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Casenotes: Criminal Procedure — Defendant's Absence from a Stage of the Trial Can Constitute Harmless Error despite Maryland Rule Requiring Presence. Noble v. State, 293 Md. 549, 446 A.2d 844 (1982)

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CRIMINAL PROCEDURE — DEFENDANT'S ABSENCE FROM A STAGE OF THE TRIAL CAN CONSTITUTE HARMLESS ERROR DESPITE MARYLAND RULE REQUIRING PRESENCE. *Noble v. State,* 293 Md. 549, 446 A.2d 844 (1982).

During the *voir dire* of prospective jurors at Liston G. Noble's trial, one venireman asked to approach the bench with the prosecutor and the defense attorney.[1] In essence, the prospective juror admitted to possible prejudice against the defendant because members of his family had been the victims of an unsolved violent crime.[2] Accordingly, the judge excused that venireman from serving on the jury.[3] The bench conference took place in the defendant's absence. Noble was subsequently convicted on all counts.[4]

Three years later, the defendant filed a petition in criminal court under the Uniform Post Conviction Procedure Act[5] attacking his conviction on several grounds.[6] Noble argued that his right to be present at every stage of the trial, as guaranteed by the Maryland Rules of Procedure,[7] was violated during the *voir dire* of a prospective juror at a bench conference at which the defendant was not present.[8] The post-conviction court found that any violation of the defendant's right to be

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1. Noble v. State, 293 Md. 549, 570, 446 A.2d 844, 854 (1982). The defendant was tried on charges of felony murder, attempted armed robbery, and use of a handgun in the commission of a violent crime. *Id.* at 551, 446 A.2d at 845.
2. The following colloquy occurred at the bench:

   THE JUROR: Part Four, I'm Mr. Roy. My father and brother were both murdered in the city, no arrests have been made in the case.

   THE COURT: Well I have a feeling that probably would make it pretty difficult for you to sit on a jury of this kind. I'm going to excuse you.

   MR. ROY: All right, thank you.

   (END OF BENCH CONFERENCE)

   Id. at 570, 446 A.2d at 854.
3. *Id.*
4. *Id.* at 551, 446 A.2d at 845. Noble appealed his conviction on issues concerning the sufficiency of the evidence, jury instructions, and the prosecutor's closing argument. The Court of Special Appeals of Maryland affirmed the conviction in an unreported opinion. The defendant's petition for a writ of certiorari to the Court of Appeals of Maryland was subsequently denied. *Id.; see also* Noble v. State, 281 Md. 741 (1977).
5. MD. ANN. CODE art. 27, § 645A-J (1982 & Supp. 1982).
6. One of those grounds concerned whether the defendant had waived his right to be present at the bench conference. The court noted that a recent decision, Williams v. State, 292 Md. 201, 438 A.2d 1301 (1981), held that waiver could be found from the defendant's failure to be present and by failing to object to the exclusion from a bench conference. However, since *Williams* was rendered after Noble's original trial, the court was bound by the former waiver rule which provided that the defendant must personally and expressly waive his right to be present. Noble v. State, 293 Md. 549, 556, 446 A.2d 844, 847 (1982).
7. Rule 724 of the Maryland Rules of Procedure states in pertinent part: "The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as provided by these rules." MD. R. P. 724.
8. The defendant testified that he was unfamiliar with the jury process, that the process had not been explained to him, and that had he known of his right to be

present was harmless error because the potentially biased juror had been excused.[9]

On appeal, the Court of Special Appeals of Maryland found it difficult to understand how the defendant could have been injured by his absence from the conference; nevertheless, the court reversed the application of the harmless error doctrine because "the cases are legion that the Maryland Rules are precise rubrics to be read and followed."[10] In *Noble v. State,*[11] the Court of Appeals of Maryland held that the doctrine of harmless error can apply to the Maryland Rules of Procedure, and that a procedural error, such as failing to include a defendant at a bench conference, does not necessarily require the reversal of a defendant's conviction.[12] The *Noble* court found harmless error present in this case because a defendant would not normally suffer prejudice from being absent from a bench conference which results in the dismissal of a potentially biased juror.[13] Because the conversation occurred at the bench, the court further reasoned that the other prospective jurors were not tainted with prejudice against the defendant.[14] Thus, the court found beyond a reasonable doubt that Noble was not harmed by his absence from the *voir dire* bench conference.[15]

The dissenting judge in *Noble* feared that the application of the harmless error principle to a denial of a defendant's right to be present resulted in an evisceration of that right.[16] Furthermore, the dissent declared that the majority was changing the harmless error standard from beyond a reasonable doubt to "bald speculation as to what the defendant may or may not have done had he been present."[17]

Although all jurisdictions generally endorse the use of the harm-

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present he would have asserted it. Noble v. State, 293 Md. 549, 552-53, 446 A.2d 844, 845-46 (1982).

9. *Id.* at 552 n.5, 446 A.2d at 849 n.5. The test for harmless error in Maryland criminal cases was set forth in Dorsey v. State, 276 Md. 638, 350 A.2d 665 (1976) as follows:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. *Id.* at 659, 350 A.2d at 678.

10. Noble v. State, 46 Md. App. 154, 156, 416 A.2d 757, 759 (1980), *rev'd,* 293 Md. 549, 446 A.2d 844 (1982).
11. 293 Md. 549, 446 A.2d 844 (1982).
12. *Id.* at 558, 446 A.2d at 848. However, the court did note that violations of certain procedural rules could rarely be classified as harmless error. These rules included: rule 723(c), (d), (e) (waiver of right to counsel); rule 731(c) (acceptance of guilty plea); rule 735(d) (waiver of right to jury trial); and rule 746 (speedy trial). *Id.*
13. *Id.* at 571, 446 A.2d at 855.
14. *Id.* at 573, 446 A.2d at 856.
15. *Id.*
16. Noble v. State, 293 Md. 549, 574, 446 A.2d 844, 856 (1982) (Cole, J., dissenting).
17. *Id.*

less error doctrine,[18] it appears that a majority of jurisdictions specifically apply it to violations of the defendant's right of presence deeming this to be a substantial right.[19] Thus errors which deprive the accused of a substantial right require reversal.[20] For example, denial of a substantial right occurs when there is a change in the composition of the jury in the absence of the defendant and his counsel.[21] However, a deprivation of a substantial right would not occur when the accused was temporarily absent during *voir dire* and the judge deferred the jury selection until the defendant returned.[22] A small minority of courts refuse to apply harmless error to situations where the defendant is denied his right to be present, finding it too difficult to determine the amount of prejudice suffered by him.[23]

Maryland courts have on occasion followed both the majority and minority views in applying harmless error. The earliest Maryland case on the subject, *Duffy v. State,*[24] held that the Maryland Constitution gave the defendant the right to be present at all stages of the trial and therefore courts could not speculate as to whether the defendant was injured.[25] If the record was unclear, prejudice to the defendant was presumed.[26] Subsequent cases accepted that reasoning in part, but held that if the record affirmatively indicated that a violation of the defendant's right to be present was not prejudicial and had no tendency to influence the verdict then the error would be deemed harmless and no reversal would be required.[27]

In order to reconcile the defendant's right to be present with the

18. *See* Note, *Harmless Constitutional Error: A Reappraisal,* 83 HARV. L. REV. 814 (1970) (all fifty states and the federal government have a harmless error rule mandated by either constitution, statute, judicial rule or decision); *see also* Chapman v. California, 386 U.S. 18, 22 (1967) (all fifty states have harmless error statutes or rules).
19. *See, e.g.,* Noble v. State 293 Md. 549, 564 n.7, 446 A.2d 844, 851 n.7 (1982) (citing to Duffy v. State, 151 Md. 456, 473-75, 135 A. 189, 195-96 (1926)); *see also* Bryan v. State, 141 Fla. 676, 194 So. 385 (1940); State v. Bryant, 281 N.W.2d 712 (Minn. 1979); People v. Ganett, 68 A.D.2d 81, 416 N.Y.S.2d 914 (1979).
20. *See, e.g.,* 28 U.S.C. § 2111 (1976) (on appeal or writ of certiorari, the court gives judgment after an examination of the record, without regard to errors which do not affect substantial rights of the parties).
21. United States v. Gay, 522 F.2d 429 (6th Cir. 1975).
22. State v. Isaac, 261 La. 487, 260 So.2d 302 (1972).
23. *See, e.g.,* United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968) (remand is mandated when there is no way to assess the prejudice that may have occurred to the defendant), *cert. denied,* 394 U.S. 908 (1969). *But cf.* United States v. Dioguardi, 428 F.2d 1033 (2d Cir.) (harmless error applied when defendants sat fifteen to twenty feet away from the side bar where *voir dire* occurred), *cert. denied,* 400 U.S. 825 (1970).
24. 151 Md. 456, 135 A. 189 (1926).
25. "[I]n dealing with an absolute constitutional right, the accused should not be at the mercy of speculation as to whether the violation of it did or did not injure him." *Id.* at 476, 135 A. at 196.
26. *Id.*
27. *See, e.g.,* Midgett v. State, 216 Md. 26, 36-37, 139 A.2d 209, 214 (1958); LaGuardia v. State, 190 Md. 450, 458, 58 A.2d 913, 917 (1948).

application of the doctrine of harmless error, some Maryland courts focused on whether the defendant's absence during a stage of the trial had a tendency to influence the verdict. In *Midgett v. State,*[28] a defendant was ruled to have the absolute right to be present when the court answered a supplemental jury question in writing because such action constituted a stage of the trial.[29] However, the *Midgett* court also held that a violation of the right to be present would be harmless if the error did not tend to influence the verdict.[30] The court of special appeals in *Young v. State*[31] attempted to clarify *Midgett*'s application of harmless error. *Young* viewed the written answering of supplemental jury questions as mere "communications" and not as a stage in the defendant's trial.[32] Thus, *Young* limited the defendant's right to be present to only "instructions" or charges from the court to the jury in regard to the facts, law, or form of the verdict.[33]

In *Noble v. State,*[34] the Court of Appeals of Maryland held that a violation of the defendant's right to be present at all stages of the trial could constitute harmless error, if a reviewing court determined beyond a reasonable doubt that the error did not influence the verdict.[35] A decisive factor in the *Noble* decision was the court of appeals' view that *Young* had erroneously interpreted *Midgett* by distinguishing between "communications" and "instructions."[36] Based on *Midgett, Young* held that a jury "instruction" was a stage of the trial and harmless error was therefore inapplicable.[37] *Young* further held that a mere "communication" with the jury was not a stage of the trial and thus the harmless error doctrine would be applicable.[38] The *Noble* court held that it would be illogical to apply harmless error to events which did not constitute a stage of the trial because a criminal defendant would have no right to be present; thus, the defendant's absence would normally not be error.[39] Furthermore, the court of appeals noted that *Midgett* had dealt with events constituting stages of the trial.[40]

The *Noble* court's approach to applying harmless error is logical and exemplifies judicial common sense. The decision now brings

28. 216 Md. 26, 139 A.2d 209 (1958).
29. *Id.* at 36-37, 139 A.2d at 214.
30. *Id.* In reaching its holding, the *Midgett* court relied on LaGuardia v. State, 190 Md. 450, 58 A.2d 913 (1948). Midgett v. State, 216 Md. 26, 36-37, 139 A.2d 209, 214-15 (1958).
31. 5 Md. App. 383, 247 A.2d 751 (1968).
32. *Id.* at 390, 391, 247 A.2d at 755, 756.
33. *Id.*
34. 293 Md. 549, 446 A.2d 844 (1982).
35. *Id.* at 568-69, 446 A.2d at 854.
36. *Id.* at 567-68, 446 A.2d at 853. The *Noble* court did not overrule *Young* because there were alternative grounds for its decision. *Id.* at 569 n.9, 446 A.2d at 854 n.9.
37. Young v. State, 5 Md. App. 383, 390, 391, 247 A.2d 751, 755, 756 (1968).
38. *Id.*
39. Noble v. State, 293 Md. 549, 568, 446 A.2d 844, 853 (1982).
40. *Id.* at 567-68, 446 A.2d at 853.

Maryland into line with the majority of jurisdictions.[41] It is essential that the doctrine of harmless error be applicable to violations of some procedural rules. The cost in terms of judicial resources, time, money, and basic fairness would be too high if reversal was mandated for every technical violation.[42] Furthermore, the fear expressed by the *Noble* dissent is not likely to be realized because the defendant will always have the right to appeal and the reviewing court will carefully review the record to determine whether harmless error is indicated or a reversal mandated.[43]

The *Noble* decision clears up a great deal of confusion and protects the courts from frivolous grounds for appeal. However, as great as the need is for efficiency in the courts, it is not as great as are the rights of the accused. Thus, the application of harmless error to violations of the defendant's rights must be exercised with great and sensitive discretion in order to guard against the possibility of prejudicing the defendant.

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41. The majority of jurisdictions apply the harmless error principle to violations of procedural rules. *See* Note, *Harmless Constitutional Error: A Reappraisal,* 83 HARV. L. REV. 814 (1970). The federal system in particular embraces this view by codifying the harmless error rule in the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 52(a).
42. See United States v. Alessandrello, 637 F.2d 131 (3d Cir. 1980), *cert. denied,* 451 U.S. 949 (1981) where the Third Circuit stated:

> By automatically requiring a new trial every time there was a miniscule infraction of the rule requiring presence at jury impaneling, even when the defendant presented only the most speculative claim of potential prejudice, we would be sacrificing considerable judicial resources without a corresponding increase in the actual fairness of trial.

637 F.2d at 143 n.22.
43. The *Noble* decision has already been followed by the court of special appeals in Couser v. State, 52 Md. App. 81, 447 A.2d 105 (1982). *Couser* held that *Noble's* application of harmless error to those situations where a defendant was excluded from a bench conference would apply and for that reason the case was remanded to the hearing court to determine whether Couser's absence from a bench conference was indeed harmless. *Couser* identified a trilogy of questions, based on Maryland case law, which should guide post-conviction courts when reversal of convictions are sought due to the defendant's absence at a stage of the trial: (1) Did the defendant validly waive his right to be present?; (2) Was the violation of the defendant's right of presence harmless error?; and (3) Were the violations of the defendant's rights corrected? *Id.* at 83-84, 447 A.2d at 107.