UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1341

September Term, 2014

JOHN MICHAEL WINNER

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: June 29, 2015

Following a trial in the Circuit Court for Anne Arundel County, a jury convicted appellant, John Michael Winner, of four counts of second-degree rape, one count of fourth-degree sexual offense, and sexual abuse of a minor.[1] The trial court sentenced appellant to a total of 65 years in prison, suspending all but 45 years,[2] after which he filed a timely notice of appeal.

Appellant presents the following questions for our consideration:

> 1. Did the trial court err in refusing to propound a *voir dire* question directed at uncovering bias?
>
> 2. Did the trial court err in permitting the prosecution to conduct improper cross-examination of the defendant?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

Scarlette S., aged 18 at the time of trial, testified that on several occasions when she was between the ages of 14 and 16, appellant, who had been her stepfather since she was a baby, raped and sexually assaulted her in the home they shared with Scarlette's mother, A.W., and two half-siblings. Scarlette made no contemporaneous disclosure of the assaults, even to Anne Arundel County Child Protective Services employees, who interviewed her

[1] The State *nolle prossed* a fifth rape charge and a second-degree assault charge during trial, and the jury hung on a second count of fourth-degree sexual offense, which the State *nolle prossed* at sentencing.

[2] The court imposed a 25 year sentence on the sexual abuse of a minor charge, along with a consecutive 20 years on one of the rape charges. On the second rape charge, the court imposed another 20 years, consecutive to the sentence on the first rape charge, but suspended that sentence in its entirety. The sentences on the remaining convictions were imposed to run concurrently with the 45 year total sentence.

about unrelated charges of child neglect. Scarlette claimed she was afraid that if she said anything about appellant, she would endanger her or her family's lives, as she had previously seen appellant push, punch, and scream at her mother. She also feared that disclosing appellant's actions would result in the loss of his paycheck, upon which the family relied.

In 2012, when Scarlette was 16, her mother and appellant separated. Scarlette, her mother, and her half siblings moved, without appellant, who was then in jail, to North Carolina. A.W. filed for divorce and custody of the three children in March 2012; she and appellant divorced just prior to the start of the May 2014 trial.

Noticing that Scarlette had become "reclusive" and "aggressive" when touched after the move to North Carolina, A.W. asked Scarlette whether appellant had ever acted inappropriately toward her. After initially denying any improprieties, Scarlette admitted to her mother that appellant had raped her.

Thereafter, Scarlette met with a therapist and was examined by a doctor in North Carolina; she was also interviewed over the telephone by an Anne Arundel county detective. The doctor, accepted at trial as an expert in pediatric medicine and child abuse pediatrics, found multiple trans-sections of Scarlette's hymen, indicating that her hymen had been broken, consistent with a claim of forcible penetration.

Upon cross-examination by defense counsel, Scarlette conceded that, at the time she lived with appellant, she had been upset with him because he often came home drunk or high. And, on occasion, he stole items from her to use to purchase drugs. She also disliked the fact

that appellant used harsh words with her–he called her "a fat ugly bitch"–and exhibited anger with her half-brother.

Virginia Shaw, appellant's grandmother, testified on his behalf that while appellant was incarcerated, A.W., very upset, told Shaw that she would do "anything to keep him behind bars." Shaw conceded, however, that Scarlette's accusations of rape were not exposed until nearly a year after that conversation.

Appellant chose to testify, admitting to alcohol and drug use and to theft as a means of supporting his drug habit. When he was high and A.W. was drunk, he said, they would argue in front of the children. After appellant was incarcerated for felony theft, he said, his relationship with A.W. deteriorated further.

Appellant agreed with his grandmother that Scarlette's allegations of sexual offenses did not occur until "a couple of months" after he was released from prison, when his wife retained a divorce attorney. After A.W. filed for divorce, she told him, "like it was in jest," that she could say he "molested or hurt one of the children" in order to gain custody. He did not, however, mention any such motive to fabricate to the police when questioned regarding Scarlette's accusations of rape, although he insisted that he later tried to meet with the detective to impart that information, without success. Appellant denied ever having sexually touched or raped Scarlette.

DISCUSSION

I.

Appellant first argues that the trial court erred, during *voir dire*, when it failed to ask if the prospective jurors would be more likely to believe witnesses for the prosecution solely because they were prosecution witnesses and/or would treat the testimony of defense witnesses with more skepticism than witnesses called by the State solely because they were called by the defense. Although he did not ask the trial court to propound that question to the venire, he nonetheless, on appeal asserts, that the trial court abused its discretion in failing to ask the question directed at bias.

The State counters that a trial court is only required to ask a prosecution/defense witness bias question when asked to do so. As such, appellant, in failing specifically to request that the court ask the question, has waived his right to appellate review of this issue.

Prior to trial, appellant submitted a written request for *voir dire*. Question number six read: "Has any member of the jury panel, or your family members, relatives, friends, neighbors, or other persons with whom you are closely acquainted ever been employed by the Anne Arundel County Police Department, Annapolis City Police Department, Maryland State Police, the FBI, the Office of the State's Attorney, or any other police department, law enforcement agency or Correctional/Prison Agency?" As follow-up, question seven asked, "If the answer to question six is 'yes,' would that association cause you to give more weight to the testimony of a law enforcement official?" Question nine asked, "In this case you will

hear testimony from one or more police officers. Would you give more or less weight to the testimony of a police or correctional officer merely because he/she is a police or correctional officer than to other witnesses in this case." There was no other question directed at prosecution/defense witness bias.

During jury selection, the trial court asked, "Is there any member of the jury panel who has ever been employed as a law enforcement officer: county police, state police, city police, military police? Something like that. Law enforcement officer." Only one potential juror answered in the affirmative.

After the court had asked all its *voir dire* questions, but before it called the potential jurors up to explain their answers, the court inquired of counsel whether either side had any additional questions outside the proposed *voir dire*. The following colloquy ensued:

> [Prosecutor]: Not from the State.
>
> THE COURT: And the defense?
>
> [Defense counsel]: That are outside of my proposed voir dire?
>
> THE COURT: Yes, I'm going to retro-file your proposed voir dire and then you can maintain your objection to the questions I've asked. But for purposes of preserving the record is there anything else you want me to ask?
>
> [Defense counsel]: There is nothing else at this time I want you to ask. We haven't put our objections on the record yet.
>
> THE COURT: Yes, you're —okay. Well, what questions do you want me to ask that I didn't?

> [Defense counsel]: Within the voir dire that we prepared I would ask that you ask—Defense No. 9, that question specifically involves hearing from one or more police officers. You had previously asked a question that was presented by the State about whether anyone was a police officer.
>
> THE COURT: Right. And you also had that one, number 6. All right. Pursuant to [Pearson] v. State, in this case there's only one possible witness who is a member of a law enforcement agency and as [Pearson] indicates, where all of the State's witnesses are members and where the basis for a conviction is reasonably likely to be testimony of members of law enforcement, the trial court must ask have you ever been a member of a law enforcement agency.
>
> So I did ask it, even though I think it's only the one witness. Okay.
>
> [Defense counsel]: And I would just note an objection.

Voir dire, the process by which prospective jurors are examined through the use of questions to determine the existence of any bias or prejudice, is critical in assuring that the guarantees of the Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights are protected.[3] *Curtin v. State*, 393 Md. 593, 600 (2006). Without an adequate *voir dire*, the trial court cannot fulfill its responsibility to dismiss prospective jurors who "'will not be able impartially to follow the court's instructions and evaluate the evidence[.]'" *Stewart v. State*, 399 Md. 146, 158 (2007) (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)).

[3] The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" Article 21 of the Maryland Declaration of Rights states, in pertinent part, "[t]hat in all criminal prosecutions, every man hath a right to . . .a speedy trial by an impartial jury[.]"

The scope of *voir dire* in Maryland is limited, meaning the questions are restricted to "'ascertaining the existence of cause of disqualification, and for no other purpose[.]'" *Curtin*, 393 Md. at 602 (quoting *Davis v. State*, 333 Md. 27, 37 (1993)). In this state, the sole purpose of *voir dire* is thus to ensure a fair and impartial jury by determining the existence of cause for disqualification. *Stewart*, 399 Md. at 158.

The scope of *voir dire* and the form of the questions asked are firmly within the discretion of the trial court. In reviewing the trial court's exercise of discretion, we must determine whether the questions posed and the procedures employed have created a reasonable assurance that prejudice, if present, will be discovered. *Id.* at 159. An appellate court reviews the trial court's rulings on the record of the *voir dire* process as a whole for an abuse of discretion, that is, "questioning that is not reasonably sufficient to test the jury for bias, partiality, or prejudice." In the absence of a *voir dire* that is "cursory, rushed, and unduly limited," the trial court's discretion is entitled to considerable deference, as the court had the opportunity to hear and observe the prospective jurors, assess their demeanor, and make factual findings. *Id.* at 160.

With some exceptions, the trial court is not required to ask specific questions requested by counsel. Questions that are not directed at a specific ground for disqualification, that merely fish for information to assist in the exercise of peremptory challenges, that probe the prospective juror's knowledge of the law, that ask a juror to make

a specific commitment, or that address sentencing considerations are not proper in *voir dire* and need not be propounded by the trial court. *Id.* at 161-62.[4]

In this matter, defense counsel requested, in writing and orally, the inclusion of the police witness bias question. He at no time, however, requested the inclusion of the prosecution/defense witness bias question. He nonetheless argues that because no police officers testified at trial, he was entitled to the prosecution/defense witness bias question because it is similar to the police witness bias question. We disagree.

Notwithstanding appellant's assertion that the court should have asked the prosecution/defense witness bias question because it was similar to the police witness bias question, the short answer to appellant's claim of error remains that he never requested the prosecution/defense witness bias question. As the State points out in its brief, our appellate courts would reverse on a *voir dire* issue only when the trial court refused to propound a question to the venire requested by the defendant. *See, e.g., Pearson v. State*, 437 Md. 350, 367 (2014)(when "all of the State's witnesses are members of law enforcement agencies and/or where the basis for a conviction is reasonably likely to be the testimony of members of law enforcement agencies, *on request*, a trial court must ask during *voir dire:* "Have any

[4] There are, however, certain areas of inquiry that a trial court must probe if reasonably related to the case before it. These areas of inquiry are: race; ethnicity or cultural heritage; religious bias; in a capital case, the ability of a juror to convict based upon circumstantial evidence; weight placed on police officer credibility; view on violations of narcotics laws; and, strong emotional feelings with regard to alleged sexual assault against a minor. *Curtin*, 393 Md. at 609 n.8.

of you ever been a member of a law enforcement agency?") (emphasis added); *Moore v. State*, 412 Md. 635, 655 (2010)("if the case is one in which one or more police or official witnesses will be called to testify, the occupational witness question(s) must be asked, *if requested*") (emphasis added); *Davis v. State*, 333 Md. 27, 47 (1993), *overruled by Pearson v. State*, 437 Md. 350 (2014)(when "the parties identify an area of potential bias and *properly request voir dire questions* designed to ascertain jurors whose bias could interfere with their ability to fairly and impartially decide the issues, then the trial judge has an obligation to ask those questions of the venire panel") (emphasis added); *Harmon v. State*, 227 Md. 602, 606 (1962) ("If the appellant felt the question propounded did not adequately cover the matter of freedom from prejudice, he should have submitted other questions. . . and requested the trial court to examine the veniremen more comprehensively.").

Appellant's failure to request that the trial court propound the prosecution/defense witness bias question, or to object to its absence, precludes our review of this issue on appeal. Maryland Rule 8-131(a) provides, in pertinent part: "Ordinarily, the appellate court will not decide any [ ] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" The purpose of Md. Rule 8-131(a)

> is to ensure fairness for all parties in a case and to promote the orderly administration of law. Fairness and the orderly administration of justice is advanced by requiring counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings. For those reasons, Md. Rule 8-131(a) requires an appellant who desires to contest a court's ruling or other error on appeal to have made a timely objection at trial. The failure to do so

> bars the appellant from obtaining review of the claimed error, as a matter of right.

Robinson v. State, 410 Md. 91, 103 (2009) (internal quotation marks and citations omitted).

Appellant mentioned the prosecution/defense witness bias question for the first time in his brief. As a result, the trial court was never given the opportunity to rule on the issue. Accordingly, the issue is not properly before us.

II.

Appellant also contends that the trial court erred in permitting the State to cross-examine him about his retention of a lawyer during the police investigation into Scarlette's allegation of rape, thereby invading his right to confidential communications protected by attorney-client privilege. He argues that the State's improper use of the questions on cross-examination informed the jury that he had hired an attorney during the investigation and "focused the jury on what [he] had told his attorney about his theory of the defense," even though it did not reveal actual privileged communications.

The State urges us to find the claim unpreserved in the absence of an objection or other request for relief after appellant's non-responsive answer to the prosecutor's questions revealed that he had hired an attorney. The State also argues non-preservation on the ground that appellant testified upon re-direct examination about the fact that he had hired an attorney. On the merits, the State, avers that the trial court properly exercised its discretion

in permitting the examination designed to impeach appellant's testimony that A.W. threatened to accuse him falsely of raping Scarlette in a bid for custody of their children.

Upon cross-examination, appellant testified that the first he heard of allegations of rape was when A.W. retained a divorce lawyer in North Carolina and intimated she would say he had molested the children in a bid for custody. When asked if he had told the police of the threat, he said that "detectives show[ed] up to talk to me and I tried to—." At that point, defense counsel objected, and the following occurred at a bench conference:

> [Defense counsel]: Getting close—he is real close.
>
> [Prosecutor]: To what? He has taken the stand to testify
>
> .
>
> THE COURT: —but I don't know what the situation is with the police, so what is the—
>
> [Defense counsel]: Well the situation with the police is that the police called him a number of occasions and he essentially hired or said that he had hired Peter O'Neil and then it [sic] wasn't going to talk to them.
>
> [Prosecutor]: That is not entirely correct. He did speak with the detectives a few times and made no mention—he did talk to—he did not come in for a formal—
>
> [Defense counsel 2]: This officer called on the phone and said, "I want you to come in" and he said, "Well I will come in and then—"
>
> THE COURT: He said what?
>
> [Defense counsel]: He said I will come in and then he said no I won't come in.
>
> THE COURT: That opens up a can of worms. I mean, I don't know if he is invoking his right to remain silent until talking to an attorney, what—

[Prosecutor]: At no point did he ever invoke his right to an attorney.

THE COURT: I understand that—but I don't know–

[Prosecutor]: He may have said that he hired—he may have said that he hired Mr. O'Neil but I don't think either side can ever say that he affirmed to invoke his—

THE COURT: So what is your question?

[Prosecutor]: My question was, that this is the first time that I have ever heard anything about this—

THE COURT: Well, you can ask him that? I don't have any problem if you ask him that. Okay.

When the prosecutor resumed with that question, appellant stated the first time he heard of the abuse allegations was when his wife threatened him after she hired a divorce attorney. The prosecutor again asked if that was the first time that he "ever made any sort of mention of that conversation with his wife," and defense counsel objected, arguing, "[N]ow he is infringing upon the attorney client relationship."

The prosecutor then asked appellant if the police had called him about the case. Appellant said he spoke to the investigating detective about A.W.'s threat, but he "didn't really get to talk to" her to clear his name because she "didn't have time to" meet with him.

In response to the State's question, "She didn't have time to meet with you?" appellant answered:

A. She told me that her—the one guy—she wanted me to come down to the station. And she said that the guy that she had that normally does that kind of

thing was unavailable and wouldn't be available until whenever. So anyway, the very next day, one of my friends called me and set me up with an attorney and it was Peter O'Neil and I needed some free advice. Because I didn't know what to do but I know that I didn't do this.

Q. So but you didn't go back down the police station at any point after that?

[Defense counsel]: Objection again—

THE WITNESS: I haven't even finished going to see the attorney.

[Defense counsel]: You have to wait when there is an objection until the Judge rules on the objection. Judge, we are passed the line now. We are passed the line.

THE COURT: Overruled. Overruled.

BY [Prosecutor]:

Q. And--

THE COURT: The only question was, the only question was did you go back down to the police station?

BY [Prosecutor]:

Q. And sir, you didn't go back down to the police station after that, didn't you [sic]?

A. That is correct.

[DEFENSE COUNSEL]: And again, Judge, I renew my objection.

THE COURT: Overruled.

[Defense counsel]: Because—

THE COURT: Overruled, counsel. Overruled. Next question.

Thereafter, on re-direct examination, defense counsel asked appellant:

> Q. Sir, there came a point where you contacted Peter O'Neil's office, is that correct?
>
> A. Yes.
>
> Q. And based upon that contact with that office, you decided not to talk to the police, is that correct?
>
> A. Correct. That is what I was legally informed.

Maryland Rule 4-323(a) requires that

> [a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly.

It is clear from the transcription above that defense counsel did not object immediately after appellant revealed that he had hired a lawyer, nor did he ask that appellant's non-responsive answer to the prosecutor's question about whether the detective had time to meet with him be struck or for other relief. As such, appellant's claim of error is unpreserved. *See Uzzle v. State*, 152 Md. App. 548, 584 (2003) (Defendant failed to preserve any contention for appeal that judge failed to grant relief after witness gave an allegedly unresponsive and inaccurate blurt about a lie detector test, where defendant did not object, made no motion to strike, and did not ask for mistrial or request any other relief). Moreover, given that appellant testified upon re-direct examination by his own lawyer that he had contacted attorney Peter O'Neil's office and thereafter decided not to speak with the police, he cannot now claim

prejudice in the admission of the same testimony in response to the State's question that did not inquire about his retention of a lawyer. *See Yates v. State*, 429 Md. 112, 120 (2012), and cases cited therein.

Were the issue preserved, we would have found no error. The challenged testimony was the cause of a non-responsive answer to a question posed by the prosecutor upon cross-examination. The prosecutor did not ask a question designed to elicit information about appellant's retention of an attorney, so any error in its disclosure was entirely appellant's. He cannot now "benefit" on appeal from an error he created or invited. *Murdock v. State*, 175 Md. App. 267, 294 n.8 (2007).

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.