Circuit Court for Montgomery County
Case No. 114566-C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2791

September Term, 2018

DUGLAS M. CASTILLO

v.

STATE OF MARYLAND

Reed,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: June 1, 2020

On this (belated) direct appeal, appellant Duglas M. Castillo argues that the Circuit Court for Montgomery County abused its discretion when conducting *voir dire*, and in failing to provide an interpreter, at his 2010 trial for second-degree rape. Notably, however, Castillo's trial counsel did not object to, or raise, either issue at the time. Because we decline to find plain error with respect to either claim, we affirm his convictions for second-degree rape.

BACKGROUND AND PROCEDURAL HISTORY

The essential facts are not in dispute. In June 2010, a Montgomery County jury convicted Castillo of two counts of second-degree rape, after he, as a 19-year-old, had sexual relations with a 13-year-old. Castillo was sentenced to 18 months of incarceration, all suspended, with three years of supervised probation upon release.

Because Castillo's trial counsel did not file a direct appeal at that time, and because immigration consequences resulted from the convictions,[1] in November 2018 the Circuit Court for Montgomery County granted Castillo's petition for writ of error *coram nobis*; the circuit court's order permitted Castillo to file a belated direct appeal.[2] As a result, Castillo's direct appeal is now before us.

---

[1] Castillo immigrated to the United States from El Salvador when he was eight years old, but he lost his lawful status due to the convictions in this matter. In 2012, he was deported to El Salvador. Castillo subsequently re-entered the United States, claiming that he had been immediately targeted by gangs in El Salvador, which caused him to flee in fear for his life. (Additionally, every member of Castillo's family, including his son, were in the United States).

[2] The circuit court granted the *coram nobis* petition on the basis that Castillo's trial counsel did not file an appeal. The circuit court denied the petition's other claims, which

(Continued…)

DISCUSSION

Castillo makes two claims that were not raised (or objected to) at his original trial: (1) the circuit court abused its discretion in asking compound questions during *voir dire*, and several of those questions were asked "in rapid succession without giving the jurors an opportunity to answer each question"; and (2) the circuit court abused its discretion by failing to provide an interpreter at trial, given that Spanish is Castillo's primary language. Although Castillo's brief framed the trial court's actions as now subject to review for an abuse of discretion, at oral argument Castillo's counsel effectively conceded that because neither argument was raised in the trial court, Castillo is now, on appeal, constrained to seeking plain error review.[3]

"Plain error review is 'reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.'" *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). Four conditions must be met before we can find plain error: "(1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error

alleged that Castillo's trial counsel rendered ineffective assistance by: failing to advise Castillo of the immigration consequences of the charges, and/or failing to seek a plea deal that would avoid adverse immigration consequences; failing to request a Bill of Particulars; failing to file a motion to suppress Castillo's statements to the police; failing to request a Spanish interpreter at trial; failing to object to a particular *voir dire* question (which is not among the specific *voir dire* questions now being challenged on appeal); and failing to argue a Motion for Judgment of Acquittal with particularity.

[3] This is not to say that the trial court's actions otherwise *did* constitute an abuse of discretion.

must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings; and (4) the error must seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Newton*, 455 Md. at 364 (quoting *State v. Rich*, 415 Md. 567, 578 (2010)) (Quotation marks omitted, brackets in original).

I. The Trial Court's Handling of the *Voir Dire* Did Not Constitute Plain Error.

Though his trial counsel raised no objection at the time, Castillo contends on appeal that the circuit court impermissibly asked compound questions during *voir dire*, which had the effect of allowing potential jurors to "self-select" with regard to their own potential bias or impartiality, and thus, precluded the circuit court from discerning for itself whether the prospective jurors were capable of impartiality. *See Dingle v. State*, 361 Md. 1, 14-15 (2000) (Repudiating two-part "compound" questions, which ask jurors to assess their own partiality, because "it is the trial judge that must decide whether, and when, cause for disqualification exists for any particular venire person. That is not a position occupied, or a decision to be made, by either the venire or the individual venire persons."). Castillo adds that the purportedly compound questions at his *voir dire* deprived him of the ability to challenge the prospective jurors for cause, given that pertinent information which could have otherwise been gleaned was lost due to the nature of compound questioning. *See id*. at 17-18 ("Because he did not require an answer to be given to the question as to the existence of the status or experience unless accompanied

by a statement of partiality, the trial judge was precluded from discharging his responsibility . . . [and] the petitioner was denied the opportunity to discover and challenge venire persons who might be biased . . . [t]he ability to challenge for cause is empty indeed if no way is provided for developing or having access to relevant information."). Additionally, Castillo argues that asking questions in a "rapid fire fashion" likely confused the jurors and "prevented them from divulging crucial information which would assist the Court in determining the prospective jurors' impartiality."

To begin, Castillo's claim is stymied here because his trial counsel did not object to the *voir dire* questioning, and later expressed satisfaction with the jury as empaneled.[4] The Court of Appeals has held that unqualifiedly accepting a jury as chosen generally constitutes the sort of affirmative waiver that precludes plain error relief, pursuant to the first step of the plain error test. *State v. Stringfellow*, 425 Md. 461, 469 (2012) ("Generally, a party waives his or her voir dire objection going to the inclusion or exclusion of a prospective jury (or jurors) or the entire venire if the objecting party

[4] During jury selection, apart from expressing concern about a pregnant venire member's ability to serve as an alternate, Castillo's counsel only objected that the State had disproportionately used its strikes to keep men off the jury. Of course, this complaint about gender is not directly related to any of the *voir dire* questions that Castillo now challenges on appeal. Moreover, immediately after the last juror was seated, defense counsel told the judge, "Defense is satisfied, Your Honor." (Later, defense counsel separately expressed satisfaction with the two alternates.). *See Gilchrist v. State*, 340 Md. 606, 618 (1995) ("When a party complains about the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury.").

accepts unqualifiedly the jury panel (thus seated) as satisfactory at the conclusion of the jury-selection process.")[5]; *Newton*, 455 Md. at 364 (Step one of the plain error test is that "there must be an error or defect . . . that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant[.]").

Even if Castillo could clear this first hurdle of the plain error test, we are not persuaded that the compound questioning "errors" that Castillo now claims occurred during his *voir dire* actually constituted the sort of "clear or obvious" error—if error at all—that affected the fairness of the judicial proceedings, as is required under the plain error test's subsequent steps. *Newton*, 455 Md. at 364; *see Collins v. State*, 452 Md. 614, 625 n. 5 (2017) ("[A] voir dire process that involves compound questions is not automatically invalid.").

Though Castillo compares the *voir dire* questions from his trial to the impermissibly compound questions from *Dingle v. State*, 361 Md. 1 (2000), *Dingle* is distinguishable. The particular questions that were at issue in *Dingle*[6]—questions that

[5] The Court in *Stringfellow* did note that it distinguishes between an objection that is related to the inclusion and exclusion of prospective jurors (and which is deemed unpreserved if the defendant accepts the jury without qualification) from an objection that is only incidental to the inclusion or exclusion of a prospective juror, which is later deemed preserved for appellate review. 425 Md. at 469-70. The Court went on to explain that an objection to a *propounded* question is considered to relate directly to the composition of the jury (and, thus, is waived upon unqualified acceptance of the jury), whereas an objection to an *unpropounded* question is considered incidental, and can be preserved for appeal. *Id*. at 472-73.

[6] The specific questions at issue in *Dingle*, 361 Md. at 4 n. 4, which all contained a two-part compound phrasing, were:

(Continued…)

"Have you or any family member or close personal friend ever been the victim of a crime, and if your answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this case in which the state alleges that the defendants have committed a crime?"

"Have you or any family member or close personal friend ever been accused of committing a crime other than a minor traffic violation, and if your answer to the question is yes, would the fact that you or your family member or friend has been accused of a crime interfere with your ability to be fair and impartial in this case? If so, if your answer is yes to both parts of the question, please stand."

"Have you or any family member or close personal friend ever been a witness in a criminal case, and if your answer to that question is yes, would that fact affect your ability to be fair and impartial in this case?"

"Have you or any of your family members or close personal friends ever served before as a juror either in a criminal case on a petit jury or on the grand jury, and if your answer to that question is yes, would that prior service as a juror interfere with your ability to be fair and impartial if you were seated as a juror in this case?"

"Do you or any family member or close personal friend belong to a victims' rights group such as the Roper Group, the Stephanie Roper Group, or Mothers Against Drunk Drivers, and if, in fact, your answer to that question is yes, would that fact interfere with your ability to be fair and impartial in this case?"

"Have you or any family member or close personal friend ever attended law school, studied the law, criminology, or corrections or been employed in the legal profession, either as a lawyer, a paralegal, or clerk or secretary, and if your answer to that question is yes, would that fact interfere with your ability to be fair and impartial in this case?"

"Are any of you or your family members or close personal friends associated with members of any law-enforcement agency, like the Baltimore County Police Department, the Baltimore City Police Department, the Federal Bureau of Investigation, the Maryland State Police, the Secret Service? That's part A. Part B of the question, and if you

(Continued…)

pertained to specific, discrete associations and experiences that might affect jurors' attitudes—were held to be impermissibly "compound" because they were phrased in a manner that shifted the responsibility to decide potential juror bias from the trial court to the prospective jurors themselves. 361 Md. at 21. Critically, however, the questions from Castillo's trial that were similar (in subject matter) to the pertinent questions from *Dingle* were not actually phrased in a two-part compound manner; they were properly phrased as simple questions of fact and did not ask the jurors to evaluate their own potential bias.[7]

> are so associated, would that fact interfere with your ability to be fair and impartial if you were seated as a juror in this case?"

[7] In contrast to the compound questions from *Dingle*, quoted in the previous footnote, the questions that Castillo highlights from his *voir dire* that touched upon the same subject matters were phrased in the following, non-compound manner:

> "Ladies and gentlemen, the State must prove the defendant guilty beyond a reasonable doubt. Is there any member of the prospective jury panel who feels that the state must prove the case beyond all doubt?"
>
> "Recognizing that sentencing is a function of the court and not of the jury, is there any member of the prospective jury panel who would allow possible punishment or sentence to influence the verdict in this case?"
>
> "Any member of the prospective jury panel who believes that children are not capable of accurately reporting facts about sexual assault?"
>
> "[A]ny member of the prospective jury panel who would refuse to find the defendant guilty even if the State proved its case beyond a reasonable doubt?"
>
> "Ladies and gentlemen, bear with me for a second. Is there any member of the prospective jury panel [who] participate[s] in any victims organizations such as the Stephanie Roper Committee or any other victims organizations?"

(Continued…)

Rather, only two of the questions that Castillo now highlights from his *voir dire* could potentially be construed as "compound" questions, in the sense that they might have relied upon the jurors to assess their own attitudes: (1) "Does any member of the prospective jury panel have any political, religious, or philosophical beliefs about our system of criminal justice that would cause you to hesitate to sit as a juror in this case?"[8]; and (2) "Is there any member of the prospective jury panel who would allow pity, anger, sympathy or other emotion to influence your verdict in any way in this case?"[9] We can

> "[Is] any member of the prospective jury panel employed in the area of law enforcement, State's Attorney's Office, or other governmental agency in the criminal justice system? . . . [Several venire members respond, and have bench conferences with the judge; the judge then asks if any venire member has "any background in the law whatsoever"] . . . Anybody else in response to that question? Legal training, attorneys, background?
>
> "Is there any member of the prospective jury panel who would put more or less weight on a witness simply because of that witness's occupation or the nature of their occupation? For example, a police officer? Would any member of the prospective jury panel place more evidence or weight on the testimony of a police officer simply because the person was a police officer?
>
> "Does any member of the prospective jury panel who has ever been a victim of a crime, a witness to a crime, a close friend or relative of a victim to a crime or charged with a crime? Anybody—again I'll read all those categories. A victim, witness or defendant having been charged with a crime, a witness to a crime or a victim to a crime. All right."

[8] Notably, the judge asked this question a second time, after first having a colloquy with a prospective juror who responded affirmatively the first time the question was posed.

[9] As the Court acknowledged in *Dingle*, "[i]t is true, of course, that when, on voir dire, attitudes are the subject of the inquiry, in the usual case, other than its observation of

(Continued…)

hardly conclude that it constituted plain error to have asked the second of these two questions, given that in 2019, the Court of Appeals explicitly stated that asking such a "sympathy, pity, anger, or any other emotion [question]" is allowed. *Collins v. State*, 463 Md. 372, 400 (2019). With respect to the first question: not only does it mirror Question 31 of the MSBA's Model Jury Selection Questions for Criminal Trials,[10] but we are mindful that in *Collins*, *id*. at 380, the Court noted, without disapproval, that an almost identically-worded question ("Does any member of this panel have any political, religious, or philosophical beliefs about our system of criminal justice that would make you hesitate to sit as a juror in this case?") had been asked during the *voir dire* in that case. The Court's tacit acceptance (or indifference) to the question in *Collins* spurs us to conclude that asking the same question here was not the sort of "compelling" or "extraordinary" error that merits the "rare, rare phenomenon" of finding plain error. *Alford v. State*, 202 Md. App. 582, 616-17 (2011) (Citations and quotation marks omitted). Indeed, in *Moore v. State*, 412 Md. 635, 665 n. 2 (2010), the Court specifically flagged this same question as the sort of "general question[] [about] a venireperson's

the venire persons, the venire person's answers will be all that the court will have." 361 Md. at 18-19.

[10] Question 31 provides: "Do you hold any moral, religious, or ethical conviction or belief that would prevent you from weighing the evidence and returning a fair and impartial verdict?"

personal acquaintances or beliefs[]" that can be "*pertinent and necessary* to uncover certain kinds of bias[.]"[11] (Emphasis added).

Nor are we persuaded by Castillo's related argument that the *voir dire* questions were improperly asked in a rapid-fire and confusing manner, without giving the prospective jurors an opportunity to respond. Castillo's attempt to liken his *voir dire* to the improper procedure in *Wright v. State*, 411 Md. 503 (2009), is unavailing. In *Wright*, the court asked the venire all 17 *voir dire* questions in a row before "permitting jurors to respond only after all questions had been asked." *Id*. at 506. Here, in contrast, the circuit court invited responses after each individual question, and consistently paused questioning to have the necessary follow-up discussions with prospective jurors who responded affirmatively.[12] For all we know, the absence of any relevant gaps, breaks, interruptions, or noted responses in the transcript after certain questions only indicates that those questions yielded no affirmative response from the venire. *See, e.g., Brightwell v. State*, 223 Md. App. 481, 492 (2015) ("Even though the transcript does not reflect a

[11] In *Moore*, the Court specifically identified the question to rebut the State's contention that that particular question had sufficiently stood in for another necessary question that had not been asked. Still, for our purposes here, what is important is that the Court specifically included this question in its description of the sort of general questions about a venireperson's "beliefs" that could be "pertinent and necessary[.]"

[12] During the *voir dire*, the trial judge told the venire: "In order to answer a question when the[] question is posed if you want to respond to it, please stand in place. And when you stand, please give us your juror number first and then your name." Notably, this sort of method was expressly approved of in *Wright* itself: "[T]he trial court may address a question to the venire as a whole, and then allow the panel members to respond to that individual question through a show of hands before moving on to the next one." 411 Md. at 514.

response from the jury, it is clear from the subsequent actions of the trial court, as well as the silence of defense counsel, that the jury either expressed their unanimous agreement in a non verbal way or failed to indicate any dissent to the announcements of the verdicts."). And as the State observes, we cannot discern from the cold record before us the pace at which the questions were asked. Given the absence of any objection from Castillo's counsel at the time, we hardly think that the transcript before us points to the sort of clear, obvious, or compelling error that merits finding plain error.

II. "Failing" to Provide an Interpreter at Trial Was Not Plain Error.

Castillo argues that the circuit court abused its discretion by failing to provide an interpreter at trial, *see* Md. Rule 1-333, in light of the fact that Spanish is Castillo's primary language. This contention can be dismissed summarily. As the State points out, Castillo's trial counsel assured the circuit court during *voir dire* that an interpreter was not needed because Castillo "speaks perfect English." (Defense counsel later reiterated during closing argument that Castillo "speaks perfect English."). It is difficult to imagine how a trial court's reliance upon an on-the-record assurance from counsel, in the absence of evidence to the contrary, could constitute plain error—especially when the text of Rule 1-333 states that "[t]o determine whether an interpreter is needed, the court . . . shall examine a party, *attorney*, witness, or victim on the record." (Emphasis added). *See also Garner v. State*, 414 Md. 372, 390 (2010) (The circuit court was entitled to rely upon a statement made by defense counsel "and was not required to make any further inquiry" in part because the Rules of Professional Conduct prohibit making a false statement to the

court); *State v. Graves*, 447 Md. 230, 249 n. 5 (2016) ("We recognize that defense attorneys, as officers of the court, are trusted to accurately represent their client's wishes before the court.") (Citing *Garner*, 414 Md. at 390); *cf. 4900 Park Heights Ave. LLC v. Cromwell Retail 1, LLC*, ___ Md. App. ___, No. 3136, Sept. Term 2018, Slip Op. at 21 (April 30, 2020) (Noting the "troubling implications" of a party's proposed rule that would seem to render suspect any settlement concluded—and conveyed to the court—by counsel unless and until confirmed by their clients).

In conclusion: we do not find plain error with respect to either the trial court's handling of *voir dire*, or in "failing" to provide an interpreter at trial. Accordingly, we affirm Castillo's convictions for second-degree rape.

CONVICTIONS FOR SECOND-DEGREE RAPE AFFIRMED. COSTS TO BE PAID BY APPELLANT.