Circuit Court for Baltimore City
Case No. 121210002

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 560

September Term, 2022

CHARLES MITCHELL

v.

STATE OF MARYLAND

Friedman,
Zic,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: April 18, 2023

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

A jury sitting in the Circuit Court for Baltimore City found Charles Mitchell, appellant, guilty of sexual abuse of a minor. The court sentenced appellant to twenty-five years' imprisonment, all but five years suspended, followed by five years' supervised probation. In this ensuing appeal, appellant presents the following questions for our review:

> I. Did the trial court abuse its discretion when it refused to ask the prospective jurors two of defense counsel's proposed voir dire questions aimed at uncovering bias?
>
> a. Is the question—whether any prospective juror would be more or less likely to believe a witness just because the witness is a child—a question aimed at uncovering bias directly related to a witness?
>
> b. Is the question—whether any prospective juror identifies with the #MeToo movement or Times Up—a question aimed at uncovering bias directly related to the alleged crime of sex abuse of a minor, a girl?
>
> II. Did the trial court plainly err by conducting voir dire in a manner that frustrated the purpose of uncovering bias?

For the reasons that follow, we affirm.

BACKGROUND

We provide only an abbreviated summary of the crime because the issues raised on appeal relate almost entirely to procedural issues at trial. *See, e.g.*, *Hill v. State*, 418 Md. 62, 66-67 (2011) (omitting mention of the evidence adduced at trial where the legal question on appeal concerned the trial court's ruling on a motion to suppress evidence); *Foster v. State*, 247 Md. App. 642, 646-47 (2020) (omitting recitation of the facts surrounding the underlying offenses because the only issue raised on appeal was whether the defense had preserved its objection to the trial court's refusal to ask certain voir dire questions), *cert. denied*, 475 Md. 687 (2021); *Teixeira v. State*, 213 Md. App. 664, 666

(2013) (foregoing detailed discussion of the evidence adduced at trial where the issue on appeal was whether the verdicts were legally inconsistent). For purposes of this appeal, it is enough to say that there was sufficient evidence that, on June 24, 2021, appellant sexually abused his nine-year-old daughter, L.,[1] while she was staying overnight at her uncle's apartment on Dolphin Street in west Baltimore.[2]

In July 2021, an indictment was filed in the Circuit Court for Baltimore City, charging appellant with sexual abuse of his daughter, L. The following May, a two-day jury trial was held.

Prior to trial, the parties had submitted written voir dire questions.[3] On the morning of the first day of trial, the court convened a bench conference to discuss which of those questions it would ask. Defense counsel informed the court that he wanted additional questions.

Among the additional questions defense counsel requested were the following: "In this case, you will hear testimony from a child. Do you have any concerns about a child testifying?" "Does anyone not believe that a child is capable of lying about a serious crime

[1] According to L., appellant "tried to rape" her. Appellant "lift[ed] [her] on top of him[,]" moved her hands "towards his private [i.e., his penis]," and "then he started whispering stuff into [her] ear." In addition, L. was interviewed shortly after the crime by a forensic social worker, and L.'s recorded statement (admissible under the tender years statute, Criminal Procedure Article, § 11-304) was played before the jury. That interview contained additional incriminating details concerning the sexual abuse.

[2] Appellant does not contend otherwise.

[3] Although the voir dire questions submitted prior to trial are not included in the record, the court and the parties expressly refer to them in the trial transcript.

as this?" The trial court asked the venire the first part of the question but declined appellant's request to ask the second part. During voir dire, the trial court asked the venire a truncated version of appellant's requested question: "In this case, you will hear testimony from a child. Do you have any concerns about a child testifying? And I believe the child in this case who may testify is nine years old."[4]

In addition, defense counsel requested the following question: "Does any member of the jury panel identify with, feel compassionate about, or align themselves with the #MeToo movement or Times Up?" The trial judge refused to ask this question, remarking, "#MeToo does not involve children, as far as I know."

Upon the conclusion of voir dire, the court asked whether there were "any other questions" the parties wanted the court to ask. Defense counsel replied, "None from the defense, Your Honor."

After deliberating approximately two hours, the jury rendered its verdict, finding appellant guilty of sexual abuse of a minor. The court granted a defense request to proceed directly to sentencing, and the court imposed sentence the same day. This timely appeal followed.

Additional facts are included where pertinent to discussion of the issues.

[4] L. was nine years old at the time of the offense and ten years old when she testified at appellant's trial.

DISCUSSION

I.

Parties' Contentions

Appellant contends that the trial court abused its discretion in refusing to ask two voir dire questions requested by the defense. One of those questions concerned the child witness who would testify against appellant. The trial court truncated the question defense counsel had requested, omitting the portion of the question asking whether any prospective jurors believed that a child was "capable of lying about a serious crime" such as the one charged in this case. The second question at issue would have asked whether any member of the venire "identif[ied] with, [felt] compassionate about, or align[ed] themselves with the #MeToo movement or Times Up[.]" The trial court refused to ask this question.

According to appellant, the trial court's "limited rendition" of the child-witness question, asking only whether any venirepersons had "any concerns about a child testifying[,]" did not "fairly cover the subject of bias." Appellant analogizes his child-witness question to witness occupation questions that have been ruled mandatory by the Supreme Court of Maryland[5]—for example, police witnesses, State's witnesses, and defense witnesses.

[5] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules, or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

Appellant further contends that the "#MeToo" question rejected by the trial court "was aimed at uncovering bias in favor of women alleging sexual assault in a case in which the principal witness was a girl, or young woman, alleging sex abuse." According to appellant, the slogan "believe women" that has been popularized by the #MeToo movement "is facially irreconcilable with a juror's task to evaluate witnesses' credibility[,]" and therefore, is incompatible with a juror's duty to respect the defendant's presumption of innocence and to hold the State to its burden to prove guilt beyond a reasonable doubt. Thus, according to appellant, the "#MeToo" question "was directed toward a specific cause for disqualification" and was mandatory upon appellant's request that it be asked. Finally, according to appellant, the "#MeToo" question was not fairly covered by the other questions that were asked, such as the question regarding any past associations with victim advocacy groups and the strong feelings question.

The State, relying primarily upon *Lopez-Villa v. State*, 478 Md. 1 (2022), and its interpretation of Maryland Rule 4-323(c), counters that this claim is not preserved because defense counsel did not object to the trial court's refusal to ask the two proposed questions. The State further contends that this claim is waived because, in response to the trial court's query whether he had any other questions that he wished to be asked, defense counsel replied, "None from the defense, Your Honor."

In the alternative, if we were to address this claim on its merits, the State asserts that the trial court did not abuse its discretion in refusing the defense request to ask the two questions. According to the State, the questions at issue were not directed toward a specific

ground for disqualification,[6] and to the extent they may have been, the issues raised were fairly covered by other questions that were asked.

Analysis

Preservation and Waiver

"To preserve any claim involving a trial court's decision about whether to propound a voir dire question, a defendant must object to the court's ruling." *Foster*, *supra*, 247 Md. App. at 647. A defendant objects in one of two ways: either expressly or impliedly. A defendant objects expressly to a trial court's refusal to give a requested voir dire question by doing just that—objecting. He objects impliedly by "mak[ing] known to the court the action that [he] desires the court to take[.]" Md. Rule 4-323(c). In either case, he must object "at the time the ruling or order is made or sought," *id.*, or else a claim that the trial court erred in refusing to give the requested question is not preserved.[7] *Lopez-Villa*, 478 Md. at 11-13; *Foster*, 247 Md. App. at 647.

The State's reliance on *Lopez-Villa* is misplaced. In that case, counsel submitted a written list of proposed voir dire questions ahead of time but did not object when the trial court declared that it was "not inclined" to ask the questions at issue. *Lopez-Villa*, 478 Md.

[6] In addition, the State points out that, in *Stewart v. State*, 399 Md. 146 (2007), *abrogated on other grounds by Kazadi v. State*, 467 Md. 1 (2020), the Supreme Court of Maryland held that a child-witness question was not mandatory upon defense request in a child abuse case.

[7] The Court, in *Lopez-Villa*, 478 Md. at 12, mentions a few exceptions, gleaned from the text of Rule 4-323(c) and decisional law, to the contemporaneous objection requirement, but those exceptions are not applicable to this case.

at 5-7. Our Supreme Court emphasized that counsel's failure to object contemporaneously with the court's refusal to ask the proposed questions resulted in non-preservation, *id.* at 11-12, emphasizing that merely submitting the proposed questions in advance did not satisfy the requirement that "a party, at the time the ruling or order is made or sought, make[] known to the court the action that the party desires the court to take or the objection to the action of the court." Md. Rule 4-323(c); *see Lopez-Villa*, 478 Md. at 18; *id.* at 26-27 (Biran, J., dissenting). Here, unlike in *Lopez-Villa*, defense counsel made known to the court, at the time the court made its ruling on the matter, which voir dire questions he wanted the court to propound. In addition, defense counsel confirmed that he objected[8] to the trial court's refusal to ask those questions when he told the court:

> Okay. So, those are **the ones <u>I want to add</u>**. Those are going to get printed out and (unintelligible at 10:43:49) voir dire. **And I crossed out <u>the stuff that you said you didn't want to add</u>**, which is the #MeToo movement question right there.

(Emphasis added.) Under Rule 4-323(c), that was sufficient to preserve the issue for appeal.

In addition to non-preservation, the State contends that appellant waived his claim that the trial court erred in refusing to propound the voir dire questions at issue because, upon the conclusion of voir dire, in response to the trial court's query as to whether there were "any **other** questions" he wanted the court to ask, defense counsel replied, "None

[8] We agree with appellant that his reply of "Okay" to the court's refusal to ask the proposed questions did not indicate his agreement with the trial court or otherwise effect a waiver. He merely acknowledged the court's ruling.

from the defense, Your Honor." (Emphasis added.) In context, the word "other" referred to questions *other than* the ones that the trial court already had ruled on, and therefore, we do not construe appellant's reply as a waiver.

Merits of the Claim

Both the Sixth Amendment and Article 21 of the Maryland Declaration of Rights guarantee an accused the right to a fair and impartial jury. *State v. Ablonczy*, 474 Md. 149, 156-57 (2021). In furtherance of that purpose, a trial court conducts voir dire, which "is Law French[9] for 'to speak the truth'" and "refers to 'a preliminary examination of a prospective juror'" to determine whether he or she "'is qualified and suitable to serve on a jury.'" *Collins v. State*, 463 Md. 372, 376 (2019) (quoting *Voir Dire*, BLACK'S LAW DICTIONARY (10th ed. 2014)). Voir dire is "'the mechanism whereby the right to a fair and impartial jury is given substance.'" *Ablonczy*, 474 Md. at 158 (quoting *Dingle v. State*, 361 Md. 1, 9 (2000)) (ellipsis omitted).

"The scope of voir dire and the form of questions propounded rest firmly within the discretion of the trial judge." *Washington v. State*, 425 Md. 306, 313 (2012). We generally review a trial court's decision whether to propound a voir dire question for abuse of discretion. *Kazadi*, 467 Md. at 24. That discretion, however, is constrained: "On request, a trial court **must** ask a *voir dire* question if and only if the *voir dire* question is reasonably

[9] "Law French" is the "corrupted form of the Norman French language that arose in England after William the Conqueror invaded England in 1066 and that was used for several centuries as the primary language of the English legal system[.]" *Law French*, BLACK'S LAW DICTIONARY (11th ed. 2019).

likely to reveal specific cause for disqualification." *Pearson v. State*, 437 Md. 350, 357 (2014) (emphasis added) (cleaned up). "The court … must adapt the questions to the particular circumstance or facts of the case, the ultimate goal … being to obtain jurors who will be 'impartial and unbiased.'" *Moore v. State*, 412 Md. 635, 645 (2010) (quoting *Dingle*, 361 Md. at 9).

Two areas of inquiry may reveal specific cause for disqualification of a venireperson: "(1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington*, 425 Md. at 313. Collateral matters generally include biases "'directly related to the crime, the witnesses, or the defendant.'" *Collins*, 463 Md. at 377 (quoting *Pearson*, 437 Md. at 357).

"In reviewing the [trial] court's exercise of discretion during the voir dire, the standard is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present." *Washington*, 425 Md. at 313. "On review of the voir dire, an appellate court looks at the record as a whole to determine whether the matter has been fairly covered." *Id.* at 313-14.

Child-Witness Question

In *Stewart v. State*, 399 Md. at 151, the defendant was on trial for child abuse and related sexual offenses. During voir dire, Stewart submitted fifty-two proposed questions, *id.* at 152, including the following:

40. How many of you believe children always tell the truth?

* * *

> 42. Do you believe children are more or less honest than adults?
>
> 43. Would you automatically believe an adult over a child or a child over an adult who testifies?

* * *

> 45. Do you feel just because a child or adult testifies about sexual assault that it must necessarily be true or untrue?

Id. at 156. Our high Court expressly stated that those questions, which are substantially similar to the question at issue here, were "not questions where the response would support disqualification for cause." *Id.* at 165.

Appellant acknowledges that *Stewart* held that a child-witness question was not mandatory in a sexual abuse case like his but urges that it be "further abrogated[.]" Although we recognize that appellant is required to assert this argument in order to pursue it with the Supreme Court of Maryland, we are not at liberty to ignore what our high Court has said in a case that is directly on point, even where subsequent decisions may call that holding into question. *See Foster*, 247 Md. App. at 651 (noting that it is "not up to this Court … to overrule a decision of the [Supreme] Court … that is directly on point" (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997))). We are bound by *Stewart* and therefore conclude that the trial court did not abuse its discretion in refusing to ask appellant's child-witness voir dire question.

#MeToo Question

According to the trial judge, the "#MeToo" question requested by appellant was not mandatory because "#MeToo does not involve children, as far as I know." To the extent this is a factual finding, it is not clearly erroneous.

We note that the examples appellant cites about the rise of the #MeToo phenomenon involve accusations by adult women against famous and prominent men. This case involves an accusation by a child against her own father, who is, moreover, not a public figure. At most, whether venirepersons were favorably disposed toward the #MeToo or Times Up movements was only tangentially related to the issues in this case. Moreover, the trial court asked two questions that covered the relevant issues: a strong feelings question and a question directed to whether any venirepersons had prior associations with victim advocacy groups.

Were Maryland among the majority of states that permit voir dire directed toward eliciting grounds for the intelligent exercise of peremptory strikes, appellant's complaint might have greater weight. But, thus far, the Supreme Court of Maryland has adhered steadfastly to limited voir dire. *Kazadi*, 467 Md. at 46; *Collins*, 463 Md. at 405-06 (Harrell, J., concurring in the judgment). Under these circumstances, we conclude that the trial court did not abuse its discretion in refusing to propound a voir dire question that was, at most, only marginally relevant to a contested issue and, furthermore, tended unnecessarily to inject an extraneous and controversial political issue into the proceedings.

II.

Appellant contends that the trial court committed plain error by conducting voir dire in a manner that frustrated the purpose of uncovering bias. According to appellant, the trial court ignored the suggestion of the Supreme Court of Maryland in *Collins v. State*, 452 Md. 614, 627 (2017) (observing that "a better method is to inform the jury that follow-up will occur at the bench"), and conducted follow-up questioning of jurors in open court about potentially disqualifying biases, rather than doing so at the bench. Although appellant acknowledges that defense counsel did not object to this method of conducting voir dire, he now claims that the error was so serious as to warrant our exercise of plain error review. We are not persuaded.

An appellate court will exercise its discretion to notice plain error sparingly, reserving that option only for "blockbuster errors." *Martin v. State*, 165 Md. App. 189, 196 (2005) (cleaned up), *cert. denied*, 391 Md. 115 (2006). Our Supreme Court has said that plain error review "is reserved for errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130 (2012) (quotation marks and citation omitted). And perhaps most importantly for our present purposes, plain error review is never appropriate unless a threshold question is answered affirmatively—the error must be *plain*, that is, "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

In *Collins*, our Supreme Court said:

> We agree with Collins that a better method is to inform the jury that follow-up will occur at the bench. **Yet, use of a different process, such as the one in the present case, is not automatic grounds for reversal. Maryland law does not require the trial judge to question the venire at the bench.** Instead, "[i]n Maryland, unlike some of our sister jurisdictions, the trial judge may, at his or her discretion, conduct individual voir dire out of the presence of other jurors but is not required to do so." *White* [*v. State*], 374 Md. [199,] 241 [(2003)].

Collins, 452 Md. at 627 (emphasis added).

We conclude that the error claimed here is not "clear or obvious" under Maryland law, and therefore, we decline appellant's request to review this unpreserved claim for plain error.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.