Circuit Court for Washington County
Case No. C-21-CR-18-000119

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3219

September Term, 2018

ANTHONY GEORGE ABLONCZY

v.

STATE OF MARYLAND

Fader, C.J.
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: June 19, 2020

A jury, in the Circuit Court for Washington County, convicted Anthony Ablonczy, appellant, of armed robbery, robbery, first-degree assault, second-degree assault, and theft. The Court sentenced him to a total term of 20 years' imprisonment. In this appeal, he presents three questions for our review:

1. Did the trial court abuse its discretion by refusing to ask certain *voir dire* questions requested by the Defense?

2. Did the trial court abuse its discretion by denying Mr. Ablonczy's motion to preclude the State's DNA expert from testifying based on a claim that the State violated the rule on witnesses?

3. Was the evidence adduced at trial sufficient to sustain Mr. Ablonczy's conviction of first-degree assault?

For reasons to follow, we hold the trial court abused its discretion in refusing to ask the *voir dire* questions requested by the Defense. Accordingly, we reverse the judgments of the circuit court and remand for a new trial. Because we reverse on appellant's first question, we need not address the merits of his second question. As to the third question, we hold the evidence was sufficient to sustain his first-degree assault conviction.

BACKGROUND

Anthony Ablonczy was arrested and charged following an armed robbery that occurred outside of a residence on North Potomac Street in Washington County. At trial, the victim, Marvin Lohr, testified that, in the evening hours of September 28, 2015, he was sitting in his car, which was parked in a parking space outside of a residence, when his vehicle's driver's side door was opened and an unidentified individual pointed a gun at him and demanded money. After he gave the assailant some money, the assailant reached into

the vehicle and grabbed his wallet, cellphone, and keys. The assailant then "shot" him and fled the scene.

Following the attack, Lohr was taken to the hospital, where he received "a number" of stitches in his face. He testified that, as a result of the attack, his "lip was cut open" and his "crown had gotten twisted a little bit." He also testified that he still had "a slight scar" from the stitches. Following that testimony, the State introduced several photographs of Lohr's face, which had been taken the day after the attack. These photographs showed Lohr with multiple contusions on the left side of his face, including several just below his left eye, and a visible wound with multiple stitches on the top of his upper lip.

Hagerstown City Police Officer Duane White testified that, following the robbery, he responded to the scene, where he encountered Lohr, who was "bleeding from the left side of his face and his mouth." Officer White testified that Lohr reported that he had been shot twice. Lohr later "advised that he was hit twice with a black handgun."

Agent Tammy Jurado of the Hagerstown Police Department testified that she also interviewed Lohr following the robbery. According to Agent Jurado, although Lohr initially "thought that he had been shot," he later "believed that the gun was not real." Agent Jurado added that she believed the weapon "was probably a CO2 [] cartridge or pistol."

Hagerstown City Police Sergeant Daniel Bobetich testified that he also responded to the scene and, while there, he collected various pieces of evidence, including a cigarette butt, which he found inside of the victim's vehicle. The cigarette butt was later sent to the

lab for testing, and a DNA profile was obtained from the butt. That profile was submitted to the Department's DNA database, and a preliminary match was made to a DNA profile belonging to appellant that had been previously collected and stored in the DNA database.

Elena Bemelmans, a forensic DNA analyst, testified that she performed a comparison analysis of the DNA profile recovered from the cigarette butt and appellant's DNA profile, which the police had provided. According to Bemelmans, the two profiles were "consistent." She testified that the likelihood of such a consistency between the two profiles was "one in 22 quintillion in the U.S. Caucasian population, one in 47 quintillion in the U.S. African population, and one in 38 quintillion in the U.S. Hispanic population."

At the conclusion of the evidence, the trial court instructed the jury on, among other things, the elements of assault:

> Second-degree assault . . . is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove that the defendant caused offensive physical contact or physical harm to another, in this case, Marvin Lohr, that the contact was the result of an intentional or reckless act of the defendant, and was not accidental, and that the contact was not consented to by Marvin Lohr.
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> * * *
>
> First-degree assault. The defendant is also charged with the crime of first-degree assault. In order to convict the defendant of first-degree assault, the State must prove all of the elements of second-degree assault and also must prove that the defendant intended to cause serious physical injury in the commission of the assault.
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> Serious physical injury means . . . injury that creates a substantial risk of death or causes . . . permanent or serious and protracted disfigurement.

Ablonczy was ultimately convicted. Additional facts will be supplied below.

DISCUSSION

I.

Appellant's first claim of error concerns the trial court's refusal to propound certain *voir dire* questions requested by the Defense. Prior to trial, he submitted several questions to the trial court that he wanted posed to the jury venire during jury selection. Included in that list was the following:

> 18. There are certain legal principles governing a criminal case by which you must abide once you have taken your oath as a juror. If you have any difficulty in understanding these principles, or in accepting these principles, you must inform the Court at this time. It is imperative that you be absolutely honest and open about your feelings.
>
> a. **Presumption of Innocence**
>
> One of the fundamental principles of our legal system is that when a person is brought to Court charged with a crime, he must be presumed to be innocent unless, and until, the prosecution presents evidence that convinces you beyond a reasonable doubt that he is guilty. If you are selected as a juror in this case, will you have difficulty in accepting and/or applying the rule of law the defendant must be presumed to be innocent?
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> b. **Burden of Proof**
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> The prosecution has the burden of proving that the defendant is guilty beyond a reasonable doubt. This burden never shifts to the defense. The Defendant never has to prove that he is innocent. A defendant is not required to present any evidence. If the prosecution does not prove every element of an offense beyond a reasonable doubt, the jury must find the Defendant not guilty of that offense. Will you have any difficulty accepting and/or applying this legal principle?
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> c. **Right to Remain Silent**
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> In every criminal case, the Defendant has an absolute Constitutional right not to testify.

i) Does any member of the jury panel believe that a Defendant who does not testify is more likely to be guilty?

ii) If the Defendant presented no evidence at all in his defense, would this affect your ability to presume him innocent?

d. **Beyond a Reasonable Doubt**

One of the fundamental principles of our system is that the prosecution has the burden of proving that the Defendant is guilty beyond a reasonable doubt. Will you have any difficulty accepting and/or applying this legal principle?

On the morning of trial, the parties discussed the proposed *voir dire* questions with the trial court. During that discussion, the court informed defense counsel that it would not ask appellant's proposed Question #18:

THE COURT: All of these questions about the law, I don't believe they are appropriate under Maryland law.

[DEFENSE]: That's fine, over my objection, I understand.

THE COURT: Sure. That will be just so counsel knows, that is question 18, which [is] recitations of presumption of innocence, burden of proof, right to remain silent, beyond a reasonable doubt. I've done some research actually beforehand on this, and . . . those are really questions of law that aren't necessary or required under Maryland [law].

The trial court then commenced with jury selection. At the conclusion of jury selection, the trial court asked the parties if there were any objections to the jury panel as selected. Defense counsel responded in the negative.

Appellant now claims that, pursuant to the Court of Appeals' decision in *Kazadi v. State*, 467 Md. 1 (2020), the trial court abused its discretion by refusing to pose his requested *voir dire* questions regarding the presumption of innocence, the right to remain silent, and the State's burden of proving the charges beyond a reasonable doubt. The State responds that the *Kazadi* holding does not apply to appellant because "he waived his objection when he accepted the jury without qualification." The State concedes, however, that appellant "would be entitled to the benefit of the *Kazadi* holding" had the issue been properly preserved.

In *Kazadi v. State*, the Court of Appeals held that, "on 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 fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify." *Kazadi*, 467 Md. at 9. The Court reasoned that "[*v*]*oir dire* questions concerning these fundamental rights are warranted because responses indicating an inability or unwillingness to follow jury instructions give rise to grounds for disqualification—*i.e.* a basis for meritorious motions to strike for cause the responding prospective jurors[.]" *Id.* at 41–42. The Court further held 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.

We begin our analysis by addressing the State's preservation argument. 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). 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, 701 (2014). "Moreover, accepting the jury that is ultimately selected after the circuit court has refused to propound requested *voir dire* questions does not constitute acquiescence to the previous adverse ruling." *Marquardt v. State*, 164 Md. App. 95, 143 (2005). As the Court of Appeals has explained, an objection to a trial court's refusal to propound a requested *voir dire* question is incidental to the inclusion/exclusion of prospective jurors and thus is "not waived by the objecting party's unqualified acceptance thereafter of the jury panel[.]" *State v. Stringfellow*, 425 Md. 461, 470-71 (2012) (citing *Marquardt*, 164 Md. App. at 142–43).

Here, appellant requested the trial court propound *voir dire* questions regarding the presumption of innocence, the right to remain silent, and the State's burden of proving the charges beyond a reasonable doubt. Just prior to jury selection, the trial court formally ruled that it would not pose those questions. When the court made that ruling, defense counsel objected, and the court accepted that objection and reiterated that the questions were not necessary or required. Thus, the issue was properly preserved. That defense counsel ultimately accepted the jury panel without reasserting his objection is of no moment.

The State, in setting forth its argument, recognizes that, in *Marquardt*, we held that an objecting party's acceptance of the jury after the court has refused to propound a requested *voir dire* question does not constitute a waiver of the objection. *Marquardt*, 164 Md. App. at 143. The State insists, however, that appellant's acceptance of the jury panel should constitute a waiver of his appellate claim. In so doing, the State asks that we reconsider and perhaps reject *Marquardt* as being "inconsistent with the Court of Appeals' analysis in *Kazadi*[.]"

We decline the State's request. In *Stringfellow, supra*, the Court of Appeals, citing *Marquardt*, expressly recognized that an objection to a trial court's refusal to ask a proposed *voir dire* question was not waived by the party's unqualified acceptance of the jury panel. *Stringfellow*, 425 Md. at 470–71 (2012). Since that time, this Court has consistently cited either *Stringfellow* or *Marquardt* (or both) for that very proposition. *E.g. Benton v. State*, 224 Md. App. 612, 622 (2015); *Smith*, *supra*, 218 Md. App. at 701 n. 4; *Hayes v. State*, 217 Md. App. 159, 166 n. 3 (2014); *Kegarise v. State*, 211 Md. App. 473, 477 n. 2 (2013). We find nothing in the *Kazadi* opinion to indicate that the Court of Appeals, now requires a defendant to do anything beyond that which is set forth in Maryland Rule 4-323 and the cases cited herein, nor is there anything to suggest that the Court was overruling its ruling in *Stringfellow*. *See Scarborough v. Altstatt*, 228 Md. App. 560, 577–78 (2016) ("[W]hen a party presents criticisms . . . directed against a ruling adopted by the Court of Appeals, the ruling of the Court of Appeals remains the law of this

State until and unless those decisions are either explained away or overruled by the Court of Appeals itself.") (citations and quotations omitted).

We disagree that *Pietruszewski* suggests that we have read *Marquardt* in an overly-broad way. That case involved a trial court's limitation on a defendant's use of peremptory strikes pursuant to Maryland Rule 4-313,[1] not a trial court's refusal to propound a requested *voir dire* question. *Pietruszewski v. State*, 245 Md. App. 292, 301–05 (2020). At no time did we hold that failing to object to the jury as seated constitutes a waiver. *Id.* Rather, we noted that, under Rule 4-313, "[g]rievances about both the jury selection process and the jury as constituted *should* be asserted before the jury is sworn because failure to do so *may* preclude appellate review." *Id.* at 304 (emphasis added). We did not mention *Stringfellow*, *Marquardt*, or Rule 4-323, nor did we discuss a trial court's refusal to propound a requested *voir dire* question. In short, *Pietruszewski* is inapposite to the case at hand and does not support the State's suggestion that we should reexamine our holding in *Marquardt*.

Because we hold appellant properly preserved his objection to the trial court's refusal to propound his requested *voir dire* questions regarding the presumption of innocence, the right to remain silent, and the State's burden of proving the charges beyond a reasonable doubt, he is entitled to the benefit of the Court of Appeals' holding in *Kazadi*. We hold, therefore, the trial court erred in not propounding those questions and appellant's convictions require reversal.

[1] That Rule provides, in pertinent part, that "a party may exercise any remaining peremptory challenges to which the party is entitled at any time before the jury is sworn[.]" Md. Rule 4-313(b)(3).

II.

Because we reverse on appellant's first question, we need not address the merits of his second question regarding the trial court's denial of his motion to preclude the State's DNA expert from testifying. *See Pearson v. State*, 437 Md. 350, 364 n. 5 (2014) ("Generally, where an appellate court reverses a trial court's judgment on one ground, the appellate court does not address other grounds on which the trial court's judgment could be reversed, as such grounds are moot."). We will, however, address his claim that the evidence was insufficient to sustain his conviction of first-degree assault. We do so because, should the evidence be deemed insufficient, he may not be retried on that charge. *See Benton*, 224 Md. App. at 629 ("In cases where this Court reverses a conviction, and a criminal defendant raises the sufficiency of the evidence on appeal, we must address that issue, because a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place.").

In support of his sufficiency argument, appellant claims that, in order to prove the crime of first-degree assault, the State was required to show that he either caused serious physical injury to Lohr or that he intended to cause such injury. He asserts that the State failed to make either showing. Appellant maintains that the injuries reported by Lohr, namely, a cut lip and a twisted crown, did not constitute serious physical injuries. Regarding his intent to cause such injuries, he asserts that he "did not use the pellet or CO2 gun in such a manner as to cause serious injury;" rather, "all he did was stick the fake gun

in Mr. Lohr's face and hit Mr. Lohr in the mouth (not in the eye or the skull)." As a result, the evidence was insufficient to sustain his conviction for first-degree assault.

"The test of appellate review of evidentiary sufficiency is whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (citing *State v. Coleman*, 423 Md. 666, 672 (2011)). That standard applies to all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eye-witnesses accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Darling v. State*, 232 Md. App. 430, 465 (2017) (citations and quotations omitted) (emphasis in original). In making that determination, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (citing *Cox v. State*, 421 Md. 630, 657 (2011)). Further, '[w]e defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal*, 191 Md. App. at 314 (citations omitted).

First-degree assault is defined in §3-202 of the Criminal Law Article of the Maryland Code, which provides, in relevant part, that "[a] person may not intentionally

cause or attempt to cause serious physical injury to another. Md. Code, Crim. Law § 3-202(a)(1). "Serious physical injury" is "physical injury that: (1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." Md. Code, Crim. Law § 3-201(d). "'Disfigurement is generally regarded as an externally visible blemish or scar that impairs one's appearance.'" *Thomas v. State*, 128 Md. App. 274, 303 (1999) (citing *Scott v. State*, 61 Md. App. 599, 608 (1985)).

We hold the evidence was sufficient to show that appellant caused serious physical injury to Lohr. The State produced testimony and photographic evidence establishing that appellant struck (or shot) Lohr in the face causing a visible wound to his upper lip, which required multiple stiches and resulted in a scar. From that, a reasonable inference could be drawn that he caused an externally visible blemish or scar that impaired Lohr's appearance. *See Id.* (holding that the defendant's act of biting a police officer on the forearm, which resulted in a scar, was sufficient to establish that the defendant caused a serious permanent or protracted disfigurement, such that the evidence was sufficient to sustain his conviction of first-degree assault).

Even if the evidence was insufficient to establish that appellant actually disfigured Lohr, the evidence was sufficient to establish that he attempted to cause such injury. *See generally Chilcoat v. State*, 155 Md. App. 394, 403 ("[T]he [first-degree assault] statute prohibits not only causing, but attempting to cause, a serious physical injury to another."). While attempting to rob Lohr, appellant struck (or shot) him in the face multiple times and

with such force that he suffered a laceration to his upper lip, a "twisted" crown in his mouth, and multiple contusions on the left side of his face, including several just below his left eye. Thus, even if Lohr's injuries did not constitute a permanent or protracted serious disfigurement, which they did, a reasonable inference can be drawn that appellant intended to cause such an injury. *See Id.* ("Although the State must prove that an individual had a specific intent to cause a serious physical injury, a jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, whether or not the victim suffers such an injury."). Accordingly, the evidence adduced at trial was sufficient to sustain Ablonczy's conviction of first-degree assault.

In sum, we hold that, under *Kazadi*, the trial court erred in not propounding appellant's requested *voir dire* questions regarding the presumption of innocence, the right to remain silent, and the State's burden of proving the charges beyond a reasonable doubt. We therefore reverse his convictions and remand for a new trial. We also hold that the evidence adduced at trial was sufficient to sustain his conviction for first-degree assault. As such, he may be retried on that charge.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED; COSTS TO BE PAID BY THE COUNTY.