Circuit Court for Washington County
Case No. C-21-CR-18-000195

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3111

September Term, 2018

MELSUN SHAMEL PERRY

v.

STATE OF MARYLAND

Berger,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 16, 2020

After a jury trial in the Circuit Court for Washington County, appellant Melsun Perry was convicted of two counts of second-degree assault, theft of goods valued at between $100 and $1,500, and several other, minor offenses. The court sentenced Perry to two, consecutive five-year terms for second-degree assault and a concurrent six-month term for theft. Following his convictions, Perry noted this timely appeal.

QUESTIONS PRESENTED

Perry presents two questions, which we have rephrased in the interests of brevity:

> I. Did the trial court err when it failed to ask certain voir dire questions required by *Kazadi v. State*, 467 Md. 1 (2020)?
>
> II. Did the trial court abuse its discretion by overruling an objection to the prosecutor's closing argument?[1]

We answer question one in the affirmative. For that reason, we reverse Perry's convictions and remand for further proceedings. We decline to address Perry's second question.

[1] Perry formulated his questions as follows:

> 1. Did the trial court abuse its discretion when it failed to ask the venire whether any member of the venire would have any difficulty accepting, or applying, the principles that the State must prove guilt beyond a reasonable doubt, that the defendant is presumed to be innocent, and that guilt may not be inferred from a defendant's decision not to testify or to produce evidence?
>
> 2. Did the trial court abuse its discretion when it overruled Mr. Perry's objection to the prosecutor's closing argument when the argument went beyond the bounds of the State's Bill of Particulars?

BACKGROUND

Perry was tried twice on charges arising from the alleged theft of an iPad and his flight in the aftermath of that alleged theft. His first trial, on September 11 and 12, 2018, ended in a mistrial because the jury was unable to reach a unanimous verdict on any of the charges.

On the first day of the first trial, defense counsel had submitted a list of 26 proposed voir dire questions, captioned "Defendant's Proposed General Voir Dire." The list, which appears in the record, included Question 18, a compound question generally concerning whether any prospective juror would have difficulty with the presumption of innocence, the State's exclusive burden of proving guilt beyond a reasonable doubt, the absence of any obligation that the defendant prove his innocence, and the defendant's right not to testify.

At Perry's second trial, on January 22 and 23, 2019, the trial judge conducted general voir dire, but did not ask any part of Question 18.

At the end of general voir dire during the second trial, the court called the parties to the bench. There, the following exchange occurred:

> THE COURT: All right first, are there any objections to the questions I didn't ask?
>
> [DEFENSE COUNSEL]: Your Honor, you didn't ask some of the questions I submitted.
>
> THE COURT: That's correct.
>
> [DEFENSE COUNSEL]: I'd ask the Court to note my objection by not asking those.

> THE COURT: I would and, uh, for the record, Madam Clerk, *make sure that, uh, the defendant submitted jury instructions* [sic] *are part of this trial also, uh, so any appellate court, if it's needed, can review them against a question I actually asked?*
>
> CLERK: Sure.
>
> THE COURT: So we'll offer – *We'll make that an electronic exhibit*.
>
> CLERK: Yeah that's fine.

(Emphasis added.)

Following his convictions, Perry noted this timely appeal.

Despite the court's stated intention that the proposed voir dire would be made an "electronic exhibit," it does not appear in the record from the second trial. Consequently, when Perry's appellate counsel filed his brief in this Court, she also filed an "Unopposed Motion to Correct the Record," asserting that she had spoken to trial counsel and that the proposed voir dire for the second trial was identical to the proposed voir dire for the first. The motion was supported by an affidavit from trial counsel to that effect.[2]

This Court granted the motion to correct the record on November 18, 2019, and trial counsel's affidavit was made part of the record.

[2] Appellate counsel stated in the motion that she had communicated with the Deputy Chief Attorney of the Criminal Appeals Division of the Attorney General's Office to determine his office's position on the motion. According to appellate counsel, the Deputy Chief responded that his office did not oppose the motion. In his reply brief, Perry explains that this was the standard practice because the appeal had not yet been assigned to a particular attorney in the Criminal Appeals Division.

DISCUSSION

During the pendency of this appeal, the Court of Appeals decided *Kazadi v. State*, 467 Md. 1 (2020), which held that it is reversible error for a trial court to refuse to ask requested voir dire questions concerning whether any prospective juror would be unable to follow an instruction on the State's burden of proof, the presumption of innocence, and the obligation not to consider a defendant's exercise of the Fifth Amendment right not to testify as evidence of guilt.

On a motion for reconsideration, the Court established that its holding applied to the *Kazadi* case itself and to "any other cases that are pending on direct appeal" when the *Kazadi* opinion was filed, "where the relevant question has been preserved for appellate review." *Id*. at 54. Under *Kazadi*, therefore, if Perry preserved his objection to the court's decision not to read the relevant voir dire questions, we must reverse his convictions.

As a threshold issue, the State contends that Perry has not "met his burden of showing that he requested the voir dire questions that are the subject of this appeal" because his proposed voir dire does not appear in the record from the second trial. If we are nevertheless inclined to address the issue, the State argues that we should remand the case without affirmance or reversal for the trial court to conduct an evidentiary hearing and make a factual finding as to whether the proposed voir dire at the first trial was identical to the proposed voir dire at the second trial.

In his reply brief, Perry responds that, through no fault of his or his counsel, his proposed voir dire at the second trial was omitted from the electronic record. He

emphasizes that the transcript of the second trial supports trial counsel's averment that the proposed voir dire was identical to that requested just four months earlier, at his first trial. He maintains that if the State disagreed with the veracity of trial counsel's affidavit to that effect, it should have opposed the motion to correct the record.

The transcript from the second trial reflects that the trial court posed the State's first four requested voir dire questions to the panel.[3] The court proceeded to ask Perry's proposed voir dire questions numbered 1, 2, 3, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 20, 21, 23, and 24, in verbatim or nearly verbatim form, in that order.

Trial counsel's affidavit, which was made part of the record when this Court granted the unopposed motion to correct the record, corroborates what is apparent from the transcript: that the proposed voir dire that Perry submitted before the first trial was identical to the proposed voir dire submitted at the second trial. If the State had any basis to dispute that Perry's proposed voir dire was identical in the first and second trials, it should have opposed the motion to correct the record (*see* Md. Rule 8-431(b)) and disclosed the factual basis for its position. *See* Md. Rule 8-414(c) ("[i]f the parties

[3] These standard questions were whether any prospective juror knew defense counsel, the prosecutor, the defendant, or any of the witnesses. Perry requested these questions as well. The court asked the State's other two proposed voir dire questions later in general voir dire.

disagree about whether the record accurately discloses what occurred in the lower court, the motion [to correct the record] shall specify what the difference is").[4]

In short, Perry requested Question 18 at the second trial; the court was required to ask the question under the authority of *Kazadi*; and Perry preserved his objection to the trial court's omission of that question at the end of general voir dire when he noted his objection at the bench. *See* Md. Rule 4-323(c) ("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"); *Marquardt v. State*, 164 Md. App. 95, 143 (2005), *overruled in part on other grounds by Kazadi*, 467 Md. at 27, 36.

The State responds that Perry waived his objection when he accepted the jury as empaneled, without qualification. That argument is foreclosed by our recent decision in *Foster v. State*, ___ Md. App. ___, 2020 WL 5819608 (filed Sept. 30, 2020). In *Foster* we relied on *State v. Stringfellow*, 425 Md. 461 (2012), for the proposition that the unqualified acceptance of the jury as empaneled does not result in a waiver of an objection to a court's refusal to ask a voir dire question that was requested. *Id*. at *3. Because Perry did not waive his objection to the court's failure to ask the proposed voir

[4] It defies credulity to suggest, as the State does in its brief, that for some unexplained strategic reason, defense counsel modified the proposed voir dire to eliminate his boilerplate Question 18 during the four months between the first and second trials: the issue that the Court of Appeals decided in *Kazadi* was just as current at the time of Perry's second trial (which took place less than four months before the grant of certiorari in *Kazadi*) as it was at the time of the first trial. Notably, the State submitted identical proposed voir dire at the first and second trials.

dire questions by accepting the jury as empaneled, we reverse his convictions and remand for a new trial.[5]

We decline to address the second issue that Perry raises on appeal because it is unlikely to arise on remand.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WASHINGTON COUNTY.

[5] We recognize that on October 6, 2020, the Court of Appeals granted a petition for a writ of certiorari in *State v. Ablonczy*, No. 28, Sept. Term 2020, to consider the issue that we decided in *Foster*, namely, whether a defendant waives any prior objection to the trial court's refusal to propound required voir dire questions by accepting a jury as ultimately empaneled.