Circuit Court for Montgomery County
Case No. 134710C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 796

September Term, 2019

JIMMY AGUERO

v.

STATE OF MARYLAND

Kehoe,
Meredith,
Wilner, Alan M. (Senior Judge),
Specially Assigned,

JJ.

Opinion by Wilner, J.

Filed: June 17, 2020

Appellant was convicted by a jury in the Circuit Court for Montgomery County of sexual abuse of a minor, sexual offense in the second degree, and six counts of sexual abuse in the third degree. The victim of those offenses was his stepdaughter, whom we shall refer to only as F. Appellant was sentenced to a prison term of 25 years, of which 15 years were suspended, for the sexual abuse of a minor, and a concurrent term of ten years for the second-degree sexual offense. The other convictions were merged for sentencing purposes.

Appellant raises three issues in this appeal: whether the trial court erred (1) in allowing certain testimony by the State's expert medical witness as to why children often delay reporting sexual assaults on them; (2) in refusing to ask on *voir dire* whether (i) any prospective juror or member of the juror's immediate family had ever been a member of or contributed to the House of Ruth, Mothers Against Drunk Driving, or any other organization dedicated to helping victims, or (ii) any juror participates in the social media "Me Too" campaign; and (3) in refusing to strike two jurors for cause.

BACKGROUND

Because appellant does not challenge the legal sufficiency of the evidence against him regarding the various offenses, we need not describe that evidence in detail. It clearly supports the convictions beyond any reasonable doubt. Some of that evidence, however, is relevant to the first issue raised by appellant. In summary, F. testified that, at the relevant times, she lived in a three-story townhome with her mother, her sister, her uncle, and her

grandfather. At some point, her mother began dating appellant, who eventually moved in with the family and married F.'s mother. When F. was about 10 years old, appellant began entering her room when her mother was out and no one else was nearby and sexually assaulting her. F. said that her mother worked long hours at a hotel and often was not home. At first, the assaults involved touching her vagina and breasts, sometimes over her clothing, sometimes otherwise. Later, it included assaulting her with his penis. These assaults happened a few times a week, often in the room shared by the mother and appellant. F. said that appellant had removed the door to her room. After one assault, appellant told her not to tell anyone.

When F. was eleven, she told her mother that appellant was "doing some things, he's touching me in places, you know?" Her mother listened, obviously understood the import of that, left the room momentarily, and then summoned F. into another room, where appellant was present. In F.'s presence, the mother questioned appellant, who began to cry but essentially denied the accusation, claiming it was a misunderstanding – "we were just playing around." The mother believed him and took no action. The misconduct stopped for a week but then resumed. The mother got pregnant when F. was 12. During the pregnancy, appellant and the mother separated, but after F.'s sister was born, they reconciled, appellant moved back, and the assaults on F. again resumed. Eventually, appellant and the mother divorced when F. was 13.

When F. was about 15, she told her two best girlfriends and later a boyfriend what had been happening. She said that she did not tell her mother again because "if she didn't listen to me the first time what would make her listen to me again?" By the time F. was 16, she felt "depressed all the time." Asked to elaborate, she said she was feeling suicidal. She had broken up with her boyfriend and was having problems with a teacher. Sent to the principal's office as a result of one confrontation with the teacher, she told a vice-principal about how depressed she was feeling and was sent to counseling. It was during a counseling session that, "bawling my eyes out," she revealed the sexual abuse that she had endured beginning five years earlier. She ended up at a crisis center and then a hospital. She said that, when her mother found out that she had revealed the abuse, "she was mad at me" and warned her "there's consequences if you're lying," including leaving her little sister without a father. F. said it made her feel "[l]ike she [her mother] didn't care about what was going on with me. She cared about if she had a father figure in her life" and "[i]t kind of made me regret saying it. Telling people."

Further facts are set forth in our discussion of the issues raised by appellant.

DR. SHUKAT'S TESTIMONY

Evelyn Shukat is a child abuse pediatrician who served as Medical Director of the Treehouse Child Advocacy Center in Montgomery County. She evaluates 250-300 children a year. She had examined F. and testified as an expert in child abuse pediatrics. She was asked about some of the common characteristics that she had observed in the

disclosure process of victims of child sexual abuse. She said that younger children – four to six years old – "don't understand a lot of what happens to them when they're sexually abused." They know it is wrong, do not like the way it feels, but are scared to tell anyone, because they may get punished. As children grow older, the fear is that they won't be believed and disclosure will disrupt the family situation. Dr. Shukat noted that the abuser is often the breadwinner, and the child fears, if the abuse is revealed, he/she may not have food or a house to live in. She continued that, in adolescence, there may be a partial disclosure because there are more people in a teenager's life to rely on. She said that it is not unusual for sexually-abused teenagers to tell a high school counselor, as a safe person to help protect them, and not uncommon for those children to end up hospitalized for suicidality, depression, signs of Post Traumatic Stress Disorder, or drug abuse. All of this testimony was admitted without objection.

The issue before us arose when Dr. Shukat was asked to explain in somewhat more detail the reasons that sexually-abused children may decide not to tell and, over objections, listed various reasons for a delayed disclosure. She mentioned that often there was a threat of some kind – a threat to hurt the child or the child's mother, a threat that the child will lose her father and with that, have no food and may lose her home, or, if the child is an immigrant, that she or he may be deported. She added that, even if there is no overt threat, the child often feels responsible for what happened, that it is her or his fault, a fear that he/she will not be believed, will be embarrassed or be made fun of,

especially on social media. All of this was in the context of Dr. Shukat's having treated children where those reasons have been exposed in therapy. She said, "I've heard all these stories over the years and, unfortunately, almost daily. So that's one reason children don't tell; there's a threat."

Appellant objected to the witness mentioning specific incidents involving other individuals. The court overruled the objection, treating the testimony as "just an expert explaining by example." Dr. Shukat then was asked why child victims accommodate their abusers, to which she responded, without objection, that, if the abuser is part of the home and the victim has been told not to talk about it, "a child certainly knows not to get their abuser more angry, so they will be compliant and follow rules." She added, without objection, that "*a child who's sexually abused is physically traumatized and if they do tell a member of the home or family about it and not believed, then disclosure is delayed, and the child feels helpless*." (Emphasis added)

Appellant complains in this appeal only about Dr. Shukat's reference to threats, as a reason why children may delay reporting sexual abuse. He notes this Court's conclusion in *Walter v. State*, 239 Md. App. 168, 196 (2018) that a qualified expert may provide "general testimony about the phenomenon of delayed reporting and why some children may delay in reporting the abuse," but argues that Dr. Shukat's reference to threats as a reason was more than just that kind of "general testimony" contemplated in *Walter*. He treats her testimony as introducing a suggestion that appellant had threatened

F. with physical harm when there was no evidence of any such threat. That testimony, he claims, was therefore irrelevant, confused the issues, and was unduly prejudicial.

We find no merit in that argument. Dr. Shukat was asked to explain various reasons why children delay reporting sexual abuse, and she said that threats, overt or covert, direct or perceived by the child, were one reason among others. She never suggested that appellant had directly threatened F. with physical harm, but did explain that, where the abuser is a family breadwinner and has warned the child not to tell anyone, the child may fear – perceive a threat – that disclosure could lead to a breakup of the family, the loss of support and the home, and, perhaps most important, the threat of not being believed. That testimony was highly relevant, especially in light of the fact that F. had told her mother while the abuse was occurring and was rebuffed and revealed it to the counselor four years later only as a result of a growing depression and suicidal thoughts that had led to a confrontation with a teacher. Dr. Shukat's testimony matched precisely what occurred in this case.

VOIR DIRE EXAMINATION

During the *voir dire* stage of jury selection, appellant asked the court to inquire whether (1) any member of the jury panel or any member of a juror's family had ever been a member of or made any contributions to House of Ruth or Mothers Against Drunk Driving or any other organization dedicated to helping victims of crime, and (2) any member of the jury panel participates in social media, the "Me Too" campaign. The

court denied the request based on *Pearson v. State*, 437 Md. 350 (2014). Relying largely on *Dingle v. State*, 361 Md. 1 (2000) as being more relevant, appellant seeks to distinguish *Pearson* in that the specific questions requested here were not at issue in *Pearson* but were in *Dingle*.

Dingle is only marginally on point. As the dissent in that case pointed out, the case did not involve the refusal of the trial court to propound a defense-requested question on *voir dire.* 361 Md. at 23. The defense requested a broad inquiry into whether any member of the jury panel had ever been the victim of a crime, stood accused of a crime, had been a witness, juror, or grand juror in a criminal case, was a member of any victims' rights group, or had a connection with law enforcement or the legal profession, and those questions were asked. *Id.* at 28. The problem was that those kinds of questions were relevant only if an affirmative answer would either disqualify the juror for some statutory deficiency or reveal a bias that would preclude the juror from being impartial, and the trial court, recognizing that fact, joined that inquiry as part of the single compound *voir dire* question; *e.g.*: "Do you or any family member or close personal friend belong to a victims' rights group . . . and if, in fact, your answer to that question is yes, would that fact interfere with your ability to be fair and impartial in this case?" *Id.* at 4.

The Court of Appeals majority in *Dingle* found that kind of joinder, as part of a compound question, to be inappropriate, because it left solely to the juror to determine

whether there was a disqualifying bias. A juror who may have had a disqualifying bias – belonged to such an organization – but felt that he or she could nevertheless be impartial would not respond when the compound question was asked, and neither the defendant nor the court would have the opportunity to explore either the extent of any possible bias or the sincerity of the juror's belief that he or she could be impartial. *Dingle* did not require that questions dealing with the juror's (or a family member's) association with a victim's advocacy group be asked. There was no objection to the substance of those questions in the trial court, and it was not an issue on appeal.

Subject to the one holding regarding the compound nature of the questions, the *Dingle* Court left intact the long-standing Maryland rule enunciated in earlier cases cited by the Majority, in particular *Davis v. State*, 333 Md. 27 (1993), that, (1) unlike in many other States, the function of *voir dire* in Maryland is solely to determine the existence of cause for disqualification and not for guiding the exercise of peremptory challenges, (2) the questions "should focus on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered," and (3) "the trial court has broad discretion in the conduct of voir dire, most especially with regard to the scope and the form of the questions propounded" and "need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification." *Dingle*, at 10, 13-14.

The "bottom line" was that "[q]uestions not directed to a specific ground for disqualification but which are speculative, inquisitorial, catechizing, or 'fishing,' asked in the aid of deciding on peremptory challenges, may be refused in the discretion of the court, even though it would not have been error to have asked them." *Id.* at 14, quoting from *Davis*, at 34-35, and *McGee v. State*, 219 Md. 53, 58-59 (1959).

Pearson was on trial for violation of the narcotics laws; all of the State's witnesses were police officers. The trial court asked on *voir dire* whether any member of the jury panel (1) had strong feelings regarding violations of the narcotics laws that would make it difficult for the juror to fairly and impartially weight the facts, or (2) would be inclined to give either more or less weight to the testimony of a police officer than any other witness merely because the witness is a police officer. The court refused to ask, however, whether any members of the jury panel or any family member, friend, or acquaintance had been the victim of a crime, whether the juror knew anyone employed in the police department, the prosecutor's office, or any other law enforcement agency, and whether the juror was ever a member of a law enforcement agency – the same kinds of questions that *were* asked in *Dingle*.

The *Pearson* Court confirmed the conclusions enunciated in *Dingle* (and in several cases after *Dingle*) that Maryland does not follow the rule in other States that *voir dire* questions may be used to elicit reasons for exercising peremptory challenges but that a *voir dire* question must be asked only if it is reasonably likely to reveal a specific cause

for disqualification, either a statutory cause or "a collateral matter [that is] reasonably liable to have undue influence over" a prospective juror. *Pearson*, 437 Md. at 357. The latter category is comprised of "biases directly related to the crime, the witnesses, or the defendant." *Id.* It includes an "experience, status, association, or affiliation if and only if the experience, status, association, or affiliation has a 'demonstrably strong correlation [with] a mental state that gives rise to [specific] cause for disqualification.'" *Id.* at 357-58 (quoting from *Curtin v. State*, 393 Md. 593, 607 (2006)).

Upon those precepts, the *Pearson* Court held that a trial court (1) is not required to ask whether a juror has been the victim of a crime, (2) is required to ask whether a juror has "strong feelings" about the crime with which the defendant is charged, subject to a follow-up elicitation of whether any such strong feelings would constitute specific cause of disqualification; and (3) is required to ask whether a juror had even been a member of a law enforcement agency where the basis of a conviction is reasonably likely to be the testimony of members of a law enforcement agency.

Pearson did not address whether an association or affiliation with a victim advocacy organization such as the House of Ruth or Mothers Against Drunk Driving would have the same potential for bias as affiliation with a law enforcement agency. Perhaps it might, if the evidence against appellant came solely, or perhaps even predominantly, from a member of such a group. But that did not occur in this case. The evidence as to appellant's misconduct came from F. and a detective, mostly from F. Dr.

Shukat certainly could be regarded as a victims' advocate, but she testified as a medical expert, not as an advocate, on a collateral issue of why sexually abused children often delay revealing the abuse, not as to whether the abuse occurred. She had no direct knowledge of that.

For these reasons, we find no error in the trial court's denial of the proposed questions.[1]

REFUSAL TO STRIKE JURORS 7 AND 18 FOR CAUSE

Juror No. 7 responded affirmatively to three *voir dire* questions: (1) whether he had strong feelings about the charges; (2) whether he or a close friend or relative had ever been the victim of sexual abuse, been accused of committing such abuse, or been trained in counseling or treating victims or perpetrators of such abuse; and (3) whether he felt that the defendant must present some evidence of innocence in order to be found not guilty. In follow-up questioning at the bench, he said that he felt strongly

[1] We note that, as with *Dingle*, *Pearson* was a divided Court. Three judges expressed the view that *voir dire* should be expanded to include questions designed to assist the intelligent use of peremptory challenges, noting that 48 other States and the Federal courts follow that approach. Judge Watts, writing for the Majority, referred that issue to the Court's Standing Committee on Rules of Practice and Procedure for its consideration and recommendation. The Rules Committee did consider the issue and recommended that, with certain limitations and protective procedures, *voir dire* be expanded in general conformity with the rest of the country. *See* Rules Committee's 185th Report, July 15, 2014. So far, the Court has taken no action on that Report.

about the charges because several members of his family had been molested when they were children, which went to his responses to the first two questions.

With respect to all three responses, but mostly with respect to his belief that the defendant had some duty to present exculpatory evidence, the court explained that the defendant does not have to present any evidence at all and that the burden was solely on the State to prove guilt beyond a reasonable doubt. The court then asked, "would you still be able then to, if you believe that the State has not met its burden of proof beyond a reasonable doubt, would you be able to find him not guilty," to which the juror responded "[t]hat's correct, yes."

Turning then to the juror's "strong feelings," the court asked, as a question, "you realize that in this case, there are charges, but there's no proof of the charges yet because you haven't heard any evidence?" The juror responded "[t]hat's correct." The court then added, "and given your background, would you still be able to be fair and impartial to both sides in determining whether or not, in fact, this took place?" The juror said, "I wouldn't be, you know, once I get, I look at the evidence, I hear both sides, you know, I'm not --." Without allowing the juror to finish the sentence, but obviously taking what he said as an affirmative, the court responded "[t]hat's all we can ask you to do." Defense counsel moved to strike the juror for cause, expressing concern the juror still seemed to believe that the defendant had to prove his innocence. The court denied the motion. The juror was struck on a peremptory challenge, but the issue is properly before

us, as appellant exhausted all of his peremptory challenges. *See Booze v. State*, 347 Md. 51, 71 (1997).

That last colloquy does inject some ambiguity. Appellant reads the last response as indicating some lingering doubt in the juror's mind as to whether he would be expecting some evidence from the defendant. The State notes (1) that the juror had unequivocally stated earlier, in response to the judge's instruction, that he understood that the defendant was not required to produce any evidence and that he would be able to find the defendant not guilty if, in his mind, the State failed to prove guilt beyond a reasonable doubt, and (2) the last inquiry concerned the "strong feeling" issue rather than the right to remain silent. It seems clear that the judge, who certainly understood that he could not allow a biased juror or one who could not accept a defendant's right to remain silent to serve, believed that to be the case.

In his responses, Juror No. 18 also expressed a belief that the defendant must present some evidence of innocence in order to be found not guilty and that he had strong feelings about sex offenses and sex offenders. With respect to the strong feelings, the judge acknowledged that he, too, had strong feelings about sex offenders, but noted "the question is, despite these feelings that you have, would you still be able to give the defendant, as well as the State, a fair shake, in other words, fairly and impartially judge the evidence," to which the juror responded "I believe I can."

A similar colloquy ensued with respect to the first response. The juror told the judge that "when everything is presented, I got to have something to tell me that the defendant is innocent. . . I mean I have to be able to hold onto something and, and point to something to, to believe it." The judge then explained that under Maryland and U.S. law, an accused "does not have to say anything, do anything, put any evidence up at all" and that the reason is that, "under our system, the burden of proof is on the State. Whenever the State is going to potentially deprive somebody of their liberty because they committed a crime, they have to prove beyond a reasonable doubt." The judge added, "that is the instruction that you would receive as a juror" and asked "[n]ow despite the feeling that you have, would you be able to follow that instruction . . ." to which the juror responded "I will be able to follow the instruction. I wouldn't like it, but I would follow it."

In a brief further colloquy, the juror confirmed that he would "be able to be fair to both sides, without any presumption of guilt or not guilt at this point"

The standard we apply to these conversations was stated in *Dingle* at 15 and confirmed in *Williams v. State*, 394 Md. 98, 113 (2006), namely, that "bias is a question of fact, the existence of which is a matter left to the trial judge, " whose "predominant function in determining juror bias involves credibility findings whose basis cannot be discerned from an appellate record." There is some ambiguity in some of the responses given by Jurors 7 and 18, but this was conversational colloquy at the bench. The trial

judge was far better than we, from a cold record, to determine whether the ultimate professions of fairness and impartiality and the willingness to follow the court's instructions were credible. We find no error in the court's refusal to strike the two jurors.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.