UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0083

September Term, 2015

RUSSELL SCOTT MILLER

v.

STATE OF MARYLAND

Meredith
Graeff,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 8, 2016

Russell Scott Miller, appellant, was convicted by a jury in the Circuit Court for Baltimore County of first degree burglary and fourth degree burglary. The court sentenced appellant to twelve years on the first degree burglary conviction and three years, concurrent, on the conviction for fourth degree burglary.

On appeal, appellant presents six questions for this Court's review:

1. Did the trial court abuse its discretion by failing to ask during *voir dire* whether any member of the venire would be unable to credit [a]ppellant's testimony to the same degree as any other witness in the case?

2. Did the trial court abuse its discretion by failing to ask during *voir dire* whether any member of the venire had "strong feelings" about burglary crimes?

3. Did the trial court abuse its discretion by failing to ask during *voir dire* whether any member of the venire had been the "prior victim" of a crime without asking, in the alternative, whether any member of the venire had "strong feelings" about burglary crimes?

4. Did the trial court abuse its discretion by failing to ask during *voir dire* four different questions on the ground that the court would later instruct the jury on the subject of each respective question?

5. Did the trial court abuse its discretion by failing to ask during *voir dire* a certain instruction-type question, where the instruction was not actually given?

6. Did the trial court abuse its discretion by failing to ask during *voir dire* each of [a]ppellant's six requested questions, where each question would have facilitated the "intelligent use" of peremptory strikes?

For the reasons set forth below, we agree that the circuit court abused its discretion in conducting the voir dire in this case. Accordingly, we shall reverse the judgments of the circuit court and remand the case to the circuit court for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

Because the sole issue on appeal involves voir dire, we will provide only a brief recitation of the facts at trial.

Kelly Hall, a resident of the neighborhood where the incidents occurred, testified that, on the evening of April 13, 2014, he observed a man approach his friend's vehicle and "try[] to get in on the . . . driver's side." The car was locked, so the man could not get into the vehicle. The man then went to another vehicle, which was unlocked, and he opened the door and was "going through the glove box." Mr. Hall did not know whether the man removed anything from the vehicle, but he did see him "grab[] something off of [a] sun visor" in another vehicle. Mr. Hall called the police at that point, and as he was speaking with the 911 operator, he observed the man approach another neighbor's house, push open a garage door that "was cracked a little bit," and go inside the house "for about five to 10 minutes." When the police arrived, the man ran out of the house and toward the woods. Mr. Hall testified that appellant was the man he saw entering the vehicles and the garage.

Officer Eric Scott, a member of the Baltimore County Police Department, responded to the scene. He saw appellant exiting the open, lighted garage. Appellant ran toward a wooded area, and Officer Scott chased him. Officer Scott thought he lost appellant at one point, but he located appellant lying on the ground 10 to 15 feet inside the wood line.

Jonathan Ladd, whose garage appellant entered, testified that nothing was missing from his house or garage after the incident. Mr. Ladd did not know appellant, and appellant did not have permission to be inside his home.

Stephanie Misanik, Mr. Ladd's neighbor, testified that, after the police notified her of the incident, she examined her vehicle and found that "everything that was in the . . . inner console was ripped out and thrown on the seat and on the floor," including loose change. She did not know appellant, and she did not give him permission to be in her vehicle.

Appellant testified that, on the night of the incident, he was at a local bar for approximately two hours, and he then walked to a nearby bus stop to get home. While waiting for the bus, he had to urinate, but there "was no good spot to go." Appellant walked into the woods to relieve himself, and he heard what he thought was "maybe a gang," yelling and looking for someone. Fearing for his life, he ran and laid down in the woods to hide. Police officers then jumped on him in the woods. Appellant admitted that he previously had been convicted of six theft or burglary charges dating back to 2002.

DISCUSSION

Appellant contends that the circuit court erred or abused its discretion by failing to ask the following voir dire questions:

> 2a. Does any member of the panel have strong feelings regarding the type of offense alleged?
>
> 6. Have you, any members of your family, or any close friends ever been the victim of or a witness to a crime? or ever been charged with a crime?
>
> 10. Is there any member of the panel who believes that if a person is charged with a crime, he is more likely than not to be guilty of the crime with which he is charged?
>
> 12. If the defendant elects to testify on his own behalf, would you assume that he is testifying falsely because he is the person on trial?

> 12a. Would you be able to weigh his testimony in the same manner as any other witness in the case?
>
> 14. The State has the burden of proving guilt. The defendant does not have to prove his innocence. Would you draw any inference of guilt if the defendant elects not to present any evidence?
>
> 15. The defendant has an absolute constitutional right not to testify. Would you draw any inference of guilt from his election not to testify or take the witness stand on his own behalf?

Record, Exhibit 1.

The State concedes that appellant is entitled to a new trial based on the circuit court's refusal to ask question 12. It notes that, in *Bowie v. State*, 324 Md. 1, 10-11 (1991), the Court of Appeals held that a trial court abuses its discretion when it refuses to ask "defense-witness" related voir dire questions, and it states that "[q]uestion No. 12 is a narrowly framed 'defense-witness' question, the subject matter of which was not addressed by any of the other questions posed to the venire during voir dire and should have been asked as [appellant] requested."

A.

Scope of Voir Dire

"A defendant has a right to an impartial jury," and voir dire "is critical to implementing the right to an impartial jury." *Pearson v. State*, 437 Md. 350, 356 (2014) (citations omitted). Maryland, however, "employs limited voir dire." *Id.* As the Court of Appeals recently explained:

> [I]n Maryland, the sole purpose of voir dire "is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]" . . . Unlike in many other jurisdictions, facilitating "the intelligent exercise of peremptory challenges" is not a purpose of voir dire in Maryland. . . .

> Thus, a trial court need not ask a voir dire question that is "not directed at a specific [cause] for disqualification[or is] merely 'fishing' for information to assist in the exercise of peremptory challenges[.]"
>
> . . . There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a "collateral matter [is] reasonably liable to have undue influence over' a prospective juror." . . . "The latter category is comprised of 'biases directly related to the crime, the witnesses, or the defendant[.]"

Id. at 356-57 (quoting *Washington v. State*, 425 Md. 306, 312-13 (2012)).

We review a trial court's decision whether to ask a voir dire question for abuse of discretion. *Id.* at 356. Failure to ask questions that may show cause for disqualification, however, "is an abuse of discretion constituting reversible error." *Marquardt v. State*, 164 Md. App. 95, 144, *cert. denied*, 390 Md. 91 (2005).

B.

Questions 12 and 12a

The Court of Appeals has held that, in a case where there is a defense witness, it is reversible error to decline a request for a "defense-witness" voir dire question, i.e., a question asking if a potential juror would view the testimony of a witness for the defense with more skepticism than a witness called by the State, mainly because they were called by the defense. *Moore v. State*, 412 Md. 635, 641 (2010); *Bowie*, 324 Md. at 1. The rationale behind this rule is that a juror who gives a witness' testimony more or less weight based on the witness' status or affiliation has prejudgment bias that threatens a defendant's right to a fair and impartial trial, and therefore, the defense-witness question is directed to

a specific cause for disqualification, and it must be asked, if requested and a defense witness is called. *Moore*, 412 Md. at 652-55.

Here, the State concedes that appellant's requested question No. 12 (along with 12a) is a narrowly framed "defense-witness" question, the subject matter of which was not addressed by any of the other questions asked during voir dire. *Cf. Bernadyn v. State*, 152 Md. App. 255, 283 (2003) (where the court asked a related "defense-witness" question, the court did not abuse its discretion when it declined to ask a "defendant-witness" question), *rev'd on other grounds*, 390 Md. 1 (2005). Accordingly, it agrees with appellant that the circuit court's failure to ask the question entitles appellant to a new trial. We similarly agree.

JUDGMENTS REVERSED AND CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR A NEW TRIAL. COSTS TO BE PAID BY BALTIMORE COUNTY.