Circuit Court for Baltimore City
Case No. 118190021

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1219

September Term, 2019

MICHAEL KING DORSEY

v.

STATE OF MARYLAND

Fader, C.J.
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: November 16, 2020

A jury in the Circuit Court for Baltimore City convicted Michael Dorsey, appellant, of second-degree sexual offense, second-degree attempted rape, and harassment. The court sentenced appellant to a term of fifteen years' imprisonment for the second-degree sexual offense, a concurrent term of fifteen years' imprisonment for second-degree attempted rape, and a consecutive term of ninety days' imprisonment for harassment. In this appeal, appellant presents four questions, which we have rephrased as:

1. Did the trial court err in admitting audio recordings of four telephone calls made by appellant from jail?

2. Did the trial court err in refusing to propound appellant's requested *voir dire* question regarding the presumption of innocence?

3. Did the trial court commit plain error in propounding certain *voir dire* questions in compound form?

4. Did defense counsel render ineffective assistance in failing to object when the trial court refused to propound appellant's requested *voir dire* question regarding the presumption of innocence and when the trial court asked certain *voir dire* questions in compound form?

We perceive no error and affirm appellant's convictions.

BACKGROUND

Appellant lived in a three-story townhouse with his wife, Candace G. In December of 2016, Candace G.'s adult daughter, E.G., began living in the townhouse's basement. E.G. and appellant are not related.

At trial, E.G. testified that, on Saint Patrick's Day in 2017, she was in Fells Point with some friends. After consuming "a lot of drinks," E.G. returned home, where she

continued drinking alcohol. E.G. eventually went to sleep in her basement bedroom. At the time, she was alone and fully clothed.

E.G. testified that, when she awoke, her "pants were gone" and appellant's "face" was "in [her] vagina." E.G. tried pushing appellant away, but he "wouldn't move." According to E.G., appellant "had his tongue in [her] vagina." E.G. continued to struggle, at which point appellant held her down and attempted to remove his pants and underwear. E.G. screamed, and appellant "ran."

E.G. testified that, following the incident, she "ran away" and did not return to the townhouse "for two to three days." At some point, E.G. began receiving text messages and messages on social media from appellant. The messages were "a daily harassment" and included statements such as: "I miss you. I love you. When are you going to come back? It's okay, I won't do it again." Another message included a "collage picture" of some of E.G.'s personal information with a caption that read: "This is going on Instagram, Facebook and Twitter tomorrow." In several other messages, appellant told E.G. that he wanted "to apologize" and that he was "sorry."

E.G. testified that, in May of 2017, she was outside the courthouse on North Avenue in Baltimore when appellant approached her, wanting "to talk." E.G. told appellant to leave her alone, but appellant persisted. E.G. then "turned right back around" and went "to the commission officer and filed a report."

Baltimore City Police Detective Rachel Wersley testified that she received and investigated a sexual assault complaint made by E.G. In investigating that complaint, Detective Wersley collected and reviewed recordings of four phone calls that appellant had

placed to Candace G. from jail following the incident involving E.G. In those calls, which were played for the jury, appellant made several references to the incident.

Candace G. also testified, stating that, shortly after the incident, E.G. called her and reported that "[appellant] raped her." Candace G. further recounted that appellant admitted to her that he had "performed oral sex" on E.G. "until she woke up and told him to go upstairs."

Appellant was ultimately convicted of second-degree sexual offense, second-degree attempted rape, and harassment. This timely appeal followed.

DISCUSSION

I.

Appellant's first claim of error concerns the admission of recordings of jail calls he made to Candace G. following the incident. Those recordings, which were ultimately admitted as State's Exhibits 2, 3, 4, and 5, were the subject of a Motion to Exclude filed by appellant prior to trial. The trial court heard argument on the motion on the second day of trial, after jury selection but prior to the admission of any evidence.

At the outset of the hearing, defense counsel stated that she was making a "general motion" for the exclusion of all the jail calls on the grounds that they were "not relevant" and were "too prejudicial to be probative." In response, the court indicated that it wanted to address each call individually, with the State providing a proffer as to the content of each call and defense counsel providing argument as to why each call should be excluded. During that discussion, the State informed the court that certain portions of each of the four recordings had been redacted, and thus would not be played, because they referenced the

fact that appellant was in jail. The State also indicated that it only intended to play the portions of the recordings in which appellant made inculpatory statements or referenced the incident involving E.G.

Regarding State's Exhibit 2, the State proffered that appellant could be heard stating that E.G. was "lying about being drunk or being asleep" during the incident, that she had consented to the act of cunnilingus because she wanted to have a relationship with him, and that she was "going to get what's coming to her." The State argued that the call was relevant to show that appellant was "admitting to the act" rather than providing "a straight denial." Defense counsel maintained her general objection to the admission of the call, but argued that, if the court intended to admit any portion of the call, it should not be redacted because the redacted portions provided context for the statements concerning E.G.

Regarding State's Exhibit 3, the State proffered that appellant could be heard stating that E.G. "consented to his actions," that she was not drunk or asleep when he performed the act, and that she did not scream or struggle during the act. The State proffered further that the recording captured appellant stating that he had a video of the incident involving E.G., that the video contradicted E.G.'s recitation of the incident, and that Candace G. should confront E.G. with the existence of the video in an effort to affect her testimony or persuade her not to come to court. The State added that subsequent calls revealed that appellant did not, in fact, have any video of the incident. The State argued that the call would not only corroborate E.G.'s anticipated testimony but would also support the charge of harassment. Defense counsel responded that the call was "not relevant" and was "too prejudicial." Defense counsel also argued that, should the call be admitted, it should not

be redacted because, as with State's Exhibit 2, the entire conversation provided context for the statements at issue.

Regarding State's Exhibit 4, the State proffered that appellant stated that E.G. was "lying about having been held down"; that she was "moaning and going along with it"; and that she "held his head and enjoyed every bit of it until she woke, until she woke up and seen it was him and then she acted like she was so surprised." Defense counsel argued that the entire recording was "not relevant" and "too prejudicial to be probative." As with the State's other two exhibits, defense counsel asked alternatively that State's Exhibit 4 be played in its entirety.

Regarding State's Exhibit 5, the State proffered that appellant and Candace G. discussed "the living situations at his residence"; that, in so doing, Candace G. told appellant that he should not require her daughter "to submit to sexual contact" in order to live in the house; and that, in response, appellant stated: "What would you expect when you place meat in front of a lion?" The State argued that the call showed appellant's "guilty nature." Defense counsel argued that the call was not relevant because appellant's comment was directed at another one of Candace G.'s daughters, not E.G. For that reason, defense counsel argued, the call should be excluded as "other crimes evidence."

Ultimately, the trial court ruled that State's Exhibits 2, 3, and 4 would be admitted in their entirety. The court ruled that State's Exhibit 5 would also be admitted, but only the portion of the recording in which appellant made the statement regarding placing "meat in front of a lion."

Later, the State played for the jury State's Exhibits 2, 3, and 4, each of which included the proffered statements as well as some extraneous conversation between appellant and Candace G. The State also played for the jury State's Exhibit 5, which included only appellant's statement to Candace G. about her daughters living in the house: "You gonna have p***y walking around my mother f****** house? That's like putting meat, raw meat, in a lion's cage and say, don't touch it."

We begin with the general principles that will guide our analysis of this issue. Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Evidence that is relevant is generally admissible; evidence that is not relevant is not admissible. Md. Rule 5-402. Establishing relevancy "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018) (citing *State v. Simms*, 420 Md. 705, 727 (2011)). We review the court's determination of relevancy under a *de novo* standard. *Id.* at 563.

Even if legally relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the [fact-finder's] evaluation of the issues in the case." *Smith v. State,* 218 Md. App. 689, 705 (2014). In so doing, "[w]hat must be balanced against 'probative value' is not 'prejudice' but, as expressly

stated by Rule 5-403, only 'unfair prejudice.'" *Newman v. State*, 236 Md. App. 533, 549 (2018). Moreover, "the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in [Maryland] Rule 5-403." *Ford v. State*, 462 Md. 3, 58–59 (2018) (alteration in original) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)). "This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003) (citing *Martin v. State*, 364 Md. 692, 705 (2001)).

State's Exhibit 2

Appellant argues that his comments in State's Exhibit 2, in which he asserted that E.G. had consented to the act and would "get what's coming to her," were irrelevant and prejudicial. He argues that the latter comment was merely an "assertion of innocence" because it is clear from the context of the call that he was "asserting that E.G.'s allegations are false and that they would be proven as such in court, *i.e.*, that she will be proven to have been lying." As for his comments regarding E.G.'s consent to the act, appellant claims that those comments, which amounted to a "rehash of E.G.'s allegations and a denial of same," were irrelevant. He argues further that, even if relevant, the probative value was "outweighed by the danger of unfair prejudice and the needless presentation of cumulative evidence – E.G. took the stand and recounted her allegations."

The State responds that appellant's relevancy argument is unpreserved because he did not raise it at trial. The State also contends that appellant's argument that his comments were "an assertion of innocence" was waived because he "did not seek to exclude any of the statements on the call that provided the context which allegedly showed that he was

proclaiming his innocence." The State further asserts that appellant's argument regarding the "cumulative" nature of his comments was not raised at trial and is thus unpreserved. Finally, the State claims that, even if preserved, appellant's claims are without merit: appellant's comments were relevant to show that he had committed the act of cunnilingus, which was the basis for the charges, and appellant's comments were clearly not unfairly prejudicial because they supported the defense's theory that E.G. had consented to the act.

We briefly address the State's preservation arguments. It is clear from the record that defense counsel moved to exclude the entirety of State's Exhibit 2 because it was "not relevant" and "too prejudicial." We therefore conclude that appellant's relevancy argument is preserved. Md. Rule 4-323(a). On the other hand, defense counsel never argued that any specific statement constituted an "assertion of innocence," nor did she argue that the call should be excluded because it was cumulative of other evidence. Thus, those arguments were not preserved for our review. *See State v. Jones*, 138 Md. App. 178, 218 (2001) ("[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'" (quoting *Leuschner v. State*, 41 Md. App. 423, 436 (1979))).

That said, we hold that the trial court did not err in admitting State's Exhibit 2. In that recording, appellant made statements indicating that he had, in fact, engaged in some sort of sexual act with E.G. on the night in question. Those statements were relevant to prove the charge of second-degree sexual offense. *See* Md. Code (2002, 2012 Repl. Vol.,

2016 Supp.), § 3-306(a) of the Criminal Law Article ("CR")[1]; *see also Chow v. State*, 393 Md. 431, 463 (2006) ("Every crime is generally composed of two aspects; the *actus reus* (guilty act) and the *mens rea* (culpable mental state) accompanying a forbidden act."). We are likewise not persuaded that the court abused its discretion in finding that the recording's probative value was not substantially outweighed by the danger of unfair prejudice. Although some of the statements contained in the recording were "prejudicial" in that they hurt appellant's case, they did not dissuade the jury from considering the evidence. *See Burris v. State*, 453 Md. 370, 392 (2013). Moreover, part of the recording supported appellant's trial theory, which included a claim that the act involving E.G. was consensual.

Appellant's other claims, even if preserved, are also without merit. As discussed, the statements contained in State's Exhibit 2 were relevant and admissible. Appellant's statements that E.G. was lying and was "going to get what's coming to her," when viewed in conjunction with his statements in State's Exhibit 3 falsely indicating he had a video of the incident, were probative of his guilt. The jury could infer from appellant's false claims about having a video, and his corollary threats to expose E.G. as untruthful, that appellant himself lacked credibility. *See Byrd v. State*, 98 Md. App. 627, 632 (1993) ("An attempt to suborn a witness is relevant and is admissible as conduct tending to show appellant's guilt."), *abrogated on other grounds by Winters v. State*, 434 Md. 527 (2013). In any event,

[1] To convict appellant of second-degree sexual offense, the State needed to prove that appellant (1) engaged in a sexual act with E.G. (2) by force or threat of force, or while she was mentally incapacitated or physically helpless. CR § 3-306(a)(1) and (2). This statute was repealed on October 1, 2017, when first and second-degree sexual offenses were incorporated into the rape statutes.

to the extent those statements could be construed as an "assertion of innocence," they were consistent with his defense that the act was consensual; it was for the jury to determine whether E.G. or appellant was more credible. Nor were the statements inadmissible simply because they were cumulative of E.G.'s testimony. *See Lucas v. State*, 116 Md. App. 559, 573 (1997) ("The State is obligated to present sufficient evidence to convince the jury of appellant's guilt. Because it bears this burden, the State may occasionally present redundant evidence." (citing *Anaweck v. State*, 63 Md. App. 239, 247 (1985), *overruled on other grounds by Wynn v. State*, 351 Md. 307 (1998))). Rather, Rule 5-403 gives the trial court the discretion to exclude otherwise relevant evidence if the court finds that doing so would prevent the "needless presentation of cumulative evidence." *See also Ford*, 462 Md. at 59 ("[A]lthough other evidence of consciousness of guilt was adduced at trial . . . it was entirely within the circuit court's discretion to conclude that [certain evidence] was admissible and not cumulative."). That discretion was not abused here, particularly given that E.G. had not yet testified when the court made its ruling.

State's Exhibit 3

Appellant argues that his comments in State's Exhibit 3, in which he admitted to the sexual act and falsely claimed that he had video of the incident, were irrelevant and prejudicial. Specifically, appellant contends that his statements admitting to the act should have been excluded because they were "cumulative" to the statements in State's Exhibit 2. Appellant also argues that the statements were irrelevant to show "consciousness of guilt." As for his statements regarding the existence of the video of the incident, appellant claims

that the statements were not relevant to prove harassment. He also argues that the statements were unfairly prejudicial and needlessly cumulative.

The State responds that appellant's statements admitting to the act were not cumulative and, in any event, were harmless. The State contends that appellant's false statements regarding the existence of the video tended to show a consciousness of guilt and a willingness to engage in harassing behavior. The State further claims that the comments regarding the video were neither unfairly prejudicial nor needlessly cumulative.

We conclude that the trial court did not err in admitting State's Exhibit 3. As with State's Exhibit 2, State's Exhibit 3 included statements in which appellant admitted to the act and suggested that E.G. was lying. Those comments were relevant to establish the elements of second-degree sexual offense. The probative value of the comments was not substantially outweighed by the danger of unfair prejudice. That the comments may have been cumulative to other evidence does not render the evidence inadmissible. *Ford*, 462 Md. at 59.

As noted, State's Exhibit 3 also included statements in which appellant falsely claimed that he had a video of the incident. Appellant then suggested that Candace G. should confront E.G. with the existence of the video in an effort to affect her testimony or persuade her not to testify. Those comments were probative of appellant's guilt. *Byrd*, 98 Md. App. at 632. Appellant provides no explanation as to why those statements were unfairly prejudicial, and we see no reason to disturb the trial court's ruling on that ground. Finally, the comments were not cumulative, as no other evidence was presented to show

that appellant sought to threaten E.G. with a non-existent video. For those additional reasons, the court did not err in admitting State's Exhibit 3.

State's Exhibit 4

Appellant argues that his comments in State's Exhibit 4, in which he stated that E.G. had been enjoying the act of cunnilingus until she "woke up and seen it was me," were irrelevant, prejudicial, and needlessly cumulative. He concedes that he performed cunnilingus on E.G. He also acknowledges telling Candace G. that "he performed oral sex on [E.G.] until she woke up and told him to go upstairs."

The State argues that the comments were "highly probative" not only because appellant was essentially admitting to having committed second-degree sexual offense, but because the evidence was relevant to whether E.G. was mentally incapacitated or physically helpless at the time of the act.

We agree with the State. Appellant was charged with, and the jury was instructed on, two different modalities of second-degree sexual offense. The first modality was that appellant had committed a sexual act by force or threat of force. *See* CR § 3-306(a).[2] The second modality required consideration whether appellant had committed the sexual act while the victim was mentally incapacitated or physically helpless. *Id.* Thus, appellant's statement that E.G. was asleep while he committed the act was relevant to prove the second modality of second-degree sexual offense.

[2] See footnote 1.

We likewise agree that the statements were not unfairly prejudicial or needlessly cumulative. Although perhaps prejudicial, the statements were not *unfairly* prejudicial given that they were directly probative of appellant's guilt. For that same reason, they were not *needlessly* cumulative. The statements were not cumulative for the additional reason that Candace G. had not yet testified when the statements were admitted and played for the jury. [3]

State's Exhibit 5

Appellant argues that his comment in State's Exhibit 5, in which he told Candace G. that having "p***y walking around my . . . house" was "like putting . . . raw meat in a lion's cage and say, don't touch it," was irrelevant and prejudicial. He argues that the comment was irrelevant because it did "not link to the alleged incident" and only established that he "had a ravenous sexual appetite." He also argues that the comment constituted "bad acts evidence inadmissible under Maryland Rule 5-404(b)" because the comment tended to impugn or reflect adversely upon his character.

The State argues that the comment was relevant and not unfairly prejudicial because it showed appellant's "state of mind on the key issue of whether he engaged in sexual acts with E.G. without her consent." The State argues further that the comment did not

[3] As to State's Exhibits 2, 3, and 4, defense counsel took an "all or nothing" position, *i.e.* although she preferred that those calls be excluded in their entirety, in the event the court determined that parts of the calls were admissible, defense counsel requested that the calls be played in their entirety. Because these three calls clearly contained relevant evidence, the court did not err in admitting the entirety of the calls as defense counsel requested.

constitute bad act evidence because all references to an incident involving E.G.'s younger sister were redacted.

We hold that State's Exhibit 5 was properly admitted. By likening "p***y walking around [his] house" to "putting . . . raw meat in a lion's cage," the jury could infer that appellant had difficulty controlling himself sexually when there were women in his house. The comment was therefore probative of appellant's state of mind and his intent to engage in a sexual act with E.G., a female member of his house, against her will. *See* Md. Rule 5-404(b) ("Evidence of other crimes, wrongs, or other acts . . . may be admissible for other purposes, such as proof of . . . intent[.]"); *see also Johnson v. State*, 332 Md. 456, 470 (1993) ("It is well settled in Maryland that where intent is at issue, proof of a defendant's prior conduct may be admissible to prove the defendant's intent."). Although the comment is offensive and potentially inflammatory, it was appellant's own description of his inferentially uncontrollable sexual urges. We cannot say that the comment's probative value was substantially outweighed by the danger of unfair prejudice.[4]

II.

Appellant's next claim of error concerns the trial court's refusal to propound a *voir dire* question regarding the presumption of innocence. Prior to trial, appellant submitted a numbered list of proposed *voir dire* questions to the trial court. Question 15 on that list read as follows: "Do any of you believe that because a defendant is accused of a crime, he

[4] To the extent that State's Exhibit 5 included a reference to Candace G's other daughters, we agree with the State that the court properly redacted any reference to other women in the home.

is more likely than not guilty of that crime?"

On the first day of trial, prior to *voir dire*, the trial court discussed the parties' proposed *voir dire* questions. During that discussion, the following colloquy transpired:

THE COURT: Every one of my questions, I ask [the jurors] if they will follow the law as I instruct. And as you know, I'll instruct that the Defendant is presumed innocent. But before we even start the case, I actually give a little introduction of the case.

* * *

. . . It talks about the Defendant being innocent at the beginning of this case, and that that's your -- the job of the State.

* * *

. . . So I will do that in this case, but I will not say to them, do you have any knowledge or formed an opinion about innocence or guilt. If you want me to ask if they will not follow the law as I instruct, I will ask that.

[DEFENSE]: Okay.

THE COURT: Do you follow me?

[DEFENSE]: Yeah.

* * *

THE COURT: So, [defense counsel], you've heard me give the Defendant comes in the courtroom cloaked with innocence. The burden of the State is to remove that cloak, if they can do so, beyond a reasonable doubt. I am going to give that at the beginning right before I ask them about my follow the law as instruct and ask if anyone cannot do that, cannot follow the law.

[DEFENSE]: Okay.

THE COURT: It will encompass your number --

[DEFENSE]: 15.

THE COURT: 15, but it won't be your number 15. I don't want to set up anything like, do you believe that a defendant [who] is accused of a crime is more likely than not guilty of the crime? I don't want to set that in their minds. I want every affirmative statement to place the burden squarely where it belongs and on the State and I want every affirmative statement to place burden, in the mind of the jury, the presumption of innocence and the cloak of innocence that surrounds your client.

[DEFENSE]: Okay.

THE COURT: If you send a negative message, it falls on ears who start thinking about your negative message. And I think your 15 sets that up. It changes the tone and I don't want that to be changed.

[DEFENSE]: Okay.

THE COURT: If the State can prove its case beyond a reasonable doubt, they'll do so and they'll remove that cloak. And if they can't, he keeps the cloak. And that's got to be what we do to correct any misunderstandings in the mind of any jurors that will be sitting here and to ensure that we have a fair and impartial panel.

[DEFENSE]: Okay.

The trial court then continued its discussion of proposed *voir dire* questions. At the conclusion of that discussion, the court told defense counsel: "If when I'm done, you feel the need for more questions; in other words, you feel that we haven't adequately covered some particular area . . . let me know." Defense counsel responded: "Okay."

The trial court thereafter conducted its *voir dire* of prospective jurors. At the conclusion of its *voir dire*, the court asked counsel: "So did I miss anything?" Defense counsel responded, "No."

Appellant now claims that the trial court erred in refusing to propound his requested *voir dire* question 15, which asked if jurors believed that, because a defendant is accused of a crime, he is more likely than not guilty of that crime. Appellant asserts that pursuant to the Court of Appeals's decision in *Kazadi v. State*, 467 Md. 1 (2020), the trial court's refusal to propound the requested question constituted reversible error.

The State argues, and we agree, that appellant's argument is unpreserved. In *Kazadi v. State*, the Court of Appeals held that, "[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 presumption of innocence, the burden of proof, and the defendant's right not to testify." *Kazadi*, 467 Md. at 48. The Court added that its holding applied "to this case and 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 (emphasis added).

Objections made during jury selection are governed by Maryland Rule 4-323(c), which states, in relevant part, that "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." Md. Rule 4-323(c). Thus, a defendant "preserves the issue of omitted *voir dire* questions under Rule 4-323 by telling the trial court that he or she objects to his or her proposed questions not being asked." *Smith*, 218 Md. App. at 700–01 (citing *Marquardt v. State*, 164 Md. App. 95, 143 (2005), *overruled in part on other grounds by Kazadi*, 467 Md. at 27, 35–36). On the other hand, if the "defendant does not object to the court's decision to not read a proposed question, he cannot 'complain about the court's refusal to ask the exact question he requested.'" *Brice v. State*,

225 Md. App. 666, 679 (2015) (citing *Gilmore v. State*, 161 Md. App. 21, 33, *vacated in part on other grounds*, 389 Md. 656 (2005)). Similarly, if the defendant validly waives any objection to the court's decision, he "may not complain on appeal that the court erred in denying him the right he waived[.]" *Id.* (quoting *Brockington v. Grimstead*, 176 Md. App. 327, 355 (2007)).

In *Brice v. State*, the defendant submitted several written *voir dire* questions to the court, but the court intentionally omitted those questions during *voir dire*. *Id.* At the conclusion of *voir dire*, when the court asked if the parties had any comments or objections to the *voir dire* questions, defense counsel responded, "No." *Id.* When the defendant later complained on appeal that the court had erroneously refused to propound his requested *voir dire* questions, we held that the issue had been explicitly waived. *Id.* We explained that "[d]efense counsel's response was more than 'the simple lack of an objection;' he 'affirmatively advised the court that there was no objection.'" *Id.* (quoting *Booth v. State*, 327 Md. 142, 180 (1992).

Here, as in *Brice*, appellant did not object when the trial court stated that it would not pose his *voir dire* question regarding the presumption of innocence, which he had submitted in writing prior to trial. Appellant also failed to lodge an objection at any point during the court's lengthy explanation as to why it felt that appellant's question was inappropriate as written. In fact, during that explanation, defense counsel expressed agreement with the court's course of action regarding how the topic of a defendant's innocence would be handled during *voir dire*. Moreover, at the conclusion of the court's

voir dire, defense counsel affirmatively stated that she had no objections to the *voir dire* as given. Accordingly, appellant's argument was not preserved for our review.

Appellant, citing Maryland Rule 8-131(a), argues that the issue was preserved because the trial court "decided," on the record, not to propound the requested question. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). We disagree, as our holding in *Brice* is controlling.

Appellant argues that defense counsel's responses of "okay" during the trial court's discussion of his question 15 did not constitute acquiescence in the court's ruling because the responses were "not couched in any language of agreement." Appellant also argues that defense counsel's response of "No" to the court's question as to whether it "missed anything" did not constitute acquiescence because "the court was not asking counsel whether it wished to revisit previous rulings."

Neither of appellant's claims have merit. The record makes plain that appellant did not lodge any objection to the court's decision, despite being given ample opportunity to do so. The record also makes plain that defense counsel was at all times in agreement with the court's course of action. Thus, the issue was not preserved.[5]

[5] We note that the Court of Appeals recently granted a petition for writ of *certiorari* in *Anthony George Ablonczy v. State*, No. 3219, Sept. Term 2018, *cert. granted*, No. 28, Sept. Term, 2020 (Md. Oct. 6, 2020), regarding appellate preservation pursuant to *Kazadi*. Unlike the instant case, *Ablonczy* concerns whether a defendant, by accepting the jury as empaneled, waives objection to the court's refusal to propound required *voir dire* questions.

III.

Appellant's next contention also concerns the trial court's *voir dire*. As part of his list of proposed *voir dire* questions submitted prior to trial, appellant asked the trial court to propound the following two questions:

> 14. This case involves allegations of sexual offenses. Do you have such strong feelings about allegations of sexual offenses that it would be difficult or impossible for you to render a fair and impartial verdict in this case?
>
> * * *
>
> 17. [Appellant] is an African American male. Would any of you hold any bias or prejudice towards African Americans in general, African American males, or [appellant] specifically?

The trial court ultimately propounded, without any objection from appellant, the following questions to prospective jurors:

> The defendant is an African-American male. Anyone hold a bias or prejudice against him merely because he is an African-American male, please stand. I see no one standing, I'll assume an answer in the negative.
>
> Ladies and gentlemen, I heard a few groans when I read out the charges and I'm letting the record reflect that I heard sighs or groans. I need to know if anyone has strong feelings about the allegations of these charges of sexual offense that would make it difficult or impossible for you to render a fair and impartial verdict merely because of the type of charges. I'm not asking you if you like the charges, that's not my question. My question is, is it something about the type of charges that would interfere with your ability to be fair, listen to the witnesses, consider the evidence, and render a fair verdict because of the nature of the charges. You have strong feelings about the nature of the charges. If your answer is yes, please stand.

In addition to the above two questions, the trial court posed, without any objection from appellant, the following question to prospective jurors:

> So, ladies and gentlemen, you heard me say that it was really important that I have jurors who can be fair and impartial, jurors who could listen to the case, consider the evidence, and render a fair and impartial

> verdict. Sometimes people have bias, prejudice, preconceived notions, opinions or beliefs that interfere with their ability to be fair. Does anyone have a faith that says that you can't stand in judgment; that is, you can't follow the law as I instruct because you're going to follow some other law, maybe it's some religious law that you believe. If you have a faith that says you can't stand in judgment, please stand at this time. I see no one standing and I'll assume an answer in the negative.

Appellant now claims that the trial court erred in posing the above three questions. He argues that the "compound form" of the three questions rendered them improper. Conceding that he did not object at trial, appellant asks that we recognize the issue for plain error.

We decline appellant's request. The Court of Appeals has "characterized the instances when an appellate court should take cognizance of unobjected to error as '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[.]'" *State v. Brady*, 393 Md. 502, 507 (2006) (first alteration in original) (citations omitted) (first quoting *State v. Hutchinson*, 287 Md. 198, 202 (1980); and then quoting *State v. Daughton*, 321 Md. 206, 211 (1990)). On the other hand, plain error review is inappropriate "as a matter of course" or when the error is "purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* (quoting *Hutchinson*, 287 Md. at 202–03). Moreover, plain error review "is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court." *Chaney v. State*, 397 Md. 460, 468 (2007).

In *State v. Rich*, 415 Md. 567 (2010), the Court of Appeals set forth the following four-prong test regarding plain error review:

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [court] proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. at 578 (citations and quotations omitted) (quoting *Puckett v. U.S.*, 556 U.S. 129, 135 (2009)).

The issue of compound *voir dire* questions was addressed by the Court of Appeals in *Dingle v. State*, 361 Md. 1 (2000). There, the defendant, during jury selection, asked the trial court to pose a series of questions related to whether prospective jurors had certain experiences or associations. *Id.* at 3. The court agreed, but ultimately merged each of the defendant's requests with a related suggestion by the State, in which the State had asked the court to inquire into whether the experience or association would affect the juror's ability to be fair and impartial. *Id.* at 3–4. The court thereafter posited several two-part questions to the jury venire, with each question asking both whether the prospective juror had a particular experience or association and whether that experience or association would affect the jury member's ability to be fair and impartial. *Id.* The court asked prospective jurors to stand only if they answered "yes" to both parts of the question. *Id.* at 4–6.

After the defendant was convicted and this Court affirmed, the Court of Appeals reversed, holding that the trial court erred in posing the questions as it did. *Id.* at 21. The Court noted that, during the *voir dire* of prospective jurors, it is the trial judge, and not the individual jury member, who must decide whether and when a cause for disqualification exists for a prospective juror. *Id.* at 14–15. The trial judge erred in "fail[ing] to appreciate that, should there be a challenge, he had the responsibility to decide, based upon the circumstances then existing, . . . whether any of the venire persons occupying the questioned status or having the questioned experiences should be discharged for cause[.]" *Id.* at 17. In other words,

> [b]ecause he did not require an answer to be given to the question as to the existence of the status or experience unless accompanied by a statement of partiality, the trial judge was precluded from discharging his responsibility, *i.e.*, exercising discretion, and, at the same time, the [defendant] was denied the opportunity to discover and challenge venire persons who might be biased.

Id.

Against that backdrop, we are not persuaded that appellant's argument meets the standard for plain error review. To begin with, two of the disputed questions—the one regarding appellant being an African-American male and the other regarding a prospective juror's faith—were not compound questions. The first question asked if any juror held "a bias or prejudice against [appellant] merely because he is an African-American male." The second question asked if any juror was of "a faith that says you can't stand in judgment." Neither of those questions required a juror to identify a pertinent status or experience and then evaluate whether that status or experience would cause the juror to be biased. As to

the first question, the court identified appellant as an African-American and directly asked whether any juror would be biased "merely because he is an African-American male." Likewise, in posing the question concerning a prospective juror's faith, the court was not asking whether jurors had a religious faith and, if so, whether that faith affected their partiality. Instead, the court clearly asked whether any prospective juror's "faith" (*i.e.* religious beliefs) prevented him or her from standing in judgment. We do not view these as improper compound questions and thus discern no appealable error in propounding them.

The remaining question was a compound question, inquiring whether there was "something about the type of charges that would interfere with [a juror's] ability to be fair." We recognize that those types of "strong feelings" questions have been deemed improper. *See Pearson v. State*, 437 Md. 350, 363–64 (2014) (holding that, upon request, a trial court must ask a "strong feelings" question but may not phrase the question in such a way that prospective jurors are responsible for deciding whether their "strong feelings" would affect their ability to be fair and impartial). Nevertheless, the question propounded by the court was substantially similar to the one requested by appellant. Thus, we see no error in the trial court propounding a question requested by the defendant. *See Robinson v. State*, 410 Md. 91, 104 (2009) ("[I]f the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship."); *Cf. Rich*, 415 Md. at 579 ("We have held repeatedly that where the defendant himself proposes allegedly flawed jury instructions, we deny review under the invited error doctrine[.] . . . The doctrine reflects the policy that invited errors are less worthy of consideration than

those where the defendant merely fails to object." (quoting *United States v. Perez*, 116 F.3d 840, 844 (1997))).

IV.

Lastly, appellant claims that defense counsel rendered ineffective assistance in both requesting and not objecting to the three *voir dire* questions discussed in Part III. He also claims that defense counsel rendered ineffective assistance in failing to object to the trial court's refusal to propound his requested question 15 regarding the presumption of innocence. The State argues that appellant's ineffective assistance claim should be raised in a post-conviction proceeding, not in a direct appeal.

"Generally, absent any 'objective, uncontroverted, or conceded error,' the issue of defense counsel's effectiveness is raised most appropriately in a post-conviction proceeding." *Steward v. State*, 218 Md. App. 550, 570 (2014) (quoting *Haile v. State*, 431 Md. 448, 473 (2013)). "The primary reason behind the rule is that, ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel." *In re Parris W.*, 363 Md. 717, 726 (2001). "The rule, however, is not absolute and, where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable." *Id.*

"To succeed on an ineffective assistance of counsel claim, the defendant must show: (1) that his or her counsel's performance was deficient, and (2) that he or she suffered prejudice because of the deficient performance." *Bailey v. State*, 464 Md. 685, 703 (2019) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "To prove deficient

performance, an appellant must identify acts or omissions of his attorney that were objectively unreasonable in comparison to prevailing professional norms." *Steward*, 218 Md. App. at 570 (citing *Strickland*, 466 U.S. at 688). To establish prejudice, an appellant must show "that there is a substantial possibility that, but for counsel's error, the result of his proceeding would have been different." *In re Parris W.*, 363 Md. at 727–28.

Based on the record before this Court, we cannot say that defense counsel's performance was deficient, such that direct review of appellant's claim would be appropriate. Regarding the three *voir dire* questions discussed in Part III, two of the questions were not compound; thus, appellant's claim that defense counsel rendered ineffective assistance in failing to object on those grounds is without merit. As for the "strong feelings" question, although defense counsel submitted an improper compound question, the court appeared to alter the question and ask whether any juror had "strong feelings about the nature of the charges."

Regarding defense counsel's failure to object to the trial court's refusal to propound appellant's requested question 15, we note that, at the time of trial, *Kazadi v. State* had yet to be decided. In our view, it would be inappropriate to hold as a matter of law that defense counsel was deficient by failing to presciently anticipate the Court of Appeals's decision in *Kazadi*, which abdicated long-standing precedent. We also note that, in declining appellant's request, the court provided a reasonable explanation as to why it did not want to ask the requested question as written, and the court offered a reasonable alternative to the question, which defense counsel accepted. Whether defense counsel's acceptance of

the alternative question was objectively unreasonable is a matter that is more appropriately resolved in another forum.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.