Circuit Court for Baltimore City
Case No. 118106007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 935

September Term, 2019

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EDDIE MURPHY

v.

STATE OF MARYLAND

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Kehoe,
Beachley,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: October 9, 2020

A jury, sitting in the Circuit Court for Baltimore City, convicted Eddie Murphy, appellant, of second-degree assault and acquitted him of attempted second-degree murder.[1] The court sentenced appellant to a term of ten years' imprisonment. He timely appealed, and presents the following four questions for our review:

> 1. Did the trial court abuse its discretion when it refused defense counsel's request to ask the venire, "If the defendant decided to remain silent and not present evidence would anyone make any conclusions about his guilt or innocence?"
>
> 2. Did the trial court err and/or abuse its discretion when it permitted a detective to testify that Ashley Questor, an individual to whom he spoke during his investigation, was dead, and [that] Carrie Peacock, an individual to whom he spoke during his investigation, was "in hiding," and did the court err and/or abuse its discretion when it limited defense counsel's cross-examination of the same detective concerning the circumstances surrounding the absence of Ms. Peacock?
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> 3. Did the trial court err when it permitted Kevin Ottey to testify that people in the house owed [appellant] money when such testimony was inadmissible hearsay?
>
> 4. Did the trial court abuse its discretion when it overruled defense counsel's objections to prejudicial comments the prosecutor made in closing argument?

Under *Kazadi v. State*, 467 Md. 1 (2020), the trial court erred by failing to propound appellant's *voir dire* question. Because we must vacate the judgment of the circuit court and remand the case for a new trial, we need not decide the other issues.

[1] Appellant was also charged with attempted first-degree murder, first-degree assault, reckless endangerment, and openly carrying a weapon with the intent to injure. The State nolle prossed the attempted first-degree murder charge. The jury did not reach a verdict on the charge of first-degree assault. Finally, at the close of the State's case, the court granted defense counsel's motion for judgment of acquittal as to reckless endangerment and openly carrying a dangerous weapon.

## BACKGROUND

Given that the underlying facts are largely irrelevant to our resolution of this case, we will forgo a lengthy factual recitation. *See Kennedy v. State*, 436 Md. 686, 688 (2014); *Teixeira v. State*, 213 Md. App. 664, 666-67 (2013).

On November 1, 2017, Kevin Ottey woke to the sound of knocking on the back door of his residence in the 600 block of North Robinson Street. Mr. Ottey attempted to tell the person who was knocking that he was sleeping. When the knocking continued, Mr. Ottey investigated the source of the disturbance. When he opened the door, Mr. Ottey found appellant, with whom he had been previously acquainted. He described appellant as "belligerent." Mr. Ottey stated that when he walked past appellant, "all of sudden from behind" appellant stabbed him. Mr. Ottey attempted to pursue appellant but was unable to do so.

Baltimore City Police Officer David Riehl responded to the scene, where he found Mr. Ottey on the corner of McElderry and Robinson Streets with a stab wound to his left abdomen. Police recovered a knife from atop a trash can a quarter-block away from the intersection. Detective Peter Reddy, also of the Baltimore City Police Department, arrived at the scene after Mr. Ottey had been transported to the hospital. At the intersection of McElderry Street and Loney's Lane (the alley parallel to Robinson Street), he observed a "large pool of blood." Nearby the detective found "little specks of blood outside of a backyard."

Two days later, Officer Riehl presented Mr. Ottey with a photo array containing a photograph of appellant. Mr. Ottey identified appellant as his assailant by picking

appellant's photo from the array. According to Detective Reddy, Mr. Ottey also identified appellant by name as the person who assaulted him.

**DISCUSSION**

Relying on the Court of Appeals's recent opinion in *Kazadi*, appellant contends that the trial court abused its discretion by refusing to ask the jury venire a requested *voir dire* question concerning his right not to testify at trial. The State tacitly concedes that the court erred in refusing to give the requested instruction. It claims, however, that by affirmatively accepting the jury ultimately selected, appellant waived his objection to the court's *voir dire* ruling.

Prior to *voir dire*, defense counsel requested that the court ask the prospective jurors: "[I]f the defendant decided to remain silent and not present evidence, would anyone make any conclusions about his guilt or innocence?" The trial court refused to do so, ruling: "I believe the Court of Appeals has spoken on that and held that . . . it's not appropriate in *voir dire*." Following jury selection, defense counsel unequivocally approved the empaneled jury, stating: "The panel is acceptable to the defense." The State claims that this constitutes waiver of any error concerning the court's failure to propound the requested question.

In *Kazadi*, the Court of Appeals overruled *Twining v. State*, 234 Md. 97 (1964), which held that it was not an abuse of discretion to refuse to propound *voir dire* questions pertaining to the burden of proof and the presumption of innocence. *Id*. at 100. In overruling *Twining*, the Court reasoned:

> *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, that may not be discovered until it is too late, or may not be discovered at all.

*Kazadi*, 467 Md. at 41-42 (citing *Hayes v. Commonwealth*, 175 S.W. 3d 574, 585 (Ky. 2005)). Accordingly, the Court held: "[O]n 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 fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify." *Id*. at 9. The Court of Appeals further stated that its holding applied 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)).

Cognizant that appellant requested a *voir dire* question mandated by *Kazadi*, the State attempts to salvage the conviction by urging us to "recognize that [appellant's] acceptance of the jury without qualification or reservation waived his earlier objection to the court's refusal to ask prospective jurors during voir dire the questions he requested." We recently rejected this identical argument in *Foster v. State*, ___ Md. App. ___, No. 462, Sept. Term, 2019, slip op. at 6 (Filed Sept. 30, 2020):

> There is no dispute in this case that the circuit court declined Foster's request to ask a voir dire question that is now mandated by *Kazadi*. Nor is there any dispute that, when the circuit court declined Foster's request, he objected as required by Rule 4-323(c), but that he later accepted the empaneled jury without qualification. The only question is the effect, if any, of Foster's unqualified acceptance of the jury on the preservation of his claim. Applying [*State v. Stringfellow*, 425 Md. 461 (2012)], we conclude that Foster did not waive his *Kazadi* claim through his unqualified acceptance of the empaneled jury.

As in *Foster*, there is no dispute in this case that the court declined appellant's request to ask a *voir dire* question mandated by *Kazadi*. And *Foster* holds that a defendant's "unqualified acceptance of the empaneled jury" does not constitute waiver. *Id.* Thus, *Foster* is controlling and compels the same result—vacation of appellant's conviction.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.**