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BORDEN, J., dissenting. I disagree with the majority's conclusion that the trial court did not abuse its discretion and, thereby, deprive the defendant, Scott Cancel, of the right to a fair trial. I therefore dissent.

It is important to note that (1) the trial took only eight days of testimony, and (2) all of the exchanges concerning requests to review testimony between the jury and the court occurred over a very short period of time, namely, from approximately 5 p.m. on one day, to 3 p.m. on the next day. An understanding of precisely what the trial court told the jury in its general instructions, what the jury asked for in its various notes to the trial court, and what the court said, and, even more important, did not say to the jury in response to those notes is also critical. In its general instructions, the court told the jury that it had the ''right'' to request that testimony be reread to it, that it should be precise in making such requests, and that its requests would be honored.

In its first note, the jury asked for four sets of testimony to be reread to it: (1) the testimony of the defendant's three accomplices, all of whom were key state's witnesses, namely, John Grzeszczyk, Salvatore Zampi and Gilberto Delgado, as well as Norma I. Cruz and Noel Torres, about who was living at the residence where the defendant met with the accomplices to plan the murder when that meeting took place; (2) the testimony of the same three accomplices about the meeting at the restaurant where the victim, Robert Schmidt, was pointed out to Grzeszczyk; (3) the testimony of the same three accomplices about the disposal of the clothing of Grzeszczyk and Delgado after the murder; and (4) the testimony of Grzeszczyk and Lawrence E. Skinner, an investigator with the office of the state's attorney, about the interviews in which Grzeszczyk confessed and implicated the defendant.

The next morning, the court notified the jury that this request entailed a lot of testimony, and that it would take the court monitor considerable time to locate all of it. The court asked the jury if it could be more precise in its request, but stated ''if you cannot, if this is what you want, this much testimony, then [we would] be glad to do that. . . . *So, with that, I guess I'm telling you that we're not ready to answer your questions quite yet*,'' but that ''*[w]e're working on it. We will call you out as soon as we have anything.*'' (Emphasis added.) The court also told the jury that it could continue to deliberate if it wished. The clear import of this response, especially in light of the court's initial general instructions, was that complying with the jury's request would take time because the court monitor would have to retrieve a lot of material, but that the court was

''working on'' complying with it and would let the jury know when it was ready to comply with the request—''We will call you out as soon as we have anything.''

The second note, which followed shortly after the court's response to the first note, was a more narrow version of the first request made in the first note, namely, for the testimony of only two of the accomplices—Grzeszczyk and Zampi—about who lived at the residence where the murder was planned; the jury did not ask for the testimony of Delgado, Cruz or Torres regarding this subject. The second note also contained the following explanation for this request: ''We are reviewing the initial request to narrow the scope. We will send additional correspondence. *We would prefer to start with this request.*'' (Emphasis added.)

The obvious purpose of this second note was the jury's attempt to respond, by narrowing its request from five witnesses to two, to the court's request, in response to the first note, that the jury attempt to be more precise in its request. It is also clear, however, that the second note was not meant as a replacement request because the jury stated that it preferred ''to *start* with this request.'' (Emphasis added.) The clear implication of this statement was that the jury would start with this material, but that it still wished to rehear the rest of the testimony that it had requested. Indeed, given that there were several items in the first request that the jury was never supplied with, as I explain in more detail later in this opinion, it is impossible for me to see how this second request reasonably could be interpreted by the trial court as superseding the first.

After complying with the request in the second note, the court stated: ''[W]e're working on other things, and we'll let you know.'' I fail to see how the jury could have interpreted the court's statement as indicating anything other than that the court was ''working on *[the]* other things, and we'll let you know'' when they have been located, and that those ''other things'' were the ''things'' that the jury had requested in its first note. Indeed, that this interpretation is the only way that the jury could have understood this response is compelled by the fact that it was the only way that the court could have meant it, because, in fact, neither the court nor the parties were working on any ''other things.'' Thus, taken in context with the court's response to the first note, the only reasonable interpretation of this entire exchange between the jury and the court is that the court was telling the jury that it was still attempting to comply with all of the requests made by the jury in the first note and would ''let [the jury] know'' when it would be able to comply with those requests.

Thus, after the second note and the court's response, the jury must have believed that, although its narrowed request for the testimony about the evidence of who was living where the murder was planned had been

complied with, the court was still attempting to locate the remaining testimony requested in the first note. That testimony, not yet produced for the jury, consisted of the testimony of Delgado, Cruz and Torres about who was living where the murder was planned, plus the other three items requested in the first note—namely, the meeting at the restaurant, the disposal of the clothes after the murder, and the interviews with the police in which one of the accomplices confessed and implicated the defendant.

Later that morning, a critical thing happened: the court monitor told the trial court that it had retrieved *all* of the testimony sought by the jury in its second and third requests of the first note. These requests were for the testimony of the three accomplices about the meeting at the restaurant where the victim was pointed out to Grzeszczyk, and the testimony of the same three accomplices about the disposal of the clothes after the murder. Despite the defendant's specific request to the court that it tell the jury that it now had available this evidence, which the jury had specifically requested, the court acceded to the state's position that the second note had superseded the first note. None of this discussion, of course, was in the presence of the jury.

The court then convened the jury and made the following statement: "[Y]our last correspondence indicated that you were reviewing the initial request to narrow the scope." The court then quoted to the jury from its second note: " 'We will send additional correspondence.' " The court then stated: "I'm not encouraging that; I'm not discouraging that. I'm not getting into this at all with you people. It's your decision. It's your decision what you want, when you want it. We're here to do that, *if we can*. I'm just suggesting that—and to let you know that we are here and—to answer any request. And that was something that seemed to be hanging, and I'm just reminding you of that. I'm sure I don't need to, probably. And I'm sure you're diligently going about your task of deliberation. So that's all I have." (Emphasis added.)

This statement to the jury was ambiguous at best. It is true that the court reminded the jury of its first note, and that the requests made therein had not been complied with—"that was something that seemed to be hanging . . . ." At the same time, however, the court also reminded the jury that it had narrowed the scope of the first request, and that it had indicated that it would "send additional correspondence." The court then told the jury that it was there to respond to "what you want, when you want it," but it then qualified that response with "[w]e're here to do that, *if we can*." (Emphasis added.) The jury could have heard this only as at least an implicit repetition of the court's initial response to its first note, namely, that it would take a long time for the court monitor to locate the requested

testimony, and that retrieval of that testimony had not yet been accomplished. As I indicate later in this opinion, I can see no justification for the court's refusal to tell the jury that the information that it sought in two of the four requests in its first note had now been located and was available to be read to the jury.

The third note, sent to the court at 2:45 p.m. on the same day, requested testimony that had not been included in either of the first two notes, namely, testimony of Grzeszczyk regarding the meeting on Austin Street. The court complied with that request. Yet, the court still did not tell the jury that much of the testimony that it originally had sought in its first note was now available to it. Less than two hours later, the jury rendered its verdict.

I conclude that the court abused its discretion in its treatment of the jury's requests for the rehearing of the testimony that they had requested in their first note. First, it is beyond dispute that very little of the testimony that the jury sought in that first note was ever presented to it; nor was the jury ever told that at least some of the testimony that was not presented was available to it before it rendered its verdict. Given the short length of the trial, and even taking into account the jury's understandable responses to the court's suggestion to it that it attempt to narrow its requests *while the court attempted to comply with the jury's first request,* I simply fail to see why the court did not make any additional efforts to comply with those requests.

Second, the court's response to that first note sent the clear message to the jury that the court was attempting to comply with those four requests, and that *the court would tell the jury when that compliance would be forthcoming.* The jury's response, in the second note, to that message was that it was willing to narrow its request, but that narrowing was something that it was willing "*to start with . . . .*" (Emphasis added.) Thus, the clear implication of this exchange was that the court would tell the jury when it was prepared to comply with the jury's first four requests, and the jury was willing to start with less than it originally had requested until the court informed it that the court was ready to comply. Thus, I see no basis for the majority's conclusion that it was reasonable for the court to conclude that the jury's second note superseded its requests in the first note. If that were so, then the jury's response to the court's initial statements to it, namely, that the jury would narrow its requests "to start with," meant nothing.

Third, even if I were to agree that it was unclear whether the jury's second request was intended to supersede its first request, and that it was reasonable for the court to *interpret* it as such, I see no justification on this record for the court to have gone through that interpretive exercise at all. At that point, the court knew

that the court monitor had located two of the four batches of testimony that the jury had requested in its first note, and the defendant had requested that the court simply ask the jury whether it still wanted that testimony read to it.

It is beyond me why, instead of granting that eminently reasonable request, which could not have taken more than a moment, the court shielded that important information from the jury and, instead, issued the ambiguous instructions to the jury that it did. Had the court told the jury that the testimony it had asked for was now available, as the defendant asked the court to do, the jury, the state, the defendant, and this court, would *know*, rather than have to guess, whether the second jury note superseded the first note. Furthermore, and most important, the jury would have had the information that it never had in formulating its second and third requests, namely, that at least s*ome* of what it had requested in its first note was now available to it and intelligently could have decided whether it still wanted that testimony. The failure of the court to give the jury this important information was itself an abuse of discretion.

Having decided that the trial court abused its discretion as it did, I also conclude that the error was harmful. This was a case against the defendant that depended primarily on the testimony of his three accomplices. Indeed, the defendant was not even the actual killer; that task was reserved for Delgado, the rereading of whose testimony the jury sought but did not receive. The requests for rereading of testimony that were never honored by the trial court involved critical testimony of those accomplices, whose credibility as such was necessarily subject to question. I cannot see how it could be otherwise that the *absence* of an opportunity to rehear that testimony, and the jury's ignorance of the fact that some of the testimony was available for it to rehear substantially affected the verdict that the jury ultimately reached.

I would, therefore, reverse the judgment of the trial court and remand the case for a new trial.