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RECENT DEVELOPMENT

STATE V. YANCEY: DENIAL OF A DEFENDANT'S REQUEST TO BE PRESENT DURING A VOIR DIRE BENCH CONFERENCE WITH A JUROR WHO IS LATER SELECTED TO SERVE IS NOT HARMLESS ERROR.

By: Shannon A. Stern

The Court of Appeals of Maryland held that the denial of a defendant's request to be present at voir dire bench conferences is not harmless error when a prospective juror disclosed information of potential bias and was selected to sit on the jury without input from the defendant. *State v. Yancey*, 442 Md. 616, 617, 113 A.3d 685, 686 (2015). The court determined that the State did not meet its burden of proving the error was harmless beyond a reasonable doubt. *Id.* at 628-31, 113 A.3d at 692-94.

Eric Yancey ("Yancey") was charged with robbery with a dangerous weapon, conspiracy to commit robbery, and first-degree assault in the Circuit Court for Montgomery County. At the beginning of trial, Yancey's attorney asked the judge if Yancey could approach the bench during voir dire bench conferences. The judge deferred to the policy of the sheriff, who stated that he had to make some phone calls to determine the protocol. However, the sheriff did not want Yancey to approach the bench at that time because he was in leg irons.

After a recess, defense counsel raised the issue of whether Yancey could attend bench conferences a second time. The judge again deferred to the sheriff, who stated that Yancey could not approach the bench. However, the judge stated that defense counsel could go back to trial table to inform Yancey of what was discussed during bench conferences.

Voir dire subsequently started over the objection of defense counsel. Soon after, a bench conference occurred without Yancey's presence. During this conference, prospective Juror 220 disclosed that two of her brothers had been charged with drug and sexual assault crimes, but that it would not affect her ability to render a fair and impartial verdict. Juror 220 was ultimately seated on the jury. After voir dire ended, the sheriff announced that Yancey could approach the bench and the judge allowed Yancey's leg irons to be removed.

Yancey was convicted in the Circuit Court for Montgomery County. He appealed his conviction to the Court of Special Appeals of Maryland. The court of special appeals reversed, holding that Yancey's exclusion from the bench conference was not harmless beyond a reasonable doubt. The State petitioned for a writ of certiorari to the Court of Appeals of Maryland, which was granted.

The State conceded that the trial court erred in preventing Yancey from attending bench conferences with prospective jurors during voir dire. *Yancey*, 442 Md. at 626, 113 A.3d at 691. Thus, the only issue before the Court of

Appeals of Maryland was whether this error was harmless. *Id.* at 626-27, 113 A.3d at 691.

The court of appeals began its determination of whether harmless error occurred by looking to precedent for guidance. *Yancey*, 442 Md. at 627, 113 A.3d at 691-92. In *Noble v. State*, the court contemplated a situation, in dicta, analogous to the facts of *Yancey*. *Id.* at 627, 113 A.3d at 692 (citing *Noble v. State*, 293 Md. 549, 571, 446 A.2d 844, 855 (1982)). There, the court said where a defendant is prohibited from attending the voir dire bench conference of a juror who is ultimately selected to serve, it would be difficult to find the error to be harmless. *Id.* (citing *Noble*, 293 Md. at 571, 446 A.2d at 855). The court of appeals then sought to ascertain the proper harmless error standard, concluding that an error is harmless if the defendant was not prejudiced beyond a reasonable doubt. *Id.* at 627, 113 A.3d at 692 (citing *Noble*, 293 Md. at 568-69, 446 A.2d at 854).

The court applied this standard to determine whether harmless error occurred. *Yancey*, 442 Md. at 628, 113 A.3d at 692. The State argued that the burden was on the defendant to prove harmlessness. *Id.* However, the court disagreed and determined that the burden was on the State to prove harmless error beyond a reasonable doubt. *Id.*

The court found that the State failed to prove harmless error for three reasons. *Yancey*, 442 Md. at 627, 113 A.3d at 692. First, harmless error does not occur when a defendant, such as *Yancey*, is excluded from the entirety of bench conferences during voir dire questioning. *Id.* at 628-29, 113 A.3d at 693 (citing *United States v. Gordon*, 829 F.2d 119, 129 (D.C. Cir. 1987)).

Second, the court concluded that it could not be shown that counsel conferred with *Yancey*. *Yancey*, 442 Md. at 629, 113 A.3d at 693. Even if counsel did confer with *Yancey*, the State did not prove that any dialogue between counsel and *Yancey* regarding Juror 220 would cure the error of excluding *Yancey* from the bench conference. *Id.*

Third, during the bench conference, the juror disclosed that her brothers were charged with drug and sexual assault crimes. *Yancey*, 442 Md. at 629, 113 A.3d at 693. This disclosure was a pivotal question regarding potential bias. *Id.* Therefore, the length of the conference is irrelevant. *Id.* Uncovering juror bias is one of the underlying reasons why defendants are permitted to be present at voir dire bench conferences, no matter how short the conference. *Id.*

Therefore, the court concluded that *Yancey*'s exclusion from the bench conference in which Juror 220 disclosed information regarding potential bias prejudiced *Yancey* because the State was unable to prove the error was harmless beyond a reasonable doubt. *Yancey*, 442 Md. at 629, 113 A.3d at 693. The court reasoned the State's assertion that *Yancey* was not prejudiced was purely speculative. *Id.* at 630, 113 A.3d at 693. For example, it is not enough for the State to assert that the juror reassured the court that she could be fair and impartial. *Id.* Even though *Yancey* could observe Juror 220 and Juror 220 did not show bias at the bench, the observation does not equate to

personal presence, and thus does not prove harmless error beyond a reasonable doubt. *Id.* at 630, 113 A.3d at 693-94.

Moreover, the court ultimately concluded the case hinged on three crucial facts. *Yancey*, 442 Md. at 630, 113 A.3d at 694. One, Yancey requested to be present at bench conferences during voir dire. *Id.* Two, the presiding judge deferred his decision entirely to the sheriff with respect to how to protect Yancey's rights and public safety concerns. *Id.* Three, the presiding judge dismissed defense counsel's concerns regarding Yancey's exclusion from bench conferences during voir dire. *Id.* at 631, 113 A.3d at 694. Thus, the court's error was not harmless. *Id.*

In *Yancey*, the Court of Appeals of Maryland held that it is not harmless error to exclude a defendant from a bench conference during voir dire after the defendant asks to be present. This case is important to Maryland law because it reinforces a defendant's right to be present at every critical stage of trial, including bench conferences during voir dire. The only way that a defendant can meaningfully aid his or her attorney in selecting a jury of his or her peers is if the defendant receives all information regarding the prospective juror. Therefore, attorneys need to make sure that a defendant is advised of his or her right to be present at bench conferences during voir dire, regardless of what type of crime the defendant is charged with.