UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2169

September Term, 2014

GRASON LAPOLE

v.

STATE OF MARYLAND

Leahy,
Reed,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.
Concurring Opinion by Leahy, J.
Dissenting Opinion by Raker, J.

Filed: June 27, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

By criminal information filed on August 6, 2013, the State of Maryland charged Grason Lapole, appellant, with 13 counts of various sex offenses committed over a six-year span against his stepdaughter, Diana Lapole ("Diana"), who was 18 at the time of trial. After a two-day trial in the Circuit Court for Baltimore County, the jury found appellant guilty of four counts of sexual abuse of a minor and three counts of sex offense in the third degree. On November 12, 2014, the trial court sentenced appellant to 25 years of incarceration for the first count of sexual abuse of a minor, a consecutive ten years for the first count of sex offense in the third degree, and additional sentences that were either to run concurrently or were suspended.

Appellant poses two questions for our review, which we have reordered:

1. Did the circuit court err in refusing to ask prospective jurors whether they would give greater weight to the testimony of a police officer than to the testimony of other professionals?

2. Did the circuit court err in admitting hearsay testimony of a "prompt complaint" of sexual abuse, when the abuse had ended over a year before the complaint was made?

We answer the first question in the affirmative, the second question in the negative, and reverse and remand to the Circuit Court for Baltimore County for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

As appellant concedes in his brief, "the testimony of this case is disturbing and need not be recounted in minute detail, as the sufficiency of the State's evidence is not contested in this appeal." In light of the fact that this appeal ultimately hinges on a procedural mistake, we need not recount it in great detail either, but will provide the necessary and

pertinent details from the agreed-upon statement of facts that have some bearing on appellant's contentions.

Appellant was charged by criminal information of sexually abusing his stepdaughter in an escalating fashion from 2005 to 2011, by the Baltimore County Police. The charges were organized both chronologically (by Diana's age at the time of the offenses) and geographically (where the family was living when the offenses occurred):

1. 1412 Hopewell Avenue – February 23, 2005, through February 22, 2006 – one count each of sexual abuse of a minor, sex offense in the second degree, and sex offense in the third degree;

2. 1603 Hopewell Avenue – February 23, 2006, through February 22, 2009 – same three offenses;

3. 5 North Hawthorne Road – February 23, 2008, through February 22, 2010 – same three offenses; and

4. 507 Grovethorn Road – February 23, 2010, through February 22, 2011 – one count each of sexual abuse of a minor and sex offense in the second degree.

Before trial, both the State and appellant submitted their proposed voir dire. As part of the State's voir dire, it attached a witness list that, in addition to family members and school staff (such as her school counselor), included two police officers (only one of whom, Detective Dan Kuhns, ultimately testified). Importantly, both parties proposed a question that *specifically* sought to identify any potential jurors who would give greater or lesser weight to the testimony of a police officer, merely because he was a police officer ("the police officer question").[1]

[1] The State's proposed Question 10 read as follows:

(continued…)

Appellant's jury trial began on August 4, 2014. In its actual voir dire, the trial court, rather than using the language of the parties' proposed questions, propounded the following question:

> QUESTION NO. 10: Another principle of law about which the jury will be instructed is what we call credibility of witnesses. In all jury trials, whether civil or criminal, the judge decides issues of law. That's where the judge makes rulings where he's, the judge sustains or overrules an objection but the jury decides issues of fact. You'll decide what happened. In that regard, based on the testimony and other admissible evidence the jury decides what evidence they find persuasive. My instructions will include some factors that you may consider in judging witness credibility. Ultimately if selected as a juror in this case it is for you to decide who you believe. That is to say who is right or wrong, who is truthful or untruthful, who is correct or mistaken. At the conclusion of the case, and during deliberations, the jury will have had the benefit of seeing and observing, listening to all the witnesses, viewing any other evidence that is . . . admitted, discussing all the evidence with their fellow jurors.
>
> Mindful of that principle are there any prospective jurors who would automatically give more or less weight to the testimony of any witness . . .

> You are instructed that a police officer's testimony should be considered by you just as any other evidence in this case, and in evaluating his credibility, you should use the same guidelines which [*sic*] you apply to the testimony of any other witness[].
>
> In no event should you give any greater or lesser credence to the testimony of any witness merely because he is a police officer.
>
> Does any prospective juror feel that he/she cannot follow this instruction, and would give the testimony of a police officer greater weight than any other witness merely because he/she is a police officer?
>
> Does any prospective juror feel that he/she would automatically give the testimony of a police officer less weight, merely because he/she is a police [officer?]

Appellant's proposed Question 15 read as follows:

> If you are selected as a juror in the case you may hear the testimony of one or more law enforcement officers. Do any of you believe that a law enforcement officer's testimony is entitled to greater weight than any other witness just because he is a law enforcement officer? (Bowie v. State, 324 Md. 1; A2d 448 [1991]) [*sic*]

> merely because of the witness['] title, profession, education, occupation, employment? This question is asked in a . . . vacuum and, . . . people get confused about it. So let me be . . . a little more down to earth.
>
> The whole point of this question is[:] could you sit and listen objectively to the testimony of any witness, regardless of what side called them, and regardless of their title, profession, education, occupation or employment?
>
> For example, and if anyone here is a physician I'm not picking on you, but I'm gonna give, make a simple example. We have two physicians [who] just walked out of lunch, they're walking down the street and they're talking about whatever physicians are talking about. They're standing at the street corner waiting to cross the street and a traffic accident happens and one of the physicians thought the light was green and the other one thought it was red. And if that was all you knew and you were asked to make a decision would you base that simply on their credentials?
>
> Most people would say no, I've gotta hear all the testimony, all the evidence from all the witnesses. And that's kind of the point of this question.
>
> So stated another way, if you're selected as a juror in this case[,] would you be able to judge the credibility of each witness'[] testimony based on the totality of their testimony rather than [based on] which, whichever side called them, or rather than relying on their title, profession, education, occupation or employment[?] For example, would any of you automatically give more or less weight to the testimony of a physician, a clergyman, a police officer, firefighter, a psychiatrist, social worker or other witness merely because of their title, profession, education, occupation[,] or employment? If so, please stand.

After the judge counted the responding jurors (of which there were three), a bench conference ensued, wherein the following conversation took place:

> [Counsel]: Your Honor, I assume the general question that you asked about believing one witness over another is in reference to my Number 15?
>
> THE COURT: Not only that, it's, it's to, it, not only that but it relates to just credibility of witnesses.
>
> [Counsel]: Right. I believe, and . . . I don't have it in front of me, but I believe . . . *Bowie v. State* indicates that it has to be more clearly questioned. In other words, I think the question is[:] would you believe the police officer's testimony over a non-police officer[?] I think it has to be that specific because lumping it in with physicians,

or golfers, or other people I don't think points out what, what the court is trying to prevent. [It's] that you have a uniformed police officer on the witness stand with his badge and his gun, are they gonna give that person, an authoritative person dressed in authority more weight than a civilian witness[?]

THE COURT: Well what about less weight?

[Counsel]: Or less weight. Either way. I'm not saying more, I'm just, either way. But I think it has to be just, you have to specifically say[:] would you give a police officer['s testimony] more or less weight merely because he's a police officer?

THE COURT: Okay. All right. Thank you.

[Counsel]: Thank you.

After finishing the remaining voir dire questions, the court invited both sides up to the bench, whereupon appellant's counsel reiterated his exception to the omission of the police officer question:

THE COURT: All right. Any exceptions or, [*sic*] by the State?

[The State]: No.

THE COURT: From the defense?

[Counsel]: Other than what I previously made.

THE COURT: All right. So you previously made, I mean so we're clear, your, your question was specifically if you are selected as a juror in the case you may hear the testimony of one or more law enforcement officers. Do any of you believe that a law enforcement officer['s] testimony is entitled to greater weight than any other witness just because he is a law enforcement officer? Is that the question you're referring to?

[Counsel]: Yes[,] Your Honor.

THE COURT: Okay. I declined to give that, I think I've adequately covered it. All right. . . .

The court then proceeded to conduct the individual voir dire at the bench. Relevant here are the discussions with the three jurors that responded to Question No. 10: Juror Numbers 84, 203, and 69. All three jurors were ultimately struck for cause; however, Juror Number 203 was the only one to be stricken for cause based specifically on Question No. 10, after the juror explained that, as a teacher, the juror would likely automatically believe the testimony of the guidance counselor. Juror Number 84 was dismissed for cause after explaining that, as a child psychiatrist that dealt with many victims of sexual abuse, the juror was concerned about the ability to remain impartial. Juror Number 69 was excused for cause after the juror expressed concern over the juror's ability to remain impartial because the juror's son-in-law was a Baltimore City Police officer.

The State's first witness was Ms. Johanna Goodreau, a friend of the Lapole family. She testified that, for a brief period in 2006, she and her two children lived with the Lapoles at the second Hopewell Avenue residence, but she later moved to Cecil County in 2009. Ms. Goodreau further testified that later, in 2011, Diana and her brother Kevin began occasionally visiting her there on weekends, at Diana's request. Ms. Goodreau explained that, beginning in 2012, Diana's "bubbly, goofy personality" had shifted to what she described as a "depression." Ms. Goodreau initially put it off as "[n]ormal teenage behavior," until, during a weekend visit in April or May of 2012,[2] Diana confided in her:

> Later on that night we got the kids to bed, my kids were to bed at 8:00. She came in my bedroom, knocked on the door, told her to come in. She said

[2] While there was some initial confusion in Ms. Goodreau's testimony as to when that conversation took place, appellant resolves the ambiguity by stipulating that it most likely sometime around April or May of 2012.

> "Joey, can I talk to you?" I said "sure, you can tell me anything." And that's when she had told me her father had, was touching her.

Ms. Goodreau then testified she and Diana went back to the Lapole residence the next day. Ms. Goodreau went into the house to get Rose, Diana's mom, and brought her out to the car where Diana was waiting. Ms. Goodreau told Rose what Diana had disclosed to her the day before, but Rose refused to believe it, and called Diana a liar to her face.

Ms. Goodreau also testified that she never contacted the police or the Department of Social Services about the allegations, because she thought Diana was concerned for her own safety and the safety of other members of the family, if the allegations were to become public. She further testified that Diana told her that the abuse had stopped six months to a year before confiding in her.

Diana testified the next day. She testified that beginning in 2005, appellant (whom she thought at the time was her father, but is actually her stepfather) began sexually abusing her. Diana testified that after the first time it happened, she told her mother and showed where it happened, but her mother did not believe her, and that appellant had pulled her aside and explained to her that "we can't tell anybody about this, this is our little secret."

Diana went on to testify that the abuse continued to occur until March or February of 2011. She explained that she never said anything to appellant, or anyone else, because she was afraid of him. Diana testified that she did not go into too much detail when she disclosed the abuse to Ms. Goodreau, and that Ms. Goodreau wanted to go to the police, but Diana "was scared that [she] would lose [her] mom and [her] brother." She corroborated much of the confrontation with Rose, and that her mother additionally

explained to her that she "took care of it" and that "he [wouldn't] touch you again." Diana testified that the last act of abuse occurred prior to February 22, 2011, and that her conversation was with Ms. Goodreau occurred in April or May of 2012. She said that the allegations did not "come out" until she told her school counselor in 2013.

Later that day, Detective Dan Kuhns testified as the last witness for the State. Detective Kuhns testified that, as a part of the Sexual Abuse Squad for the Crimes Against Children Unit, he was assigned to Diana's investigation the day same day she reported it to her counselor. He explained that the "first thing" he did that day was interview Diana at her school, together with a social worker that "did the questioning." Detective Kuhns testified that during the interview that lasted "a little bit over an hour," Diana was "calm" but "did break down at times" and "cried." He told the prosecutor that Diana did identify her abuser during her interview, but he was neither asked for, nor did he give, any specific answer during his testimony. The remainder of his testimony consisted of identifying the particular family members he interviewed, and confirming that the family had lived at each of the addresses where the abuse took place. Appellant's counsel asked Detective Kuhns no questions, and, after the State rested its case, appellant made a motion for judgment of acquittal, which was denied.

After two days of testimony, the jury convicted appellant on all counts except for the four counts of sex offense in the second degree. On November 12, 2014, the trial court sentenced appellant to 25 years of incarceration for the first count of sexual abuse of a minor and for a consecutive ten years for the first of the third-degree sex offense counts. Appellant received sentences on the remaining counts that were either to run concurrently

or were suspended in lieu of three years of probation. Appellant noted a timely appeal on November 17, 2014.

DISCUSSION

I. THE VOIR DIRE CLAIM

A. Parties' Contentions

Appellant argues that, based on Maryland case law, the circuit court should have rephrased the question as suggested by his counsel. Relying primarily on *Bowie v. State*, 324 Md. 1 (1990); *Langley v. State*, 281 Md. 337 (1977); and *Moore v. State*, 412 Md. 635 (2010), appellant maintains that the court committed reversible error by not specifically narrowing the subject of question to police officers and the weight of their testimony. He further contends that it cannot be deemed as harmless error, regardless of the fact that Detective Kuhns was the only police officer who testified, because "the testimony of Detective Kuhns provided an important corroboration of [Diana's] testimony," and given his rank and experience, "his testimony must have made an impression on the jurors."

The State responds that appellant's argument "lacks merit" because the trial court's question "included the question requested by [appellant]," and "[t]he fact that the court may have asked the question more broadly than [appellant] wished . . . did not undercut its import." The State contends that voir dire is in the broad discretion of the trial court, and reads the case law differently to say that the judge is only required to convey "the concept that sometimes people are accorded more credibility because of their occupations," which the State feels the trial court accomplished by asking its Question 10. The State argues that

the question, in combination with the clarifying examples, was sufficient, and that the trial court properly exercised its discretion in refusing to use appellant's proposed question.

B. Standard of Review

An appellate court reviews a circuit court's decision as to whether to ask a particular voir dire question for abuse of discretion. *Pearson v. State*, 437 Md. 350, 356 (2014); *Brice v. State*, 225 Md. App. 666, 677 (2015). While the process of voir dire, as a whole, is left to the sound discretion of the trial judge,

> [w]e review the trial judge'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. *White* [*v. State*], 374 Md. [232], 243 [(2003)]. It appears to be the universal rule that on appellate review, the exercise of discretion by trial judges with respect to the particular questions to ask and areas to cover in voir dire is entitled to considerable deference. The trial judge has had the opportunity to hear and observe the prospective jurors, to assess their demeanor, and to make factual findings. The judge's conclusions are therefore entitled to substantial deference, unless they are the product of a voir dire that "is cursory, rushed, and unduly limited." *Id.* at 241.

Stewart v. State, 399 Md. 146, 159 (2007).

C. Background

i. Voir Dire Generally

A criminal defendant is guaranteed the right to "an impartial jury," both by the United States and Maryland Constitutions. U.S. Const. amend. VI; Md. Decl. of Rts. Art. 21. Over 130 years ago, the Court of Appeals explained:

> It is a fundamental principle underlying the trial by jury, that each juror shall so far as it is possible be entirely *impartial* and *unbiased,* in order that he may hear the evidence, and decide the matter in controversy uninfluenced by any extraneous considerations whatever. We say, so far as it is possible, for after all, it may not be practicable even by the most rigid

> rules of exclusion to secure that impartiality which the law in the abstract contemplates.
>
> Every day's experience teaches that all human institutions are affected to some extent at least, by the common infirmities of those by whom they are framed, or by whom they are administered. To secure, however, a fair and impartial trial so far as it may be practicable, the law has from the earliest times prescribed certain qualifications for jurors; and has carefully excluded from the panel all persons who from partiality or prejudice, arising either from their relations to the parties or from a fixed opinion in regard to the matter in issue, cannot be expected to give an impartial consideration to the questions submitted to them.

Waters v. State, 51 Md. 430, 436 (1879) (emphasis in original).

In order to procure such an impartial and unbiased jury, Maryland employs a "limited" voir dire, where "the only purpose of the inquiry is to ascertain the existence of cause for disqualification," *Casey v. Roman Catholic Archbishop of Baltimore*, 217 Md. 595, 605 (1958), "and not as in many other states, to include the intelligent exercise of peremptory challenges." *Stewart*, 399 Md. at 158 (citations omitted). Accordingly, it is "well settled" that the trial court enjoys "broad discretion in the conduct of voir dire, most especially with regard to the scope and the form of the questions propounded, and that it need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification." *Dingle v. State*, 361 Md. 1, 13-14 (2000) (citations omitted); *see also Uzzle v. State*, 152 Md. App. 548, 560-61 (2003).

In Maryland, there are two "broad areas of inquiry" that are used in rooting out proper causes for a prospective juror's disqualification: "(1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any

collateral matter reasonably liable to have undue influence over him." *Stewart*, 399 Md. at 159. With regard to the latter area, our courts have developed two general categories of questions: mandatory and "non-mandatory."

Non-mandatory questions have been described as those "not directed at a specific ground for disqualification, which are merely 'fishing' for information to assist in the exercise of peremptory challenges, which probe the prospective juror's knowledge of the law, ask a juror to make a specific commitment, or address sentencing considerations." *Washington v. State*, 425 Md. 306, 315 (2012). These types of questions are normally improper for voir dire, subject to the trial judge's discretion. *Pearson*, 437 Md. at 357.

Mandatory areas of inquiry for a trial court, on the other hand, often include case-specific grounds for disqualification. "The Court of Appeals has explained that specific causes for disqualification involve biases 'directly related to (1) the defendant, (2) the witnesses, or (3) the crime.'" *Wagner v. State*, 213 Md. App. 419, 450 (2013) (quoting *State v. Shim*, 418 Md. 37, 45 (2011), *abrogated on other grounds by Pearson v. State*, 437 Md. 350 (2014)). Over time, our state's jurisprudence has developed the following non-exhaustive list of voir dire inquiries that, if requested by counsel, are mandatory:

1. Bias based on race, ethnicity, or cultural heritage;
2. Bias against defense witnesses;
3. Religious bias;
4. An unwillingness to convict in capital cases;
5. A juror's strong feeling toward the crime charged; and
6. *Placement of undue weight on police officer credibility*.

See Wagner, 213 Md. App. at 450 (emphasis added) (citing *Washington,* 425 Md. at 315; *Shim,* 418 Md. at 45–46; and *Curtin v. State,* 393 Md. 593, 609–10 n. 8 (2006)); s*ee also Moore v. State*, 412 Md. 635, 656-57 (2010); *Stewart*, 399 Md. at 162 n.5. It is this sixth mandatory area of inquiry that the facts of this case cause us to examine.

ii. Undue Weight on Police Officer Credibility

Almost 40 years ago, the Court of Appeals established the initial standard for the appropriateness of the police officer question in voir dire in *Langley v. State*, 281 Md. 337, 338 (1977), after the trial judge refused to propound the following proposed voir dire question: "Is there anyone here who would give more credit to the testimony of a police officer over that of a civilian, merely because of his status as a police officer?" In that case, Langley was tried and convicted of robbing a taxicab in which he was a passenger. *Id*. The police officer testified (1) that when the driver of the cab crashed and fled the scene, Langley was unable to follow suit because "he was impeded by a jammed door on the passenger side of the cab," and (2) that, upon being arrested, the officer found that Langley "had only three cents on his person." *Id*. at 338-39. Langley testified, however, that he had "no knowledge of or participation in the robbery which preceded his entry into the cab," and that he actually had $2.00 on his person at the time, which he intended to use as the cab fare. *Id*. at 339.

The Court of Appeals held that, when requested, it was prejudicial error to fail to propound the police officer question "where a principal part of the State's evidence is testimony of a police officer diametrically opposed to that of a defendant." *Id.* at 349. In reversing the judgment of the circuit court, the Court of Appeals explained that

> [a] juror who states on voir dire that he would give more credit to the testimony of police officers that to other persons has prejudged an issue of credibility in the case. Regardless of his efforts to be impartial, a part of his method for resolving controverted issues will be to give greater weight to the version of the prosecution, largely because of the official state of the witness. The argument by the State that police officers are entitled to greater credibility because they have less interest in the outcome of the case is not sufficient to overcome such an objection.

Id. at 348. The Court went on to say that the "phrasing of the court's inquiry should include whether any juror would tend to give either more or less credence (merely) because of the occupation or category of the prospective witness." *Id*. at 349 (internal quotation marks and citation omitted).

Fourteen years later, in *Bowie v. State*, 324 Md. 1 (1991), the Court of Appeals was again asked to review a case in which the trial court refused to propound the police officer question. There, Bowie was convicted of two counts of first-degree murder and multiple related charges by a jury, and sentenced to death. *Id.* at 4. In his proposed voir dire, Bowie submitted the following relevant questions:

> 1. Many of the State's witnesses will be police officers. Do you believe that a police officer will tell the truth merely because he or she is a police officer?
>
> 2. Would any of you be more or less likely to believe a police officer than a civilian witness, solely because he or she is a police officer?

Id. at 7. Ultimately, "[t]he court neither asked those questions, nor incorporated their substance into those it did ask, whereupon [Bowie] objected." *Id*. In response to his appeal, the State argued, *inter alia*, that Bowie should have proffered that police testimony was central to the State's case and that his "failure to testify resulted in there being no

'diametrically opposed' version of events; therefore no issue concerning the veracity of police testimony was presented and, consequently, [Bowie] was not prejudiced." *Id*.

The Court of Appeals, relying on *Langley*, was unpersuaded, and held that "whether, or not, a defendant elects to take the stand or to present evidence at all, it is still necessary to determine whether witnesses called by the State will start with a 'presumption of credibility' simply because of the positions occupied rather than the facts of the case." *Id*. at 10. In reversing the decision of the trial court, the Court held that it committed error in not propounding the police officer questions and that the error was not harmless. *Id*. at 11. In practice, therefore, the Court narrowed its holding in *Langley* by removing any doubts over the importance of "diametrically opposed" police testimony. *See Bowie*, 324 Md. at 9-10 ("Nor are we satisfied that the *Langley* holding applies only when a defendant takes the stand and testifies 'diametrically opposed' to the testimony of police witnesses."). As a result, after *Bowie*, the police officer question, if requested by counsel and relevant to the case, became mandatory, and by not posing the question in voir dire, a trial judge commits reversible error. *See Brice*, 225 Md. App. at 689-90.

Nineteen years later, the Court of Appeals explicitly reaffirmed the holding of *Bowie* in *Moore v. State*, 412 Md. 635 (2010). There, Moore was indicted on two counts of attempted murder and related charges stemming from an altercation that resulted in a shooting at an apartment parking lot. *Id*. at 641. In addition to the police officer question, Moore's defense counsel also requested two questions that were aimed at discovering potential bias for prosecution witnesses over defense witnesses, merely because of who was calling them ("the defense witness question"). *Id*. The circuit court gave the police

question, but declined the defense witness questions, stating that "I don't like to stress prosecution over are less likely to believe defense witness [*sic*] because that's again covered, I believe, in other instructions." *Id*. at 642. Moore was ultimately convicted of most of the charges against him, including the two attempted murders, and sentenced to two concurrent life sentences. *Id*. at 643.

On appeal, we affirmed his conviction, but the Court of Appeals reversed. *Id*. After a lengthy examination of *Langley* and *Bowie*, the Court explained that, while the holdings of those cases appear to be focused solely on the police officer question, they were in reality much broader:

> *Bowie,* therefore, did no more than reiterate the teachings of *Langley* and apply them. As we have seen, *Langley* accepted that, while questions related to a witness's occupation apply to police officers, their reach is not so narrow so as only to include police officers. *Bowie* merely reiterated, perhaps more expressly and pointedly, what *Langley* itself said, that any juror who, on the basis of status-based or party-based reasons, favors one witness over other witnesses is biased and should be disqualified. *Bowie,* 324 Md. at 11, 595 A.2d at 452–53.

Moore, 412 Md. at 655. Even though the case was ultimately reversed because of the court's failure to propound the defense witness question upon request, the Court of Appeals made very clear that "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." *Id*. at 655.

It is with this background we now turn to the voir dire in appellant's case.

D. Analysis

While we are mindful that trial judges are afforded a great deal of latitude in choosing which voir dire questions to give, here, the trial judge (rather inexplicably) abused his discretion in refusing to propound a specific police officer question, as requested by appellant. As an initial matter, we agree with the State to a certain degree—in that the trial judge *technically* asked a question that could have uncovered potential juror bias against police officers. We are unable to agree with the State, however, that "[t]he fact that the court may have asked the question more broadly than [appellant] wished did not undercut its import"— that is precisely what it did. We explain.

As the Court of Appeals said in *Langley*,

> [a] juror who states on voir dire that he would give more credit to the testimony of police officers has prejudged and issue of credibility in the case. Regardless of his efforts to be impartial, a part of his method for resolving controverted issues will be to give greater weight to the version of the prosecution, largely because of the official status of the witness.

Langley, 281 Md. at 348. And as the Court further said in *Bowie* (while dispelling the idea that the holding of *Langley* only applied when the defendant testifies), "[t]he State's burden is to prove the case against the defendant. The defendant has no burden at all." *Bowie*, 324 Md. at 10. The synthesis of those ideas readily demonstrates the necessity of the police officer question: if a juror is going to automatically resolve issues in favor of a police officer, then a criminal defendant is also therefore automatically "behind the eight ball," because in the juror's mind, the burden has more-likely-than-not shifted to the defendant to prove his innocence. Indeed, that type of burden-shifting is surely the exact problem that the police officer question is intended to prevent.

Here, even if the trial court's question was deemed to have complied with the *technical* mandates of Court of Appeals' police officer question cases by mentioning police officers in the occupational question, it certainly did not comply with the *spirit* of the police officer question. The overriding concern in a limited voir dire system, such as ours, is revealing potential biases that a prospective juror may harbor, or any other reasons for disqualification, so that the court may strike them from the panel for cause. While the occupational question undoubtedly accomplishes that objective in the right circumstances, it cannot be seriously contended that it served the purpose for which it was specifically requested by appellant's counsel in this case. Rather, under the circumstances of this case, our case law has made it clear: during voir dire, if relevant and requested by counsel, the trial judge *must* pose the police officer question to the panel.

Automatically giving more (or less) weight to the testimony of someone in uniform is obviously a potentially relevant factor in determining the suitability of a juror—in any type of case, be it civil or criminal. But in a criminal case, where the consequences are indisputably more severe, associating police officers with an assortment of other professions in voir dire does not serve to expose the specific bias that the police officer question itself is intended to reveal. While it would be perfectly reasonable for a criminal defendant to worry about juror bias based on a witness' profession, in all likelihood, it was not a clergyman or a firefighter that arrested the defendant and locked him in jail.[3] For that

[3] Indeed, the trial court's "example" regarding physicians testifying about the color of the traffic light likely compounded this problem. Potential juror bias based on the fact that they are physicians may be important, for example, if they were testifying about the injuries sustained in the car accident they happened to witness. In the (continued…)

reason, the testimony of police officers plays a unique role in a criminal trial that almost always carries a markedly different connotation than other witnesses' testimony, and therefore, in most circumstances, should be treated differently than other professionals.

When the trial judge in this case asked whether the panel would "automatically give more or less weight to the testimony of a physician, a clergyman, a police officer, a firefighter, a psychiatrist, social worker or any other witness merely because of their title, profession, education, occupation or employment," he conflated the role of a police officer in a criminal case to that of any ordinary witness.[4] Indeed, "[t]he question asked was in a form so general that it is likely it did not sufficiently indicate to the panel of jurors what possible bias or prejudice was being probed." *Casey*, 217 Md. at 606.

Pausing briefly to address the actual substance of Detective Kuhn's testimony, we note that we do not necessarily share appellant's concerns regarding whether the detective's testimony provided "an important corroboration of Diana's testimony," but that is not the issue. Admittedly, with the benefit of hindsight, we know that Detective Kuhns' testimony was hardly the 'smoking gun' in this case, consisting mainly of (1) explaining how, and with whom, he conducted interviews during the investigation (but not about the substance of those interviews) and (2) confirming the family's various addresses. The degree of materiality, however, cannot serve to be the deciding factor in whether the

criminal context, however, the physician who testified that the light was "red" is unlikely to be the one who placed the culpable driver under arrest at the scene for causing the accident.

[4] To be clear, it bears repeating that Detective Kuhns was the only witness that testified in any sort of professional capacity. Every other witness was either a relative or friend of the family.

question should or should not be propounded, because the potential for harm to a defendant comes not necessarily from the *substance* of the officer's testimony, but from the officer's testimony *itself*. For example, as the Court of Appeals illustrated in *Bowie*:

> Where the issue is the defendant's criminal agency, the State must prove that agency by presenting witnesses, whose credibility ordinarily is necessarily at issue. And, in that situation, even though the defendant never takes the stand, cross-examination may suggest another version of facts, or, at least raise questions as to the accuracy, or veracity, of the testimony of the State's witnesses. Therefore, whether, or not, a defendant elects to take the stand or to present evidence at all, it is still necessary to determine whether witnesses called by the State will start with a "presumption of credibility" simply because of the positions occupied rather than the facts of the case.

Bowie, 324 Md. at 10. Put another way, even assuming, *arguendo*, that a police officer's testimony in a particular case is *de minimis*, if a juror has resolved even the slightest issue of credibility in a case in favor of the prosecution because of that officer's testimony, "the State would receive a 'presumption of credibility' in direct contravention to a defendant's right to a fair and impartial trial." *Moore*, 412 Md. at 663.

To be sure, that is not to say that we are endeavoring to create a bright-line rule where the police officer question must be worded a specific way or that it must be asked in every case, regardless of circumstances—such a rigid application would needlessly elevate form over substance. Rather, in reviewing the cases where a particular voir dire question was deemed either mandatory or non-mandatory, an obvious thread emerges: the question, even if requested by counsel, must still be *relevant*. *See, e.g.*, *Moore*, 412 Md. at 662 ("As a secondary matter, our precedents reflect that *any question requested that is relevant to the facts or circumstances presented in a case* which assists the trial judge in uncovering

bias can, *must, be asked*." (emphasis added) (citations omitted)). The police officer question was relevant here, and accordingly, should have been asked.

Finally, we are unable to conclude this error was harmless beyond a reasonable doubt. The trial court failed to ask a requested question that is "aimed specifically at revealing bias among the prospective jurors," which, as we have held before, "is not, by definition, harmless." *Smith v. State*, 218 Md. App. 689, 702-03 (2014) (failing to ask the defense-witness question). The trial court abused its discretion in refusing to ask the police officer question as specifically requested by counsel.

II. The Hearsay Claim

Normally we would decline to address any other claims when an appellant's conviction is able to be reversed based on any one discrete issue. *See Logan v. State*, 164 Md. App. 1, 75 (2005) ("Because we have vacated appellant's conviction, we decline to address appellant's objections to the court's instructions." (citations omitted)). Nevertheless, even if we had not reversed on the basis of the voir dire question, we would still hold that appellant failed to preserve this issue for review.

Rule 4-323 governs the method of making objections, which provides, in pertinent part:

> An 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.

Md. Rule 4-323(a) (emphasis added). Known as the "contemporaneous objection rule," it generally refers to:

> (1) the requirement set forth in Md. Rule 4-323(a) that an objection to the admission of evidence in a criminal trial is waived unless it is made at the time the evidence is offered or as soon thereafter as the ground for the objection becomes apparent; and (2) *the well-settled principle that a pre-trial motion* in limine *to preclude the admission of evidence does not suffice to constitute or preserve an objection to that evidence, but rather an objection must be made when the evidence is offered*.

Cure v. State, 195 Md. App. 557, 571 n.4 (2010) (emphasis added). Here, while the procedural history reflects the inverse relationship (*i.e.*, the State offered the motion *in limine* to *include* the evidence and not vice versa), the result remains the same.

During arguments regarding the motion *in limine*, the discussion was partly regarding the promptness of the complaint of sexual assault, pursuant to Md. Rule 5-802.1(d).[5] The record reflects that at trial, appellant offered two objections to Ms. Goodreau's testimony. The first objection was made when the State asked, "And what, if anything, happened in April of 2012?" When asked for the specific basis by the trial court, appellant offered his belief that, pursuant to *Gaerian v. State*, 159 Md. App. 527 (2004), the victim was required to testify first in order to present testimony under Rule 5-802.1(d). *See Gaerian*, 159 Md. App. at 538 (explaining the limitations on a prompt complaint of

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[5] Md. Rule 5-802.1(d) provides, in pertinent part:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *
>
> (d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]

sexual assault's admissibility). The trial court (correctly) overruled the objection, seeing no such requirement in that case. The second objection was for a separate hearsay issue:

> [The State]: And once she made those statements to you what, if anything, did you do?
>
> [Ms. Goodreau]: I told her we needed to go tell somebody. And she straight out screamed at me and [said] "no, you cannot."
> And I asked her, in reply[,] I asked why not, and she goes "I'm afraid that my –
>
> [Counsel]: Objection.
>
> THE COURT: Overruled. Not offered for the truth of the matter asserted. You may continue your answer.

It is well established that, "[p]ursuant to Md. Rule 4–323(a) . . . our scope of review is limited to the basis stated by appellant's counsel when making a contemporaneous objection." *Gordon v. State*, 204 Md. App. 327, 344-45 (2012). Clearly: (1) neither of the stated grounds for the contemporaneous objections were regarding the promptness of the complaint, and (2) the grounds that were actually stated are not challenged in this appeal. As a result, the issue regarding the promptness of the complaint was not sufficiently preserved for review.

However, as it is almost certain to be raised again in a subsequent retrial, we will briefly pass upon the issue in order to provide guidance for the trial court and promote the orderly administration of justice. *See, e.g.*, *Schowgurow v. State*, 240 Md. 121, 135 (1965) ("While the conviction is to be reversed for the reasons given in the preceding portions of this opinion, the question of the admissibility of the statement is pertinent if the appellant

is reindicted and retried. It is appropriate therefore that the issue be considered here." (citation omitted)).

We note that, in *Gaerian*, we explained that once the exception in Rule 5-802.1(d) applies, "[t]he question [of] whether a complaint is sufficiently prompt to be presented to the jury is one that is best committed to the sound discretion of the court." *Gaerian*, 159 Md. App. at 545. "The discretion necessarily entrusted to the umpire on the field embraces, by definition, a range of rational decisions. Within that range a trial judge may freely rule in either direction without fear of being overturned." *Allen v. State*, 192 Md. App. 625, 652 (2010) (citation omitted). "Once the court determines that the report is 'prompt,' it is for the jury to determine what weight to give it." *Gaerian*, 159 Md. App. at 545 (citation omitted).

This is to say that, when applying the exception to the facts of a case, there is nothing in the rule or its related case law that says any particular length of time (like that in question here) is *presumptively* unreasonable. Clearly, our aim in *Gaerian* was to illustrate that there was no bright-line rule regarding the timing of the complaint. *See, e.g.*, *id.* at 543 (citing with approval a Massachusetts case that upheld a fourteen-year-old victim's complaint that occurred twenty-one months after the sexual assault).

In any subsequent retrial, "[t]he court should consider whether the complaint is prompt as 'measured by the expectation of what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so.'" *Id*. at 545 (citation omitted). Put another way, the trial court, using the factors listed in *Gaerian*, is entrusted with the discretion to decide

whether a complaint is "prompt" enough to be presented to the jury, and that finding will only be disturbed on appeal in the event that discretion is abused.

CONCLUSION

In sum, we first hold that the trial court committed reversible error by including police officers in its version of the occupational question, rather than propounding a specific police officer question as requested by appellant. Additionally, we also hold that appellant did not preserve the issue regarding the "promptness" of the complaint in Ms. Goodreau's testimony under Rule 5-802.1(d) for review.

We pause briefly to note that the gravity of ordering a new trial in this instance does not escape us; that, however, should serve to demonstrate the gravity of the trial court's error committed during its voir dire. The objective concern of ensuring every defendant is afforded their constitutional right to a fair trial must outweigh (even if lamentably) any subjective considerations in this case. Because the nature of the error fundamentally affected every part of the trial that followed it and was not harmless, we are unable to order a limited remand, and must reverse the judgment and remand for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY BALTIMORE COUNTY.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2169

September Term, 2014

GRASON LAPOLE

v.

STATE OF MARYLAND

Leahy,
Reed,
Raker, Irma, S.
(Retired, Specially Assigned),

JJ.

Concurring Opinion by Leahy, J.

Filed: June 27, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

I join the majority opinion, but I write separately to clarify that under our decisional law, I see no reason why the police officer question could not, in a different case involving police witnesses, be asked in conjunction with the witness occupation question. *See Washington v. State*, 425 Md. 306, 320 (2012) (stating that "the witness occupation question seeks to uncover biases with regard to 'police or other official witnesses'" (quoting *Moore v. State*, 412 Md. 635, 655 (2010)). The dissenting opinion advances a strong argument that the circuit court's reworded question including police officers with other professionals did not undercut the import of the question. Still, the circuit court "must adapt the questions to the particular circumstances or facts of the case[.]" *Moore*, 412 Md. at 645. Here, both defense counsel and the State specifically requested the same police officer question, *see* Maj. Op. at 3; Detective Kuhns was the only witness that testified in any professional capacity, *see* Maj. Op. at 19; and the circuit court included the police officer profession within a group of five other professions, none of which were relevant to the case at hand, *see* Maj. Op. at 4. In these circumstances, the court abused its discretion by not more explicitly separating the mandatory police officer question from the other occupations as requested by the parties because, as the majority opinion notes, "even assuming . . . that [the] police officer's testimony is *de minimis*, if a juror has resolved even the slightest issue of credibility in a case in favor of the prosecution because of that officer's testimony, 'the State would receive a "presumption of credibility" in direct contravention to a defendant's right to a fair and impartial trial.'" *See* Maj. Op. at 20 (citing *Moore*, 412 Md. 663).

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Dissenting Opinion by Raker, J.

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I respectfully dissent. I would hold that the trial court did not err or abuse its discretion in rephrasing appellant's proposed *voir dire* question to the jury regarding police officer testimony. Reading the *voir dire* question as a whole, I conclude that the judge, even though he did not ask the question in the exact form requested by appellant, fairly covered the issue so as to elicit any bias a prospective juror may hold as to assessing the weight to be given to police officer testimony. The fact that the judge's reworded[1] question included police officers with other professionals does not undercut the import of the question.

Twice the judge explained the issue to the jury, asking as follows:

> ". . . For example, would any of you automatically give more or less weight to the testimony of a physician, a clergyman, a police officer, firefighter, a psychiatrist, social worker or any other witness merely because of their title, profession, education occupation or employment?
>
> So stated another way, if you're selected as a juror in this case would you be able to judge the credibility of each witness's testimony based on the totality of their testimony rather than which, whichever side called them, or rather than relying on their title, profession education, occupation or employment. For example, would any of you automatically give more or less weight to the testimony of a physician, a clergyman, a police officer, firefighter, a psychiatrist, social worker or any other witness merely because of their title, profession education occupation or employment?"

[1] I do not endorse the judge's example about the two physicians but that example does not amount to reversible error.

Merely because the court grouped several occupations or professions together does not diminish the inquiry as to the weight a juror might give to a particular witness's testimony.[2] Nor does the question fail to inquire as to whether a juror will approach any witness's testimony with a "presumption of credibility." The question covers the field. Moreover, the fact that several occupations are combined does not violate the precepts of *Dingle v. State*, 361 Md. 1 (2000), and the admonition against compound questions. The *voir dire* question at issue here does not permit a prospective juror to self-assess his or her potential biases. The juror must self-identify for the court to probe further if the response to any of the identified occupations is in the affirmative.

[2] In *Moore v. State*, 412 Md. 635 (2010), the Court of Appeals considered whether the trial court erred in not asking whether a juror would give more weight to witnesses called by the State than by witnesses called by the defendant. In the course of resolving that question, the court engaged in a discussion of more or less weight to the testimony of a police officer. The point made in *Moore* is that the concern about more or less weight to a particular witness is not limited to police officers but is broader that just officers, and applies to other occupations as well. The Court stated as follows:

> "Thus, it is apparent that the *Langley* Court, from the outset, understood that, although it was addressing police officer credibility and, thus, some of the cases were not directly on point, the underlying issue of prejudgment encompassed more than police officers, that many more occupations and categories potentially were implicated. To be sure, it was the nature of the issue and who the witnesses were that would determine which questions, about which occupations and categories, had to be asked to uncover prejudicial or disqualifying bias."

Id. at 649.

Thus, it can hardly be said that it is reversible error *per se* to ask the occupation-weight question combining several different occupations, nor does it contribute to an error analysis that both the State and the defendant asked for a particular *voir dire* question.

When appropriate and when requested, a question probing prospective juror bias with regard to more or less weight to a police officer's testimony is a mandatory question. There are two questions presented herein. First is whether the question propounded by the court was sufficient as the inquiry. The majority says "No" because it "did not comply with the *spirit* of the police officer question." Maj. op. at 18. The Majority concludes that associating police officers with an assortment of other professions in *voir dire* does not serve to expose the specific bias that the police officer question itself is intended to reveal. *Id.* As noted above, I disagree. The second question we must consider is, assuming a trial court errs with respect to this question, is such error subject to harmless error analysis.

The real question, however, is whether this is a case which fits into the mold even requiring such a question. In *Langley v. State*, 281 Md. 337 (1977), the Court of Appeals held that "where a principal part of the State's evidence [was] testimony of a police officer diametrically opposed to that of a defendant, it [was] prejudicial error to fail to propound [Langley's] question . . . ." *Id.* at 349. The Court of Appeals held that the trial judge abused his discretion in declining to present Langley's proposed *voir dire* question to the jury. The Court refined its holding in *Bowie v. State*, 324 Md. 1 (1991), making clear that a defendant's entitlement to the "police officer" question was not limited to only when a defendant takes the stand and testifies "diametrically opposed" to police testimony. *Id.* at 9-10. Thus, the Majority is correct in stating that an entitlement to the "police officer" *voir dire* question does not depend upon whether the defendant testifies and whether the police testimony is diametrically opposite from the officer's. Maj. op. at 14-15; *see also Bowie*, 324 Md. at 9-10. Nonetheless, simply because one police officer may testify in a criminal

trial, and that testimony is to the most inconsequential facts, the proposed question does not become a mandatory question. Nor does the refusal to ask the question, or propounding the question in the form given by this trial judge, require reversal of an otherwise fair conviction.

My view of the circumstances requiring the "police question" is supported by the analogous reasoning in *Pearson v. State*, 437 Md. 350 (2014). In that case, the question presented was whether any member of the jury panel had ever been a member of any law enforcement agency. The Court of Appeals held as follows:

> "[W]here 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 of you ever been a member of a law enforcement agency?' Where 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, a prospective juror's experience as a member of a law enforcement agency has a demonstrably strong correlation with a mental state that could give rise to specific cause for disqualification."

Id. at 367. (Internal citation omitted). It is clear in *Pearson* that the law enforcement employment question must be asked when law enforcement testimony is important to the case; when it is material; or, in the court's language, where all the State's witnesses are law enforcement members or where the basis for the conviction is reasonably likely to be based on law enforcement testimony.

In sum, I conclude that in this case, it is a very close question as to whether the trial judge was even required to ask the law enforcement question. The single officer's

testimony was inconsequential in this case, and his credibility hardly relevant to any issue in this case. Recognizing that whether the officer's testimony was significant was not readily apparent to the judge at the beginning of the trial, the better course for the judge was to ask the question. The trial judge asked the requested question, albeit in a different form. The form of the question satisfied the purpose of *voir dire*. Assuming error *arguendo*, any error was harmless because the officer's testimony was inconsequential.

As might be expected, Maryland is not the only jurisdiction to consider this exact issue. In fact, many of our sister states and the federal circuits have considered this *voir dire* question, both the "mandatory" nature of the question, and the appellate effect of the failure to give the question. The overwhelming consensus is that omission of the question on *voir dire* does not automatically require reversal. The courts have looked to the circumstances of individual cases and whether police testimony was important to the case. The courts have adopted generally the following four factors to ascertain whether the failure to ask the "police officer" *voir dire* question was prejudicial:

> " . . . [T]he importance of the government agent's testimony to the case as a whole; the extent to which the question concerning the venireperson's attitude toward government agents is covered in other questions on voir dire and on the charge to the jury; the extent to which the credibility of the government agent-witness is put into issue; and the extent to which the testimony of the government agent is corroborated by non-agent witnesses."

United States v. Baldwin, 607 F.2d 1295, 1298 (9th Cir. 1979).[3]

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[3] This harmless error test is most appropriate for appellate review of error. It also works as a guide for trial judges in determining whether the "police officer" (continued…)

A leading case on the *voir dire* police question issue is *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964). In that case, the defendant requested the trial judge to ask the following question to the jury venire: "Would you give greater credence to the testimony of a law enforcement officer merely because he is an officer as compared to any other witness?" *Id.* at 544. The trial judge denied the request and the appellate court reversed, finding that "although the trial court possesses a 'broad discretion as to the question to be asked' on *voir dire*, the exercise of that discretion is 'subject to the essential demands of fairness.'" *Id.* (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)). The court explained as follows:

> "[W]hen important testimony is anticipated from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be more, or less, inclined to credit their testimony, a query as to whether a juror would have such an inclination is not only appropriate but should be given if requested."

Id. at 545. In that case, the court reversed. The court held that failure to ask the question or make appropriate inquiry does not *per se* require reversal. The court held that "the issue turns on the degree of impact which the testimony in question would be likely to have had on the jury and what part such testimony played in the case as a whole." *Id.* The four-factor test has emerged to determine whether a trial judge's error in *voir dire* by failing to ask "'the question of whether prospective jurors would be unduly influenced by the testimony of a law enforcement officer' served to deny a defendant the right to have

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voir dire question should be given. When in doubt, the trial judge should ask the question. *See Miller v. State*, 893 A.2d 937, 947, n. 37 (Del. 2006).

his claims decided by a fair and impartial jury." *Miller v. State*, 893 A.2d 937, 945 (Del. 2006) (quoting *Baldwin*, 607 F.2d at 1298).

Almost all of the federal circuit courts hold that, like in Maryland, the trial judge has very broad discretion as to what is asked of prospective jurors and the form of *voir dire* questions.[4] And, the federal courts that have considered the law enforcement bias question have all held that whether a trial court errs in not asking those bias questions depends on

[4] *See Butler v. City of Camden, City Hall*, 352 F.3d 811, 815 (3d Cir. 2003) ("Since the trial judge 'must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions,' the trial judge is necessarily vested with broad discretion in determining the manner and scope of questioning.") (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188-89 (1981)); *see also United States v. Lawes*, 292 F.3d 123, 128 (2d Cir. 2002) ("A district court is 'accorded ample discretion in determining how best to conduct . . . *voir dire*.'") (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981)); *United States v. Montenegro*, 231 F.3d 389, 394 (7th Cir. 2000) ("[T]he conduct of *voir dire* is left to the trial court's sound discretion.") (quoting *Gardner v. Barnett*, 199 F.3d 915, 920-21 (7th Cir.1999)); *Paine v. City of Lompoc*, 160 F.3d 562, 564-65 (9th Cir. 1998) ("A district judge has broad discretion in how to conduct the *voir dire* . . . . 'It is wholly within the judge's discretion to reject supplemental questions proposed by counsel if the *voir dire* is otherwise reasonably sufficient to test the jury for bias or partiality.'") (quoting *United States v. Powell*, 932 F.2d 1337, 1340 (9th Cir. 1991)); *United States v. Parmley*, 108 F.3d 922, 924 (8th Cir. 1997) ("Conducting voir dire and striking jurors for cause are matters committed to the district court's discretion."); *United States v. Tegzes*, 715 F.2d 505, 507 (11th Cir. 1983) ("The conduct of *voir dire* of a jury panel is a matter directed to the sound discretion of the trial judge, subject to the essential demands of fairness."); *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977) ("[T]he conduct of a *voir dire* examination is a matter within the broad discretion of the trial judge . . . ."); *United States v. Desmarais*, 531 F.2d 632, 633 (1st Cir. 1976) ("[I]n the conduct of the *voir dire* the trial judge has a considerable amount of discretion. 'It is well settled that the latitude and manner of *voir dire* examination is within the sound discretion of the district judge. . . .'") (quoting *United States v. Gassaway*, 456 F.2d 624, 626 (5th Cir. 1972)); *Kreuter v. United States*, 376 F.2d 654, 657 (10th Cir. 1967) ("The extent of the inquiry must be left to the sound discretion of the trial court.").

the facts and circumstances of the particular case. In *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979), the court observed as follows:

> "All circuits appear to be in agreement that the refusal to ask the question of whether the prospective jurors would be unduly influenced by the testimony of a law enforcement officer does not always constitute reversible error; that question hinges upon such factors as the importance of the government agent's testimony to the case as a whole; the extent to which the question concerning the venireperson's attitude toward government agents is covered in other questions on *voir dire* and on the charge to the jury; the extent to which the credibility of the government agent-witness is put into issue; and the extent to which the testimony of the government agent is corroborated by non-agent witnesses."

Id. at 1298. Where the police officer's testimony is of marginal importance, reversal is not in order. *United States v. Gelb*, 881 F.2d 1155, 1164-65 (2d Cir. 1989).

The four factors embraced by the United States Court of Appeals for the Ninth Circuit in *Baldwin* has developed over the years into what has become known as the *Brown-Baldwin* rule, the majority rule among the federal circuits. *See Butler v. City of Camden, City Hall*, 352 F.3d 811, 818 (3d Cir. 2003) (quoting *Baldwin*, 607 F.2d at 1298); *United States v. Lancaster*, 96 F.3d 734, 740-41 (4th Cir. 1996); *United States v. Espinosa*, 771 F.2d 1382, 1405 (10th Cir. 1985) ("[R]eversal is not required in all such cases; rather, 'the issue turns on the degree of impact which the testimony in question would be likely to have had on the jury and what part such testimony played in the case as a whole.'") (quoting *Brown*, 338 F.2d at 545); *United States v. Victoria-Peguero*, 920 F.2d 77, 84-85 (1st Cir. 1990) (adopting the four factors of the *Baldwin* harmless error test); *United States v. Nash*, 910 F.2d 749, 755-56 (11th Cir. 1990) (concluding that the trial court's failure to proffer

defendant's police officer question was a harmless error based on the application of the *Baldwin* factors); *United States v. Gelb*, 881 F.2d 1155, 1164-65 (2d Cir. 1989) (same).

Indeed, many state courts have adopted a rule similar to that in *Brown*. *See*, *e.g.*, *Miller v. State*, 893 A.2d 937, 943-47 (Del. 2006); *Nodd v. State*, 549 So. 2d 139, 145-47 (Ala. Crim. App. 1989); *State v. Rogers*, 497 A.2d 387, 388-90 (Conn. 1985); *Commonwealth v. Futch*, 366 A.2d 246, 249-50 (Pa. 1976); *State v. Wilson*, 207 S.E.2d 174, 180 (W.Va. 1974). The rule that has emerged is that "'where government [law enforcement] agents are apt to be key witnesses, the trial court, particularly if seasonably requested, should ordinarily make inquiry into whether prospective jurors are inclined to have greater faith in the agents' testimony merely by virtue of their official positions.'" *Butler*, 352 F.3d at 817 (quoting *Victoria-Peguero*, 920 F.2d at 84). Finally, courts have applied the harmless error analysis of the *Baldwin* court to determine whether the failure to ask the *voir dire* question denied or contributed to denying the defendant the right to have his claims decided by a fair and impartial jury. As a guide to trial judges—when a party requests the trial court to ask the prospective jurors whether any member of the venire would "be more likely to believe the testimony of a police officer than the testimony of any other fact or opinion witness," the trial judge should address these factors and proceed accordingly.

I would hold that the trial judge did not abuse his discretion in propounding the "police officer" *voir dire* question in the form he chose. Hence, there was no error. Even assuming error *arguendo*, I would hold that the error was harmless beyond a reasonable doubt. The police officer's testimony was so inconsequential in this case such that the

Majority does not even identify the relevance of his testimony. How can the explanation of his investigation or confirming the family addresses be anything other than inconsequential testimony? It was marginal, at best.

Accordingly, I would affirm the judgment of the Circuit Court for Baltimore County.