Circuit Court for Baltimore City
Case No. 118190013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 54

September Term, 2019

CARLOS GARCIA-ORTIZ

v.

STATE OF MARYLAND

Friedman,
Beachley,
Gould,

JJ.

Opinion by Beachley, J.

Filed: August 18, 2020

A jury sitting in the Circuit Court for Baltimore City convicted Carlos Garcia-Ortiz, appellant, of first-degree assault. The court sentenced appellant to fifteen years' imprisonment. On appeal, appellant presents the following questions for our review:

1. Did the trial court err by refusing to propound to the venire appellant's proposed *voir dire* question number 15, pertaining to the presumption of innocence and proof beyond a reasonable doubt?

2. Did the trial court err by refusing to give a missing witness instruction?

3. Did the trial court err by failing to give a missing evidence instruction?

4. Did the trial court err by allowing inadmissible hearsay contained in medical records?

5. Did the trial court err in instructing the jury to complete the verdict sheet in a certain manner?

For the reasons set forth below, we answer the first question in the affirmative. Accordingly, we shall vacate appellant's conviction and remand for a new trial. For guidance on remand, we address the second, third, and fourth questions. We need not address appellant's fifth question, as it is unlikely to arise on remand.

BACKGROUND

On the evening of June 9, 2018, Anita Di Bartolomeo and Cesar Rodriguez went to a bar in Baltimore City. A short time later, appellant entered the bar, greeted Rodriguez, and shook his hand.[1] According to Di Bartolomeo, she and Rodriguez were dancing when appellant punched Rodriguez in the face, cutting him above his eyebrow. Di Bartolomeo testified that appellant then punched Rodriguez repeatedly, while five

[1] Di Bartolomeo testified that she observed Rodriguez and appellant exchange similar greetings outside Rodriguez's home two days earlier, on June 7, 2018.

other patrons joined in punching Rodriguez. Bar staff broke up the fight and helped Di Bartolomeo and Rodriguez outside.

Once outside, appellant and others descended on Rodriguez, punching him, beating him with a chain necklace, and kicking him in the head until he fell to the ground, unconscious. Di Bartolomeo observed appellant punch Rodriguez at least twice outside the bar. Rodriguez was taken to the hospital by ambulance.

Officer Edgard Ayala-Lopez responded to the scene outside the bar on June 10, 2018, at 1:40 a.m. and observed "a large group of people running from that location." Officer Ayala-Lopez found Rodriguez on the ground "severely injured" and unconscious, and called for an ambulance. Rodriguez regained consciousness before being transported to the hospital.

Gupreet Singh, the manager of the bar, observed Rodriguez intoxicated and bumping into people in the bar prior to the assault. Singh told Officer Ayala-Lopez that video surveillance cameras were located inside and outside the bar, and that video footage recorded that night would be available for two days before new footage automatically recorded over it. Officers returned to retrieve the video footage more than two days after the incident, but the video of the incident was no longer available. Singh did not view the video footage recorded on the night of the incident. At trial, the defense introduced into evidence a cell phone video from an unknown source showing a portion of the events outside the bar.

Officer Patrick Curtis was on patrol in the Highlandtown area when he heard a police broadcast for assistance locating a male wearing a white t-shirt and blue jeans in his patrol area. Officer Curtis observed appellant, wearing a white t-shirt and jeans, walking alone, at the intersection of the 100 block of South Eaton Street and Mount Pleasant. Officer Curtis observed that appellant's hand was wrapped in a white t-shirt with visible blood on it. Officer Curtis stopped appellant and asked for his identification, which appellant provided. Following a street identification, appellant was taken into custody.

DISCUSSION

I.

Appellant first contends that the trial court erred in failing to ask the jury his proposed *voir dire* question pertaining to the presumption of innocence and the State's burden of proof beyond a reasonable doubt. He contends that, pursuant to *Kazadi v. State*, 467 Md. 1 (2020), a case decided while his appeal was pending, the trial court's failure to ask his proposed *voir dire* question requires reversal of his conviction. As we shall explain, we agree.

Prior to trial, appellant submitted several proposed *voir dire* questions, including No. 15, which provided:

> You must presume the Defendant innocent of the charges now and throughout this trial unless and until, after you have seen and heard all of the evidence, and the State convinces you of Defendant's guilt beyond a reasonable doubt. If you do not consider the Defendant innocent now, or if you are not sure that you will require the State to convince you of the Defendant's guilt beyond a reasonable doubt, please stand.

The trial court refused to give this proposed *voir dire* question, explaining that the issue was thoroughly covered "by asking . . . whether anyone believed that there was a presumption of guilt on the part of anyone charged[.]" At the conclusion of jury selection, the court seated the jury without objection from the parties.

In *Kazadi*, the Court of Appeals held that "on request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify." 467 Md. at 35-36. The *Kazadi* decision overruled the longstanding rule set forth in *Twining v. State*, 234 Md. 97, 100 (1964), which held that it was not an abuse of discretion for a trial court to decline to ask prospective jurors if they would presume the accused's innocence and recognize the State's burden of proof. The Court of Appeals noted that the reasoning of *Twining* had become "outdated" and "superseded by significant changes in the law." *Kazadi*, 467 Md. at 9. In overruling *Twining*, the Court explained that "*[v]oir dire* questions concerning these fundamental rights are warranted because responses indicating an inability or unwillingness to follow jury instructions give rise to grounds for disqualification – *i.e*., a basis for meritorious motions to strike for cause the responding prospective jurors[.]" *Id*. at 41-42. The Court mandated that the holding applies to "any other cases that are pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellate review." *Id*. at 47.

The State argues that appellant is not entitled to reversal of his conviction because he waived his objection to the court's ruling on his *voir dire* question when he accepted the jury without qualification. The State concedes, however, that reversal would be required had appellant's argument been preserved. The State contends that the *Kazadi* decision implicitly overruled *Marquardt v. State*, 164 Md. App. 95, 143 (2005), which held that an appellant is not required to object to the composition of the jury in order to preserve an objection to the trial court's failure to ask a *voir dire* question.

In *Marquardt*, the defense proposed *voir dire* questions directed at potential jurors' abilities to follow the law regarding the presumption of innocence and the State's burden of proof. *Id*. at 141. The trial court declined to give the requested questions, believing that the jury instructions given at the close of all evidence would sufficiently cover the matter. *Id*. On appeal, this Court held that Marquardt's objection to the trial court's refusal to ask the proposed *voir dire* questions was preserved, regardless of his subsequent acceptance of the empaneled jury. *Id*. at 143. Recognizing the then controlling precedent of *Twining*, we held that the trial court did not abuse its discretion in refusing to ask appellant's proposed *voir dire* questions regarding the presumption of innocence and burden of proof beyond a reasonable doubt. *Id*. at 144.

The State asserts that, because the decision in *Marquardt* was based on the Court of Appeals's "outdated" reasoning in *Twining*, we should "reject the now-vestigial *Marquardt* holding regarding waiver." The State cites *Pietruszewski v. State*, 245 Md. App. 292 (2020), in support of its argument that *Marquardt* has been abrogated.

Pietruszewski involved the right of a defendant to exercise unused peremptory strikes in the course of jury selection. *Id*. at 300-01. In *Pietruszewski*, we recognized that "[g]rievances about both the jury selection process and the jury as constituted should be asserted before the jury is sworn because failure to do so may preclude appellate review." *Id*. at 305. Though we discussed the significance of defense counsel's objections at certain times in the jury selection process, we did not find waiver on the part of the defendant because there was nothing in the record indicating that the defendant would have exercised his peremptory challenges differently. *Id*. at 315. Rather, we concluded that the trial court's error resulted in no prejudice to the defendant. *Id*. Because our holding in *Pietruszewski* is inapposite from the facts of the present case, we disagree with the State's assertion that *Pietruszewski* mandates a finding of waiver in this case.

The State further contends that *State v. Stringfellow*, 425 Md. 461 (2012), which predated *Kazadi*, and directly addressed waiver in the context of certain *voir dire* questions, requires a finding of waiver in this case. In *Stringfellow*, Stringfellow "objected timely to the trial judge asking the venire about their views regarding whether the State must demonstrate that it employed certain scientific investigative techniques and/or scientific evidence before any member of the venire could convict him." *Id.* at 465. The trial court propounded the State's *voir dire* question regarding scientific evidence over Stringfellow's objection, but Stringfellow nevertheless accepted the empaneled jury without objection. *Id.* Because Stringfellow argued that the objectionable question "would prejudice the venire against him and diminish the State's

burden of proof," the Court concluded that his "objection went to the composition of the jury." *Id*. "Thus, when he accepted (after his objection was overruled and the question propounded) the jury, without qualification, he waived any future opportunity to complain on appeal about the objected-to question and its potential effect." *Id.*

The *Stringfellow* Court articulated the distinction between objections that are preserved for appellate review and those that are not, stating:

> Objections related to the inclusion/exclusion of prospective jurors are treated differently for preservation purposes because accepting the empaneled jury, without qualification or reservation, "is directly inconsistent with [the] earlier complaint [about the jury]," which "the party is clearly waiving or abandoning." Objections related indirectly to the inclusion/exclusion of prospective jurors are not deemed likewise inconsistent and are deemed preserved for appellate review. Although the difference between the two categories of objections may appear slight, it is important in light of the waiver implications."

Id. at 470 (internal citation omitted).

The Court concluded that Stringfellow's objection directly related to the inclusion/exclusion of prospective jurors because his "objection asserted that the venire members, if the relevant question was posed, would be unfit to sit as jurors in his trial." *Id.* at 471. As such, when Stringfellow accepted the jury without qualification, he "failed to preserve his *voir dire* objection for future consideration on appeal." *Id.*

We note that the *Stringfellow* Court expressly endorsed our holding in *Marquardt* that an objection to a judge's refusal to ask a proposed *voir dire* question is "incidental to the inclusion/exclusion of prospective jurors and, therefore, not waived by the objecting party's unqualified acceptance thereafter of the jury panel[.]" *Id*. at 470-71. The Court

identified a principal difference between propounded and unpropounded *voir dire* questions: "Therefore, an objection to a propounded, purportedly prejudicial, *voir dire* question relates directly to the composition of the jury. An unpropounded *voir dire* question, like a defused time bomb, cannot likewise prejudice the venire." *Id.* at 472-73. As in *Marquardt*, the unpropounded *voir dire* question here squarely falls within the category of objections "incidental to the inclusion/exclusion of prospective jurors," which are not waived by a party's unqualified acceptance of the jury panel.

We therefore reject the State's waiver argument and hold that appellant's request for the court to propound the subject *voir dire* question was preserved at the time the request was made and then denied by the court. In this case, *Kazadi* requires that appellant's conviction be vacated and the case shall be remanded for a new trial, where appellant's proposed *voir dire* questions regarding the presumption of innocence and burden of proof may be presented to the jury venire.

II.

Appellant next contends that the trial court erred by failing to give a missing witness instruction regarding the State's failure to call Rodriguez, the victim, as a witness. The State counters that a missing witness instruction was not appropriate because Rodriguez was not "peculiarly available" to the State.

On the first day of trial, defense counsel requested an opportunity to speak with Rodriguez, whom he characterized as a "shielded witness." Defense counsel indicated

that Rodriguez "is either here or on his way here into victim witness." The trial court responded to defense counsel's request as follows:

> THE COURT: Here's the thing, I don't think under the rules of discovery I can compel him to answer any of your questions. If [the prosecutor] wants to make him available for you -- she's indicating that she will.
>
> [PROSECUTOR]: I will make him available.

The trial proceeded, but Rodriguez did not testify.

At the close of all evidence, defense counsel requested a "missing witness" jury instruction. The following colloquy ensued:

> THE COURT: Missing witness? So that's 3:29. Are you asking for that?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: All right. So the [Criminal Pattern Jury Instruction] says you've heard testimony about the victim in this case Mr. Rodriguez who was not called as a witness in this case. So if a witness could have given important testimony on an issue in the case and if the witness was peculiarly within the power of the State to produce but was not called as a witness by the State and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the State. I will hear from you.
>
> [PROSECUTOR]: I would object to that for the victim, because he's in victim witness and if the [d]efense wanted to call him for their case he could have.
>
> THE COURT: All right. [Defense counsel], do you agree?

[DEFENSE COUNSEL]: Your Honor, the State bears the burden of proof in this case with regard to the individual --

THE COURT: Well, I think you can argue it, but I'm not going to give them an instruction on it unless you can tell me why you didn't, you know, how you were prejudiced. You could have called him if you wanted. But you can very well argue that the State didn't produce him.

[DEFENSE COUNSEL]: Understood, Your Honor. Well, given -- again, we'll make the request and just note the exception.

THE COURT: Okay. I do.[2]

Maryland Rule 4-325(c) provides that a trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Because missing witness instructions involve matters of facts and factual inferences, rather than law, they are generally not required. *Harris v. State*, 458 Md. 370, 405 (2018). As such, "a trial court has discretion not to give a missing witness instruction even if a party requests the instruction and the necessary predicate for such an instruction has been established." *Id*. at 405-06. "A trial court abuses its discretion if it commits an error of law in granting or denying a request for such an instruction." *Id*. at 406.

The "missing witness" instruction advises the jury that a party's failure to "call a material witness permits the jury to infer that the testimony would have been

[2] We note that the trial court explicitly excused the parties from renewing their previous objections at the close of the jury instructions.

unfavorable" to that party. *Dansbury v. State*, 193 Md. App. 718, 741 (2010). "[T]he missing witness rule applies where (1) there is a witness, (2) who is peculiarly available to one side and not the other, (3) whose testimony is important and noncumulative and will elucidate the transaction, and (4) who is not called to testify." *Pinkney v. State*, 200 Md. App. 563, 578 (2011) (quoting *Woodland v. State*, 62 Md. App. 503, 510 (1985)). A witness may be peculiarly available to a party if the witness is physically available only to that party or "the witness has the type of relationship with [that party] that pragmatically renders his testimony unavailable to the opposing party." *Dansbury*, 193 Md. App. at 746 (quoting *Bereano v. State Ethics Comm'n*, 403 Md. 716, 742 (2008)). A missing witness instruction is not appropriate if the witness is available to both parties. *Pinkney*, 200 Md. App. at 580.

Pinkney, *supra*, is instructive. In *Pinkney*, the defendant sought a missing witness instruction where the victim was not called by the State to testify at trial. *Id.* at 576. The trial court denied the defendant's request for the missing witness instruction, finding that there was no evidence that the victim was "peculiarly within the power of the State to produce." *Id.* at 577. On appeal to this Court, the defendant argued that the trial court erred in refusing to give the instruction because the State "was in the best position to secure the witness's presence at trial." *Id*. at 577-78. We determined that the victim was not peculiarly available to the State, and the identity of the victim was equally available to the defendant and the State. *Id*. at 579-80. Moreover, we noted that the defendant had

"not identified any efforts or attempts on his part" to secure the victim's presence at trial. *Id*. at 580.

Here, as in *Pinkney*, there was no evidence that Rodriguez was not physically available to the defense or that he had any type of relationship with the State that would render him practically unavailable. "The mere possibility that a witness personally may favor one side over the other does not make that witness peculiarly unavailable to the other side." *Bereano*, 403 Md. at 744. The trial court recognized that appellant, like the State, could have called Rodriguez as a witness if he chose to do so. There was no evidence that appellant took any steps to produce Rodriguez, either by issuing a subpoena or seeking a body attachment for him. In this case, appellant failed to make any showing that Rodriguez was peculiarly available to the State.

Moreover, although the trial court denied appellant's request to give a missing witness instruction, appellant's counsel suggested to the jury during closing argument that the jury could draw a negative inference from Rodriguez's absence. Appellant's counsel argued that Rodriguez's testimony would have been "extremely helpful" and asked the jury to consider why the State did not call him to testify and identify appellant. In light of these facts, we conclude that the trial court did not abuse its discretion in denying appellant's request for a missing witness instruction.

III.

At the close of all the evidence, appellant asked the court to instruct the jury regarding missing evidence based on the police's failure to secure the bar's surveillance

video footage from the night of the assault. The trial court denied the request, noting that "it's a fair commentary that you can make in closing[.]"

Appellant argues that the trial court erred in declining to instruct the jury regarding the missing evidence. Appellant contends that, "[d]espite the bar manager urging the police to recover the recording within the next two days," the police failed to collect the video, which "might well have created reasonable doubt as to appellant's guilt." According to appellant, "[t]he State was ultimately responsible for the failure to produce the video at trial."

A missing evidence instruction, like a missing witness instruction, involves a question of fact, not a question of law, and therefore, instructions as to evidentiary inferences are typically not required. *Patterson v. State*, 356 Md. 677, 684 (1999). "[R]egardless of the evidence, a missing evidence instruction generally need not be given; the failure to give such an instruction is neither error nor an abuse of discretion." *Id*. at 688.

Appellant argues that *Cost v. State*, 417 Md. 360 (2010), supports his position that the missing evidence instruction was warranted in this case. In *Cost*, the Court of Appeals recognized that a missing evidence instruction may be required under "exceptional" circumstances. *Id*. at 378-79. There, Cost was charged with reckless endangerment in connection with the stabbing of a fellow prison inmate. *Id*. at 363. The State sealed the victim's cell and took blood-stained linens and towels into evidence. *Id*. at 366-67. That evidence was subsequently destroyed; the linens and towels were

disposed of prior to being analyzed by the State and the victim's cell was cleaned. *Id*. The Court of Appeals determined that Cost was entitled to a missing evidence jury instruction "because the State had destroyed highly relevant evidence in its custody that it normally would have retained and submitted for forensic examination." *Id*. at 382. The Court cautioned, however, that a trial court could properly deny a request for a missing evidence instruction "where the destroyed evidence was not so highly relevant, not the type of evidence usually collected by the state, or not already in the state's custody[.]" *Id*.

Although *Cost* is clearly distinguishable because the evidence there was destroyed by State agents while in the State's custody, the court on remand should afford appellant the opportunity to develop a record as to the relevance of the surveillance cameras' footage to appellant's defense, whether this type of evidence is usually collected by the police, and the reasons why the police failed to collect the surveillance camera evidence in this case. Only then can the trial court properly exercise its discretion in determining whether to give a missing evidence instruction.

IV.

Finally, appellant contends that the trial court erred in admitting records of the Baltimore City Fire Department, State's Exhibit 6, and Johns Hopkins Bayview Medical Center, State's Exhibit 7. At trial, appellant objected to the admission of the records as containing "medical conclusions, hearsay within hearsay" and "conclusory findings about what a medical . . . test might have shown[.]" The trial court determined that the medical

records were certified business records, admissible pursuant to the business records exception to the hearsay rule, Rule 5-803(b)(6).[3] Appellant argues on appeal that the medical records "included hearsay statements that were totally unrelated to the diagnosis and treatment of Rodriguez's injuries[,]" and he specifically challenges one statement in the medical center record that "[p]er EMS, [Rodriguez] was 'jumped' by 6 guys at a nightclub for unknown reason."

"Ordinarily, hospital records may be admitted under the business records exception to the hearsay rule, Rule 5-803(b)(6)." *Hall v. Univ. of Md. Med. Sys. Corp.*, 398 Md. 67, 86 (2007) (internal quotation marks omitted) (quoting *State v. Bryant*, 361 Md. 420, 430 n.5 (2000)). Hospital records are generally considered inherently reliable as "[t]here is no motive for the person whose duty it is to make the entries, to do other than record them correctly and accurately." *Id*. at 87 (quoting *Globe Indem. Co. of N.Y. v. Reinhart*, 152 Md. 439, 446 (1927)). Indeed, "[t]he very purpose of Rule 5-803(b)(6) .

[3] Md. Rule 5-803(b)(6) provides, in pertinent part:

> Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness.

. . is to carve out an exception to the personal knowledge requirement in order to allow greater admissibility of business records." *Id*. at 88.

When considering the admissibility of any medical record, however, we require that the "statements in a hospital record must be 'pathologically germane' to the physical condition which caused the patient to go to the hospital in the first place." *Id*. at 92 (quoting *Yellow Cab Co. v. Hicks*, 224 Md. 563, 570 (1961)). A statement is "pathologically germane" if it "includes facts helpful to an understanding of the medical or surgical aspects of the case[.]" *State v. Garlick*, 313 Md. 209, 222 (1988). That "is not to say, however, that there have not been some [medical] records (or more precisely some entries within those records) that have been objectionable or found to have been inadmissible." *Id.* at 220.

Here, the trial court should determine whether the medical records, including the statement that Rodriguez "was 'jumped' by 6 guys," were pathologically germane to the diagnosis and treatment of Rodriguez's condition when he arrived at the medical center by ambulance, suffering from multiple injuries.[4] On remand, the parties may wish to consider redaction of the records to remove any objectionable references.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED TO THAT COURT FOR

[4] We also note that, pursuant to Rule 5-803(b)(4), "[s]tatements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment" are generally admissible.

A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.