Circuit Court for Baltimore County
Case No. C-03-CR-19-000076

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1601

September Term, 2019

DE'SHON C. RODGERS

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 2, 2021

The case before us arises from an alleged altercation between De'shon C. Rodgers ("Appellant") and his ex-girlfriend, Azaria Griffin ("Ms. Griffin"), that took place on Super Bowl Sunday, February 3, 2019. Appellant and Ms. Griffin were allegedly arguing in her vehicle when Appellant threatened her with a gun. Soon after that, Ms. Griffin drove to her parents' home and left Appellant in the car while she made a 911 call to the Baltimore City Police Department ("BCPD"). Minutes later, police officers arrived at the scene, but Appellant was no longer in the vehicle. As a result, BCPD dispatched its aviation unit in search of Appellant.

The aviation unit located Appellant and informed officers on the ground of his location. The officers and the aviation unit vigorously pursued Appellant and eventually located him and later located the gun allegedly used during the altercation.

Based on the facts above, Appellant was subsequently charged and tried by a jury in the Circuit Court for Baltimore County. On August 16, 2019, a jury found Appellant guilty of first-degree assault, use of a firearm in the commission of a crime of violence, and illegal possession of a firearm with a prior disqualifying conviction. On October 22, 2019, Appellant was sentenced to seventeen years in prison: twelve years for first-degree assault; and two five-year sentences, to be served concurrently, for unlawful use of a firearm in the commission of a felony crime of violence and possession of a regulated firearm after being convicted of a crime of violence.

On October 22, 2019, Appellant filed a timely notice of appeal[1] and presents three questions for our review,[2] although the first is dispositive:

I. "Did the trial court abuse its discretion by refusing defense counsel's request to ask the venire questions about long-standing fundamental rights concerning a defendant's presumption of innocence, the State's burden of proof, and a defendant's right not to testify?"

We shall reverse Appellant's convictions under *Kazadi v. State*, 467 Md. 1 (2020) and *State v. Ablonczy*, ___Md. ___, No. 28, September Term 2020 (filed June 23, 2021) and remand for new trial because: 1) Appellant requested the trial court ask prospective jurors whether they were unwilling or unable to comply with the jury instructions on the fundamental principles of the State's burden of proof and the defendant's right not to testify, and the trial court agreed; 2) the trial court, for unknown reasons, failed to ask the question; *and* 3) Appellant's case was pending on appeal when the *Kazadi* opinion was rendered. Because we reverse on Appellant's first question, we need not address the merits of Appellant's remaining questions.

[1] On October 23, 2019, Appellant submitted an additional Notice of Appeal in the Circuit Court of Baltimore City that was identical to the Notice submitted on October 22, 2019. The additional Notice does not affect the proceeding before us.

[2] Appellant's remaining "Questions Presented" are:

II. "Did the trial court err by permitting Officer Brian H. Carver to offer expert testimony about Rodgers' actions in an aerial video without being qualified as an expert witness?"

III. "Did the trial court err by preventing defense counsel from cross-examining Officer Alexander A. Pearson about his failure to comply with department policy that required him to file a complaint against Officer First Class Thorne A. Allen for use of excessive force?"

BACKGROUND

Jury Selection

In preparation for trial, the circuit court began jury selection proceedings on August 12, 2019. After all potential jurors were sworn in under oath**,** the judge explained to them what jury selection or "*voir dire*" means. The judge also explained that the oath the jurors had just taken was similar to the oath taken by a witness testifying during a trial. After the judge asked the potential jurors general *voir dire* questions, he asked them specific questions relating to the case.

Appellant's counsel and the State's attorney were called to the bench. The judge asked counsel to discuss any questions that the prospective jurors had not been asked. Appellant's counsel stated, "[y]our Honor, there's [sic] a few questions you didn't ask and maybe you're not intending to. But I wanted to ask you to ask those and put on the record what those are." The judge responded, "[w]ell, I want to get through the questions that I will ask first. But since you're here, if it's something I would change my mind about." Appellant's counsel then requested the judge to ask several questions, and the following exchange occurred:

> [DEFENSE COUNSEL]: Question 18. In a criminal case like this one, each side will present arguments about the evidence, but the State has the only burden of proof. The Defendant need not testify in his own behalf or present any evidence at all. Would you tend to believe or disbelieve the testimony of a witness called by the defense more than the testimony of a prosecution witness? Would you hold it against the Defendant if he chose not to testify and present any evidence[?]

THE COURT: All right.

[THE STATE]: Your Honor, I'm not opposed.

THE COURT: All right. I'll ask a modification of that.

The judge then denied several questions proposed by Appellant's counsel. Finally, Appellant's counsel presented the last proposed question:

> [DEFENSE COUNSEL]: It's the last one. The last one, you did instruct them, but I would request that you ask the jury, you must presume the Defendant innocent of the charges now and throughout this trial unless and until after you've seen and heard all of the evidence and the State convinces you of the Defendant's guilt beyond a reasonable doubt. If you do not consider the Defendant innocent now or if you're not sure that you[] require the State to convince you of the Defendant's guilt beyond a reasonable doubt, please stand.

The judge responded, "[d]enied. I know those are pattern questions in *voir dire* that have been proposed, but that's what they are, they're pattern." Following the discussion at the bench, the judge continued to ask questions to the potential jurors. However, the judge failed to ask "Question 18" or any modification of that question.

When the judge concluded posing the questions to the venire, the following exchange occurred:

THE COURT: Other than what's already been stated, anything else about *voir dire*?

[DEFENSE COUNSEL]: Nothing from me.

COURT: Nothing from you. All right.

[THE STATE]: No, Your Honor.

COURT: Nothing. All right. Then we'll start bringing everyone up.

Appeal

At the conclusion of the jury trial, Appellant was convicted of first-degree assault, use of a firearm in the commission of a crime of violence, and illegal possession of a firearm with a prior disqualifying conviction. On October 22, 2019, he was sentenced to seventeen years in prison, and on that same day, he filed a notice of appeal.

Oral argument in this case was held on November 2, 2020. On November 13, 2020, we ordered a stay of this appeal, on our own initiative, because the Court of Appeals granted certiorari in *State v. Ablonczy*, No. 28, September Term 2020, and the outcome of that appeal could control our decision in the instant case. On June 23, 2021, the Court of Appeals issued its decision in *Ablonczy*. We lifted the stay, *sua sponte*, on June 30, 2021.

DISCUSSION

I.

Voir Dire

Appellant asserts that the trial court abused its discretion, under the new standard established in *Kazadi v. State*, 467 Md. 1 (2020), by failing to honor the Appellant's request to ask the venire questions pertaining to Appellant's fundamental rights; specifically, the presumption of innocence, the State's burden of proof, and Appellant's right not to testify. Appellant further avers that *Kazadi* established that *voir dire* questions concerning these long standing fundamental rights of a defendant *must* be asked upon request. Citing *Moore v. State*, 412 Md. 635, 666-68 (2010), Appellant urges that "the trial court's failure to allow

these kinds of fundamental questions, which are again directed to determine a specific cause for disqualification, is an abuse of discretion constituting 'reversible error,' which 'is not, by definition, harmless.'"

The State concedes that the standard established in *Kazadi* would apply to the proposed questions that the court failed to ask in the instant case, which was pending on appeal at the time of the Court's decision in *Kazadi*, but asserts that the issue was not properly preserved below. The State points to the Court's instruction that only cases pending on direct appeal when the opinion was filed would receive the benefit of its holding, "where the relevant question has been preserved for appellate review." *Kazadi*, 467 Md. at 47. The State argues that Appellant's counsel failed to preserve the issue for this Court's review when he failed to raise a proper objection at the time the Court refused to ask the presumption of innocence question, and when he failed to state any objection at the conclusion of the jury selection—missing the "opportunity to remind the court that it had agreed to ask a 'modified' question regarding the State's burden of proof and the defendant's right not to testify." Finally, the State contends that the Court fairly covered Appellant's proposed presumption of innocence question,[3] as acknowledged by Appellant's counsel when he said, "you did instruct them."

[3] The State is referring here to the following question that the court asked prospective jurors:

> THE COURT: It will be stipulated in this case that the Defendant has a prior criminal conviction which prohibits him from possessing a regulated firearm. Does the knowledge that the Defendant has a prior criminal conviction affect your ability - to change your belief that the Defendant is presumed innocent of the charges in this case?

Citing Maryland Rule 4-323(c)[4] and *Stevenson v. State*, 94 Md. App. 715, 721 (1993), Appellant counters that defense counsel preserved both questions for appeal by making it known to the court that he wanted the judge to ask the specific questions. Appellant states that "[i]n order to preserve an issue for appeal '[i]t is sufficient that a party, at the time the ruling . . .is sought, makes known to the court the action that the party desires the court to take[,]'" (quoting a portion of Rule 4-323 governing objections to rulings). Accordingly, Appellant argues, his right to appeal was not waived by the failure to raise an objections at the conclusion of *voir dire* because, again, once counsel made known to the trial court what he wanted the court to do, nothing more was required to preserve the issue.

Appellant also contests the State's claim that the trial court fairly covered the presumption of innocence question earlier during *voir dire*. Although, in its earlier question, *see* f.n. 3 *supra*, the court mentioned the presumption of innocence, Appellant asserts that the court did not describe the right. According to Appellant, the Court of Appeals instructed in *Kazadi*, 467 Md. at 46, that the parties must describe these

[4] Maryland Rule 4-323(c) outlines the method of objecting to the adverse ruling of a trial court on a proposed *voir dire* question:

> **Objections to Other Rulings or Orders.** For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

fundamental rights so that prospective jurors can understand them and intelligently notify the judge of his or her inability or unwillingness to honor them.

a. Venire Questions

In *Kazadi v. State*, 467 Md.1, 7 (2020), the Court of Appeals overturned the fifty-five-year-old standard established in *Twining v. State*, 234 Md. 97, 100 (1964), holding that "a trial court need not ask during *voir dire* whether any prospective jurors would be unwilling to follow jury instructions on the presumption of innocence and the State's burden of proof." The Court noted that at the time *Twining* was decided it was "common practice for trial courts to tell juries that the jury instructions were 'advisory only and not binding[.]'" *Id.* at 43 (quoting *Vogel v. State*, 163 Md. 267, 269 (1932)). The Court emphasized that that standard was no longer applicable in the State of Maryland. *Id.* Accordingly, the *Kazadi* Court adopted a new standard:

> We point out that a trial court is not required, on its own initiative, to ask *voir dire* questions concerning fundamental rights. Instead, a trial court must ask such *voir dire* questions only if a defendant requests them. This is consistent with prior cases in which this Court has required trial courts to grant requests to ask certain *voir dire* questions, as opposed to requiring trial courts to ask those *voir dire* questions *sua sponte*. Additionally, consistent with this Court's case law, we provide Kazadi with the benefit of the holding in this case, and we determine that our holding applies 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) (citations omitted).

In the instant case, Appellant presented two *voir dire* questions that fall under the standard established in *Kazadi*. According to the record, the first question requested was:

> Question 18. In a criminal case like this one, each side will present arguments about the evidence, but the State has the only burden of proof.

> The Defendant need not testify in his own behalf or present any evidence at all. Would you tend to believe or disbelieve the testimony of a witness called by the defense more than the testimony of a prosecution witness? Would you hold it against the Defendant if he chose not to testify and present any evidence[?]

The second question Appellant presented to the judge was:

> I would request that you ask the jury, you must presume the Defendant innocent of the charges now and throughout this trial unless and until after you've seen and heard all of the evidence and the State convinces you of the Defendant's guilt beyond a reasonable doubt. If you do not consider the Defendant innocent now or if you're not sure that you're require the State to convince you of the Defendant's guilt beyond a reasonable doubt, please stand.

Because both questions directly address "whether any prospective jurors are unwilling or unable to comply with the jury instructions on the fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify" we agree with both parties that they qualify as questions that must be asked by the court during *voir dire* upon request. *See Kazadi*, 467 Md. at 35-36. Additionally, it is not disputed that this case was pending on appeal when the *Kazadi* opinion was rendered. Therefore, the determinative issue is whether the questions were preserved for appeal.

b. Preservation

The trial judge affirmatively consented to asking a "modification" of "Question 18," concerning the State's burden of proof and Appellant's right not to testify, and the State did not oppose. However, the judge failed to ask the question prior to empaneling the jury. With respect to the second question at issue concerning the presumption of innocence, the judge denied the request, and Appellant's counsel failed to state an objection or properly preserve the issue in any way, other than, as Appellant admits, to make known to the court

that he wanted the court to ask the question. At the end of the *voir dire* process, Appellant accepted the jury as empaneled. As we next explain, the trial court's failure to ask a modification of Question 18 was reversible error and, therefore, we need not address whether the question concerning the presumption of innocence was preserved or fairly covered by the Court's earlier question.

First, as noted above, the judge neglected to ask a modified version of Question 18 for reasons unknown, and a formal objection was not required because Appellant made known to the court the question that he desired the court to ask pursuant to Maryland Rule 4-323(c), and the court agreed. Accordingly, the deciding issue is whether Appellant's counsel was required to make an objection, or, more appropriately, remind the judge at the conclusion of jury selection that the judge failed the ask the question that he had agreed to ask potential jurors.

The Court of Appeals has recently considered the question; "Should accepting a jury as ultimately empaneled waive any prior objection to the trial court's refusal to propound [*voir dire*] questions?" *State v. Ablonczy*, ___Md. ___, No. 28, Sept. Term 2020, slip op. at 1 (filed June 23, 2021). In *Ablonczy*, the *voir dire* questions that were requested by the defendant's counsel fell within the parameters of *voir dire* questions required under *Kazadi*. *Id.* at 2. As in the instant case, in *Ablonczy*, the defense counsel accepted the jury as empaneled without objection. *Id.* at 3. Because the defense counsel had initially objected when the trial judge refused to answer the proposed *voir dire* questions in *Ablonczy*, the Court of Appeals held:

> As this Court set forth in [*State v.*] *Stringfellow*[, 425 Md. 461 (2012)], objections that relate to the determination of a trial court to not ask a proffered *voir dire* question are not waived by later acceptance, without qualification, of the jury as empaneled. ... For the reasons expressed previously, Respondent did not waive that objection by accepting the jury as empaneled without repeating his prior objection.

Id. at 15-16. Here, Appellant's counsel requested the court to ask the *Kazadi*-type question, and "a trial court must ask such *voir dire* questions only if a defendant requests them." *Kazadi*, 467 Md. at 47. We agree with Appellant's contention that the trial court's failure, in this case, to ask prospective jurors Question 18 as requested, or some modification of that question, was an abuse of discretion constituting reversible error.[5] *See Moore v. State*, 412 Md. 635, 666-68 (2010). The circumstances in *Ablonczy* and *Moore*—where defense counsel made an objection incidental to the inclusion/exclusion of prospective jurors at the time the court refused to ask the proposed questions—are clearly distinguishable from the circumstances here, where no objection was required. Still, we conclude that the Court's holding in *Ablonczy* signifies that it is not necessary to object to the jury as empaneled at

[5] As noted in Judge McDonald's concurrence, we point out:

> It should be emphasized that, in expressing that holding in this context, an appellate court does not fault the trial court for applying the law as it existed at the time of the trial. The phrase "abuse of discretion" often connotes a trial court's failure in some way to do that which the law required it to do. But it is appropriate to note that, in this case, the trial court *did* act in accordance with the law at the time it acted, and that the reversal in this case and others on *Kazadi* grounds is attributable to a retroactive change in the law made by [the Court of Appeals].

Ablonczy, ___Md. at ___, No. 28, Sept. Term 2020, slip op. at 2-3 (McDonald, J., concurring).

the conclusion of *voir dire* in order that "*the relevant question has been preserved for appellate review.*" *Kazadi*, 467 Md. at 47 (emphasis added).

The two concurring opinions in *Ablonczy* support the conclusion that we reach here. In his concurring opinion, Judge McDonald commented that "[t]he more fundamental question [] is why in any instance we require a party to express an objection to the jury selection process a second time after that objection has been fully articulated once. Our rules do not require it." *Ablonczy*, ___Md. at ___, No. 28, September Term 2020, slip op. at 1-2 (McDonald, J., concurring). Judge Watts, in her concurring opinion, concluded that "an objection is required to be made or renewed at the time the jury is empaneled to preserve an issue as to the trial court's refusal to propound Kazadi-type *voir dire* questions, *but the rule should not be applied to the detriment of defendants whose cases are now pending on direct appeal*." *Ablonczy*, ___Md. ___, No. 28, September Term 2020, slip op. at 1 (Watts, J., concurring) (emphasis added).

Conclusion

Pursuant to the standard outlined in *Kazadi* and *Ablonczy*, we hold that the trial court abused its discretion and committed reversible error by not propounding the requested *voir dire* question it had consented to ask to the potential jurors because the question directly addressed the right to remain silent and the State's burden of proving the charges beyond a reasonable doubt. Accordingly, we shall reverse Appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR NEW TRIAL; COSTS TO BE PAID BY BALTIMORE COUNTY.