

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 19th day of October, 2017.*

Rokee Yu Opaletta, Appellant,

against Record No. 161051  
Court of Appeals No. 2003-15-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is reversible error in the judgment of the Court of Appeals.

During the sentencing phase of Appellant's trial, the jury was provided an additional sentencing verdict form. The additional sentencing form related to a charge that had previously been nolle prosecuted. Upon discovery, the trial court immediately explained the error to the jury and voided the additional verdict form. Appellant's counsel responded by stating that he would "reserve [his] motion." After the jury was dismissed and had left the courtroom, Appellant moved for a mistrial due to the inclusion of the additional verdict form. The trial court denied the motion.

Shortly after the jury was dismissed, the Commonwealth informed the trial court that a conversation had occurred between the bailiff and the jury foreperson regarding the extra verdict form. The bailiff, unprompted by the trial court or the Commonwealth, stated:

The foreperson asked, Your honor, she said she learned that the verdicts was different, it was just that extra one in there. I told them to read into it. It's different charges there. It's not the same exact charges, it's a different charges on each one of them. And that's when she said, "Okay. I understand," and went back in.

The trial court then stated "I'm not granting a mistrial" before Appellant had the opportunity to raise an objection or move for a mistrial. At a subsequent sentencing hearing, Appellant explicitly moved for a mistrial based on the communication between the bailiff and the jury foreperson. The trial court again denied the motion.

The Court of Appeals, in a per curiam opinion, ruled that the Appellant's motions for mistrial were untimely. With regard to the communication between the bailiff and the jury foreperson, the Court of Appeals also ruled such error would be harmless.

With regard to the motion for mistrial that addressed the additional jury verdict form, the Court of Appeals correctly ruled that Appellant's motion was untimely. Although Appellant "reserved" his motion at the time it was discovered, he did not articulate the nature and the grounds of the motion until after the trial court had dismissed the jury. *See Maxwell v. Commonwealth*, 287 Va. 258, 268, 754 S.E.2d 516, 520 (2014) ("The defendant must make the motion for mistrial before the jury retires or it 'is untimely and properly refused.'") (quoting *Cheng v. Commonwealth*, 240 Va. 26, 39, 393 S.E.2d 599, 606 (1990)).

With regard to the motion for a mistrial that addressed the communication that occurred between the bailiff and the jury foreperson, however, the Court of Appeals erred. Unlike Appellant's first motion for a mistrial, the communication between the bailiff and the jury foreperson was not discovered until after the jury had been dismissed. Further, immediately after learning of the communication, the trial court preemptively ruled that it was not granting a mistrial before Appellant had the opportunity to make a motion. In so doing, the trial court indicated that it was aware of the nature and the grounds of Appellant's unspoken motion. Thus, Appellant's subsequent motion for a mistrial was neither waived nor untimely. *See, e.g., Scialdone v. Commonwealth*, 279 Va. 422, 437-38, 689 S.E.2d 716, 724-25 (2010) (recognizing that the purpose of the contemporaneous objection rule is satisfied when the record demonstrates that the trial court is aware of a party's objection and rules on the matter).

Furthermore, the trial court's decision to deny the motion for a mistrial was not harmless error. As an initial matter, in analyzing whether the error was harmless, the Court of Appeals applied the incorrect standard of review. Notably, the Court of Appeals used the standard for non-constitutional error, as established in Code § 8.01-678. However, "[r]esponding to jury inquiries regarding sentencing instructions without notifying defendant or his counsel violates a defendant's Sixth Amendment right to counsel." *Lenz v. Warden of the Sussex I State Prison*, 267 Va. 318, 327, 593 S.E.2d 292, 297 (2004). Therefore, the correct standard of review would be that of constitutional error. *See Crawford v. Commonwealth*, 281 Va. 84, 100, 704 S.E.2d 107, 117 (2011).

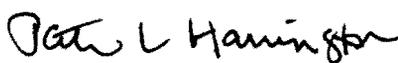
In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

*Remmer v. United States*, 347 U.S. 227, 229 (1954).

Here, it is undisputed that a private communication occurred between the bailiff and the jury foreperson about a matter pending before the jury (i.e., Appellant's sentencing). Therefore, under *Remmer*, the communication was presumptively prejudicial and the burden rested upon the Commonwealth to prove otherwise. The Commonwealth conceded that it did not present any evidence to rebut the presumption of prejudice and, therefore, failed to meet its burden. Accordingly, the judgment of the Court of Appeals with regard to Appellant's latter motion for a mistrial is reversed and the matter is remanded for a new trial for the limited purpose of resentencing Appellant.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Sussex County.

A Copy,

Teste: 

Clerk