Circuit Court for Baltimore City
Case No. 115336022

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2193

September Term, 2018

ANTHONY BURRIS

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: February 19, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Anthony Burris, was tried before a jury in the Circuit Court for Baltimore City for the murder of Earl Burton, who was shot in the head at close range. Burris raises two issues, each stemming from interactions between the court and a juror, to which he assigns error prejudicing the conduct of his trial.

On October 16, 2017, the first day of Burris's trial, the clerk informed the court that a juror had expressed concerns about her safety because Burris had been staring at her. After the juror initially denied having spoken to the clerk, the judge offered to ask the juror about it again, outside of the presence of counsel, and then inform counsel of what the juror said. Both sides agreed.

The juror told the judge that she did discuss safety concerns with the clerk and other jurors, but that her concerns were resolved and would not affect her ability to be a fair and impartial juror. The judge reported to counsel that the juror told him that she asked the clerk about her safety, but omitted that she also told him: 1) that another juror expressed the same concern about safety, and 2) that "somebody" else said, "Well, he's probably been arrested for a long time and he's just looking because you're a female." Defense counsel did not learn of the court's failure to disclose the entirety of the juror's communication until after the trial. Defense counsel did voice concern, however, that the juror may have seen Burris in shackles when she entered the courtroom to speak with the judge. Counsel requested a curative instruction on Burris's custodial status, which the court denied.

The jury found Burris guilty of second degree murder and use of a firearm in the commission of a crime of violence. The court sentenced Burris to 30 years for second degree murder and 20 years on the firearm charge (all but five suspended), to run

consecutively. The court further ordered Burris to complete four years of supervised probation upon his release. Burris noted his timely appeal and presents two questions for our review:

> "I. Did the trial court err by refusing to provide the requested curative instruction?"
>
> "II. Did the trial court err by failing to disclose juror communications to the defense?"

For the reasons that follow, we hold that, although the court did not err or abuse its discretion by refusing to provide the requested curative instruction, the court did err by failing to disclose completely to the defense juror communications. Because the court's error was not harmless, we reverse Burris's conviction and remand the case for a new trial.

BACKGROUND

As we review the relevant facts adduced at Burris's jury trial, we focus mainly on the interactions between the court and the juror that form the basis of the legal questions before us.

On October 31, 2015, an officer was dispatched to the 1100 block of Laurens Street in Baltimore City in response to calls about a serious shooting. The officer located the victim, Earl Burton, unresponsive and lying on the sidewalk. Burton was transported to the University of Maryland, Shock Trauma Center, where he succumbed to his injuries and was pronounced dead on November 3, 2015. Dr. Pamela Southall, a medical examiner, would later conclude that Burton's death was a homicide, that the cause of death was a gunshot wound to the head, and that there was evidence of close-range firing. Investigation by officers at the scene, witness interviews, and photo arrays conducted at the Baltimore

Police Department led to the identification of Anthony Burris as the man who shot Burton. On December 2, 2015, a grand jury in the Circuit Court for Baltimore City returned an indictment charging Burris with three counts: (I) first degree murder, (II) second degree murder, and (III) use of a firearm in the commission of a crime of violence.

The events leading up to and immediately after the fatal shooting of Burton were described by witnesses during Burris's three-day jury trial. Alisa Coates, a witness for the State, testified that she was with her boyfriend, Davone Richardson, on the night in question. Coates said that she was also with Burris, whom she had known for "at least" ten years, and that she met Burton just two or three hours prior to the shooting. According to Coates, she, Richardson, and Burris went around the city before meeting up with Burton and his brother, Chao Burton.[1] Richardson drove Coates's Lexus with Coates in the passenger seat, Burris in the rear driver's side seat, and Burton in the rear passenger seat. Deon Hayes, the Burtons' cousin, drove Chao in a second car.

Richardson parked the Lexus on the 1100 block of Laurens Street near the Burtons' residence as they waited for Hayes's car to arrive. A few minutes after Coates noticed Hayes's car pull up, she "hear[d] [Burton's] door open, and then [] heard the gunshot, and then [] just like saw like powder, and [] couldn't hear anything." She believed the gunshot came from inside the car, although she had been facing forward. Coates then turned to her right, away from Burris, to look at Burton, who was "slouched over and . . . almost looked as if he was [] tying his shoe," "like half in, half out" of the car. She got out of the car as

[1] Meaning no disrespect, we will refer to Chao Burton by his first name for the sake of clarity, as he shares a last name with the victim, Earl Burton.

Burton hit the ground and observed that there was "like smoke coming from the back of his head." Coates was outside for less than a minute before Richardson told her to get back in the car and told Burris to get out. Richardson drove away with Coates in the Lexus.

The State asked Coates if she saw Burris with a gun that night, and she responded that she did not. She affirmed her statement on cross-examination, noting that she did not see Burris with a gun at any time during the four hours they were in a car or after the shooting. Coates testified, however, that she and Richardson encountered Burris after the police had taken her to the station for questioning, and Burris told her "[she] better not have . . . [s]aid anything."

The State also called Deon Hayes, who testified that he had known Burris for "about a year or two" from "[a]round one of [his] old neighborhoods[.]" Hayes testified that, as he pulled up behind the Lexus on Laurens Street, Chao said "they busing, they busing," which Hayes understood to mean "they're shooting, they're shooting." He saw all three passengers get out before observing Burton's "body just fall out of the car." Hayes indicated, on cross-examination, that he did not observe any altercation or "bad words" between Burris and Burton, nor did he see Burris with a gun that night. He further agreed that he did not see Burris shoot anyone, though Hayes noted that he saw Burris in the backseat of the car.

Next, the State called Burton's brother, Chao, who testified that he and Hayes got stuck at a red light before the 1100 block of Laurens Street and "when the light changed, [Richardson] was pulling out and my brother [Burton] was hanging out the car." When asked if he knew Burris from before the shooting, Chao said "when my brother got shot,

that's the only time I ever saw him." Chao agreed that he did not know how Burris got to Laurens Street, but maintained that he did see Burris at the scene. Though Chao agreed that he did not see Burris with any blood on his shirt, he noted that he only "glanced" at Burris because he was focused on Burton.

The Lexus was located and seized four days after the shooting on November 3. Detective Robert Burns testified that, during his search of the vehicle, he "didn't see any blood spatter to the naked eye" or "observe any blood on the interior of the car."

Juror 11

At the end of the first day of Burris's trial, which consisted solely of jury selection and the preliminary jury instructions, the clerk alerted the court of a potential issue with a juror. Because the clerk planned to be out the following day, she provided the court deputy with a description of the juror so that the court could address the issue. Before testimony was heard on the second day of trial, the trial judge had the juror the clerk described, Juror 11, brought into the courtroom. In the presence of defense counsel and the State, the judge asked Juror 11 if she "mention[ed] something to the clerk yesterday," and she indicated that she did not.

The court told counsel he would also ask all of the jurors, as a group, about the discussion with the clerk. With the entire jury present, the court asked, "Did any member of the jury have a discussion with the court clerk yesterday after [] we finished? Anybody that had a private conversation with the court clerk yesterday?" None of the jurors raised their hand to indicate that they had. During a bench conference, the judge suggested calling out Juror 11 again, but the State objected on the basis that further questioning could "make

her feel singled out." The court accepted the State's point and decided to handle the issue when the clerk returned the next day.

Upon the clerk's return on the third day of trial, the court informed defense counsel and the State:

> Okay. Madam Clerk says the lady really did talk to her and said that, so **I don't know how you all want to handle this.** I mean, I can – my suggestion is, but it's up to you guys, is – they're both off, but is we might get a straighter answer out of her if I'm just talking to her by myself up here. It'll be on the record. **It's just that it'll be her and me talking and then I can advise you in terms of what she said.**

(Emphasis added). Defense counsel responded with "Sure" and then agreed when the judge opined that having counsel watch the conversation could leave Juror 11 "feeling really intimidated." The judge reiterated, "I'll fully and accurate[ly] advise you as to what she says and then you can decide at that point." Both the State and defense counsel consented.

After counsel returned to the trial tables, Juror 11 approached the bench and the judge told her that he wanted to clarify her response from the day before. Juror 11 explained that the judge's question "took [her] by surprise because [she] didn't remember having a specific conversation just with [the clerk]"; rather, she had expressed concerns during a group discussion. The following colloquy took place between Juror 11, the judge, and the clerk:

> JUROR NO. 11: So, and I'm glad you called me up because we had this discussion yesterday, but I didn't talk to Madam Clerk directly. It was in a group discussion where we expressed, you know, our questions, so.
> THE COURT: What do you mean?
>
> * * *

JUROR NO. 11: Well, just[] at the end when we said, "Do you have any questions," and[] some people asked about parking or people asked about going to the bathroom and stuff, and **I did say, "Well, what about our security?" you know, because I feel like he keeps looking at me.**

And when you asked me the question yesterday, I didn't – I don't remember having a conversation with you[, Madam Clerk,] directly just you and I. []I remember speaking with the whole group and saying my response. Does that make sense? So when you asked me yesterday, I didn't – again, I didn't recall having a question directly with Madam Clerk. It was with everyone[.]"

* * *

THE COURT: Now, when you said that, that was before the trial started about you were concerned about security?
JUROR NO. 11: No, that was when we were –
THE CLERK: Going in the back.
JUROR NO. 11: – doing the jury selection.
THE CLERK: Oh.
JUROR NO. 11: And when we were in the back, we were asking questions to prepare for, "What are we going to expect for the week," and my question in front of the entire group was[] "Are we safe?" . . .

* * *

THE COURT: [] I understand you're saying, "What about our security?" **Beyond that, what did you say specifically about this Defendant?**
JUROR NO. 11: **Oh, nothing.** I don't –
THE CLERK: No, no. **Nothing about** –
JUROR NO. 11: – recall anything.
THE CLERK: – **this Defendant**.
JUROR NO. 11: Yeah.
THE COURT: Okay.
THE CLERK: She just said that she was nervous or she was scared and [] I thought she was addressing it to me.
JUROR NO. 11: Oh, no. I was addressing it to, like, the entire group because this is my first time being selected.

* * *

THE COURT: [H]as there been any discussion at all throughout the course of the deliberations about any security or fear that people have?
JUROR NO. 11: You mean with me or the group?
THE COURT: The group.
JUROR NO. 11: No. Like, when I posed the question with everyone, **just saying the Defendant was looking at me**, and –
THE COURT: That was the first day?
JUROR NO. 11: Yes, but it wasn't – you know, **another one expressed it as well.** You know, **somebody said, "Well, he's probably been arrested**

> **for a long time and he's just looking because you're a female."** You know, somebody said that.
> THE COURT: Al[]right. Well, let me ask you in particular. **Do you have any concern, do you have any fear, at this point in time, to the extent that it's going to affect your ability to be a fair and impartial juror?**
> JUROR NO. 11: **No, I don't.**

(Emphasis added).

The trial judge relayed the following version of the conversation to counsel after Juror 11 exited the courtroom:

> THE COURT: So anyway, the long and short of what [Juror 11] said was that it was on the very first day that the jurors were in the back. They had – the case had not started. It was that afternoon. And she said that she said[,] loud enough that she thought that a group would hear her, not the whole group, but she said just the other jurors, that she wanted to know, "What about security?" and then she said, "The Defendant was looking at me."
>
> And, at that point, I think that's when Madam Clerk said, . . . to everybody, "If you ever have any concerns, just talk to the Deputy." And I asked [Juror 11] point blank – she said, "Since the trial started," she's like, "I have had no concerns." And I said, "Well, [do] you, in fact, have any fear at this point in time?" She said, "No." I said, "Are you able to be fair and unbiased in reaching a decision?" She said, "Yes."

Defense counsel told the court, "[W]e're satisfied." There was, however, "one additional issue" that defense counsel perceived: "When the juror came up, she saw Mr. Burris in shackles. So I think the fact that Mr. Burris is in custody is probably not much of a secret to these jurors." Accordingly, defense counsel asked the court to "instruct the jury . . . that the Defendant has been in custody solely because he couldn't make bond, which is the truth, and that they are to draw no inference."

The trial judge and the clerk agreed that Burris was already uncuffed by the time Juror 11 entered the courtroom, but defense counsel contended that "[w]hen she entered the courtroom, [he] saw her take a pause." Juror 11 was again brought into the courtroom

and, when asked if she had seen any interaction between Burris and the correctional officer, she told the court that she had not. The court accepted Juror 11's answer, denied defense counsel's request for a curative instruction, and directed the State to continue its case.

After the State rested, defense counsel moved for a judgment of acquittal, which the court denied. The defense did not call any witnesses and Burris invoked his right to remain silent. The court instructed the jury and again denied defense counsel's request for a curative instruction related to Burris's custodial status. After deliberating, the jury found Burris guilty of second-degree murder and use of a firearm in the commission of a crime of violence. Burris's timely appeal followed.

We will include additional detail in our discussion below.

DISCUSSION

Because we reverse on the second issue, we will address the first issue only briefly to provide clarity, as the facts informing the issues on appeal overlap in several respects.

I.

Jury Instruction

According to Burris, "[a] jury's knowledge that a defendant is in custody is highly prejudicial," and the court's failure to address the "improper prejudice," by giving his requested curative instruction, was not a harmless error so reversal is required. To show that the jury was aware of and discussing his custodial status, Burris references defense counsel's contention that Juror 11 saw Burris in shackles when she entered the courtroom to speak with the judge. Burris also points out that Juror 11, during her second conversation with the judge, noted that another juror expressed similar concerns Burris was looking at

her, prompting "somebody" to say "Well, he's probably been arrested for a long time and he's just looking because you're a female."

The State responds that the trial court did not abuse its discretion in declining to give the requested instruction because the instruction was not generated, and the subject matter was fairly covered by other instructions. The States notes that defense counsel requested the instruction at trial because of his belief that Juror 11 had seen Burris in shackles when she entered the courtroom at the court's request to address her conversation with the clerk. According to the State, the record does not indicate that any members of the jury saw Burris in shackles; instead, the transcript supports Juror 11's statement that she did not see anything. Even if the instruction was generated, the State points out that other instructions covered the subject matter of the requested instruction, although they did not expressly reference Burris's custodial status.

Maryland Rule 4-325

Our review of a trial court's decision to grant or deny a party's request for a particular jury instruction is guided by Maryland Rule 4-325. *Nicholson v. State*, 239 Md. App. 228, 239 (2018), *cert. denied*, 462 Md. 576 (2019). Rule 4-325 governs jury instructions in criminal cases and provides, in part:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Md. Rule 4-325(c). Maryland courts have interpreted this rule to require trial courts to give requested jury instructions when a three-part test is met: "The instruction must state

correctly the law, the instruction must apply to the facts of the case (e.g., be generated by some evidence), and the content of the jury instruction must not be covered fairly in a given instruction." *Preston v. State*, 444 Md. 67, 81-82 (2015) (citations and internal footnote omitted).

We read jury instructions in their entirety to determine if reversal is required. *Fleming v. State*, 373 Md. 426, 433 (2003). "[W]hile the trial court has discretion, we will reverse the decision if we find that the defendant's rights were not adequately protected." *Cost v. State*, 417 Md. 360, 369 (2010). But when jury instructions, read together and taken as a whole, "correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Id.*

Analysis

A. Three-Part Test

As mentioned above, we apply a three-part test to determine whether the trial court abused its discretion in denying Burris's request for the curative instruction. *Bazzle v. State*, 426 Md. 541, 549 (2012). The first prong, which requires that the instruction state the law correctly, is not at issue in this case. As noted by the Supreme Court, "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). Defense counsel's proffered instruction, that the jury was to draw no inferences from Burris's custodial status, was a correct statement of the law. To

factually generate an instruction and satisfy the second prong of the test, "the defendant must produce 'some evidence' sufficient to raise the jury issue." *Arthur v. State*, 420 Md. 512, 525 (2011) (citation omitted). The "some evidence" standard is a "fairly low hurdle for a defendant: . . . It calls for no more than what it says—'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Id.* at 526 (citation omitted). As the reviewing court, our task is "to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." *Bazzle*, 426 Md. at 550 (citation omitted). The "threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge," *id.*, so our review is without deference.

We conclude that Burris did not produce the minimum threshold of evidence during trial necessary to require the trial court to issue the instruction. As noted by the State, defense counsel asked the court to give the instruction based on his belief that Juror 11 "saw Mr. Burris in shackles" when she entered the courtroom. Defense counsel also told the court, "I think the fact that Mr. Burris is in custody is probably not much of a secret to these jurors," without adducing any evidence aside from his speculation that Juror 11 saw Burris in shackles. The court believed, and the clerk agreed, that Burris was already uncuffed by the time that Juror 11 entered, but defense counsel maintained that "[w]hen she entered the courtroom, I saw her take a pause."

Upon examination, the record supports the State's argument that Burris was uncuffed by the time that Juror 11 entered the courtroom. The transcript, at the relevant time, reflects the following:

> [DEFENSE COUNSEL]: Good morning, Your Honor. Michael Lawlor and Nicholas Madiou for Mr. Burris. He is present, Your Honor.
> THE COURT: Al[]right. Good morning.
> [DEFENSE COUNSEL]: Good morning.
> [BURRIS]: Good morning.
> THE COURT: Good morning. Officer, you can uncuff him.
> Madam Clerk?
> (Court confers with Clerk.)
> (Court confers with Bailiff.)
> (Juror No. 11 entered courtroom.)
> (Juror approached the bench . . .[.])

Out of caution, the court offered to question Juror 11 about whether she saw anything and whether it would affect her understanding the case. But defense counsel asked the court to give an instruction at the close of the trial, instead of asking Juror 11 whether she had noticed anything. The court replied,

> I'm not doing that. You're making an issue about something that is probably not an issue. And just because the process in the courts happens to be that the correctional officers are right next to the Defendants all the time, that's just the way it is. That means I would make the instruction every single case and I'm not doing that. . . .
>
> I will ask her if she saw anything and then we can make a decision as to whether or not, given the culmination of things, whether she is to be excused or whether she can stay.

The trial judge then emphasized that he would not give defense counsel's requested instruction "unless [Juror 11] has said something to [the jury], in which case I'll reconsider."

Juror 11 was brought back into the courtroom and the following conversation took place:

> THE COURT: You need roller skates. You can just come on up. **When I called you out here before and you came out, did you see anything with the correctional officer and the Defendant?**
> JUROR NO. 11: Oh. **No, I didn't.**
> THE COURT: Al[]right. Did you see – so you never saw the correctional officer and the Defendant together?
> JUROR NO. 11: **It was so weird and I was just thinking about coming out there, so I didn't notice anything. Was I supposed to?**
> THE COURT: Where were you looking? Were you looking here? Were you looking there?
> JUROR NO. 11: **I was looking at you** because when we came yesterday, everyone (indiscernible) clerk said I was supposed to look (indiscernible).
> THE COURT: Okay. Al[]right. Thanks. You can step in the back.
> (Juror No. 11 exited courtroom.)
> THE COURT: Counsel, she said she did not see anything.

(Emphasis added). Juror 11's responses confirmed the observations of the judge and the clerk that she did not see Burris in shackles. Defense counsel did not provide the court with any additional evidence that Juror 11, or any other juror, was aware of Burris's custodial status.

Turning to the third prong, we conclude that the requested instruction was fairly covered in the instructions actually given. As noted earlier, defense counsel asked the court to instruct the jurors "Defendant has been in custody solely because he couldn't make bond, . . . and that they are to draw no inference." Prior to closing arguments, the court instructed the jury that Burris was presumed innocent and that the State had the burden of proving his guilt beyond a reasonable doubt:

> The Defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome

> unless you are convinced beyond a reasonable doubt that the Defendant is guilty.
>
> The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt. This means that the State has the burden of proving beyond a reasonable doubt each and every element of the crimes charged. The elements of a crime are the component parts of the crime about which I will instruct you shortly. This burden remains on the State throughout the trial.
>
> The Defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty, nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. If you are not satisfied of the Defendant's guilt to that extent for each and every element of the crime charged, then reasonable doubt exists and the Defendant must be found not guilty of that crime.

Further, the court instructed the jury on what evidence it could and could not consider, and how the evidence should be considered: "During your deliberations, you must decide this case based only on the evidence that you and your fellow jurors heard together in the courtroom. You must not do any outside research or investigation. . . ." Before instructing the jury on the elements of each count, the court reiterated the defendant's presumption of innocence and the State's burden of proving guilt: "The burden is on the State to prove beyond a reasonable doubt that the offense was committed and the Defendant was the person who committed it."

In conclusion, even viewing the evidence provided to the court in the light most favorable to Burris, *see Nicholson*, 239 Md. App. at 240, we hold that he did not adduce evidence sufficient during trial to generate the curative jury instruction.[2]

B. Actual Prejudice

Although the trial court has discretion to grant or deny a party's request for a particular jury instruction, reversal is required where the defendant's rights are not adequately protected. *Cost*, 417 Md. at 369. Burris asserts that his "custodial status was clearly in the jurors' minds, and he was prejudiced by them being aware of it and discussing it prior to (if not during) deliberations." The trial court's failure to address the "improper prejudice" was not a harmless error, Burris contends, and reversal is required.

[2] In his brief, Burris also argues that members of the jury were aware of his custodial status because of Juror 11's statement to the court that "somebody" said, "[w]ell, he's probably been arrested for a long time and he's just looking because you're a female[.]"According to Burris, because the circumstances "were known to the trial court, at least[], the court should have granted the defense's request for an instruction that the jury draw no negative inference from [his] custodial status." It is not clear, however, whether the judge realized the significance of the statements that he neglected to relay to counsel; after all, he was more focused—and did report—on the issue of whether Juror 11 had mentioned her safety concerns to the clerk. In turn, defense counsel did not raise this argument for the court to consider, as defense counsel was not aware that Juror 11 mentioned Burris's custodial status.

Burris had the burden of producing "some evidence" *during* his trial to generate the requested instruction. *See Bazzle*, 426 Md. at 550; *Arthur*, 420 Md. at 525. We agree that the court, in failing to relay Juror 11's full statement, deprived defense counsel of the opportunity to make the necessary showing that the instruction was generated. We address why this problem warrants a new trial in our discussion of Burris's second issue on appeal. But in regard to Burris's first contention on appeal, Juror 11's complete statement, unknown to defense counsel during trial, was not presented to the court as "some evidence" for the purpose of generating the requested jury instruction.

In considering whether a defendant was prejudiced by the jury's awareness of his custodial status, our role as the reviewing court is to "look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial[.]" *Bruce v. State*, 318 Md. 706, 721 (1990) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986)). The Court of Appeals determined, in *Bruce*, that "one inadvertent viewing of [the defendant] in handcuffs" by the jury "did not require the trial judge to take any action *sua sponte* and did not result in any prejudice to defendant's right to a fair trial." 318 Md. at 720-21. In *Bruce*, "handcuffs were being removed from [the defendant] as the jury was being led into the courtroom." *Id.* at 720. The Court characterized the viewing of the defendant in handcuffs as "clearly inadvertent" and concluded that it was not "an inherently prejudicial practice like shackling during trial." *Id.* at 720-21.

Similarly, in *Miles v. State*, the defendant "alleged that he was observed by some of the jurors" while wearing leg and arm shackles after he "walk[ed] by the jury room where the door inadvertently remained open a few inches." 365 Md. 488, 569 (2001). Rather than requesting that the jurors be polled to determine if any of them had actually seen him in shackles, the defendant moved for a mistrial. *Id.* Holding that the trial court did not abuse its discretion in denying the motion for mistrial, the Court in *Miles* concluded that "one inadvertent viewing" of the defendant in handcuffs did not prejudice his right to a fair trial. *Id.* at 573 (citing *Bruce*, 318 Md. at 721). The Court explained:

> Because the jury was never polled to determine whether there was actual prejudice, and there are no facts on the record which indicate an unacceptable risk of prejudice to the appellant in using shackles during prisoner transport,

> we decline to infer that the jurors who may have witnessed appellant walk down the hall, if any, were biased against the appellant and therefore, find no abuse of discretion.

Miles, 365 Md. at 573.

In this case, defense counsel speculated that Juror 11 saw Burris in shackles as she entered the courtroom. Defense counsel also told the court, "I think that the jury in this case is aware of the fact that the Defendant is detained." Despite this belief, defense counsel did not ask the court to poll the jurors to determine whether any of them were aware that Burris had been detained; instead, defense counsel asked the court to instruct the entire jury to make no inference from Burris's custodial status. Though Burris argues that the jury was aware of his custodial status, Burris concedes that "there is no indication in the record that jurors saw [him] in shackles or prison clothing" and that "the record reveals no particular moment when the jury was alerted to his custodial status." We decline to infer that the jurors were biased against Burris because, as the Court reasoned in *Miles*, "the jury was never polled to determine whether there was actual prejudice, and there are no facts on the record which indicate an unacceptable risk of prejudice to [Burris.]" 365 Md. at 573. Accordingly, we will not disturb the trial court's proper exercise of discretion in declining to give Burris's requested jury instruction based on speculation that the jury was aware of Burris's custodial status, including that Juror 11 may have seen Burris in handcuffs when she entered the courtroom on the third day of trial.

II.

Juror Communications

Burris argues that the trial court erred by not sharing completely with the defense juror communications, in violation of Maryland Rule 4-326. He contends that the court "omitted that [Juror 11] had said that a second juror expressed concerns about how [Burris] had looked at her, and that someone else responded that [Burris] had probably been in jail a long time." According to Burris, "[d]efense counsel only waived his and [Burris's] presence during Juror 11's *voir dire* on the condition that the court fully inform them what she said. The court failed to satisfy that condition." Further, Burris argues, the defense could have asked the court to question the rest of the jury had it known the whole of Juror 11's statement, and the defense could have then "requested various forms of relief" depending on the jury's responses. Burris concludes that reversal is required because the State cannot show that the court's error was harmless.

The State concedes that "the trial court did not notify the defense about a juror communication" but contends that the error was waived or, if not waived, harmless. According to the State, Burris waived any claim of error because he could have "objected to the trial judge's proposal that the trial judge talk to Juror No. 11 by himself" and "been present at the bench when the court talked to Juror No. 11," or reviewed the transcript during trial to discover the court's error. If the error was not waived, the State continues, it was harmless because the "fact that the jury knew that Burris was in custody and 'someone' had commented on that fact does not suggest that the jury was prejudiced against [him]."

Maryland Rule 4-326

Maryland Rule 4-326(d) "provides explicit guidance to a trial court in dealing with communications from the jury." *Perez v. State*, 420 Md. 57, 63 (2011). The subsection provides, in relevant part:

> (2) *Notification of Judge; Duty of Judge.* (A) A court official or employee who receives any written or oral communication from the jury or a juror shall immediately notify the presiding judge of the communication.
>
> (B) **The judge shall determine whether the communication pertains to the action.** If the judge determines that the communication does not pertain to the action, the judge may respond as he or she deems appropriate.
>
> (C) **If the judge determines that the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response.** The judge may respond to the communication in writing, or orally in open court on the record.

(Bold emphasis added; italic emphasis in original). The Court of Appeals has noted that the "rules governing communications between the judge and the jury" are "not abstract guides"; rather, they are "mandatory and must be strictly followed." *Winder v. State*, 362 Md. 275, 322 (2001).

The requirements of Rule 4-326(d) originate from the right of a criminal defendant to be present at every stage of his or her trial, which is a "common law right preserved by Art. 5 of the Maryland Declaration of Rights" and "in some measure at least, [] also protected by the Fourteenth Amendment to the United States Constitution." *Perez*, 420 Md. at 64 (citation omitted). The right applies "from the time the jury is impaneled until it reaches a verdict or is discharged." *Id.* (citing *Midgett v. State*, 216 Md. 26, 36-37 (1958)). Maryland Rule 4-231 incorporates the constitutional and common law, and

provides that a "defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial[.]"[3] Md. Rule 4-231(b); *State v. Hart*, 449 Md. 246, 264 (2016). Importantly, "[a]ny communication pertaining to the action between the jury and the trial judge during the course of the jury's deliberations is a stage of the trial entitling the defendant to be present." *Stewart v. State*, 334 Md. 213, 224-25 (1994). Because the "right is deemed 'absolute,' [] a judgment of conviction ordinarily cannot be upheld if the record discloses a violation of the right." *Id.*

We review violations of Rule 4-326 under the harmless error standard. *Perez*, 420 Md. at 65. The harmless error standard is "highly favorable" to the defendant. *Dove v. State*, 415 Md. 727, 743 (2010). Once error is established, the burden is on the State to show that it "was harmless beyond a reasonable doubt and did not influence the outcome of the case." *Id.* (citing *Denicolis v. State*, 378 Md. 646, 658-59 (2003)) (internal quotation mark omitted). Accordingly, the "record must affirmatively show that the communication (or response or lack of response) was not prejudicial." *Denicolis*, 378 Md. at 659.

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[3] Rule 4-231 also contains limitations, not relevant here, to the right to be present: a defendant's presence is not required "at a conference or argument on a question or law" or "when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248." Md. Rule 4-231(b). Pursuant to Rule 4-231(c), the right to be present is waived by a defendant:

> (1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or
> (2) who engages in conduct that justifies exclusion from the courtroom; or
> (3) who, personally or through counsel, agrees to or acquiesces in being absent.

See also Hart, 449 Md. at 265 (explaining that the right to be present is subject to waiver).

Analysis

The State agrees that, "at least arguably, the omitted communication 'pertain[ed] to the action' in that it related to the defendant," and that "although the jury communication was not a written jury note, the trial court was obliged to disclose to Burris the full substance of its oral communication with Juror No. 11[.]" Accordingly, we need not analyze whether there was a violation of Rule 4-326 and our analysis is limited to whether Burris waived his claim of error and, if he did not, whether the trial court's error was harmless.

A. Waiver

Burris acknowledges that his trial counsel agreed to be absent from the court's conversation with Juror 11, but contends that the waiver was made on the condition that the court fully inform them of what Juror 11 said. To defeat the State's argument that any "condition" on the waiver was ineffective, Burris relies primarily on *State v. Hart*, 449 Md. 246 (2016).

In *Hart*, the Court of Appeals granted certiorari to address, among other issues, whether petitioner Kenneth Hart had "a right to be present during a colloquy with the jury foreperson, and, if so, whether that right was waived by defense counsel[.]" 449 Md. at 261. The issue arose on the second day of Hart's trial, when the jury sent a written note approximately three hours into deliberations. *Id.* at 255. Defense counsel agreed to waive Hart's presence for a "preview" of the note, which indicated that the jury was deadlocked on Count 1. *Id.* at 256. Soon afterwards the court was informed that Hart was absent due to a medical emergency, so defense counsel suggested an "inquiry as to how seriously [the

jury was] deadlocked." *Id.* at 256. Consequently, the court summoned the foreperson, who reported that jurors had "unequivocal positions on each side" and would be unlikely to change their minds. *Id.* at 258.

Once the foreperson returned to the jury room, defense counsel told the court:

> **I think the only thing that I am in a position to request at this moment is that the[jury] be excused for the night and read the *Allen* charge first thing in the morning, start deliberations again.** If they pass a similar note suggesting that they're deadlocked, we can deal with it accordingly. But they haven't been read the *Allen* charge. And most importantly **I don't know what Mr. Hart's situation [is]. And without him to give me his input related to his desires, I would be I think delinquent in my duties if I requested a mistrial on his behalf.**

Id. at 258. The judge replied that he would not ask the jury to deliberate any further and that he was inclined to declare a mistrial on the deadlocked count. *Id.* at 259-60. Defense counsel objected to the court looking at the verdict sheet in Hart's absence, but the judge dismissed the concern because Hart's absence was "through no fault of the court[.]" *Id.* at 259. After summoning the jury, the court received a partial verdict and declared a mistrial as to Count 1. *Id.* at 260.

The Court of Appeals held that Hart did have a right to be present at the colloquy with the jury foreperson. *Id.* at 261. As the Court explained, the colloquy, which was prompted by the receipt of the note indicating a deadlock, "directly related to the jury's ability to reach a verdict, and thus, it 'pertained to the action' within the meaning of Rule 4-236." *Id.* at 270. Nonetheless, the Court concluded that Hart's right to be present *at* the colloquy was not violated because "defense counsel consented to Hart's absence from the colloquy for the limited purpose of obtaining information with regard to the extent of the

jury's deadlock." *Id.* at 272. Looking at the events that took place *after* the colloquy with the jury foreperson had ended, however, the Court concluded that Hart's right to be present was violated because the court went "beyond the information gathering requested by defense counsel and answer[ed] the jury's communication, in the defendant's absence and without the opportunity for his input[.]" *Id.* at 274. The Court noted that, "[i]mmediately following the colloquy, defense counsel made clear the scope of the waiver" by objecting to further proceedings in Hart's involuntary absence, including the declaration of a mistrial. *Id.* at 272-73.

The Court further held that the trial court's error was not harmless. *Id.* at 275. The error was prejudicial, the Court explained, because the trial judge "denied Hart the opportunity to observe the members of the jury (or to be seen by them) at a critical stage of the proceedings, consult with defense counsel, provide input, or express his position." *Id.* The Court was "unable to say that seeing defense counsel alone at the trial table had no influence on the verdict of the jury." *Id.*

Although the judge's failure to relay Juror 11's communication occurred at an earlier stage of the proceedings than in *Hart,* the principles applied in *Hart* apply equally to the case on appeal. Here, the judge proposed that he would talk to Juror 11 again, outside the presence of counsel, to discover the contents of her conversation with the clerk on the first day of trial. The judge opined, "we might get a straighter answer out of [Juror 11] if I'm just talking to her by myself up here. It'll be on the record. It's just that it'll be her and me talking and then I can advise you in terms of what she said." After affirming that he would "fully and accurate[ly] advise [counsel] as to what [Juror 11] sa[id]," the judge

added, "and then you can decide at that point." Based on this representation by the court, defense counsel acquiesced to being absent from the colloquy between the court and Juror 11 about Juror 11's prior conversation with the clerk. We conclude that the circumstances "made clear the scope of the waiver" of Burris's presence, *see Hart*, 449 Md. at 272, which was conditioned on the understanding that the court would relay the full contents of the colloquy. It is undisputed that the court failed to fully inform counsel of what Juror 11 said. Accordingly, we hold that Burris did not waive his claim of error regarding the trial court's failure to disclose a juror communication by waiving his right to be present for the colloquy because the court exceeded the scope of that waiver.

In response to the State's argument that he waived his claim of error by failing to discover the undisclosed communication during the trial, Burris contends that "the State grafts a new requirement onto the rule that appears nowhere in the rule's text[:] . . . before the trial court's duty to disclose juror communications takes effect, the defense must first review transcripts of the ongoing trial . . . in a search for undisclosed communications[,] [o]therwise, the issue will be waived on appeal." Also, Burris notes that in Baltimore City "no transcript is made until the trial is over" and, anyway, the "rule places the onus on the trial court to relay juror communications to the parties." We agree.

The State's reliance on *Graham v. State*, 325 Md. 398 (1992), to support its argument that Burris waived the claim of error by failing to review the record is unpersuasive, as that case is inapposite. In *Graham*, the trial court received a note which "stated that the jury could not reach a unanimous verdict and indicated the jury's numerical split." 325 Md. at 408. The court then "disclosed to counsel all but the numerical split,

stating that the jury had indicated its vote but that it would be improper for the court to reveal it." *Id.* at 408-09. After asking the parties "what action they would propose," the court gave the jury a "modified *Allen* instruction" and required further deliberation. *Id.* at 409. Before the Court of Appeals, the petitioner, Melvin Graham, argued that the court abused its discretion by failing to disclose the full contents of the jury note. *Id.* at 408. The Court determined that any objection was waived by Graham's failure to object. *Id.* at 411. As observed by the Court, "with full knowledge that the information disclosing the numerical split of the jury was contained in the note and that the trial judge did not intend to disclose it, defense counsel interposed no objection and acquiesced in the giving of the modified *Allen* charge." *Id.* Accordingly, the Court held that issue was not preserved for appeal. *Id.*

Unlike in *Graham* where defense counsel had "full knowledge" of what the court did not disclose from the jury note, *id.* at 411, defense counsel in the matter at hand had no knowledge of what the court did not disclose from its communication with Juror 11. The court intended to talk to Juror 11 about her prior conversation with the clerk, and subsequently told defense counsel what Juror 11 said about the conversation. There was no reason for defense counsel to believe that the court had not disclosed the entire contents of the communication. We hold, therefore, that Burris did not waive his claim of error by failing to review the record to discover the error during trial.

B. Harmless Error

We now turn to the State's contention that the error was harmless and determine whether "based on the record, [] the error possibly influenced the verdict in this case."

Perez, 420 Md. at 76. Burris "is not required to prove what [he] would have done differently; the burden is on the State to persuade us *beyond a reasonable doubt* that violations of Rule 4-326 did not influence the verdict to [his] prejudice." *Id*. at 76-77 (emphasis added).

Rule 4-326 requires "full communication of the contents of a jury communication so that both parties can have input into the response." *Allen v. State*, 77 Md. App. 537, 545 (1989), *cert denied, State v. Allen*, 315 Md. 692 (1989). This Court has expressed that the "very spirit" of Rule 4-326(d) is to "provide an opportunity for input in designing an appropriate response to each question in order to assure fairness and avoid error." *Id.* A court's failure to provide notice of a jury communication "necessarily deprives the defense of the opportunity to provide the input on how to proceed that the Rule contemplates." *Grade v. State*, 431 Md. 85, 106 (2013) (citing *State v. Harris*, 428 Md. 700, 720 (2012)). A review of the relevant precedent reveals that it is this lack of opportunity for input that creates prejudice to the defendant.

As an example, in *Perez v. State*, the Court of Appeals considered whether a trial judge's error in not disclosing six jury notes was harmless beyond a reasonable doubt. 420 Md. at 60, 70. Five of the undisclosed notes asked substantive questions about the testimony of several witnesses,[4] and the trial judge posed four of those questions directly

[4] One of the six notes "reflected the concern on the part of several jurors with the efficacy of another juror." *Perez*, 420 Md. at 70. The juror was ultimately excused for tardiness and replaced with an alternate, so it was unnecessary for the court to deal with the jury note. *Id.* at 71. Accordingly, the Court held that the continued participation of the juror was a moot issue, and "of no consequence to [the] harmless error analysis." *Id.*

to the witnesses. *Id.* at 69-70. Testimony by the trial judge revealed the judge's belief that there was a

> category of jury notes, not outlined by [Rule 4-326(d)] or prior cases, which would allow a judge to use his or her discretion in dealing with what the trial judge characterized as "obvious" or "clarifying" questions, rather than follow the dictates of the rule and require input from counsel prior to responding.

Id. at 76.

The Court declined to "fundamentally alter" Rule 4-326(d) by "expanding the harmless error standard to allow a trial judge to read a jury note, not inform counsel, and ask the question directly to the witness without allowing for counsel's input in advance[.]" *Id.* at 76. In determining "whether the error possibly influenced the verdict[,]" the Court noted:

> In this case, although most of the notes in question were asked to the witnesses by the judge, this did not relieve the court of its obligation to inform both parties that the communication originated with the jurors and the substance thereof, pertaining to noncollateral issues, prior to any response by the court. **The trial judge's failure to disclose the receipt of the jury notes to counsel deprived counsel of the opportunity to have input into the form and substance of the court's response**.

Id. at 77 (emphasis added). The Court held, therefore, that the State did not meet its burden to persuade the Court beyond a reasonable doubt "that the failure of the trial judge to inform counsel of the receipt and content of the jury notes, . . . prior to the court's response to the jury's inquiry, did not influence the jury's verdict." *Id.* Accordingly, the Court instructed that the case be remanded to the circuit court for a new trial. *Id.*

Similarly, in *Stewart v. State*, the Court determined that the petitioner was prejudiced by the trial judge's error in having an ex parte meeting with a juror. 334 Md. at

228. During the petitioner's trial, the judge went to the jury room and was handed a note signed by one of the jurors that said "I need to talk to you." *Id.* at 217. The judge asked the "upset and tearful" juror to come out of the jury room and, after listening to her concerns, "asked her to go back and continue deliberating[.]" *Id.* at 217-18. The Court explained that the "judge's failure to obtain [the petitioner's] presence at his encounter with the juror[] was erroneous" because it violated the petitioner's right to be present at every stage of his trial. *Id.* at 224-25. Further, the Court instructed that the petitioner was prejudiced by the judge's errors because the petitioner's "absence at the meeting between the judge and [juror] precluded him from having 'input' in the judge's response to the juror's conduct." *Id.* at 228-29. The Court continued:

> **[The petitioner] may have had other suggestions as to how the situation could be handled**, for example that the trial be continued upon agreement with eleven jurors. No matter how innocent the motives of the judge may have been, and no matter what may have actually been said to the juror (the conversation here was not recorded), **the mere opportunity for improper influence in [the petitioner's] absence prejudiced him.** [The petitioner] was denied the chance to evaluate the distress of the juror and the judge's solution to the problem and make such objection and suggestions as he deemed to be advisable.

Id. at 229 (emphasis added). Considering together the prejudice to the petitioner and the "substance of the judge's conversation with the juror," the Court concluded that the judge's error was not harmless. *Id.*

In this case, the State asserts that the jury was not prejudiced against Burris because Burris was not physically restrained in front of the jury; the court properly instructed the jury to make a decision based only on the evidence; and the court merely "failed to disclose to the defense what it already knew—that the jury was aware that Burris was in custody."

In addition, the State directs us to the evidence adduced at trial to demonstrate that the court's error did not influence the verdict to Burris's prejudice. The State notes that the jury heard witnesses testify that Burris was seated beside Burton when he was shot at close range in the head. Further, the State references one witness's testimony that Burris "threatened her when he learned that [she] . . . had been questioned by the police about the shooting."

We conclude that the State did not carry its burden of proving that Burris was not prejudiced by his inability to address the comments Juror 11 made about the jury's awareness of his custodial status, and we cannot say, *beyond a reasonable doubt*, that the violation of Rule 4-326 in this case did not influence the verdict. The State did not show how the "communication (or response or lack of response)" itself was not prejudicial. *Denicolis*, 378 Md. at 659. As noted by the Court of Appeals, "[t]he kinds of communication [that] may be regarded as non-prejudicial[] are those that clearly do not pertain to the action or to a juror's qualification to continue serving and [] are of a purely personal nature." *Id.* at 656-57. Here, Juror 11's comment that multiple jurors were discussing Burris's custodial status clearly does pertain to the action and to the jurors' qualification to continue serving.

We are not persuaded by the State's argument that the undisclosed communication from Juror 11 was not prejudicial because it contained information that the defense already knew. Although defense counsel raised the issue that the jury was aware of Burris's custodial status, that concern was based on his general suspicion and a belief that Juror 11 saw Burris in shackles. As Burris writes in his brief, "the information the defense had

when it requested a cautionary instruction was very different than what Juror 11 revealed during the bench conference"—"Juror 11's comments during the bench conference indicated that *numerous* jurors were considering [Burris's] custodial status and discussing it prior to deliberations." (Emphasis added.) In light of the fact that Juror 11's comment would have provided the "some evidence" necessary to generate defense counsel's requested curative instruction, the court's failure to disclose the communication is especially troublesome.

The State points to facts supporting the verdict but disregards the "role or significance of the notification and opportunity for input into [the court's response] that Rule 4-326(d) provides and requires." *Grade*, 431 Md. at 106. By failing to disclose Juror 11's comments, the trial judge denied Burris the chance to assess the situation and make any objections or suggestions. *See Stewart*, 334 Md. at 229. *Cf. Gupta v. State*, 452 Md. 103, 128 (holding that, although the defendant was not notified of a communication between a juror and the judge's law clerk until a day later, he was not prejudiced by the *ex parte* communication because both parties were provided subsequent opportunities to offer input on how to resolve the situation). As Burris notes in his brief, though he was not required to prove what he would have done differently, had the court given notice of Juror 11's comments, the "defense could have requested *voir dire*" and then, depending on what was learned, requested other remedies, "including dismissing individual jurors, issuing curative instructions, or declaring a mistrial."

As we saw, defense counsel raised the issue of the jury's awareness of Burris's custodial status but lacked the evidence needed to generate an instruction. While Juror

11's comment about other jurors' perceptions of Burris should have caught the judge's attention, the transcript indicates that the judge's failure to disclose that portion of the communication was unintentional. Our review, however, is not focused on the inadvertent nature of the court's error, but on the prejudice to the defendant, and "whether the error possibly influenced the verdict." *Perez*, 420 Md. at 76. Especially where the State did not adduce indisputable direct evidence, such as the murder weapon, or an eyewitness who could testify that they actually saw who shot the victim, or any evidence of motive—we cannot be convinced beyond a reasonable doubt that the judge's failure to disclose Juror 11's comment about jurors discussing Burris's custodial status did not influence the jury's verdict to Burris's prejudice. Accordingly, we hold that the violation of Rule 4-326 was not harmless error. Consequently, we must reverse the judgment of the circuit court and remand for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AND CASE REMANDED FOR A NEW TRIAL; COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.