Circuit Court for Somerset County
Case No. C-19-CR-20-000065

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 996

September Term, 2021

DEBORAH HRUSKO

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: July 26, 2022

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Deborah Hrusko was convicted in the Circuit Court for Somerset County of one count of theft and one count of theft scheme. On appeal, she contends that the circuit court erroneously omitted certain *voir dire* questions that the parties submitted before trial and that defense counsel's failure to object to this omission constituted ineffective assistance of counsel. We affirm.

I. BACKGROUND

Given the narrow scope of Ms. Hrusko's appeal, we focus on the events of *voir dire*. In *Kazadi v. State*, the Court of Appeals held that, on a defendant's request, a trial court must ask *voir dire* questions related to the State's burden of proof, the presumption of innocence, and a defendant's right not to testify. 467 Md. 1, 46 (2020). Twelve days before Ms. Hrusko's trial began, defense counsel submitted a written list of proposed *voir dire* questions that included six questions raising the *Kazadi* principles:

> 6. Ladies and gentleman, a defendant need not testify, need not offer any evidence, and may, in fact, stand mute, since she is presumed innocent. Does anyone here feel a defendant should testify before you could find her not guilty?
>
> 7. Do any of you feel that you would be more likely to acquit a defendant who testified than a defendant who elected not to testify?
>
> 8. A Defendant may choose to present evidence solely through questioning of the State's witnesses. Would any prospective juror require that a defendant present witnesses on her own behalf in order to acquit her?
>
> 9. Is there anyone who thinks a defendant should be required to prove her innocence?
>
> 10. The defendant is presumed innocent of the charges against her. This presumption alone is enough for you to find a defendant not guilty unless the State proves

> beyond a reasonable doubt that she committed the alleged offenses. Would any of you have reservations about finding a defendant not guilty based solely upon the presumption of innocence?
>
> 11. If a defendant testifies in her own behalf would you be able to weigh her testimony in the same way you would weigh any other witness's testimony?
>
> 12. The defendant has an absolute right to remain silent, and to not testify in this case. Do any of you believe that a person charged with a crime, who chooses not to testify, is probably guilty? Would you find it more difficult to vote to acquit any defendant who decides not to testify?
>
> * * *
>
> 14. Are you confident that in sitting as a juror in this case you could refrain from placing upon the defendant any responsiblity to find out who committed the offence?

The State then submitted its own proposed *voir dire* questions, which included one of the *Kazadi* questions among them:

> 8. The Defendant is charged with Theft-$100,000 Plus CR 7-104, Theft $25,000 to Under $100,000 CR 7-104, Theft Scheme-$100,000 Plus CR 7-104, Theft Scheme $25,000 to Under $100,000 CR 7-104, Embezzle Misappropriate CR 7-113 (1).
>
> Many people have strong feelings about the above charges. However, a Defendant is presumed to be innocent until proven guilty, and every case must be decided on the law and the evidence. Does any member of the panel have such strong feelings about the above charges that they would be unable to listen to the evidence, follow the Court's instructions and render a fair and impartial verdict?

The circuit court began *voir dire* on May 11, 2021.

During *voir dire*, the circuit court did not ask any of the *Kazadi* questions that the parties had submitted in writing. COVID-19 procedures in place at the time of trial required

the circuit court to split prospective jurors into two smaller groups, so the court asked the *voir dire* questions twice—once to each small group of prospective jurors. After the court asked the first round of *voir dire* questions, it gave both parties the opportunity to raise any objections:

> THE COURT: All right. We've got the responses to those. Any objections to the voir dire questions?
>
> [THE STATE]: None from the State.
>
> [DEFENSE COUNSEL]: Your Honor, I have a few things involving question number 12.
>
> THE COURT: I'm sorry.
>
> [DEFENSE COUNSEL]: Question No. 12 in the voir dire. . . . I think you missed it.
>
> [THE COURT]: All right. Correction. Yeah, do that. Once we get the responses to Question 12, I guess we're ready to go to the jury room, on questions with "yes" answers? You have some who didn't answer any questions.

Defense counsel alerted the court that it had forgotten to ask one of the *voir dire* questions submitted in writing, but the forgotten question pertained to prospective jurors' connections to law enforcement,[1] not one of the *Kazadi* questions. So although defense counsel submitted *Kazadi* questions in a pre-trial, written request, they didn't object to the omission of Ms. Hrusko's requested *Kazadi* questions at any point during the remainder of *voir dire* or during trial.

At the end of trial, the jury convicted Ms. Hrusko of one count of theft and one count

[1] The question the circuit court skipped asked, "Are you or any member of your immediate family or close friend[s] now or formerly employed by any law enforcement agency or correctional facility, including parole and probation or a prosecutor's office[?]"

of theft scheme. The circuit court imposed concurrent sentences of ten years' imprisonment with all but two years suspended and five years of probation upon release. Ms. Hrusko timely filed a notice of appeal. We supply additional facts as needed below.

II. DISCUSSION

On appeal, Ms. Hrusko contends primarily that the circuit court's refusal to ask *voir dire* questions required by *Kazadi* constituted reversible error.[2] Although she presents only one question, her argument encompasses two related issues. *First*, Ms. Hrusko asserts that defense counsel's submission of *Kazadi* questions in a pre-trial, written request for *voir dire* preserved the issue for appeal despite counsel's failure to object when the circuit court omitted the *Kazadi* questions during verbal *voir dire*. *Second*, and alternatively, she argues that defense counsel's failure to object to the circuit court's omission of the *Kazadi* questions constituted ineffective assistance of counsel. The State doesn't dispute that her

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[2] Ms. Hrusko framed her Question Presented as, "Did the trial court err by failing to ask *voir dire* questions requested by the defense?"

The State phrased its Questions Presented as follows:

> 1. Did [Ms.] Hrusko fail to preserve a claim that the trial court erred in not asking questions required under *Kazadi v. State*, 467 Md. 1 (2020), where defense counsel filed a pleading requesting certain voir dire questions 12 days before trial, but made no mention of those questions during voir dire and did not object to the failure to ask those questions when given the opportunity?
>
> 2. If [Ms.] Hrusko failed to preserve that claim, should this Court decline to address an ineffective assistance of cousel claim for the first time on appeal, where the record does not reveal defense counsel's reasons for not raising the issue during voir dire?

requested questions were required by *Kazadi* and that the court never asked them, but counters with two procedural arguments. *First*, the State asserts that Ms. Hrusko waived her right to appeal the failure to ask the *Kazadi* questions when she failed to object during verbal *voir dire*. *Second*, the State contends that Ms. Hrusko's ineffective assistance of counsel claim is inappropriate for direct appeal because the record does not reveal defense counsel's trial strategy.

A. Ms. Hrusko Waived Her Appeal Of The Circuit Court's Omission Of Certain *Voir Dire* Questions.

Ms. Hrusko admits that she didn't object to the circuit court's omission of the *Kazadi* questions during the verbal portion of *voir dire*. She asserts instead that she preserved her right to appeal the issue by including the *Kazadi* questions in her pre-trial, written request for *voir dire*. To support this assertion, she predicts that in *Lopez-Villa v. State*[3] (a case pending on appeal when she filed her brief), the Court of Appeals would hold that a written request for *Kazadi* questions preserves the issue for appeal despite counsel's failure to object to the omission of the *Kazadi* questions during verbal *voir dire*. The State counters that a written request for *voir dire* cannot preserve the *Kazadi* issue for appeal and, therefore, that Ms. Hrusko waived the issue when she elected not to object during verbal *voir dire*. We focus our analysis on whether a written request for *voir dire* by itself preserves the right to appeal a trial court's decision regarding whether to ask a *voir dire* question. We hold that it doesn't.

We "review[] for abuse of discretion a trial court's decision as to whether to ask a

[3] 478 Md. 1 (2022).

voir dire question." *Pearson v. State*, 437 Md. 350, 356 (2014) (citation omitted). A court abuses its discretion when "no reasonable person would take [its] view . . . or when the court acts without reference to any guiding rules or principles." *Nash v. State*, 439 Md. 53, 67 (2014) (cleaned up). Article 21 of the Maryland Declaration of Rights protects a defendant's "right to examine prospective jurors to determine whether any cause exists for a juror's disqualification." *Bedford v. State*, 317 Md. 659, 670 (1989) (citation omitted). A trial court thus errs when it declines to ask *voir dire* questions that may show cause for a juror's disqualification. *Marquardt v. State*, 164 Md. App. 95, 144 (2005). But an appellate court may only reach the merits of an issue as allowed under the Maryland Rules. *See, e.g.*, Md. Rule 8-131(a).

Maryland's rules of preservation balance fairness and efficiency by providing two paths to appellate review. *Robinson v. State*, 410 Md. 91, 103 (2009). The general preservation rule provides that an appellate court may only consider an issue that "plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). To preserve the right to appeal a trial court's decision regarding whether to ask certain *voir dire* questons, parties must raise their concerns to the trial court in a timely manner:

> For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated . . . . If a party has no opportunity

> to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Md. Rule 4-323(c). An appellate court may only review a trial court's decision regarding whether to ask certain *voir dire* questions, then, when (1) a party preserves the issue by raising a timely concern in the trial court, *id.*, or (2) the appellate court determines that it is necessary to decide the issue. Md. Rule 8-131(a).

A party's pre-trial, written request for *voir dire* cannot preserve the right to appeal a trial court's decision to omit a *voir dire* question. *Lopez-Villa*, 478 Md. at 20; *Brice v. State*, 225 Md. App. 666, 679 (2015). As both Ms. Hrusko and the State acknowledge, *Brice v. State* is instructive and controlling on this issue. There, Mr. Brice submitted *Kazadi* questions in a pre-trial, written request for *voir dire* but didn't object when the trial court omitted those questions during verbal *voir dire*. *Id.* at 679. The Court held that Mr. Brice's written request for *voir dire* could not preserve the *Kazadi* issue for appeal when he declined to object to the omission of the *Kazadi* questions during verbal *voir dire*. *Id.*

As we noted in *Brice*, "if a defendant does not object to the court's decision not to read a proposed question, he cannot complain about the court's refusal to ask the exact question he requested." *Id.* (cleaned up). Maryland's preservation rules require timely objections to ensure that trial courts have the opportunity to administer justice fairly and efficiently. *Lopez-Villa*, 478 Md. at 19–20 (*citing Robinson*, 410 Md. at 103). A written request for *voir dire*, submitted before verbal *voir dire* begins, does not make the trial court aware of a party's objection "*at the time the ruling or order is made or sought* . . . ." Md.

Rule 4-323(c) (emphasis added). And as such, a written request for *voir dire* fulfills neither Rule 4-323(c)'s notice requirement nor its purpose of allowing the trial court to consider possible errors fairly. *Lopez-Villa*, 478 Md. at 20.

Ms. Hrusko's prospective reliance on *Lopez-Villa* turns out to be misplaced. Contrary to her prediction, the Court in *Lopez-Villa* reiterated *Brice*'s holding that a party must object during verbal *voir dire* to preserve the right to appeal a trial court's omission of requested *Kazadi* questions. *Id.* Because Ms. Hrusko failed object to the omission of the *Kazadi* questions during verbal *voir dire*, therefore, she didn't preserve the issue for appeal. Her written request for *voir dire*, submitted twelve days before verbal *voir dire* began, did not meet Rule 4-323(c)'s requirement of *timely* alerting the circuit court to an objection. As in both *Brice* and *Lopez-Villa*, the circuit court did not have the opportunity to correct any potential error during verbal *voir dire*.

Nor is this case appropriate for the exception to the general preservation requirement contained in Rule 8-131(a). Appellate courts exercise their discretion to decide an unpreserved issue only when deciding the issue will serve the purpose of the preservation rules. *Chaney v. State*, 397 Md. 460, 468 (2007); *Robinson*, 410 Md. at 104. Preservation requirements ensure "that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Chaney*, 397 Md. at 468. Here, the circuit court lacked the opportunity to develop a proper record regarding the issue and like the Court in *Lopez-Villa*, we decline to exercise our discretion to review this unpreserved issue on appeal.

B. Ms. Hrusko's Ineffective Assistance Of Counsel Claim Is Inappropriate For Direct Appeal.

The record in this case is equally underdeveloped as to the defense's trial strategy. Ms. Hrusko asserts that if her failure to object during verbal *voir dire* waived the *Kazadi* issue for appeal, she received ineffective assistance of counsel because defense counsel had no strategic reason not to object. Specifically, she argues that defense counsel's failure to object during verbal *voir dire* demonstrated counsel's ignorance of the controlling holding in *Brice*. She contends that we can review her ineffective assistance of counsel claim on direct appeal because ignorance of this law constitutes performance so deficient that no further factfinding is required to find ineffective assistance of counsel. The State responds that defense counsel could have numerous legitimate reasons for declining to object and therefore this claim is inappropriate for direct appeal. Because the record is silent as to defense counsel's strategy during *voir dire*, Ms. Hrusko's ineffective assistance of counsel claim is best addressed at post-conviction.

Post-conviction proceedings under Maryland's Uniform Post-Conviction Procedure Act present the most appropriate path to raise an ineffective assistance of counsel claim. *Mosley v. State*, 378 Md. 548, 558–59 (2003). To prove ineffective assistance of counsel, a defendant must show (1) counsel's performance was deficient, and (2) that deficient performance prejudiced the defense in a way that deprived the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Maryland courts presume that counsel's conduct was reasonable. *Mosley*, 378 Md. at 557–58. Such deferential scrutiny of counsel's trial conduct requires information about counsel's decisionmaking that is

rarely found in the trial record. As the Supreme Court has noted, the trial record, which reflects the trial's purpose of evaluating innocence or guilt, "may reflect the action taken by counsel but not the reasons for it." *Massaro v. United States*, 538 U.S. 500, 505 (2003).

Post-conviction proceedings, on the other hand, present ample opportunity for the court to evaluate trial counsel's strategy and reasoning. A post-conviction proceeding "is a collateral attack designed to address alleged constitutional, jurisdictional, or other fundamental violations that occurred at trial." *Mosley*, 378 Md. at 559–60 (citations omitted). Crucially, post-conviction proceedings allow for evidentiary hearings at which the post-conviction court can gather and evaluate evidence. *Id.* at 560. Maryland appellate courts generally decline, therefore, to hear ineffective assistance of counsel claims on direct appeal. *See, e.g.*, *Johnson v. State*, 292 Md. 405, 434 (1982) ("[A] claim of ineffective assistance is more appropriately made in a post-conviction proceeding . . . .").

An ineffective assistance of counsel claim is appropriate for direct appeal only "when 'the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim.'" *Mosley*, 378 Md. at 566 (*quoting In re Parris W.*, 363 Md. 717, 726 (2001)). The record is developed sufficiently when (1) the defendant can show a prejudicial conflict of interest, (2) the trial court heard facts related to the claim, or (3) the case involves the death penalty. *Id.* at 563–64. To create a sufficiently developed record, then, a defendant typically must raise an ineffective assistance of counsel claim at the trial level. *See, e.g.*, *Ruth v. State*, 133 Md. App. 358, 367 (2000) (reviewing ineffective assistance of counsel claim on direct appeal after the trial court considered the claim at a

new trial hearing). Otherwise, ineffective assistance of counsel claims are best addressed at post-conviction, where trial counsel may explain their strategy. *Mosley*, 378 Md. at 567; *see also Stewart v. State*, 319 Md. 81, 92 (1990) ("We have consistently held that the desirable procedure for determining claims of inadequate assistance of counsel, when the issue was not presented to the trial court, is by way of the Post Conviction Procedure Act.").

Here, the record is silent about defense counsel's trial strategy. Ms. Hrusko didn't raise an ineffective assistance of counsel claim in the circuit court, and nothing in this record suggests defense counsel's rationale for declining to object during *voir dire*. Perhaps because of this silence, Ms. Hrusko asserts that defense counsel failed to object because he was ignorant of the law, and thus no further factfinding is required to address the claim. But we cannot assume without evidence that defense counsel here failed to object because he was unaware of controlling case law.

As the State notes in its brief, it's possible that defense counsel determined that the *Kazadi* questions could signal implicitly to jurors that the State had a strong case. It's equally possible that defense counsel opted not to object based on counsel's perception of the prospective jurors at the time. We cannot know because the record is silent as to defense counsel's decisionmaking. Post-conviction proceedings will present Ms. Hrusko the opportunity to develop the record to support her assertion that defense counsel failed to object due to ignorance of the law.

To determine this claim on direct appeal, we would have to make conjectures about defense counsel's strategy and knowledge, which exposes this Court to "'the perilous

process of second-guessing' without the benefit of potentially essential information." *Mosley*, 378 Md. at 561 (*quoting State v. Johnson*, 292 Md. 405, 435 (1982)). That sort of guesswork would defy the purpose of ineffective assistance of counsel claims and post-conviction proceedings. So because the record is silent as to defense counsel's trial strategy, Ms. Hrusko's ineffective assistance of counsel claim is best addressed at post-conviction.

JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED. APPELLANT TO PAY COSTS.