UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0927

September Term, 2015

NICHOLAS DAVID GEORGE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: June 22, 2016

A jury in the Circuit Court for Anne Arundel County convicted Nicholas David George, appellant, of reckless endangerment for his role in an incident that occurred in the early morning hours of January 8, 2015. The court subsequently sentenced appellant to a term of five years' imprisonment, with all but six months suspended on house arrest, and a suspended fine of $5,000, to be followed by a five year period of probation. Appellant raises two issues in this appeal:

> 1. Did the trial court err when it refused to ask the mandatory, Defense-witness question, during *voir dire* of prospective jurors?
>
> 2. Was it error to refuse to hold a hearing on the suppression of the in-court identification, after the State disclosed, on the night before trial, that the State had shown the complaining witness a security camera recording, from which he had identified Appellant?

For the reasons that follow, we agree that the court abused its discretion in refusing to ask the defense-witness question, and we vacate appellant's conviction and remand for further proceedings. Appellant's second issue is, therefore, moot.

FACTS AND PROCEDURAL HISTORY

Around 5:00 a.m. on January 8, 2015, 71-year-old Elliott McEntee left the Maryland Live Casino in Hanover accompanied by appellant and appellant's two friends – Gabrielle Rigaud and Brennan Seegobin – in a white car. McEntee alleges that a short time after the vehicle left the casino, appellant punched him at least three times, causing McEntee to bleed profusely. Then, appellant forced McEntee to exit the car, and in this process, appellant took McEntee's wallet, which contained cash and credit cards. Eventually, McEntee received medical treatment and spoke with police officers about the incident. Appellant testified in

his defense and stated that he left the vehicle and was at a friend's house before anything happened to McEntee.

The State charged appellant with robbery, second-degree assault, reckless endangerment, and theft. The jury acquitted appellant of every offense, except for reckless endangerment.

DISCUSSION

During *voir dire* prior to trial, appellant's counsel requested a defense-witness instruction, and the following colloquy ensued at the bench:

> APPELLANT'S COUNSEL: Okay. Let me see. Is there any member of the prospective Jury Panel – testimony of a witness called by the Defense with more skepticism than called by the State merely because – Defense.[1]
>
> Is there any member of the Jury Panel who believe [sic] the Defendant's testimony is skepticism or believe the Defendant would be testifying – and I think – in there. Sixteen (sic), [i]s there any member of the prospective Jury Panel who would give greater weight to the testimony of a police officer simply because he is a police officer?
>
> THE COURT: I thought I did ask that, but I will ask it.
>
> APPELLANT'S COUNSEL: We just did it with the one – with that last lady.
>
> THE COURT: Okay. I will ask that question –

[1] We note that the transcript includes portions that were inaudible to the transcriber. The record reflects, however, that appellant requested the court to ask potential jurors the following question: "Is there any member of the prospective jury panel who would tend to view the testimony of a witness called by the defense with more skepticism than those called by the State, merely because they were called by the defense?"

The court then addressed the jury, and the following colloquy occurred:

> THE COURT: So we have one other short answer question, and you can respond out there. The Court is going to be giving you instructions that you have to evaluate every witness the same as any other witness regardless of their employment, their status in the case, whether they are someone who is bringing the charges, responding to the charges. Whether it is a police officer, whether it is a civilian witness, you have to evaluate each one on their own merits.
>
> Is there any member of the Jury Panel who – and one person has already answered this question, you don't need to answer it again. But is there any member of the Jury Panel who believes you would not be able to do that, that you would automatically give more or less weight to a witness because of work as a police officer, or some other status of that witness before they arrived in the courtroom? For the record, no response.
>
> * * *
>
> THE COURT: We will pick the 12 first. Four and four, and then we will pick the alternates. Any other housekeeping – counsel, before we do that?
>
> APPELLANT'S COUNSEL: No, but that one – we pick, because – I am not satisfied with the Jury because – did not ask for – questions that I requested. I just want to – the record – no.[2]
>
> * * *
>
> THE COURT: Is the Defense satisfied now with the Jury as empaneled?
>
> APPELLANT'S COUNSEL: May we approach – Your Honor?
>
> (Away from microphone.)

[2] Again, the transcript is replete with inaudible portions, but it is apparent here that appellant was objecting to *voir dire* for the court's refusal to ask requested questions, specifically the defense-witness question.

> THE COURT: Sure.
>
> (Whereupon, a Bench Conference commenced.)
>
> THE COURT: So if it is –
>
> APPELLANT'S COUNSEL: For the record, I am not satisfied, the Court didn't ask the *voir dire* questions that I submitted and made part of the record and, you know, the Court denied my motion – my request.
>
> THE COURT: Okay. Well, we are not finished yet with the alternates, so you may need to repeat that again.
>
> APPELLANT'S COUNSEL: Okay.

Appellant brought the issue to the court's attention again once the parties selected the alternate jurors. The court again refused to ask the defense-witness question.

On appeal, appellant contends that the court erred in refusing to ask the defense-witness question, which is required if the defense requested it, and appellant clearly requested it in this case. Moreover, appellant argues, the court's question pertaining to the status of witnesses is not an adequate substitute. Accordingly, appellant contends that this error was not harmless, and his conviction should be reversed. The State agrees.

The Court of Appeals has remarked: "'*Voir dire*, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and impartial jury . . . is given substance.'" *Moore v. State*, 412 Md. 635, 644 (2010) (quoting *Dingle v. State*, 361 Md. 1, 9 (2000)) (internal citations omitted). "In the absence of a statute or rule prescribing the questions to be asked of the

venirepersons during the examination, 'the subject is left largely to the sound discretion of the court in each particular case.'" *Id.* (quoting *Corens v. State*, 185 Md. 561, 564 (1946)). The Court of Appeals noted that questions asked of the *venire* panel should "'discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him.'" *Id.* at 645 (quoting *Corens*, 185 Md. at 564). The questioning court should tailor the questions to the case, with "the ultimate goal, of course, being to obtain jurors who will be 'impartial and unbiased.'" *Id.* (quoting *Dingle*, 361 Md. at 9).

The outcome of this case is controlled by *Moore*, *supra*. In that case, the Court of Appeals held: "[T]he Defense-Witness question is mandatory in cases . . . because it falls within the very core of the purpose of *voir dire*, it is designed to uncover venireperson bias." *Id.* at 663. Accordingly, if the defense-witness question is requested, the court refuses to ask it, and witnesses testify for the defense, then it is an abuse of discretion to fail to ask this question. *See id.* at 665-66. Such an error cannot be considered to be harmless. *See id.* at 668. *See also Smith v. State*, 218 Md. App. 689, 702-03 (2014) ("A Defense-Witness question is aimed specifically at revealing bias among the prospective jurors against witnesses for the defense. . . . Both parties also agree that failure of a trial court to ask a requested Defense-Witness question 'is not, by definition, harmless' error and that such an omission necessarily requires a new trial, and we agree as well." (internal citations omitted)).

Here, appellant clearly requested the court to ask the defense-witness question of the *venire* panel. The court refused. Moreover, the Court of Appeals has recognized that there is rarely an adequate substitute to the defense-witness question. *See Moore*, 412 Md. at 665-66. The court, therefore, abused its discretion, and we vacate appellant's conviction and remand for further proceedings, in accordance with *Moore* and *Smith*, *supra*. Appellant's remaining issue, pertaining to the pretrial identification of appellant by McEntee, is moot, and we do not address it.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED AND REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.