Circuit Court for Anne Arundel County
Case No. C-02-CR-18-001709

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 240

September Term, 2019

BRIGIDO LOPEZ-VILLA

v.

STATE OF MARYLAND

Berger,
Arthur,
Kenney, James A. III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 19, 2020

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

After a four-day jury trial in the Circuit Court for Anne Arundel County, appellant Brigido Lopez-Villa was acquitted of three counts of second-degree rape and two counts of second-degree sexual offense, but convicted of one count of sexual abuse of a minor and four counts of third-degree sexual offense. The court sentenced Lopez-Villa to 20 years' imprisonment for sexual abuse of a minor and to four, concurrent 10-year terms for the third-degree sexual offenses. This timely appeal followed.

QUESTIONS PRESENTED

Lopez-Villa presents two questions, which we have rephrased for accuracy and concision:

> I. Did the trial court err by not asking the venire panel certain requested voir dire questions that are required by *Kazadi v. State*, 467 Md. 1 (2020)?
>
> II. Did the trial court abuse its discretion by denying motions to strike four prospective jurors for cause?[1]

We hold that Lopez-Villa failed to preserve his first contention of error; we answer the second question in the negative. Thus, we shall affirm the judgments of the circuit court.

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[1] Lopez-Villa formulated his questions as follows:

> 1. Did the trial court err by failing to propound to the venire appellant's request voir dire questions pertaining to the presumption of innocence and proof beyond a reasonable doubt?
>
> 2. Did the trial court err by failing to strike four potential jurors for cause?

BACKGROUND

The underlying facts are largely irrelevant to the issues on appeal. Suffice it to say that the evidence, when viewed in the light most favorable to the State, was sufficient to support the convictions. Lopez-Villa does not contend otherwise.

About a month after Lopez-Villa appealed his conviction, the Court of Appeals granted a petition for a writ of certiorari to review the decision in *Kazadi v. State*, 240 Md. App. 156 (2019). The petition asked the Court to decide whether a criminal defendant is "entitled, upon request, to voir dire questions aimed at identifying prospective jurors who are unable or unwilling to apply the principles that the State has the burden of proving the defendant guilty beyond a reasonable doubt, that the defendant is presumed innocent, and that the defendant has the right to remain silent and refuse to testify and that no adverse inference may be drawn from the defendant's silence?"

Because Lopez-Villa's appeal relates to the issues that were before the Court of Appeals in *Kazadi*, we stayed his appeal pending the resolution of that case. On January 24, 2020, the Court of Appeals decided *Kazadi v. State*, 467 Md. 1 (2020), and 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." *Id.* at 35-36. On April 2, 2020, this Court lifted the stay on Lopez-Villa's appeal, and briefing resumed.

DISCUSSION

I. Omission of Questions During Voir Dire

At Lopez-Villa's trial, he and the State submitted a total of 46 written proposed voir dire questions. Two of Lopez-Villa's questions generally concerned the presumption of innocence and the State's obligation to prove his guilt beyond a reasonable doubt.

On the first day of trial, the trial court advised the parties that it had "reviewed the voir dire as proposed." The court went through each party's proposed voir dire, beginning with the State's requests, and advised the parties which questions it was "inclined" and "not inclined" to ask.

The court said that it was "not inclined" to ask either of Lopez-Villa's proposed questions concerning the presumption of innocence and the requirement of proof beyond a reasonable doubt. Defense counsel did not object to the court's statement that it was disinclined to ask those questions. Instead, he asked for clarification about how the court intended to handle other proposed voir dire questions.

The court ultimately posed a modified version of one of the two questions that mentioned the presumption of innocence and the State's obligation to prove guilt beyond a reasonable doubt. In modifying the proposed question, however, the court omitted any reference to the presumption of innocence and the obligation to prove guilt beyond a reasonable doubt.

After the court finished the general voir dire, it convened a bench conference, at which it asked counsel whether it had "miss[ed] any questions." Defense counsel did not

point out or object to the court's failure to ask the questions concerning the presumption of innocence and the requirement of proof beyond a reasonable doubt. Moreover, when the court asked whether the defense requested any additional questions, counsel answered, "[n]o."

In this appeal, Lopez-Villa contends the trial court erred in declining to ask his proposed voir dire questions concerning the presumption of innocence and the requirement of proof beyond a reasonable doubt. He maintains that both questions are required under *Kazadi*.

Kazadi applies to any cases that were pending on direct appeal when the opinion was filed, as long as "the relevant question has been preserved for appellate review." *Id.* at 47 (citations omitted). This appeal was pending when *Kazadi* was decided. Therefore, *Kazadi* applies here, provided that "the relevant question has been preserved for appellate review." *Id.*

"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 v. State*, ___ Md. App. ___, 2020 WL 5819608, at *2 (Sept. 30, 2020). Rulings on proposed voir dire questions are governed by Rule 4-323(c), which provides, in pertinent part, as follows:

> For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.

Appellants can preserve the issue of omitted voir dire questions under Rule 4-323 by telling the trial court that they object to their proposed questions not being asked. *Smith v. State*, 218 Md. App. 689, 700-01 (2014). For example, an appellant preserved an objection when, "[d]uring the time set aside for objections to omitted *voir dire* questions, [he] listed several omitted questions, and the trial court ruled on each." *Id*. at 701. Similarly, an appellant preserved an objection when he "told the circuit court that he objected to [certain requested questions] not being asked" after the court "asked if there were any problems with voir dire." *Marquardt v. State*, 164 Md. App. 95, 143 (2005), *overruled in part on other grounds*, *Kazadi v. State*, 467 Md. 1 (2020). An appellant also preserved an objection when his counsel enumerated the specific questions that he had requested, but that the court had refused to read. *Baker v. State*, 157 Md. App. 600, 608-10 (2004).

In this case, when the circuit court indicated that it was disinclined to ask Lopez-Villa's proposed voir dire questions concerning the presumption of innocence and the State's obligation to prove his guilt beyond a reasonable doubt, defense counsel did not "make[] known to the court . . . the objection to the action of the court." Md. Rule 4-323(c). In particular, defense counsel did not identify the questions that the court had failed to ask or tell the court that he objected to the failure to ask those specific questions. Instead, he asked what the court intended to do with some of his other proposed questions. Lopez-Villa, therefore, did not preserve his objection to the court's failure to ask his requested questions. Lopez-Villa also failed to preserve his objection to the

court's decision not to ask his proposed voir dire questions when his counsel told that court that he requested "[n]o" additional questions. *See Gilmer v. State*, 161 Md. App. 21, 33 (2005) (stating that if defendants fail to object to the decision not to ask a proposed voir dire question, they "cannot . . . complain about the court's refusal to ask the exact question [they] requested"), *vacated in part on other grounds*, 389 Md. 656 (2005).

In his reply brief, Lopez-Villa argues that "any additional 'protest' by defense counsel . . . would have run the risk of antagonizing the court." His argument fails because Lopez-Villa registered no "protest" when the court announced that it would not read his proposed questions concerning the presumption of innocence and the State's obligation to prove his guilt beyond a reasonable doubt. He could not antagonize the court with an additional protest if he had never made an initial protest.

Lopez-Villa adds that he had "no obligation to state the grounds for the objection, because the court did not direct him to do so." Had Lopez-Villa made an objection on the record to the court's statement that it did not intend to ask the requested questions, we would agree. Because he made no objection, however, the court did not have the opportunity to inquire as to the grounds.

In summary, Lopez-Villa failed to preserve his objection to the court's refusal to read his proposed voir dire questions concerning the presumption of innocence and the State's burden of proving his guilt beyond a reasonable doubt. In these circumstances, he cannot fault the circuit court for not asking the voir dire questions that are now mandatory under *Kazadi*.

II. Denial of Motions to Strike Prospective Jurors for Cause

Under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, a criminal defendant has the right to be tried by an impartial jury. The right to an impartial jury does not mean that prospective jurors "will be free of all preconceived notions relating to guilt or innocence," but only that they "can lay aside [their] impressions or opinions and render a verdict based solely on the evidence presented in the case." *Couser v. State*, 282 Md. 125, 138 (1978); *accord Irwin v. Dowd*, 366 U.S. 717, 723 (1961)(stating that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court[]"). Voir dire is the means "'to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'" *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312 (2012)).

If parties believe that a prospective juror will not be fair and impartial, they can move to strike that juror for cause. Md. Rule 4-312(e)(2). Because "[t]he trial court is in the best position to assess a juror's state of mind, by taking into consideration the juror's demeanor and credibility[,]" it is afforded wide discretion in assessing whether to excuse a juror for cause. *Ware v. State*, 360 Md. 650, 666 (2000); *accord Morris v. State*, 153 Md. App. 480, 501 (2003).

Lopez-Villa argues that the trial court abused its discretion by not disqualifying four prospective jurors (Jurors No. 11, 43, 54, and 54) for cause. In Lopez-Villa's view,

the jurors' answers, which he describes as "equivocal," show that they could not be fair and impartial.[2]

The jurors in question, along with more than 40 other jurors, answered "yes" to the question about whether they had "strong feelings" about the nature of the charges. During individual voir dire, the court, on its own motion, dismissed 13 of those jurors for cause. The court also dismissed three additional jurors for cause on Lopez-Villa's motion.[3]

Juror No. 11 initially stated that the charges were "awful," "disgusting," and "bad." The court responded by explaining that the charges were mere allegations and that the State would need to prove its case. When the court asked Juror No. 11 if she could "put aside those strong feelings," she responded, "I could do my best." The following discussion ensued:

> THE COURT: I need more than that. I need to know – well, let me finish. Could you put aside the strong feelings and listen to the law and the evidence? And if the State proves it, they prove it. And if they don't, you have to be willing to say you didn't prove it. Could you do that?

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[2] Because Lopez-Villa used all his peremptory challenges, this issue is before us for review. *See White v. State*, 300 Md. 719, 729 (1984); *accord Ware v. State*, 360 Md. at 665; *Morris v. State*, 153 Md. App. at 496-97. Lopez-Villa exercised two of his peremptory challenges to excuse Jurors No. 11 and 43. After he had exhausted all of his peremptory challenges, Juror No. 45 was seated as Alternate No. 2, but she was excused before the deliberations began. Juror No. 54 was excused at the end of jury selection and was never seated.

[3] The court denied the State's motion to strike a juror who complained that she had been falsely accused of sexual abuse.

JUROR NO. 11: Yeah, I could do that.

THE COURT: Okay.

JUROR NO. 11: I could. Yeah.

THE COURT: All right. It is not easy. It is real hard. But you have got to dig deep and you have got to say – you can't be swayed by any emotions. Can you do that?

JUROR NO. 11: Yeah, I can. I mean if he didn't do it and they prove that he didn't do it, then he didn't do it.

THE COURT: Well, it is not their burden to prove anything.

JUROR NO. 11: Right.

THE COURT: The Defense doesn't have to prove anything. He is presumed innocent.

JUROR NO. 11: Okay. So it's – okay.

THE COURT: It is only on the State's Attorney. It is only whether they prove it or they don't prove it.

JUROR NO. 11: Okay.

THE COURT: Okay?

JUROR NO. 11: Uh-huh.

THE COURT: Now, do you understand that?

JUROR NO. 11: I do.

THE COURT: Have you ever been in a courtroom or a jury or anything like that?

JUROR NO. 11: No.

THE COURT: So it is brand new?

JUROR NO. 11: Yeah.

THE COURT: Okay, all right.

JUROR NO. 11: I don't know if that's good or bad.

THE COURT: No, no. It is all right. I just appreciate your honesty. You can go ahead and have a seat.

JUROR NO. 11: All right. Thanks.

THE COURT: All right.

Defense counsel moved to strike Juror No. 11. Although some of counsel's comments were inaudible, he appears to have objected on the ground that the juror did not understand "rudimentary and fundamental" concepts. The court responded, "[W]e will instruct her." In addition, the court stated that Juror No. 11 "made it very clear she would follow the law."

Juror No. 43 worked for the Secret Service and previously had worked for a local police department. He told the court that he had "always felt that sexual assault was probably one of the most heinous crimes." The court reminded him that the charges were only allegations and asked whether he could "put aside" whatever he thought he knew "and decide this case only upon the law and the evidence as it is presented in the courtroom?" The juror replied, "I could." The trial court denied defense counsel's motion to strike for cause without comment.

Juror No. 45 expressed feelings of "[d]isgust, anger[,]" and "[h]atred" in response to the charges against Lopez-Villa. The court inquired if he could "put aside those feelings and decide the case based solely on the law and the evidence[.]" The juror

initially answered, "I can do the best I can." The court responded that the juror could not equivocate and asked him against if he could "decide the case based on the law and the evidence and not allow [his] feelings and not allow [his] emotions to get in the way." The juror responded, "I can do it. Yes. It's the best I can do." When defense counsel moved to strike Juror No. 45, the court denied the motion, reasoning that he "answered it as I would expect a human being to [answer]. I don't like the charges and I can be fair."

Juror No. 54 remarked that the charges were "really serious," "especially" because the victim was "a minor." "It's just really heartbreaking," she added. When asked if she could put aside her strong feelings, she initially replied, "I really want to say yes, but I don't know what I would actually do in the situation." The court responded by discussing the role of a juror in a criminal trial with her:

> THE COURT: I will give the State's Attorney a fair side. I will give the Defense a fair side. And then in the end, I will judge it based upon the law and the evidence. Nobody knows if they can do it until they do it, but we have to have people who are willing to say they will be fair and impartial and then step in and do it. Can you do that?
>
> JUROR NO. 54: I will try.
>
> THE COURT: Can you do it?
>
> JUROR NO. 54: I guess. It's hard. I don't know.
>
> THE COURT: If you're a group of 12 selected to hear the case, will you give both the State and the Defense a fair trial?
>
> JUROR NO. 54: Yes.
>
> THE COURT: You are nodding your head yes even when you were saying I will be fair.

JUROR NO. 54: I know.

THE COURT: [Inaudible] you are a little scared, aren't you?

JUROR NO. 54: A little. Yeah.

THE COURT: [Inaudible].

JUROR NO. 54: Well, it's just a really like sensitive subject. So –

THE COURT: Sure. We are going to talk about things that people don't talk about [inaudible] societies, you know? But life is what it is. Put aside your emotions and be fair. All right. Thank you. You can have a seat.

The court denied defense counsel's motion to strike Juror No. 54, explaining that it "was watching her very, very closely, and as she was saying I can or try, she was nodding her head yes." The court said that it saw "clearness in her eyes" and heard "the strength of her voice." Although the juror was "scared," the court had "no doubt" that "she would be fair."

Lopez-Villa argues that the court abused its discretion in denying his motion to strike these four jurors, because, he says, they "never affirmed unequivocally that they could set aside their strong feelings towards the charges and decide the case on the facts presented." To the contrary, Juror No. 11 said that she "could" put aside her strong feelings and listen to the law and the evidence. Juror No. 43 also said that he "could" put aside his preconceptions and decide this case based only upon the law and the evidence as it was presented in the courtroom. When the court asked Juror No. 45 whether he could decide the case based on the law and the evidence and not allow his feelings and

emotions to get in the way, he answered, "I can do it." Similarly, Juror 54 said that she could give both the State and the defense a fair trial.

The court did not abuse its discretion in denying a motion to strike merely because the jurors affirmed their ability to decide the case fairly and impartially based solely on the evidence before them only after a series of exchanges in which the court instructed them about a juror's obligations. In *Morris v. State*, 153 Md. App. at 498, a homicide case, one of the jurors began by saying that "he might be biased against the defendants" because two of his brothers had been "'gunned down in the street.'" The juror's "final position, however, was that he probably could keep an open mind until he had heard all the evidence." *Id.* at 499. On those facts, a majority of this Court held that the trial judge did not abuse his "wide discretion" in denying a motion to strike. *Id.* at 501. "In all of these discretionary calls on challenges for cause," the majority reasoned, "what matters most is the final position asserted by the challenged juror and the judge's conclusion as to the significance of that response." *Id.* at 501-02. "There may have been a potential for bias in the air but there was not, as a matter of law, actual bias on the ground." *Id.*

In this case, the trial judge had the singular ability to see and hear the prospective jurors as they discussed their strong feelings and preconceptions and affirmed their ability to decide the case fairly and impartially based solely on the evidence presented. "The appellate judge, by contrast, is stuck with the court reporter." *Id*. at 503. "[T]hat is why we constantly admonish ourselves to be deferential." *Id*. In view of those admonitions,

we conclude that the trial judge did not abuse his discretion in denying the motions to strike these four jurors for cause in Lopez-Villa's case.[4]

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] Because Juror 54 was excused at the end of jury selection and was never seated as a juror, the court could not have committed prejudicial error in declining to strike her for cause. *See Ware v. State*, 360 Md. at 665 (holding that where none of the challenged jurors served on the jury, it was "clear beyond a reasonable doubt that any alleged bias and/or knowledge of the case could not have influenced the verdict"). Similarly, because Juror No. 45 was seated as an alternate, but was excused before the jurors started deliberations, it is unclear how Lopez-Villa was prejudiced by his participation. *See id.* The State, however, does not make those arguments. Consequently, we do not consider them.