Circuit Court for Harford County
Case No. 12-K-16-000898

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 281

September Term, 2019

RONALD BRIAN COMER, JR.

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: November 20, 2020

A jury in the Circuit Court for Harford County convicted appellant, Ronald Brian Comer, Jr., of two counts of second-degree assault, but acquitted him of more serious murder, conspiracy, and handgun charges. After receiving a twenty-year prison sentence, Comer filed a timely notice of appeal, but his trial attorney did not file the required trial transcripts. As a result, this Court dismissed his appeal. Finding that Comer's trial attorney provided ineffective assistance of counsel, the trial court granted Comer's petition for post-conviction relief and permitted the belated filing of a notice of appeal, which Comer filed on April 18, 2019.

Comer asks us to consider whether: (1) the trial court erred or abused its discretion in declining to ask a particular *voir dire* question he proposed; and (2) the trial court's award of restitution for the victims' funeral expenses constituted an illegal sentence. For the reasons that follow, we reverse the restitution award in favor of the Criminal Injuries Compensation Board, but otherwise affirm the judgments of the trial court.

BACKGROUND

On the night of June 12, 2016, several people, including Comer, Tanesha Smothers, Smothers's boyfriend Jumal Dudley, and Michael Ringgold, were socializing at Emmanuel Carlos and his fiancée Renee Gregory's home in Aberdeen, Maryland. Throughout the evening, Comer and Smothers were "in and out" of the apartment several times attempting to obtain drugs.

Starting at approximately 2:30 a.m. on June 13, 2016, Comer began using Ringgold's cell phone to exchange text messages with Terrell Walton. At 3:06 a.m.,

Walton texted to Comer, "Come out in five minutes." A few minutes later, Comer prompted Smothers to go with him outside, and Smothers asked Dudley to join her.

Carlos, sensing that something was amiss, looked out an upstairs window and saw Walton on his back porch. As Comer, Smothers, and Dudley exited the building, Carlos observed Comer grab Dudley in "[l]ike a bear hug." Walton then shot Dudley in the head. Smothers attempted to run, but while she was still only a few feet away from the building, Walton shot her four times. Smothers was pronounced dead on the scene, and Dudley succumbed to his injuries at University of Maryland Shock Trauma shortly thereafter.

After the gunshots, Carlos saw Walton hand something to Comer before both men ran up the alley.[1] Walton got into a waiting car, and, a few minutes later, Comer came around to Carlos's back door. Comer re-entered the apartment and asked Carlos and Gregory to lie to the police and say that he and Smothers had been on the porch together "rollin' a blunt." To Ringgold, Comer appeared distraught, saying he could not believe what had just happened. Carlos characterized Comer as "[s]cared, jittery" but not upset.

When the police arrived, Comer was still on the scene. Despite having witnessed the murders, Carlos was afraid to speak to the police with Comer present, so Carlos did not immediately tell the officers what he had seen.

Comer told Officer James Evans that "a black guy" shot the victims and then ran toward a wooded area behind the apartment building. Comer told Detective John Divel

[1] According to the State's theory of the case, Walton handed Comer the gun used in the shooting.

that he was outside with both victims when he saw "flashes out of nowhere," which caused him to run and hide under a car. Comer also initially told Detective Arnold Houghton that, after the shooting, he ran down a ravine and hid under a car. When Detective Houghton searched the area near the car, however, he noted that it appeared undisturbed.

During a second interview a short time later, Comer told Detective Houghton that he ran around the apartment building and re-entered it through a different door. Between the first and second interviews, Detective Houghton observed that Comer had changed his clothes, which led Detective Houghton to believe Comer had left the scene between the two interviews.

Upon learning that Comer had used Ringgold's phone to contact Walton, Detective Divel re-interviewed Comer at his home. Comer admitted to using the phone to text Walton but said it was for the purpose of contacting his drug dealer. Carlos finally provided his eyewitness account of the shooting to police once they assured him that he and his family would be relocated to an undisclosed location to ensure their safety.

As stated above, the State charged Comer with murder, assault, conspiracy, and handgun charges. Following a four-day trial, the jury only convicted appellant of two counts of second-degree assault.

DISCUSSION

I. *Voir Dire*

Comer first argues that, in light of the Court of Appeals's decision in *Kazadi v. State*, 467 Md. 1 (2020), he is entitled to a reversal of his convictions because the trial court

declined to ask prospective jurors whether they agreed with the principles of proof beyond a reasonable doubt and presumption of innocence. The State acknowledges that *Kazadi* would require a reversal had Comer preserved his appellate claim, but counters that Comer failed to do so by: (1) withdrawing or abandoning his request for the questions; and (2) expressing unconditional satisfaction with the jury as selected.

Prior to trial, defense counsel submitted written *voir dire* questions, requesting the trial court to include question 12 in its *voir dire* inquiry:

> 12. The Defendant has entered a plea of not guilty to the charges in this case, thereby requiring the Prosecutor to prove [his] case beyond a reasonable doubt.
>
> (a) Are there any of you who do not accept the proposition that RONALD B. COMER, JR. is innocent if and until the Prosecutor is able to prove him guilty?
>
> (b) Do you attach any particular significance to the fact that RONALD B. COMER, JR. has been charged with this crime? If so, what significance?

On the first day of trial, the court asked if the prosecutors and defense counsel had reviewed the other side's requested *voir dire*. When both attorneys indicated that they had, the court engaged in a colloquy with counsel concerning *voir dire*, including the following discussion regarding questions requested by the defense:

> THE COURT: All right. Now, in terms of your voir dire, I don't ask any questions that expand to family members. I ask questions specifically as to the jurors. Concerning your Question 7, I have rephrased it. You have asked that question as: Is there any member of the jury panel who feels that because they have a close friend or relative employed by a law enforcement agency, State's Attorney's Office, United States Attorney's

Office, Attorney General's Office, Special State Prosecutor of Maryland Office, he or she would give more weight to the testimony of a law enforcement Officer or the relationship would cause him or her to favor the State? I'm already asking the question about more or less scrutiny. I'm going to ask this question as follows: Is any member of the panel employed by or associated with any law enforcement agency, State's Attorney's Office, United States Attorney's Office, Attorney General's Office or the Special State Prosecutor's Office? That's it.

[DEFENSE COUNSEL]: That's acceptable to me, Your Honor.

THE COURT: Anything from the State?

[PROSECUTOR]: No, Your Honor.

THE COURT: Okay. Anything else that's repetitive, I'm not going to be asking.

[PROSECUTOR]: Your Honor, if I could just note some objections. Number 9 and 10. Number 9 I think is more of a jury instruction than it is a proper voir dire question. Number 10 I don't believe is a proper question.

THE COURT: Do you want to be heard?

[DEFENSE COUNSEL]: No, Your Honor. I mean, these questions are probably handled in other questions and they seem to be repetitive, duplicative. So I'll have to make a note to change this.

THE COURT: I agree with Number 9 about the principles because I think by asking the jurors if they have any moral or philosophical views, I think the State covers that in one of their questions. I do think it might be appropriate simply to ask whether anybody is inferring guilt as a result of

	the charges, just to thread that out. So I'll ask 11. Anything else?
[PROSECUTOR]:	*No. Well, 12, I think, is sort of trying to get the jurors to prejudge.*
THE COURT:	*I have that crossed off. Anything you want to be heard on Number 12?*
[DEFENSE COUNSEL]:	*No, Your Honor.*
[PROSECUTOR]:	And Number 18.
THE COURT:	I have crossed that out, too. Do you want to be heard on 18?
[DEFENSE COUNSEL]:	No, Your Honor.
THE COURT:	Okay. Anything else from the State?
[PROSECUTOR]:	No, Your Honor.
THE COURT:	Any concerns you have with the State's voir dire?
[DEFENSE COUNSEL]:	The only concern I have is Number 1 because it doesn't seem to be a question.

(Emphasis added).

The court did not include Comer's requested question 12 in its *voir dire* questioning. At the close of the general questioning, but before individual follow-up questioning of the prospective jurors, the court inquired of counsel:

THE COURT:	All right. Any issues concerning the questions or anything that I did not ask that needs to be asked? Any concerns?
[PROSECUTOR]:	None by the State.

[DEFENSE COUNSEL]: *None by the defense*.

(Emphasis added).

At the completion of *voir dire*, Comer accepted the jury, including alternates, as seated, without condition or exception.

In *Kazadi v. State*, 467 Md. 1, 35-36 (2020), 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." A trial court abuses its discretion when it fails to ask these questions upon request. *Id.*

The *Kazadi* decision overruled the longstanding principle set forth in *Twining v. State*, 234 Md. 97 (1964), that a trial court could properly decline to ask prospective jurors questions concerning the accused's presumption of innocence and the State's burden of proof. *Kazadi*, 467 Md. at 48. In overruling *Twining*, the *Kazadi* Court explained that "*Voir 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 (citing *Hayes v. Commonwealth*, 175 S.W.3d 574, 585 (Ky. 2005)).

The Court of Appeals explained that *Kazadi* 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 (citing *Hackney v. State*, 459 Md. 108, 119 (2018)). We note that this case was pending on direct appeal when *Kazadi* was filed on January 24, 2020 (and amended on March 2, 2020). Nevertheless, we must first determine whether Comer preserved any challenge to the court's denial of his question, either by failing to object, or by accepting the empaneled jury without qualification.

Kazadi did not clarify the requirements for preserving the relevant question for appellate review. Since its publication, several appeals have followed where the State has argued, as it does here, that the appellant failed to preserve the issue by accepting the empaneled jury without qualification. We recently addressed whether accepting the empaneled jury without qualification preserved the issue for appeal in *Foster v. State*, ___ Md. App. ___, No. 462 Sept. Term, 2019 (Ct. of Spec. App. Sept. 30, 2020).[2] There, the trial court declined Foster's request to ask a *voir dire* question now mandated by *Kazadi*, and although Foster objected, he later accepted the jury without qualification. *Id.* slip op. at 6. Applying *State v. Stringfellow*, 425 Md. 461 (2012), we concluded that Foster effectively preserved the issue by immediately objecting upon the trial court's denial of his request, and that he "did not waive his *Kazadi* claim through his unqualified acceptance of the empaneled jury." *Foster*, slip op. at 6.[3]

[2] We note that a petition for writ of *certiorari* was filed in *Foster* on October 26, 2020.

[3] The Court of Appeals recently granted *certiorari* in a case involving the same issue. *See Anthony George Ablonczy v. State*, No. 3219, Sept. Term, 2018, *cert. granted*, No. 28, Sept. Term, 2020 (Md. Oct. 6, 2020).

We therefore reject the State's argument that Comer's acceptance of the empaneled jury constituted a waiver of his *Kazadi* claim. Unlike in *Foster*, however, where the defendant promptly objected after the trial court stated it would not propound the requested questions, Comer's counsel failed to object to the court's decision and, at the close of questioning, specifically stated that he had no issue or concern regarding any question the court had not propounded. By failing to object to the trial court's decision, Comer failed to preserve the issue for appellate review.

Objections made during jury selection are governed by Maryland Rule 4-323(c), which states, in relevant part, that "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." *See also Wimbish v. State*, 201 Md. App. 239, 265-66 (2011). A defendant "preserves the issue of omitted *voir dire* questions under Rule 4-323 by telling the trial court that he or she objects to his or her proposed questions not being asked." *Smith v. State*, 218 Md. App. 689, 700-01 (2014). "This objection does not need to be a formal exception to the ruling; rather, the objector simply needs to make known to the circuit court what is wanted done." *Id.* at 700 (internal citation and quotation marks omitted) (quoting *Marquardt v. State*, 164 Md. App. 95, 143 (2005)). If, however, an opportunity to object presents itself and a defendant fails to object to a court's refusal to read a proposed question, the objection is waived. *Brice v. State*, 225 Md. App. 666, 679 (2015).

Here, after the court stated that it had "crossed off" question 12, it asked defense counsel whether he wanted to be heard, to which counsel responded "No, Your Honor." Later, when the court asked the attorneys whether they had any "issues" or "concerns" regarding "anything [the court] did not ask that need[ed] to be asked," defense counsel responded, "None by the defense." Although counsel had at least two opportunities to object to the trial court's decision not to ask his proposed question number 12, he failed to do so. Accordingly, the issue has not been preserved for appellate review, and reversal of his convictions on that basis is not warranted.[4]

II. *Restitution Reimbursement to Criminal Injuries Compensation Board*

Comer next argues that the trial court imposed an illegal sentence when it ordered him to pay a total of $7,073 to the Criminal Injuries Compensation Board as reimbursement to Smothers's and Dudley's families for funeral expenses. Because he was acquitted of murder and other charges related to their deaths, Comer asserts that restitution for funeral expenses was improper as they were not "the direct result of the crime" of which he was convicted—second-degree assault. The State concedes that the trial court improperly applied a "but for" causation analysis in awarding funeral expenses and that the restitution award should be vacated, but nevertheless seeks a remand for the trial court to apply the

[4] Anticipating his lack of preservation, Comer also asks that we consider whether the trial court committed plain error by failing to propound the requested question. We decline to do so. At the time of Comer's trial, pursuant to *Twining*, the law was that a trial court did not abuse its discretion in refusing to ask *voir dire* questions relating to the presumption of innocence or the State's burden of proof. We fail to see how the trial court committed plain error under these circumstances.

appropriate standard. In his reply brief, Comer responds that a remand "will not change the fact that funeral expenses are not proper restitution expenses for a second[-]degree assault conviction." We agree with Comer and reverse the restitution award.

An award for restitution may be challenged as an illegal sentence at any time. *See Goff v. State*, 387 Md. 327, 340 (2005). We generally review a trial court's restitution order for abuse of discretion. *In re G.R.*, 463 Md. 207, 213 (2019). If "determining the propriety of a restitution order" involves a matter of "statutory interpretation, however, the review is conducted without deference to the trial court's action." *Ingram v. State*, 461 Md. 650, 659 (2018) (citing *Harrison-Solomon v. State*, 442 Md. 254, 265 (2015)).

A trial court may order restitution as part of a criminal sentence pursuant to Md. Code (2001, 2018 Repl. Vol.), §11-603(a) of the Criminal Procedure Article ("CP"). *See Pete v. State*, 384 Md. 47, 55 (2004). That statute provides, in relevant part:

> (a) A court may enter a judgment of restitution that orders a defendant . . . to make restitution in addition to any other penalty for the commission of a crime . . . , if:
>
> * * *
>
> (2) as a *direct result of the crime* or delinquent act, the victim suffered:
>
> (i) actual medical, dental, hospital, counseling, funeral, or burial expenses or losses;
>
> * * *
>
> (5) the Criminal Injuries Compensation Board paid benefits to a victim[.]

CP §11-603(a) (emphasis added).

Restitution is "a criminal sanction, not a civil remedy." *State v. Stachowski*, 440 Md. 504, 512 (2014) (quoting *Grey v. Allstate Ins. Co.*, 363 Md. 445, 451 (2001)). Although restitution may have "a therapeutic and rehabilitative function with respect to the defendant, its predominant and traditional purpose is to reimburse the victim for certain kinds of expenses that he or she incurred as *a direct result of the defendant's criminal activity*." *Chaney v. State*, 397 Md. 460, 470 (2007) (emphasis added).

In *Pete*, the Court of Appeals stressed the significance of the "direct result of the crime" language contained in the restitution statute. 384 Md. at 57. There, Pete assaulted a woman and fled the scene. *Id*. at 51. Nearly two hours later, he engaged in reckless driving which ultimately resulted in over $6,000 in damage to a police cruiser. *Id*. at 52. Following a bench trial, the circuit court convicted Pete of second-degree assault, reckless driving, and other charges. *Id*. at 49. Relevant here, as a condition of probation, the court ordered Pete to make restitution to the assault victim in the amount of $355.06 for the harm he caused her, and $6,490.53 to the Local Government Insurance Trust for the damage to the police cruiser. *Id*. at 50.

On appeal, the Court of Appeals struck the restitution award as it pertained to the police cruiser. *Id*. at 50. At the outset, the Court noted that probation was only ordered based on Pete's second-degree assault conviction, and that the restitution was a condition of that probation. *Id*. at 54. The Court next observed that the sentencing court did not have the authority to award restitution for damage to the police cruiser based on Pete's reckless driving conviction because reckless driving "is not a 'crime' for which restitution may be

ordered." *Id*. at 56. This was so because reckless driving may not be punished by a term of confinement, which prevented the court from ordering probation and restitution as to that offense. *Id.* at 56-57.

The Court of Appeals then turned to the only other remaining offense that could substantiate the restitution award—the second-degree assault conviction. *Id*. at 57. The Court, however, rejected the notion that the damage to the police cruiser could constitute a "direct result" of that crime. *Id*. The Court explained,

> In this case, the collision with, and resultant damage, to [the] cruiser are a direct result of Pete's reckless driving, not his assault on [the victim]. The damage to the cruiser is a direct result of Pete stopping abruptly, from a relatively high rate of speed, in the path of the cruiser. . . . It is easy to see on this record that the damage to the police cruiser could not be a direct result of the assault on another individual that occurred approximately two hours earlier than the vehicle collision.

Id. at 61. In short, the damage to the police cruiser was not a "direct result" of Pete's assault. Accordingly, the Court vacated that portion of the restitution award.

Another important principle regarding the "direct result of the crime" component of restitution awards is that restitution may only be awarded for the "crime" of which the defendant is convicted. *Walczak v. State*, 302 Md. 422 (1985), succinctly demonstrates this principle. There, the defendant was charged with two counts of robbery with a dangerous weapon and related charges stemming from an incident in which he and three cohorts robbed two women: Ms. Gardner and Ms. Martin. *Walczak*, 302 Md. at 424. "Pursuant to an agreement between Walczak and the State, Walczak was tried on count one only, which charged the robbery of Gardner with a deadly weapon." *Id*. Following

his conviction on that count, the court, as part of Walczak's sentence, ordered him to pay restitution to both Gardner *and* Martin. *Id*.

On appeal, Walczak challenged the restitution as to Martin because she was the victim of a crime of which he had not been convicted. *Id*. at 424-25. In vacating Walczak's restitution as to Martin, the Court of Appeals stated, "restitution is punishment for the crime of which the defendant has been convicted. Restitution depends on the existence of that crime, and the statute authorizes the court to order restitution only where the court is otherwise authorized to impose punishment." *Id*. at 429. Because the State never secured a conviction based on conduct Walczak committed against Martin, "the trial court was not authorized under [the then applicable restitution statute] to impose any order of restitution under the counts charging Walczak with the robbery of Martin." *Id*. at 430.

We recognize that *Pete* and *Walczak*, though helpful, are not on all fours with the instant case. Nevertheless, those cases lead us to conclude that the restitution award for funeral expenses here was not a direct result of the crimes for which Comer was actually convicted. The State charged Comer with first and second-degree murder. As the Maryland Criminal Pattern Jury Instructions[5] generally show, to sustain a conviction for murder, the jury must find that the defendant caused the death of the victim.[6] By acquitting

[5] The record reveals that the court read to the jury the applicable Maryland Criminal Pattern Jury Instructions.

[6] First-degree murder also requires a finding that the killing was willful, deliberate, and premeditated. Second-degree murder requires only that the defendant engaged in deadly conduct with the intent to kill or inflict such serious bodily harm that death would be the likely result. *See* Maryland Criminal Pattern Jury Instructions 4:17 (2d ed. 2018).

Comer of these charges, the jury rejected the notion that he caused the victims' deaths, regardless of whether the theory was by premeditation (first-degree murder), or by intentionally engaging in deadly conduct with the intent to kill or inflict such serious bodily harm as to likely cause their deaths (second-degree murder). Maryland Criminal Pattern Jury Instructions 4:17 (2d ed. 2018). Furthermore, the jury rejected the notion that Comer conspired to kill the victims as demonstrated by his acquittal for conspiracy to commit first-degree murder.

In addition to acquitting Comer of any murder-related charges, the jury also acquitted him of first-degree assault. That crime consists of a defendant using a firearm to commit an assault, or intending to cause serious physical injury in the commission of an assault. MPJI-Cr 4:01.1. The State's only eyewitness to the murders testified that Comer bear-hugged Dudley so that the shooter could kill him. By acquitting Comer of first-degree assault, the jury inferentially rejected the theory that Comer helped cause Dudley's death, either by using a firearm or by assaulting him with the intent to cause serious physical injury. In fact, the trial court instructed the jury that it could find Comer guilty of any of the crimes under a theory of accomplice liability, meaning that if he intended for any of those crimes to occur, or aided, counselled, commanded, or encouraged the commission of those crimes, the jury could convict him as if he himself had committed them. In closing argument, the State told the jury that although the evidence did not show that Comer pulled the trigger, it could still find him guilty because "[t]his is an accomplice liability case." Nevertheless, the jury only convicted Comer of second-degree assault, a finding that

Comer caused "physical harm" to Smothers and Dudley, that the "contact" was not accidental, and that neither Smothers nor Dudley consented to such contact.

Indeed, the only facts introduced at trial to support the assault convictions stemmed from testimony that Comer led Smothers and Dudley out of the house, and then bear-hugged Dudley while the shooter killed him. By rejecting any charges specifically relating to Smothers's and Dudley's deaths, the jury rejected the notion that Comer, even in his capacity as an accomplice, was responsible for their deaths. We therefore hold that the deaths in this case were not the direct result of Comer's actions, *Pete*, 384 Md. at 57, and the restitution for funeral expenses was improperly based on crimes for which Comer was not convicted, *Walczak*, 302 Md. at 429. Because, the sentencing court erred in awarding restitution for funeral expenses, we reverse the award of $7,073 in favor of the Criminal Injuries Compensation Board.

RESTITUTION ORDER REVERSED; JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY OTHERWISE AFFIRMED; COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND HARFORD COUNTY.