Circuit Court for Baltimore City
Case No. 118199006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2894

September Term, 2018

LEMAR WATSON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Reed, J.

Filed: May 20, 2021

A jury sitting in the Circuit Court for Baltimore City convicted Lemar Watson ("Appellant") of possession of a firearm after having been convicted of a crime of violence; wearing, carrying, and knowingly transporting a handgun in a vehicle; possession of ammunition by a prohibited person; and unlawfully operating a motor vehicle without being restrained by a seatbelt. Appellant was sentenced to a total term of ten years' imprisonment. In this appeal, Appellant raises a single question, which we have rephased for clarity[1]:

> I. Pursuant to the Court of Appeals' decision in *Kazadi v. State*, 467 Md. 1 (2020), is Appellant entitled to a reversal of his convictions based on the trial court's refusal to propound a *voir dire* question requested by the Defense regarding whether prospective jurors would have difficulty accepting and applying the rule of law that an accused is presumed innocent?[2]

[1] Appellant requests appellate review of one question:

> 1. Did the trial court err by refusing to propound a *voir dire* question requested by the defense aimed at identifying jurors who would be unwilling or unable to apply the legal principles that the State has the burden of proof beyond a reasonable doubt and that the defendant is presumed innocent?

[2] Appellant claims that his requested question also incorporated the fundamental right that the State must prove guilt beyond a reasonable doubt. We disagree. Indeed, Appellant's proposed *voir dire* question 10, as it was submitted in his written request prior to trial, included a statement regarding the State's burden of proof. But nowhere in that question did Appellant ask whether prospective jurors would be unable or unwilling to follow that rule of law. Moreover, when the issue was raised on the record prior to *voir dire*, defense counsel stated that she would be satisfied if the court merely posed the last part of Appellant's question 10, which made no reference to the State's burden of proof. Thus, for the purposes of this appeal, we do not consider Appellant's question 10 as having incorporated the State's burden of proof.

For the reasons that follow, we hold that Appellant is entitled to a reversal of his convictions based on the trial court's refusal to propound the requested *voir dire* question.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged in a four-count indictment with possession of a firearm after having been convicted of a crime of violence; wearing, carrying, and knowingly transporting a handgun in a vehicle; possession of ammunition by a prohibited person; and unlawfully operating a motor vehicle without being restrained by a seatbelt. Prior to trial, Appellant submitted a list of *voir dire* questions that he wanted propounded to prospective jurors. Included in that list were the following:

> 10. The State has the burden of proof in this, as in every other criminal case, to prove beyond a reasonable doubt all elements of each offense charged, and the defendant has no burden of coming forward with any evidence in order to establish his innocence. If you are selected as a juror in this case, will any of you have difficulty in accepting and applying the rule of law that an accused is presumed innocent?
>
> 11. The defendant need not testify, need not offer any evidence, and may, in fact, stand mute, since he stands presumed innocent. Does anyone here feel the defendant should testify or put forth evidence on his own behalf before you could find him not guilty?

The trial court thereafter sent the parties a list of *voir dire* questions that the court intended to pose to prospective jurors. Omitted from that list were Appellant's proposed questions 10 and 11.

On the first day of trial, prior to *voir dire*, the trial court asked the parties if there were "any issues" with the court's list of proposed *voir dire* questions. The State responded that defense counsel "had asked for two items[.]" The following colloquy ensued:

THE COURT: She asked for ten, the State has the burden of proof in this case as in every other criminal case to prove beyond a reasonable [doubt] all elements of each offense charged and the Defendant has no burden of coming forward. I mean, I think the Courts are very clear that that is not an appropriate question for *voir dire* as it pertains to explaining to the jury what the State has in its burden of proof that that will come in my instructions to the jury when we seek them in the preliminary jury instructions. [B]ut those type of questions explaining what the law is, isn't an appropriate question. But I will hear from [defense counsel] as it pertains to that.

[DEFENSE]: Well, I think that -- so, it's not an explanation of the law. [B]ecause you're going to explain what the burden of proof is and what beyond a reasonable doubt actually means. It's just asking the juror if they're selected, are they going to have difficulty in accepting and applying with the rules of law. Specifically the one that a person is presumed innocent and I've had cases before where jurors have actually responded to that and said that they would have a problem with that. Especially, as it goes to question number eleven. [W]here, there have been people who have responded regarding whether anybody, whether if the Defendant didn't testify or put forth any evidence that they would have difficulty finding him not guilty. So I'm not, I mean I'm not as pressed for question ten, but certainly for eleven and I wouldn't be opposed to ten being just worded with the last sentence. If you're selected as a juror, would you have any difficulty in accepting and applying the rule of law that indicates this person's innocence.

THE COURT: [State], would you like to be heard about either one of those questions?

[STATE]: [N]o Your Honor.

THE COURT: [I]t's within my discretion and I disagree. [I] don't think number ten, the State has the burden of proof, one, I won't explain to them what burden of proof would be or reasonable doubt in that question and so … again I do not find that it's an appropriate question. As to number eleven … Again, the role of *voir dire* is to direct a specific cause for disqualification and to determine whether or not that person, whether the fact or relationship, experience would affect their judgment, prevent them from bringing a fair and impartial verdict based solely on the evidence that's presented in Court. I don't believe that that question is appropriate in the sense that it is not covered by the other questions in the case. I just do not believe -- it may be information that we all want as to biases and if we start going down that road, you could put anything in there as it pertains to whether or not the jury panel

> would have an issue with that or not. I'll give you a little leeway. I'll ask eleven. I don't think I should, but I will. I will not ask, put ten, but I'll ask eleven.
>
> [DEFENSE]: Thank you, Your Honor.

During *voir dire*, the trial court asked prospective jurors a modified version of Appellant's question 11: "The Defendant … need not testify, need not offer any evidence. Does anyone here feel that the defendant should testify or put forth evidence on his own behalf before you could find him or her guilty or not guilty of the charges?" The court did not, however, ask whether prospective jurors would have difficulty accepting and applying the rule of law that an accused is presumed innocent.

At the conclusion of the court's *voir dire*, the parties approached the bench, and the court asked the prosecutor if he had any exceptions to the *voir dire*. It does not appear from the record that the court asked defense counsel whether she had any exceptions. Nevertheless, defense counsel did not indicate that she had any exceptions to the court's *voir dire*. The proceedings continued with jury selection. When the final jury was ultimately selected, defense counsel stated that the panel was acceptable.

STANDARD OF REVIEW

"*Voir dire*, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and impartial jury, guaranteed by Art. 21 of the Maryland Declaration of Rights, is given substance." *Dingle v. State*, 361 Md. 1, 9 (2000) (citations and footnote omitted). In Maryland, "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence

of [specific] cause for disqualification[.]'" *Pearson v. State*, 437 Md. 350, 356 (2014) (citations omitted). "There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a 'collateral matter [is] reasonably liable to have undue influence over' a prospective juror." *Id.* at 357 (citations omitted). Generally, the scope and form of the questions presented during *voir dire* rest solely within the discretion of the trial court. *Washington v. State*, 425 Md. 306, 313 (2012). But, if a party requests a question and that question is aimed at a specific cause for disqualification, "then the question must be asked and failure to do so is an abuse of discretion." *Smith v. State*, 218 Md. App. 689, 699 (2014) (citations and quotations omitted)**.**

DISCUSSION

A. Parties' Contentions

Appellant contends that the trial court erred when, during *voir dire*, it refused to propound his proposed question 10, which asked whether prospective jurors would have difficulty accepting and applying the rule of law that an accused is presumed innocent. Appellant asserts that, pursuant to the Court of Appeals' decision in *Kazadi v. State*, the court's refusal to propound the requested question constituted error requiring reversal.

The State argues that Appellant's claim was not preserved because he did not object at the time of the trial court's decision or at the conclusion of the court's *voir dire*. The State argues further that Appellant's failure to object at the conclusion of the court's *voir dire* constituted "acquiescence" in the court's ruling and an affirmative waiver of the issue. The State argues that defense counsel also affirmatively waived the issue by accepting the

final jury without qualification. Finally, the State argues that, even if the issue were preserved and not affirmatively waived, Appellant would not be entitled to a reversal because the trial court's other *voir dire* questions "fairly covered the requested *voir dire* questions consistent with the rights explained in *Kazadi*."

B. Analysis

In *Twining v. State*, 234 Md. 97 (1964), the Court of Appeals held that *voir dire* questions regarding certain rules of law, such as the presumption of innocence and the State's burden of proof, were inappropriate. *Id.* at 100. Recently, in *Kazadi v. State*, the Court overturned that holding and concluded that, in a criminal case, three rights - the State's burden of proof, the presumption of innocence, and a defendant's right not to testify - were so critical to a fair jury trial that a defendant should be entitled to *voir dire* questions aimed at uncovering biases regarding those rights, as such questions could elicit responses that would uncover a specific cause for disqualification. *Kazadi*, 467 Md. at 46-47. The Court held that, "[o]n request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the presumption of innocence, the burden of proof, and the defendant's right not to testify." *Id.* at 48. The Court explained that, although a court is not required to use any particular language when complying with such a request, "[t]he questions should concisely describe the fundamental right at stake and inquire as to a prospective juror's willingness and ability to follow the trial court's instruction as to that right." *Id.* at 47. The Court also explained that its holding applied "to this case and any other cases that are pending on direct appeal

when this opinion is filed, where the relevant question has been preserved for appellate review." *Id.* at 47.

Here, Appellant's requested *voir dire* question 10, which asked whether jurors would be unable or unwilling to follow the rule that a defendant is presumed innocent, and his question 11, which asked whether jurors believed that a defendant should testify or put forth evidence, both fell within the ambit of questions that a trial court must ask pursuant to *Kazadi*. Although the trial court did ask question 11, the court did not ask question 10. Therefore, if properly preserved, Appellant should be entitled to the benefit of the *Kazadi* holding. As noted, the State claims that Appellant's claim was not properly preserved because he did not lodge an appropriate objection. We disagree.

Objections made during jury selection are governed by Maryland Rule 4-323(c), which states, in relevant part, that "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." Md. Rule 4-323(c); *See also Wimbish v. State*, 201 Md. App. 239, 265 (2011). Thus, a defendant "preserves the issue of omitted *voir dire* questions under Rule 4-323 by telling the trial court that he or she objects to his or her proposed questions not being asked." *Smith v. State*, 218 Md. App. 689, 700-01 (2014). "This objection does not need to be a formal exception to the ruling; rather, the objector simply needs to make known to the circuit court what is wanted done." *Id.* at 700 (internal citations and quotations omitted).

Here, Appellant submitted a written request to have his questions 10 and 11 propounded during *voir dire*, and the trial court expressly refused that request. When the issue of the court's refusal was raised prior to *voir dire*, defense counsel objected to the court's decision and provided a detailed argument in support of the request. In doing so, defense counsel reiterated her request for both questions, indicating that, with respect to question 10, she would be satisfied if the court merely asked whether prospective jurors had any difficulty in accepting and applying the rule of law regarding the presumption of innocence. In response, the court agreed to pose Appellant's question 11 but refused to pose his question 10.

From that, it is clear Appellant objected to the trial court's decision not to propound his *voir dire* question 10, and it is equally clear that Appellant made known to the court that he wanted that question posed to prospective jurors. Thus, the issue was properly preserved. That Appellant did not object again after the court rendered its decision is immaterial, as Appellant had objected just moments before and the court had, in response, determined unequivocally that it would not ask Appellant's question 10.[3] *See Norton v. State*, 217 Md. App. 388, 396 (2014) (noting that, under Rule 4-323, when a motion *in limine* to exclude evidence has been denied, "requiring the defendant to make yet another

[3] The State points out that, when the court made its ruling, defense counsel not only failed to object but instead "thanked the court twice." To the extent that the State is claiming that defense counsel's act of thanking the court constituted some form of acquiescence in the court's ruling, we disagree. The record shows, rather, that defense counsel was likely showing deference to the court following an unfavorable ruling. *See Lancaster v. State*, 410 Md. 352, 381 (2009) ("Having vigorously argued the matter, defense counsel's polite deference to the motion court cannot be deemed acquiescence.") (citations and quotations omitted) (cleaned up).

objection only a short time after the court's ruling … would be to exalt form over substance.") (citations and quotations omitted).

The State also argues that Appellant's failure to object at the conclusion of the trial court's *voir dire* constituted acquiescence in the court's ruling and an affirmative waiver of the issue. In support, the State relies on *Brice v. State*, 225 Md. App. 666 (2015).

We disagree with the State's assertion and conclude that *Brice v. State* is inapposite. In that case, the defendant submitted several written *voir dire* questions to the trial court but then failed to object when the court later intentionally omitted those questions during *voir dire*. *Id.* at 679. Then, at the conclusion of the *voir dire*, when the court asked if the parties had any comments or objections to the *voir dire* questions, defense counsel responded, "No." *Id.* When the defendant later complained on appeal that the court had erroneously refused to propound his requested *voir dire* questions, we concluded that the issue had been explicitly waived. *Id.* We explained that "[d]efense counsel's response was more than the simple lack of an objection; he affirmatively advised the court that there was no objection." *Id.*

Here, when the issue of Appellant's omitted *voir dire* questions was raised prior to *voir dire*, Appellant objected to the court's decision and provided argument as to why his omitted questions should have been propounded. That is, unlike the defendant in *Brice*, Appellant did not affirmatively advise the court that there was no objection. To the contrary, Appellant affirmatively advised the court that he did have an objection, which the court overruled after a lengthy discussion on the matter.

To be sure, Appellant did not renew his objection at the conclusion of the court's *voir dire*. We do not read Rule 4-323 or the relevant case law as requiring Appellant to renew his objection at the conclusion of the court's *voir dire*. All that is required is that a defendant object (or make known to the court the desired action) "at the time the ruling or order is made or sought[.]" Md. Rule 4-323(c). That is precisely what Appellant did here.

The State argues further that Appellant waived his objection by accepting the final jury without qualification. We disagree, as that exact argument was considered, and rejected, by this Court in *Foster v. State*, 247 Md. App. 642 (2020) (holding that objection to trial court's refusal to ask requested *voir dire* question was sufficient to preserve issue where defendant later accepted empaneled jury without qualification).

Finally, the State argues that, even if the issue was preserved, Appellant would not be entitled to a reversal. The State contends that Appellant's omitted question 10 regarding the presumption of innocence was "fairly covered" by Appellant's question 11, which the court did pose and which asked whether prospective jurors believed that a defendant should testify or put forth evidence. The State asserts that the question posed by the court was sufficient to satisfy *Kazadi* because it "implicitly recognized" the fundamental right at issue in Appellant's omitted question 10.

Again, we disagree with the State. Although Appellant's question 11 may have implicitly recognized the rule of law that a defendant is presumed innocent, the question as posed did not "concisely describe the fundamental right at stake" in Appellant's question 10, nor did it "inquire as to a prospective juror's willingness and ability to follow the trial

court's instruction as to that right." *Kazadi*, 467 Md. at 47. Thus, the questions posed by the trial court were insufficient to satisfy the requirements set forth in *Kazadi*.

CONCLUSION

In sum, Appellant's argument was properly preserved. As such, we must hold, pursuant to *Kazadi*, that the trial court erred in not propounding Appellant's requested *voir dire* question 10 regarding the presumption of innocence. We therefore reverse Appellant's convictions and remand for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.