Circuit Court for Howard County
Case No. 13-K-17-057541
Case No. 13-K-17-057542

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1256
September Term, 2017

ERIC SHIRD
v.
STATE OF MARYLAND

No. 124
September Term 2018

DARIES WILLIAMS
v.
STATE OF MARYLAND

Wright,
Nazarian,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: December 4, 2018

Appellants in these cases were charged separately but tried together in the Circuit Court for Howard County for crimes arising from a shooting that occurred on January 7, 2017. There were two victims – Kristopher Odle, who drove to the scene to arrange a sale of marijuana to appellants, and a 16-year-old girl whom we shall identify only as EB, who was a passenger in the back seat of Odle's car.

Appellants had something other than a drug purchase in mind. When Odle pulled up to the agreed meeting point, appellants approached the car on foot. Williams was armed. He pointed his gun at Odle through the open passenger-side window and told him not to move. Ignoring that instruction, Odle attempted to escape by putting the car in reverse and retreating, whereupon Williams, at close range, fired several shots into the car, wounding Odle and frightening EB. Appellants attempted to flee but, after a chase by rapidly responding police officers, were captured near the scene.

For this conduct, appellants were charged with a variety of assaultive and controlled dangerous substance offenses. Both were convicted of (1) assault in the first degree by displaying a firearm at Odle, (2) first-degree assault by shooting at Odle, (3) first-degree assault of EB by shooting in and at the vehicle, (4) use of a firearm in the commission of a crime of violence against Odle, and (5) use of a firearm in the commission of a crime of violence against EB. Shird was convicted of four additional offenses.

Because the major issues raised by appellants are similar, we scheduled their separate appeals for argument on the same day and shall deal with the issues they raise in this one Opinion.[1]

Voir Dire Examination

During the *voir dire* process, both appellants requested that the prospective jurors be asked whether any of them believed, or were members of a religious faith that believed, that "you cannot sit in judgment of another human being," which was Question 16. Williams requested that three other questions be asked as well:

> 18. Under the law, a defendant in a criminal case is presumed innocent until proven guilty beyond a reasonable doubt. Does any prospective juror have any difficulty accepting this principle, or would any of you have difficulty in applying it if you were chosen as a juror in this case?
>
> 19. Does any prospective juror believe that the defendant has a duty or responsibility to prove his innocence?
>
> 21, Have you or any members of your family ever been associated with, contributors to or in any way involved with any local, state, or national, or community group or organizations to combat crime or help victims of crime, such as CASA, Operation Identification, Neighborhood Watch, Guardian Angels, Mothers Against Drunk Driving, and or similar organizations?

The court declined to ask those questions. Shird complains about the refusal to ask Question 16. Williams complains about the refusal to ask Questions 18, 19, and 21.

Dealing first with Question 16, which Shird contends was designed to uncover jurors whose religious beliefs conflicted with their legal duty to render a fair and

[1] Shortly before the scheduled argument date, Williams waived oral argument and submitted on his brief.

impartial verdict based on the evidence, and which, in his view, makes it mandatory to ask when requested. The court's refusal to ask it, he complains, resulted in his inability to seek the disqualification of unsuitable jurors.

As noted by the Court of Appeals on several occasions, unlike in many other States, Maryland employs what the Court has termed "limited voir dire." *Pearson v. State*, 437 Md. 350, 356 (2014); *Collins v. State*, 452 Md. 614, 622 (2017). The sole purpose of *voir dire* in this State "is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification." *Id.* It is not intended to provide guidance in the exercise of peremptory challenges. In *Pearson,* the Court made clear that a trial court must ask a requested question "if and only if the *voir dire* question is 'reasonably likely to reveal [specific] cause for disqualification,'" which is limited to a statutory disqualification or "biases directly related to the crime, the witnesses, or the defendant." *Id.* at 357, quoting from *Washington v. State*, 425 Md. 306, 313 (2012).

In *State v. Logan*, 394 Md. 378, 396 (2006), the Court explained that "it is the responsibility of the trial judge to conduct an adequate voir dire to eliminate prospective jurors from the venire who will be unable to perform their duty fairly and impartially," and, to that end it "should focus questions upon 'issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered'" (quoting from *State v. Thomas*, 369 Md. 202, 207-08 (2002).

Question 16 was a general one having no particular connection with either appellant, with any crime with which either appellant was charged, or with any witness;

nor would the question elicit any bias toward either appellant In its broadest sense, it essentially asked whether the jurors would be unable to render *any* verdict in the case, which was directly covered by the final question put to them: "does any member of the panel know of any matter about which you have not been asked would [*sic*] you feel would tend to interfere with your ability to arrive [at] a fair and impartial verdict in this case?" It is apparent from the verdicts that none of the selected jurors believed themselves unable to sit in judgment of appellants, because they clearly and unanimously did so, convicting them of some charges and acquitting them of others.

Williams regards Questions 18 and 19 as testing whether the jurors could accept the presumption of innocence and the fact that the State had the burden to prove guilt beyond a reasonable doubt. His argument is doomed on two grounds. The Court of Appeals and this Court have made clear that it is not an abuse of discretion, or other legal error, for a trial court to decline to propound specific *voir dire* questions on issues of law that will be covered either by the court's binding instructions to the jury at the end of the case or are covered by other questions propounded on *voir dire. See State v. Logan supra*, 394 Md. 378, *Stewart v. State*, 399 Md. 146, 162-63 (2007), and *Thompson v. State*, 229 Md. App. 385, 405 (2016), all holding that it is inappropriate to inquire on *voir dire* whether jurors would be disposed to follow, or ignore, instructions on the law that are binding on them, including instructions on the presumption of innocence and the State's burden of proof.

Williams asks us to ignore those decisions because, in his view, they proceed from a discredited decision of the Court's holding in *Twining v. State*, 234 Md. 97 (1964). Apart from the fact that we are not at liberty to ignore decisions of the Court of Appeals (unless clearly overruled by the U.S. Supreme Court or by statute), the underlying basis of Williams' argument is incorrect.

The relevant issue in *Twining* was whether the trial court erred in declining to ask whether the prospective jurors would give the defendant the benefit of the presumption of innocence and the burden of proof – essentially the same questions embodied in Questions 18 and 19. The Court replied in the negative for two reasons: First, as here, "[t]he rules of law stated in the proposed questions were fully and fairly covered in subsequent instructions to the jury" and second, because "[i]t is generally recognized that it is inappropriate to instruct on the law at this stage of the case or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." *Id*. at 100. With respect to the second statement, the Court noted that "[t]his would seem to be particularly true in Maryland, where the court's instructions are only advisory." *Id.*

That last statement was based on an unstated reference to Article 23 of the Maryland Declaration of Rights (MDR), which provides that, in the trial of criminal cases, "the Jury shall be the Judges of Law, as well as of fact." The Court of Appeals has since construed that provision as applying only to non-Constitutional disputes of the substantive law of the crime and not such Constitutional rights as the presumption of innocence and burden of proof. *Unger v. State*, 427 Md. 383, 388 (2012). Williams

seeks to construe the last noted statement in *Twining* as being the basis of the decision, from which he characterizes *Twining* as "an artifact." It is not an artifact, at least not in this context.

It is clear, based both in the actual wording of the holding in *Twining* and, more significantly, from later cases that the principle confirmed in *Twining* was not dependent on the more expansive view of MDR Art. 23 held at the time, but rather is founded on the broader principle that is it inappropriate at the *voir dire* stage to question whether the jurors would be able to follow jury instructions from the court that *are* binding on them, in particular instructions regarding the presumption of innocence and the State's burden of proof. There was no error in declining to ask Questions 18 and 19.

Question 21 asked whether any juror or member of a juror's family was *ever* associated with, contributed to, or involved with any group or organization to combat crime or help victims of crime, including organizations such as Mothers Against Drunk Driving and CASA.[2] Counsel argued that the question went to bias as to persons who would contribute to or be connected with "some of these organizations" and that it "would be helpful to know that for the use of peremptory strikes and for cause strikes."

[2] CASA is an acronym for Court Appointed Special Advocates. It is a program under which courts recruit and appoint trained volunteers to provide an independent voice for abused and neglected children who are under the protection of the court. There are 15 such programs operating in the Maryland Circuit Courts. An entity known as Maryland CASA Association is a private non-profit organization designed to facilitate the development of individual CASA programs.

As noted above, questions designed to provide guidance in exercising peremptory strikes need not be asked in Maryland so, to the extent that was the purpose of the question, the court did not err in declining to ask it.

As to eliciting bias for purposes of disqualification for cause, the issue is not so straight-forward. In *White v. State*, 374 Md. 232 (2003) a question seeking that kind of information, but more narrowly tailored in its scope, was challenged, but for a different reason. The question there was whether any juror had any connection with any "advocacy or lobbying groups for victim rights or offender punishment," including Mothers Against Drunk Driving and CASA, and because of that participation, "you believe that you could not render a fair and impartial verdict in this case." The addition of the latter clause made the question a compound one of the kind that was disapproved in *Dingle v. State*, 361 Md. 1 (2000), and it was challenged, by the defendant, on that ground. No issue was raised as to whether, absent that problem, the question would have been a mandatory one. Given the extensive personal *voir dire* conducted in the *White* case, the Court of Appeals found *Dingle* not to be an impediment.

We are not dealing with a *Dingle* issue here. Had the question been allowed, there would have been a follow-up question regarding the impact of any connection with the organization. The question at issue here, however, is much broader than that in *White*. In *White*, the question asked only about the *juror's current* connection. The juror would know whether he or she had such as connection. The question here included any member of the juror's family (without any definition of "family") and asked whether any such

member *ever* had such a connection, of which the juror may have utterly no knowledge. Would that include a juror whose sister, or aunt, or cousin, or stepfather was once an emergency room nurse who treated victims of crime? A question as broad and amorphous as this one can produce, quite innocently, inaccurate, incomplete, misleading, and irrelevant information. This is different than questions that are more narrowly focused – to relatives who are employed by a law enforcement agency or, in a firearm case, who belong to lobbying groups that support or oppose gun control.

With only a few exceptions, the allowance of particular *voir dire* questions is discretionary with the trial judge. We find no abuse of that discretion in disallowing Question 21.

Sufficiency of the Evidence

Appellants' sufficiency argument focuses on the counts in the indictment charging appellants with assault in the first degree of EB by shooting in and at the vehicle, and use of a firearm in the commission of a crime of violence against EB (Counts 6 and 11). Their argument as to Count 11, as they frame it, hinges entirely on the convictions on Count 6: the only crime of violence against EB was the assault alleged in Count 6.

At the end of the State's case, appellants moved for judgment of acquittal, focusing their argument on the assertions that neither Odle nor EB identified either appellant as one of the men who approached the car or as the shooter, that there was no evidence of any intent to harm EB, that she was not, in fact hurt, and that there was no

evidence that either of them even knew she was in the car. Those arguments are repeated in this appeal.

They are correct that neither Odle nor EB specifically identified them as the men who approached the car or as the shooter. There was ample evidence, however, that Shird and Williams, by prior arrangement, *were* the two men who approached the car,[3] that they were together as the event quickly unfolded, that they fled together immediately after the shooting, that they were the only subjects of the chase that almost immediately followed the event, and that, at different points, each had possession of the gun. The State seems to accept that Williams was the actual shooter and that Shird's liability for the shooting was mostly as an accomplice and willing participant.

The court instructed the jury that, in order to convict of first-degree assault, the State had to prove all of the elements of second-degree assault plus (1) that the defendant used a firearm to commit the assault, (2) the defendant intended to cause serious physical

[3] There was evidence that a third man walked by the car at or near the time Shird and Williams approached it, but there was no evidence that he was involved in any way with appellants or with the shooting. Cell phone evidence was admitted corroborating Odle's testimony that he was there, by pre-arrangement, to sell marijuana. EB testified that one of the assailants was wearing a green jacket and one was wearing blue. When they were apprehended, a green sweatshirt was recovered from Shird and a blue one from Williams. Both articles of clothing were tested for the presence of gunshot residue and both produced a positive result. EB identified the gun that Shird had discarded as the one used in the shooting. When the officers arrived at the scene, within minutes after a 911 call from EB, Odle pointed to the two men running from the scene and told the officers that "those two had just shot him." Those were the ones who were chased and turned out to be Shird and Williams. Appellants' sufficiency argument takes little or no account of this evidence.

injury in the commission of the assault, and (3) serious physical injury is an injury that creates a substantial risk of death *or* causes permanent or protracted disfigurement or loss or impairment of a bodily function or organ. Second degree assault, the court added, can be proved by showing that (1) the defendant committed an act with the intent to place EB in fear of immediate offensive physical contact or physical harm; (2) the defendant had the apparent ability to bring about offensive physical contact or physical harm; (3) EB reasonably feared immediate physical contact or physical harm; and (4) the defendant's actions were not legally justified. Those instructions were correct; appellants do not contend otherwise. *See Jones v. State*, 440 Md. 450, 455, 456 (2014).

The *Jones* Court confirmed the principles that control this issue:

> "[W]e conclude that a defendant can commit second-degree assault of the intent-to-frighten type against a victim whose presence in particular the defendant does not know . . . Where a defendant intentionally commits an act that creates a zone of danger, and where the defendant knows that multiple people are in the zone of danger, the defendant intends to place **everyone** in the zone of danger in fear of immediate physical harm – even if the defendant does not know of a particular victim's presence in the zone of danger."

Id.

Unquestionably, deliberately firing at least three and possibly as many as five bullets from a semi-automatic weapon into the passenger compartment of a car at point-blank range creates a zone of danger that places anyone and everyone within that zone in danger of imminent physical harm. The 16-year-old EB clearly was aware of the danger and was terrified by it. Odle testified that EB "was screaming and crying" that "they're going to kill us," "they're going to shoot us."

Appellants contend that these elements were not apposite to the "intent to frighten" branch of assault alleged in Count 6 but rather to the "displaying a firearm" branch charged in Count 5, of which they were acquitted. We disagree. They fall as well within the elements of second-degree assault plus the additional element of first-degree assault that the defendant used a firearm to commit assault.

The evidence more than sufficed to support the conviction on Count 6, and, as first-degree assault is a crime of violence (*see* Code, Public Safety Article, § 5-101(c)(3)), on Count 11 as well.

Objection to Prosecutor's Remark

During closing argument, Shird's attorney attempted to discredit the significance of evidence that, during his flight from the scene, Shird had discarded the gun used in the shooting. The attorney questioned whether that gun was, in fact, the one used to shoot Odle, noting that the State had produced no evidence linking the bullets found at the scene of the shooting to the gun. In her rebuttal argument, the prosecutor acknowledged that the State had not introduced evidence "regarding matching bullets to gun," but pointed out that "[n]o one asked during the trial. Yeah, you don't have that evidence. You haven't made up things. Saying, oh well because they didn't introduce it, then it's this, that's speculating." No objection was made to that remark, so it is not before us.

Later in her rebuttal, as she continued to respond to defense counsel's argument, the prosecutor mentioned again that "[n]o attorney asked for ballistic tests or analysis that was performed or anything like that, so why are you considering it?" Shird's attorney

objected but offered no basis for the objection. Williams' attorney remained silent, and the objection was summarily overruled. Further along in her rebuttal, however, the prosecutor stated that people "do bad things, they commit a crime. People hurt children, hurt animals," and Shird's attorney objected to that comment. During discussion at the bench with respect to that objection, the attorney revisited his objection to the prosecutor's response to the argument regarding the lack of ballistic evidence, claiming that "that's an improper burden shift" and requesting an instruction that "the State has the burden of proof in this case." Williams' attorney joined in "that argument." The court made no direct ruling on that request but, having previously given that precise instruction, did not repeat it.

Appellants press the argument that the prosecutor's remarks impermissibly sought to shift the burden of proof by suggesting to the jury that appellants had the burden of testing the bullets and offering evidence that they did not match the gun that Shird had discarded. Shird claims as well that the State's response "referenced facts not in evidence," although he does not indicate what facts were so referenced. The State urges that the prosecutor's remark was a proportional and fair response to appellants' truthfully informing the jury that no ballistic tests were made, by either side, and that it did not have the effect of shifting the burden of proof to appellants.

Arguments of this kind, where a prosecutor attempts to rebut comments from defense counsel in closing argument regarding the lack of evidence that the prosecutor

could have produced to strengthen his/her case, can take many forms, and a structure of sorts has been developed to provide guidance in analyzing those kinds of arguments.

A starting point is the principle that precludes either side from suggesting the existence of evidence that was not presented at trial, from stating or commenting on facts for which no evidence was admitted, or stating what he or she could have proven. *Washington v. State*, 180 Md. App. 458, 473 (2008); *Fuentes v. State*, 454 Md. 296, 319 (2017). On the other hand, "when the State has failed to utilize a well-known, readily available, and superior method of proof to link the defendant with the criminal activity, the defendant ought to be able to comment on the absence of such evidence." *Robinson v. State*, 436 Md. 560, 580 (2014); *Sample v. State*, 314 Md. 202, 207 (1988). That is what defense counsel did.

The State, of course, is free to respond affirmatively to such a comment but its response is subject to at least two limitations. First, pursuant to the more general rule, there must be evidence in the record to support the response, to the extent that the response is a factual one. The prosecutor would not be able to argue that the additional evidence in question does not exist or that the cost of its production would be prohibitive, unless evidence to that effect was admitted, which is not likely to be the case when the issue is raised for the first time in closing argument. The State can argue, however, if it be truthful, that, in light of the other evidence it had, it regarded the unproduced evidence as unnecessary, irrelevant, or not exculpatory in nature.

What produces potential friction with the State's burden of proof is when the prosecutor suggests that the missing evidence could have been produced by the defense, for, depending on how that argument is presented, that could suggest to the jury that the defendant had some duty to obtain and present that evidence. Words matter. Here, the prosecutor did not suggest that appellants had any duty to obtain a ballistics examination. All she said was that such evidence was not presented because, until closing argument, when it was obviously too late, no one suggested that it should be, which was a truthful statement. It was implicit that the State did not regard a ballistics test as important to its case; EB identified the gun that Shird had discarded as the one she saw fire bullets into the car.

Neither appellant asked for a mistrial; the only request was for the court to repeat that the State had the burden of proof, which the Court already had told the jury and which had been reinforced by both defense counsel and the prosecutor. Under all of the circumstances, we find no abuse of discretion or other legal error in the court's denial of the request for an additional instruction, similar or identical to the one already given.

Calling the Prosecutor as a Defense Witness

In his initial encounter with the police and throughout the pretrial period, Odle had maintained that he had gone to the scene of the event to purchase a $10 bag of marijuana. On the day before trial began, he advised the prosecutor that, in fact, he had gone there to arrange for the sale of marijuana to the appellants. His excuse for this dissembling was

that he did not want to get anyone in trouble. The prosecutor immediately notified defense counsel of the change in his story, which was brought out at trial. Odle was examined and cross-examined about it, and its impact on his credibility was argued to the jury.

At a bench conference at or near the end of the State's case, counsel for Williams indicated that he "may be calling" the prosecutor regarding Odle's inconsistent and corrective statement to the prosecutor for the purpose of impeaching Odle's credibility. Counsel for Shird objected on the ground that such testimony would be prejudicial to Shird. The prosecutor also objected. She explained that the change in Odle's story came about when, after reviewing the cell phone contacts between Odle and Shird to arrange a meeting between them, she became suspicious about Odle's statements that his intent was only to buy a small amount of marijuana, and she wanted to confront him regarding that matter. The issue became whether Odle was provoked into changing his story or did so on his own initiative.

The court denied the request, if, indeed, it was one, on the grounds that (1) it was "problematic" whether it was appropriate to call the prosecutor to impeach a State's witness, and (2) even if permissible, it would be more prejudicial than probative. Williams claims that the court's ruling denied him his Sixth Amendment right to obtain witnesses in his favor, citing only cases articulating that general right.

This Court has dealt with the specific issue of whether a defendant in a criminal case is entitled to call the prosecutor in the case as a witness for the purpose of

impeaching a State's witness on two occasions, neither of which is cited by Williams. *See Johnson v. State*, 23 Md. App. 131 (1974), a*ff'd per curiam*, 275 Md. 291 (1975), and *Raines v. State*, 142 Md. App. 206 (2002). In *Johnson* and *Raines*, the trial court denied a request by a defendant to call the prosecutor in the case, and this Court found no error in that ruling.[4]

We made clear in *Raines* that a prosecuting attorney is competent to be a witness, but that courts have been reluctant to permit a prosecutor from serving as a witness *in a case he or she is prosecuting*, except in extraordinary circumstances. Often, we said, that reluctance stems from a "concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors." *Raines*, at 212-13. When, as here, it is the defendant who wishes to call the prosecutor in the case, the decision whether to allow it remains a discretionary one with the trial court, but the exercise of that discretion must be guided by the defendant's right to call relevant witnesses and present a complete defense. *Raines*, at 213. The prosecutor's testimony "must be relevant and material to the theory of the defense" and "must not be privileged, repetitious, or cumulative." *Id.* at 214. Applying those principles, we are not persuaded that the court abused its discretion in rejecting Williams' request. The theory of the defense, in this regard, was that Odle should not be

[4] In a third case, *Carr v. State*, 50 Md. App. 209 (1981), we held that it was not error for the State to call as a witness an Assistant State's Attorney who had served as an investigator and collected some of the evidence in the case but who was not acting as a prosecuting attorney in the case.

regarded as a credible witness, in part because he told two different stories about why he was at the scene, but that evidence, through his own mouth, was before the jury, and whether he was persuaded to tell the truth by the prosecutor or entirely on his own initiative adds little to the fact that he had lied to the police.

JUDGMENTS IN NOS. 124 AND 1256 AFFIRMED; APPELLANTS TO PAY THE COSTS IN THEIR RESPECTIVE CASES.