *Thomas v. State*, 113 Md. App. 1, 11 (1996) (quoting 6 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 24.6(d), at 1044 n.13 (2d ed. 1992)).

Considering the totality of the circumstances, we are not persuaded that the trial court abused its discretion in declining to declare a mistrial and ordering the jurors to

continue deliberating. In a trial involving a charge of domestic violence, the court received evidence over a span of a day and a half, which included the responding police officers' body-worn camera footage of interviews with the defendant and the alleged victim, and the alleged victim's recorded and in-court shifting and conflicting version of events as she testified both for the State and the defense.

After less than two hours of deliberations and after only two votes, the jury sent a note stating it was deadlocked 10-2. By that time, the jury had been given a 10-minute cigarette break.

The note, while revealing the breakdown of the split, did not indicate whether the majority was in favor of conviction or acquittal, did not identify the holdout jurors, and did not indicate whether those jurors were aware that the court knew of the numerical split. The court proposed giving an *Allen* charge, but defense counsel asked the court not to do so yet because such an instruction, so early in deliberations, could pressure the two jurors to capitulate. The court nonetheless gave an *Allen* charge, quoting MPJI-Cr. 2:01 almost verbatim, without further objection from defense counsel.

Then, in response to the next note asking the court to honor its promise to the foreperson to dismiss the jury so she could get to a 5:00 p.m. class, defense counsel, rather than asking for a mistrial, requested that the court give the jury the choice of continuing deliberations past 4:30 p.m. or returning the next day. The court sent the jurors a note offering that choice, and then just 15 minutes later, the jury sent another note indicating it was again deadlocked, this time with an 11-1 split, and further stating that further

deliberations would be fruitless.[4] Only at that point did defense counsel move for a mistrial because, despite the court's earlier *Allen* charge, it did not appear to her that the one holdout juror was going to budge.[5]

Although acknowledging it was a "close call," the court denied the motion and said it would have the jury "sleep on it" and return the next day. The court brought the jury back into the courtroom and instructed:

> Ladies and gentlemen, you have, obviously, been working very hard. I've gone through those notes with counsel, all the ones that you have sent, including the last one, reporting on the—reporting that you believe you're, you're deadlocked, given the discussions and where you are now. Um, you have been deliberating for less than 3 hours, and despite the fact that you may feel at this point you can't go any further, it's my considered judgment that I think—and I don't think it's appropriate to declare a mistrial at this point. So, then, what I'm gonna ask you to do, I'm gonna excuse you for the evening and ask you to return at 9:00 tomorrow morning to resume deliberations. And, ah, (PAUSE)—and not much else to say. I, I know you're working hard and everybody's trying their best to come to a resolution of this. So,

[4] The fact that the trial court was twice made aware of the numerical split, while regrettable, is not dispositive of a claim of coercion. Citing "the overwhelming majority of courts throughout the country [that] have rejected the defendant's position and have held that a trial judge is not required, as a matter of law, to declare a mistrial whenever a jury, which has not yet been able to reach a verdict, voluntarily reveals its numerical split[,]" the Court of Appeals, in *Mayfield v. State*, 302 Md. 624, 631-32 (1985), declined to hold that "whenever the jury is deadlocked and the vote is voluntarily disclosed, the trial judge must, as a matter of law, declare a mistrial." *Id.* at 631. The Court explained that it would be "sheer speculation to conclude that, when a jury becomes deadlocked and voluntarily reveals its numerical split, it is always coercive for the trial judge to give an ABA recommended *Allen*-type instruction." *Id*. at 632. And, in *Browne*, 215 Md. App. at 62-63, this Court held that although there is "an increased risk that the trial judge's remarks in response" to a jury's revelation that it is deadlocked—with a volunteer of the numerical breakdown of its split—will be coercive, a mistrial is not automatically mandated when that occurs.

[5] We point out that it is unclear whether the one holdout juror was one of the original two holdout jurors. It is possible that both of those jurors changed their minds to side with the majority and a third juror switched his or her position from the majority to the minority.

> with that, I will excuse you, I'll see you back here at 9:00 tomorrow morning and we'll resume deliberations at that point.

Defense counsel did not object to that instruction.

When the jury returned the next morning, the court sent a note instructing them to resume deliberations. Although the court did not apprise defense counsel or the prosecutor of the morning note, once defense counsel learned of it, she again interposed no objection.[6] With no written suggestion of a continued deadlock, the jury returned a unanimous verdict less than one hour later.

On this record, we are not persuaded that the trial court was constrained to conclude that the jury was "genuinely deadlocked" when it first reported the 10-2 split in the first two votes taken. Rather, we believe that the jury may have been grappling with the alleged victim's credibility, its understanding of the elements of the charged offense, and the

[6] Because defense counsel did not object to the additional instructions to the jury to continue deliberations on any ground, including coercion, Mr. Barnett cannot now claim that the language used was impermissibly coercive or failed to adhere to an accepted *Allen* charge. Maryland Rule 4-325(e) "makes clear that an objection to a jury instruction is not preserved for review unless the aggrieved party makes a timely objection after the instruction is given and states the specific ground of objection thereto." *Taylor v. State*, 236 Md. App. 397, 447 (2018) (quoting *Gore v. State*, 309 Md. 203, 207 (1987)). Accordingly, the issue is not preserved for our review. *See* Md. Rule 8-131(a).

Even if it were, we would find no merit to Mr. Barnett's claim of coercion based on the second and third deliberation instructions to the jury. Having given the jury an *Allen* charge only one hour before, the court, in its second deliberation instruction at 4:30 p.m., merely told the jury they would be released for the evening. It is likely that the jury, instead of feeling coerced to come to a quicker decision, understood the instruction to be a response to the foreperson's request to be dismissed in time for her class. And, the court's note to resume deliberations on the morning of the second day was likely meant and construed as a simple acknowledgement that all the jurors had arrived, so deliberations could re-commence.

foreperson's stated desire to leave early on the first day of deliberations. Further, given the frequency and timing of the jury's various notes, the trial court had ample reason not to give up hope that, with a sufficient uninterrupted period of deliberations, the jurors could eventually reach a unanimous decision. The trial judge also had reason to surmise that the jurors' evaluation of the evidence was skewed, at least subconsciously, by the desire to finish the case that day, and that if they returned the next day, the jurors would be more patient and more amenable to consider the views of other jurors.[7]

Finally, in its instructions, the trial court did not single out or criticize the view held by the lone holdout. The court addressed all twelve jurors. The court emphasized its belief that they were working hard and trying their best to come to a resolution. The court expressed hope that with three hours of deliberation under their belt, the jury might be able to reach a unanimous verdict the next day, thus potentially alleviating some conflict created by the foreperson's stated desire to leave by 4:30 p.m. The trial court's instructions, viewed in their entirety, did not result in "the improper coerci[on] of a juror into acquiescence with a majority." *Butler*, 392 Md. at 182. We, therefore, perceive no abuse of discretion in the court's denial of Mr. Barnett's motion for mistrial.

[7] Relatedly, even though the note reporting the 11-1 split indicated that the one holdout was in favor of the defendant, the court was not required to assume that the only path to a unanimous verdict was for the 11 jurors to persuade the lone holdout to convict the defendant. Another path, of course, was for the lone holdout to persuade the 11 to switch their votes. Although that seems unlikely, from the information available at the time, the trial judge would have had no way of knowing whether any of the jurors favoring a conviction were taking the perceived path of least resistance in order to reach a verdict that day, and that once ordered to return the next day, they may have been more open to the views of the holdout.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.