Circuit Court for Montgomery County
Case No. 132115C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 628

September Term, 2018

RUBEN ORTIZ,

v.

STATE OF MARYLAND

Reed,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: July 16, 2020

Ruben Ortiz (hereafter "Appellant") was charged with first-degree murder, second-degree murder, and robbery with a deadly weapon. Appellant was acquitted on all charges except the second-degree murder by a jury for the Circuit Court for Montgomery County. On May 1, 2018, Appellant was sentenced to 30 years with all but 24 years suspended and five years' probation.

Appellant timely filed this appeal and presents the following question for our review, which we rephrased:[1]

I. Did the trial court err when asking compound *voir dire* questions proposed by the co-defendant's counsel and assented to by Appellant's counsel that required jurors to assess their own impartiality?

II. Was Appellant denied his right to effective assistance of counsel?

III. Did the trial court err by not submitting the lesser-included first-degree assault charge to the jury?

[1] Appellant presents the following questions:

1. Did the lower court err in improperly asking voir dire questions in such a manner as to shift the burden of determining bias to the individual juror?

2. Was Mr. Ortiz denied the effective assistance of counsel?

3. Did the lower court err in refusing to permit the jury to consider and reach a verdict on the offense of first-degree assault?

For the following reasons, we answer questions I and III in the affirmative and remand to the court with instructions to reverse its judgments and set a new trial. We do not rule on the issue of whether Appellant was denied effective assistance of counsel.

FACTUAL & PROCEDURAL BACKGROUND

On May 28, 2017, Appellant and his girlfriend ("Cox") were walking in downtown Silver Spring, Maryland, looking to sell marijuana. Appellant and Cox came across a group of prospective buyers and arranged a sale in an alleyway near the Days Inn Hotel. Approximately five men exited the hotel and ambushed the Appellant, beating, punching, kicking, and robbing him of his possessions. Cox ran to a nearby apartment complex to call 911, however, police officers arrived after the assailants had already fled the scene. Appellant emerged from the attack with no shoes, no shirt, and a blood-stained undershirt.

Appellant called his brother, informed him what happened, and arranged for him to bring him a shirt and a pair of shoes. Not long after, Appellant connected with several friends and began to search for the assailants. After surveilling the area, Appellant and his friends found and confronted one of the assailants. They arranged for Appellant's friend, James Jackson ("Jack") to retrieve Appellant's stolen belongings. The group watched from a distance as after Jack reclaimed the items, he dropped them and punched the assailant. Once Jack struck the assailant, the group, including Appellant, ran across the street to join the fight. The group dispersed at the sound of police sirens and the assailant, now the victim, attempted to stand and return to the hotel room. The victim died from his injuries, as it was later discovered that Jack had repeatedly stabbed him with a knife during the assault.

Appellant and Jack were tried jointly. During the trial, the State played the body-worn camera footage of the responding officer, depicting the officer's effort to aid the victim. Near the end of the video, John and Amara Cartwell, members of the victim's family, stormed past the courtroom sheriff, launching threats and insults at Appellant. The jury was promptly removed from the courtroom during the struggle to control the men.

After the outburst, the court conducted an individual *voir dire* of each juror, inquiring if they could continue to serve impartially.[2] Four jurors who served in Appellant's trial did not answer any *voir dire* questions. Before the case was turned over to the jury for deliberation, Appellant asked the court to submit a first-degree assault charge on the verdict sheet as a lesser-included offense of second-degree specific intent murder. The trial court denied his request. Appellant was subsequently convicted of second-degree murder, and on May 1, 2018, he was sentenced to 30 years imprisonment with all but 24 years suspended and five years' probation. Appellant filed this timely appeal.

DISCUSSION

I. Voir Dire

A. Parties' Contentions

Appellant argues that *voir dire* questions posed to the jury improperly shifted the burden of determining bias from the court to the jurors; thus, the court abused its discretion in asking the questions in such manner. The *voir dire* questions allowed each juror to independently assess his/her own ability to be fair and impartial, Appellant contends, and

[2] *See infra* Section I.C.1.

this possibility vitally affects his right to a fair and impartial trial. Although Appellant did not object to the questions at the time, he asserts that a compelling reason exists to justify plain error review—to protect his absolute right to a fair and impartial jury.

The State asked the question, "should this Court decline to exercise plain error review of four *voir dire* questions asked in a form disapproved by *Pearson v. State*, 437 Md. 350 (2014)". The State contends that Appellant does not meet the threshold requirement for plain error review that (1) the trial court erred, (2) the error was plain, and (3) the error was material to the defendant's rights. *See State v. Brady*, 393 Md. 502, 506 (2006). Even if these prerequisites are met, the State argues that Appellant is unable to demonstrate a relevant reason for recognizing plain error review, such as: egregiousness of the error, its impact on the Appellant, and the degree of attorney dereliction in not lodging a timely objection. Thus, the State argues that plain error review cannot be applied to safeguard Appellant's failure to object at trial. We disagree.

B. Standard of Review

When reviewing a trial court's decision to ask a *voir dire* question, we ask whether the court abused its discretion. *See Pearson*, 437 Md. at 356; *see also Washington v. State*, 425 Md. 306, 314 (2012) ("We review the trial [court]'s rulings on the record of the *voir dire* process as a whole for an abuse of discretion[.]" (citation omitted)). Generally, this Court only decides issues that "plainly appear[]s by the record to have been raised in or decided by the trial court…" Md. Rule 8-131. A party must make a timely objection to a jury instruction and state the specific grounds, otherwise the objection is not preserved for

review. *See Taylor v. State*, 236 Md. App. 397, 411 (2018); *Gore v. State*, 309 Md. 203, 2017 (1987).

However, Maryland Rule 4-325(e) states in relevant part, "[a]n appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." *See Brady*, 393 Md. at 506. This Court will review unpreserved errors in "compelling, extraordinary, exceptional or fundamental" circumstances "to assure the defendant a fair trial, and as those 'which vitally affect [] a defendant's right to a fair and impartial trial.'" *Brady*, 393 Md. at 507 (internal citations omitted) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)). Conversely, we do not recognize "errors that are purely technical, the product of conscious design or trial tactics or the result of bald inattention." *State v. Hutchinson*, 287 Md. 198, 204 (1980). This Court may, but is not required to, consider relevant reasons for recognizing plain error, such as: (1) egregiousness of the error, (2) its impact on the defendant, (3) the degree of attorney dereliction in not lodging a timely objection, and (4) the nature of the legal issue presented. *See Austin v. State*, 90 Md. App. 254, 267–72 (1992).

C. Analysis

In the case before us, Appellant did not preserve his objection to the jury instructions and now asks this Court to exercise plain error review. The predominate purpose of *voir dire* is to assure a criminal defendant's right to an impartial jury. *See Thomas v. State*, 454 Md. 495, 507–08 (2017) (citing *Dingle v. State*, 361 Md. 1, 9 (2000)). The scope and form of the questions submitted for *voir dire* is left to the broad discretion of the trial judge. *See*

Thomas, 454 Md. at 504. However, "parties to an action triable before a jury have a right to have questions propounded to prospective jurors on their *voir dire*, which are directed to a specific cause for disqualification, and failure to allow such questions is an abuse of discretion constituting reversible error." *Moore v. State*, 412 Md. 635, 646 (2010). A potential juror can be disqualified by statute or "any collateral matter reasonably liable to have undue influence over" the juror. *Washington*, 425 Md. at 313.

1. The Trial Court Erred

The trial court has the responsibility to assess prospective juror biases and remove those who cannot impartially follow the court's instruction or evaluate evidence. *See Collins v. State*, 452 Md. 614, 622 (2017); *Dingle*, 361 Md. at 8. To be meaningful, *voir dire* "must uncover more than the jurors bottom line conclusions [to broad questions], which do not in themselves reveal automatically disqualifying biases as to their ability fairly and accurately to decide the case, and, indeed, which do not elucidate the bases for those conclusions…." *Id*. at 15 (citing *Bowie v. State*, 324 Md. 1, 23 (1991)) (internal marks omitted).

In *Dingle*, 361 Md. 1, the Court of Appeals held that the *voir dire* questions asked by the trial judge prevented the court from impaneling a fair and impartial jury. The trial judge asked the venire the following question:

> Have you or any family member or close personal friend ever been the victim of a crime, and if your answer to that part of the question is yes, **would that fact interfere with your ability to be fair and impartial in this case** in which the state alleges that the defendants have committed a crime?

Id. at n.4 (emphasis added). The Court of Appeals explained that the form of question "allows, if not requires, the individual venire person to decide his or her ability to be fair and impartial." *Id*. at 21. In doing so, the trial judge's responsibility to determine bias is shifted to the individual juror. *Id*. "Without information bearing on the relevant experiences or associations of the affected individual venire persons who were not required to respond, the court simply does not have the ability, and, therefore, is unable to evaluate whether such persons are capable of conducting themselves impartially." *Id*. The court opined that instead of "*advancing the purpose of voir dire*," the form of questions posed to the jury "distorts and frustrates it." *Id*. (emphasis added). Thus, the Court reversed the trial court's judgment and remanded the case for further proceedings.

In one of the most important cases on this issue, the Court held in *Pearson*, 437 Md. 350, that the trial judge has the burden of determining bias and whether a juror can remain impartial. *Id.* at 362. During *voir dire* in this case, the trial judge asked:

> (1) Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?; and (2) [W]ould any member of the jury panel be inclined to give either more or less weight to the testimony of a police officer than to any other witness in the case, merely because the witness is a police officer?

Id. at 355 (internal marks omitted). Similar to the *voir dire* questions used in *Dingle*, the compound "strong feelings" question improperly shifts the trial court's responsibility to decide bias to the individual juror.

The *voir dire* questions asked in the present case have the same effect as the questions posed in *Dingle* and *Pearson* and are also improper compound questions. During *voir dire*, the trial court asked the following questions:

> Does any member of the prospective jury panel have political, religious, or philosophical beliefs about our system of criminal justice **which interfere with your ability to sit as a fair and impartial juror** in this case? **Tr. 01/22/18 at p. 57–58.**
>
> Does any member of the jury panel have such **strong feelings** regarding ethnicity that it **would be difficult for you to fairly and impartially weigh the facts** at trial for Mr. Ortiz, who is a Hispanic-American? **Tr. 01/22/18 at p. 79.**
>
> Does anyone here have any, such **strong feelings** about the crimes charged in this case – homicide and robbery – that **you cannot render a fair and impartial verdict**? I don't think anybody's here in favor of any of these crimes, but do you have such **strong feelings** that it would **affect your ability to render a fair and impartial verdict based upon the evidence that you hear and the instructions that I give**? **Tr. 01/22/18 at p. 94.**
>
> I don't know what evidence is going to be, but again, it's a homicide case, so there may [be] autopsy photos in this case. Would that have – any type of graphic photos being presented **affect your ability to render a fair and impartial verdict in this case**? **Tr. 01/22/18 at p. 94.**

(emphasis added). By asking the jurors if their feelings on a particular issue would interfere with their ability to be fair and impartial, the trial court improperly shifted the burden to determine bias to the jurors. *Dingle* and *Pearson* have made clear that the trial judge has broad discretion over *voir dire*. Thus, the trial judge must assess potential juror biases and remove jurors that cannot impartially follow the court's instruction or evaluate evidence. The compound questions asked by the trial judge sought bottom line conclusions to broad questions and did not reveal disqualifying

biases that would aid the court in determining if the jurors could fairly and accurately decide the case.

> As this Court explained in *Dingle*, 361 Md. at 21, 759 A.2d at 830, compound questions "deprive[the defendant's counsel] of the ability to challenge [certain prospective juror]s for cause" because compound questions fail to elicit "information bearing on the relevant experiences or associations of the [prospective juror]s who were not required to respond[.]"

Collins v. State, 463 Md. 372, 397 (2019) (citing *Dingle*, 361 Md. at 21). Moreover, these *voir dire* questions did not elucidate the bases for those conclusions. Accordingly, we find that the trial court erred when instructing the jury.

2. The Error Was Plain

We will not review an error pursuant to Maryland Rule 4-325(e) unless the error is "plain." *See United States v. Olano*, 507 U.S. 725, 734 (1993). The Supreme Court of the United States interprets "plain" to be "synonymous with clear or, equivalently, obvious." *Id.* (citing *United States v. Young*, 470 U.S. 1, 16 at n. 14 (1985)) (internal marks omitted). An error is not plain "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id*. at 734.

Here, the record reflects that the trial court understood that the questions asked during *voir dire*, which allowed jurors to assess their own bias, was improper. In the midst of *voir dire*, the court interrupted itself and called on counsel to approach the bench to see if the question still needed to be asked where the following colloquy ensued:

> THE COURT: Again, if you've already answered this one, but I don't think I really asked this form of this question. Is there any member of the jury panel who has a, I'm—come on up. Approach attorneys.
>
> (Bench conference as follows)

THE COURT: Anything left out if so I would like to see it.

THE COURT: I think this 13, don't you just want me to ask them if they have members? Otherwise—

[ORTIZ'S COUNSEL]: Yes, that's, that's fine.

THE COURT: —that violates the self-selecting case. I don't know if you have this question or not. I haven't gone back over it again, the law—do you have—

[JACKSON'S COUNSEL]: the law enforcement?

THE COURT: —family member in law—

[JACKSON'S COUNSEL]: Yes, I—

THE COURT: Sure.

[JACKSON'S COUNSEL]: —I think I do. I'm trying to remember,

THE COURT: I want to see how you—

[JACKSON'S COUNSEL]: I apologize. I don't know the self-selecting case. I apologize. Which—

THE COURT: —you don't let them self-say whether

[JACKSON'S COUNSEL]: Got it.

THE COURT: [name omitted] case from Prince George's County—picked a fast jury, but—

[JACKSON'S COUNSEL]: Yes I do have it. So do—

THE COURT: I want to see how you phrase it,

[JACKSON'S COUNSEL]: Yes. No, I think it's the same, I think we're using the same template.

[ORTIZ'S COUNSEL]: **My stuff is all original**.

THE COURT: No, you—

[JACKSON'S COUNSEL]: No?

THE COURT: —you have a—

[JACKSON'S COUNSEL]: Do I?

THE COURT: —so you're not—they're not self-selecting in yours.

[JACKSON'S COUNSEL]: Okay.

THE COURT: So I'm going to wait until I get to [Jackson's counsel's] and ask that question

[JACKSON'S COUNSEL]: Okay.

[ORTIZ'S COUNSEL]: **Fine Your Honor.**

(emphasis added). Only two questions after consulting with counsel, as the record indicates, the court improperly asked if any juror had "strong feelings regarding ethnicity" that would make it difficult for the juror to be fair and impartial. Such error was so plain, as to be considered "clear" and "obvious" to the court. The precedent that the Court of Appeals has made makes it clear that the actions of this court were error. Thus, we find that the trial court's error was plain.

3. Error was Material to Appellant's Rights

Finding that the court erred, and such error was plain, we must now consider whether the error affected Appellant's substantial rights. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018). As previously stated, the error must be "compelling, extraordinary, exceptional or fundamental…to assure the defendant a fair trial, and as those 'which vitally affect [] a defendant's right to a fair and impartial trial.'" *Brady*, 393 Md. at

507 (internal citations omitted) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)). In *Dingle*, the Court of Appeals declared that "[t]he broad discretion of the trial court and the rigidity of the limited voir dire process are tempered by the importance and preeminence of the right to a fair and impartial jury and the need to ensure that one is impaneled." 361 Md. at 14.

Relying on *Dingle*, the Court in *Wright v. State*, 411 Md. 503 (2009), examined whether the collective questioning of the venire consisting of uninterrupted questioning violated appellant's right to an impartial jury. The Court stated that, although the *voir dire* process is not "foolproof," the Court does "require a comprehensive, systematic inquiry that is reasonably calculated, in both form and substance, to elicit all relevant information from prospective jurors." *Id*. at 514. "An incomplete voir dire necessarily means an incomplete investigation into potential juror biases, which in turn leads to the very real possibility that the venire members failed to disclose relevant information." *Id*. at 513. The State correctly points out that "in *Wright* the objection was to the entire process of voir dire, which involved the judge reading five and a half minutes of questions after which jurors were called to the bench one at a time."

However, *Dingle* and its progeny unequivocally support the notion that at the core of the right to an impartial jury is a reasonably calculated *voir dire* in which a judge has the sole responsibility to assess potential bias. Here, the court failed to conduct a reasonable calculated *voir dire*. The court's form of questioning, a compound question, required the jurors to independently determine if they could fairly and impartially serve in the trial. As this Court explained in *Dingle* and most recently in *Collins*, 463 Md. 372, "compound

questions 'deprive[the defendant's counsel] of the ability to challenge [certain prospective juror]s for cause' because compound questions fail to elicit 'information bearing on the relevant experiences or associations of the [prospective juror]s who were not required to respond[.]'" *Collins*, 463 Md. at 397 (citing *Dingle*, 361 Md. at 21). [3]

Such determination is the sole responsibility of the trial judge. Additionally, the record indicates that four jurors who served in Appellant's trial did not answer any *voir dire* questions, increasing the probability that jurors determined their own ability to be fair. The trial court's *voir dire* questions shifted the burden of determining bias from the court to the jury, which vitally affected Appellant's right to a fair and impartial trial. Thus, we recognize plain error and reverse the trial court's judgment.

4. Relevant Reason for Review

[3] In *Collins*, 463 Md. at 379, which came after the present appeal, the Court of Appeals opined:

> We reaffirm our holding in *Pearson*, 437 Md. at 354, 86 A.3d at 1234, that, on request, a trial court is required to ask a properly-phrased—i.e., non-compound—"strong feelings" question. In other words, under *Pearson*, during voir dire, on request, a trial court must ask: "Do any of you have strong feelings about [the crime with which the defendant is charged]?" We reiterate that, during voir dire, on request, a trial court must ask the "strong feelings" question in the form set forth above, and it is improper for a trial court to ask the "strong feelings" question in compound form, such as: "Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts?"

Relying on *Austin v. State*, 90 Md. App. 254 (1992), the State contends that for this Court to exercise plain error review, Appellant must give us some reason to use our discretion, such as: (1) egregiousness of the error, (2) the error's impact on the defendant, (3) the degree of attorney dereliction in not lodging a timely objection, and (4) the nature of the legal issues presented. On the contrary, we do not require petitioners to establish some heightened level of cause for this Court to exercise plain error review. We have made clear in *Austin* that considerations set forth are guideposts to aid attorneys on what may influence our exercise of discretion and is in no way an exhaustive list.[4] For this reason, we reject the State's argument that Appellant must show cause for the Court to exercise its discretion. Under the circumstances presented in this case the error was egregious, counsel was reminded of Maryland precedent, the error has a clear impact on the defendant. The effect of this error is described in *Collins v. State*:

> Due to the way in which the circuit court phrased these three questions, it is impossible to know whether any prospective juror refrained from responding because, even though he or she was involved with a prior experience, emotion, or other matter that posed a threat to his or her ability to be fair and

[4] *Austin*'s guidepost sets forth the following:

> In the expectation that conscientious lawyers will not wish to raise appellate contentions that will be nothing more than exercises in futility, we point out, as guideposts, some of the more typical considerations that from time to time may influence our exercise of discretion. It is by no means an exhaustive catalogue. The considerations that may come into play are infinite, frequently unforeseeable and unsusceptible to mathematical measurement. We are not laying down rules but simply providing insight. The touchstone remains, as it always has been, ultimate and unfettered discretion.

90 Md. App. 254, 267–68 (1992).

> impartial, the prospective juror determined for him- or herself that the prior experience, emotion, or other matter would not prevent him or her from being fair and impartial. To be clear, a trial court may ask the "something in the past," "sympathy, pity, anger, or any other emotion," and "catchall" questions. Our point with regard to the "something in the past," "sympathy, pity, anger, or any other emotion," and "catchall" questions is that, contrary to the position of the State and the Court of Special Appeals, *see Collins*, 238 Md. App. at 553-55, 192 A.3d at 925-26, these questions did not substitute for properly-phrased "strong feelings" questions.

Id. at 399–400. We now turn to the second issue.

II. Ineffective Assistance of Counsel

A. Parties' Contentions

Appellant argues that he was denied his right to effective assistance of counsel because counsel failed to object to the improper *voir dire* questions even after he was placed on notice of the impropriety of such questions. Citing the Supreme Court case, *Strickland v. Washington*, 466 U.S. 668 (1984), Appellant argues that counsel's representation fell below an objective standard of care, and absent such unprofessional error, the result of the proceeding would have been different.

The State argues that Appellant's claim for ineffective assistance of counsel is inappropriate for disposition on direct appeal, but, if the Court extends its review, Appellant cannot show that he has been prejudiced.

B. Standard of Review

The State is correct that although Maryland courts prefer post-conviction proceedings to address denial of effective assistance of counsel claims, such claims may be heard on direct appeal in several circumstances. *Mosley v. State*, 378 Md. 548, 562–63 (2003). The Court of Appeals informs in *Mosley*, 378 Md. at 566, that the rare instances in

which the Court has allowed "direct review are instructive, because they indicate our willingness to entertain such claims…only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel." "Direct review is an exception that applies only when 'the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim.'" *Id*. at 566 (quoting *In re Parris W.*, 363 Md. 717, 726 (2001)). Here, the critical fact that counsel for Appellant failed to object to the improper *voir dire* questions is not in dispute, however, the record is not fully developed and transcribed. Accordingly, this Court will not exercise its authority to review Appellant's claim of ineffective assistance of counsel.

C. Analysis

All criminal defendants have a right to effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article 12 of the Maryland Declaration of Rights. *See State v. Mann*, 240 Md. App. 592, 596–97 (2019). For the trial court's sentence to be vacated due to a violation of this right, Appellant bears a heavy burden to show that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 669. Appellant must satisfy both prongs to have a viable claim. *Id*. at 597. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

1. Deficient Performance

Establishing deficient performance is not an easy feat considering that this Court "assume[s], until proven otherwise, that counsel's conduct fell within a broad range of reasonable professional judgment, and that counsel's conduct derived not from error but from trial strategy." In *State v. Mann*, 40 Md. App. 592 (2019), appellant argued that trial counsel's failure to request an alibi instruction constituted deficient performance as required to support a claim for ineffective assistance of counsel. The State conceded that there was no dispute that defense counsel simply overlooked requesting the jury instruction, notwithstanding counsel's presentation of an alibi defense. *Id*. at 601. It seems clear that Defense counsel's failure was not a matter of trial strategy but rather oversight. We believe that counsel's omission may amount to deficient performance; however, we cannot complete our reasoning that "counsel's non-strategic failure to request the alibi jury instruction fell below the 'broad range of reasonable professional judgment' standard recognized in *Strickland* and its progeny, and therefore constituted deficient performance." *Id*. at 602 (quoting *Mosley*, 378 Md. at 558). Testimony is needed and is necessary to complete this inquiry.

In the case before us, it is difficult to be convinced that counsel's failure to object to the improper *voir dire* questions was a matter of trial strategy, rather than oversight of the issue. Appellant's counsel was made aware that one of the questions submitted was "self-selecting," and was informed by the court that such form of question was improper.[5] As the court inquired whether co-counsel had similar "self-selecting" *voir dire* questions,

[5] *See* supra I.C.2.

counsel for Appellant merely acknowledged that his questions were all original. Notwithstanding the court's caution, counsel failed to object to no more than two questions after being advised. Counsel's failure to object to the form of *voir dire* questions may have fallen below an objective standard of reasonableness.

2. Prejudice to Appellant

Even though we are not convinced we have enough evidence that counsel's failure to object constituted deficient performance, we now turn to whether such performance had a prejudicial effect. Appellant must show that there is a reasonable probability that counsel's error was "sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. To be clear, Appellant is not required to prove counsel's deficient conduct more likely than not altered the outcome of the case. *State v. Jones*, 138 Md. App. 178, 208, (2001). Neither is Appellant required to prove prejudice by a preponderance of evidence standard. *Id*. at 208. This court has long held, "the focus is not merely on the effect of error on the outcome. Rather, a proper analysis of prejudice includes consideration of whether the result ... was fundamentally unfair or unreliable." *Id*. at 208 (quoting *State v. Purvey*, 129 Md. App. 1, 10 (1999) (internal citations and marks omitted)).

The *Wright* case is informative when determining whether Appellant has satisfied the prejudice prong. In *Wright*, the State argued that the defendant was not prejudiced by the court's method in asking numerous *voir dire* questions at one time then asking for the jurors to answer at the end of all questioning. *Id*. at 513–14. The Court determined that the method of questioning was improper, stating that the trial court had an "incomplete

understanding of the jury pool," and "could not effectively guarantee a fair and impartial jury with such limitations circumscribing its own knowledge." *Id*. at 513. The Court held:

> Nor do we find persuasive the State's assertion that Wright was not prejudiced by the failure to conduct a proper voir dire. An incomplete voir dire necessarily means an incomplete investigation into potential juror biases, which in turn leads to the very real possibility that the venire members failed to disclose relevant information. That potential failure forecloses further investigation into the venirepersons' states of mind, and makes proof of prejudice a virtual impossibility. *Cf. Williams v. State*, 394 Md. 98, 109–14, 904 A.2d 534, 540–43 (2006) (holding that a new trial was warranted where a juror did not properly disclose information during voir dire and there was no possibility of further investigating potential juror bias). Accepting the State's argument would require Wright to prove a negative-he would have to demonstrate that he was not prejudiced by a non-event (i.e., a failure to disclose relevant information). We will not impose that insurmountable burden.

Id. at 513–14. Earlier, we stated that the trial court's error vitally affected Appellant's right to a fair and impartial trial. Such error by the court was sufficient to undermine the credibility of the jury, and thus our confidence in the outcome. However, we are not ready to hold that counsel's failure to object to the improper *voir dire* questions constituted ineffective assistance of counsel.

Applying the logic in *Jones*, our focus is not merely on the effect of the error on the outcome—i.e., whether the error caused Appellant's guilty verdict. Rather, the proper analysis of prejudice includes consideration of whether the result—i.e., Appellant's conviction—was fundamentally unfair or unreliable. We have already determined that the *voir dire* inquiry was fundamentally unfair and unreliable because the form of question required jurors to determine their own bias. For that reason, we have instructed the court's judgment to be reversed and the case remanded. In evaluating Appellant's claim for denial

of effective assistance of counsel, we look towards counsel's actions as they relate to the error at trial. Had counsel objected to the improper form of question after having been made aware by the court—thereby exercising an objective standard of reasonable care—the trial court could have corrected its error and Appellant's right to a fair trial would be intact. Therefore, it follows that by failing to object and allowing the improper questioning, counsel's error was sufficient to undermine the outcome, resulting in a process that was fundamentally unfair and unreliable. For the reasons stated, we cannot find that Appellant was denied his right to effective assistance of counsel at this time.

III. Lesser-Included Offense Instruction

A. Parties' Contentions

In Appellant's final claim before us, he argues that the trial court erred when it refused to submit a first-degree assault charge to the jury as a lesser-included offense to second-degree murder. Appellant contends that the State's objection to including first-degree assault on the verdict sheet is no different than nolle prossing the offense had it been charged. Additionally, Appellant alleges that the evidence at trial could have supported a conviction of first-degree assault.

The State argues that Appellant did not make a specific request for the first-degree assault charge—as a lesser-included offense of first-degree murder—to be submitted to the jury for deliberation. Instead, the State argues that Appellant only requested the charge after the court informed the parties of its intent to instruct the jury on accomplice liability using the language: "the defendant committed the crime of assault as a primary actor or as an accomplice." The court asked the State if it wished an instruction on first-degree assault.

Having agreed to the court's instruction, the State argues that Appellant only requested the court to include the charge on the verdict sheet as a "dead count" in light of the State's proposed instruction to the jury.

B. Standard of Review

We have long held that "an exercise of discretion based upon an error of law is an abuse of discretion." *See Bass v. State*, 206 Md. App. 1, 11 (2012) (quoting *Brockington v. Grimstead*, 176 Md. App. 327, 359 (2007)). And when the discretionary decision is based on legal error, the decision is certainly an abuse of discretion because "the court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." *See Bass*, 206 Md. App. at 11 (quoting *Arrington v. State*, 411 Md. 524, 552 (2009)).

C. Analysis

"Under Maryland common law, a defendant charged with a greater offense can be convicted of an uncharged lesser included offense as well as the charged offense." *State v. Bowers*, 349 Md. 710, 718 (1998). However, "a defendant may only be convicted of an uncharged lesser included offense if it meets the elements [i.e. required evidence] test." *Hagans v.* State, 316 Md. 429, 450 (1989). The lesser-included defense doctrine has traditionally been applied for the benefit of the prosecution; however, a criminal defendant may now invoke the doctrine as well. *Id*. at 453. The Supreme Court has indicated that by refusing a defendant's right to request an instruction on a lesser included offense, the defendant's Fifth Amendment right to due process might be violated. *See Keeble v. United*

States, 412 U.S. 205 (1973). In *Hook v. State*, 315 Md. 25, 44 (1989), the Court of Appeals has held that:

> It is simply offensive to fundamental fairness, in such circumstances, to deprive the trier of fact, over the defendant's objection, of the third option of convicting the defendant of a lesser included offense. And if the trial is before a jury, the defendant is entitled, if he so desires, to have the jury instructed as to the lesser included offense.

We have faced a similar question to the claim before the Court today in *Bass v. State*, 206 Md. App. 1 (2012). In *Bass*, the appellant raised the following question for our review: Did the circuit court err by refusing to allow appellant's request to submit the lesser included charge of fourth-degree burglary to the jury? *Id.* at 3. When evaluating whether the court was obligated to instruct the jury on an uncharged lesser-included offense, we have applied the two-part test set forth in *Bowers*, 349 Md. 710. The *Bowers* Court stated:

> The inquiry in assessing whether a defendant is entitled to a lesser included offense jury instruction is a two-step process. The threshold determination is whether one offense qualifies as a lesser included offense of a greater offense.... Once the threshold determination is made, the court must turn to the facts of the particular case. In assessing whether a defendant is entitled to have the jury instructed on a lesser included offense, the court must assess whether there exists, in light of the evidence presented at trial, a rational basis upon which the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense.

349 Md. at 721–22 (internal citations and marks omitted). Here, neither party disputes that first-degree assault is a lesser-included offense of second-degree murder "based on the specific intent to inflict grievous bodily harm." *See Hagans*, 316 Md. at 447–55. Thus, the threshold determination is satisfied.

We now turn to whether the jury had a rational basis on which they could have found Appellant guilty of the first-degree assault, but not second-degree murder, in light of the evidence presented at trial. The trial record reflects that the court heard testimony from Cox that after Jack threw the first blow at the victim, Appellant and the group joined in on the attack. Cox also testified that neither she nor Appellant knew that Jack had a knife or that he stabbed the victim. Additionally, a responding officer captured the aftermath of the attack on his body worn camera. The jury heard Cox's testimony and watched the video depicting the victim beaten and bloodied. Cox's testimony and the police body worn camera footage could have supported a rational basis upon which a jury could have found Appellant guilty of first-degree assault, and not guilty of second-degree murder. Moreover, deliberations lasted almost 12 hours, during which the jury asked four questions relating to accomplice liability and murder. The jury's questions indicated that they were concerned or undecided as to the State's evidence to support a murder conviction. The first substantive question asked, "Is it possible to have accomplice liability to 2nd degree murder." The second substantive question was "Is armed robbery a necessary element of felony murder, or does 1st degree assault satisfy the 1st element of 1st degree felony murder." The third and fourth questions were "Do we have to find one Def guilty of 1st or 2nd degree murder in order to find the other guilty of accomplice liablility? Or is it sufficient that we believe a murder occurred to find both Defs guilty of accomplice liability?"

The State argues that Appellant's request was not the type of request set forth in *Hagans*, 316 Md. 429 because his request was inconsistent with what he understood the law to be. Under *Hagans*, Appellant could require the jury to have the option of conviction

of a lesser-included offense if it satisfies the elements test. However, Appellant represented to the court that a sentence on the lesser-included conviction would be illegal. Although the State correctly points out Appellant's inconsistency, the court is required to submit the lesser included offense upon request, pursuant to the holding of *Hagans*. The first-degree assault charge arose out of the same set of facts and is undisputedly a lesser-included offense of second-degree murder based on the specific intent to inflict grievous bodily harm. Our role is not to decipher counsel's intentions when counsel requested the lesser-included charge be submitted to the jury. Rather, we must decide whether the trial court abused its discretion in applying the law.

CONCLUSION

Accordingly, we find that the trial court committed plain error when conducting *voir dire* in this case and abused its discretion by not submitting the first-degree assault charge as a lesser-included offense to the jury. For this reason, we reverse the trial court's judgement and remand for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE COUNTY.