

Circuit Court for Worcester County
Case Nos. C-23-CR-18-311 & C-23-CR-18-290

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

No. 3250
September Term, 2018

No. 3252
September Term, 2018

ROBERT LEE AUBLE

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Wells,

JJ.

Opinion by Friedman, J.

Filed: November 5, 2020

*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.

Appellant, Robert Lee Auble, was charged in two related cases—C-23-CR-18-311 and C-23-CR-18-290—with various burglary and theft offenses. After the Circuit Court for Worcester County granted the State’s motion to join the two cases for trial, a jury convicted Auble of fourth-degree burglary in case number 311, and rogue and vagabond and theft of property valued under \$100 in case number 290. Auble filed timely notices of appeal in both cases, and this Court consolidated the two matters.

Auble asks us to consider whether the trial court abused its discretion in refusing to ask a particular *voir dire* question proposed by the defense. Based upon the Court of Appeals’ holding in *Kazadi v. State*, 467 Md. 1 (2020), we conclude that the trial court erred in declining to ask Auble’s requested *voir dire* question. Accordingly, we will vacate his convictions and remand for a new trial.

DISCUSSION

This case is controlled by *Kazadi*. Because we will reverse Auble’s convictions based on the trial court’s failure to ask a required *voir dire* question, we dispense with a recitation of the underlying facts.

In writing, prior to the start of trial, defense counsel asked the trial court to include the following *voir dire* inquiry:

You must presume the defendant innocent of the charges now and throughout this trial unless and until, after you have seen and heard all of the evidence, the State convinces you of the defendant’s guilt beyond a reasonable doubt. If you do not consider the defendant innocent now, or if you are not sure that you will require the State to convince you of the defendant’s guilt beyond a reasonable doubt, please stand.

The trial court did not include the inquiry in its *voir dire* questioning.

After propounding its *voir dire* questions, the trial court asked defense counsel if he sought any other questions, which led to the following exchange:

[DEFENSE COUNSEL]: Acknowledging that the case law says it's not required to be asked, we would request that the Court consider propounding the question regarding the presumption of innocence, and if any prospective jury [sic] in the venire panel would feel they would be unable to require the State to prove its case beyond a reasonable doubt.

[THE COURT]: I believe that the intent of that question is fairly captured by the other—a number of the other questions that reflect what is expected of a juror regarding not being influenced by anything outside of the evidence that's presented in the courtroom, the instruction of law that will be given to them if they were selected as a juror. So I'll decline to give that instruction.

The jury was then selected with no further objection by either side, the trial commenced, and Auble was convicted and sentenced, as noted above.

In *Kazadi*, 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 long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify.” 467 Md. at 35-36. A trial court's failure to ask the question on request is an abuse of its discretion. *Id.*

The *Kazadi* decision overruled the longstanding rule set forth in *Twining v. State*, 234 Md. 97, 100 (1964), which held that it was not an abuse of discretion for a trial court to decline to ask prospective jurors if they would presume the accused's innocence and recognize the State's burden of proof. *Id.* at 48. In overruling *Twining*, the *Kazadi* Court explained 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 of Appeals explained that *Kazadi* applies to “any other cases that are pending on direct appeal when” the opinion was filed, so long as “the relevant question has been preserved for appellate review.” *Id.* at 47. Although this case was pending on direct appeal when *Kazadi* was filed on January 24, 2020 (and amended on March 2, 2020), the State argues that Auble is not entitled to reversal of his convictions because he waived his objection to the trial court’s ruling on his *voir dire* question when he accepted the empaneled jury without qualification.

Kazadi did not explain what is required to preserve this type of claim for appellate review, and after a spate of appeals in which the State argued, as here, that the appellant failed to preserve the issue because he or she accepted the empaneled jury without qualification, we recently addressed the preservation requirement in a reported case, *Foster v. State*, No. 462, September Term 2019, slip op. (Md. App. Sep. 30, 2020). In *Foster*, the trial court declined Foster’s request to ask a *voir dire* question now mandated by *Kazadi*, and Foster objected as required by Maryland Rule 4-323(c),¹ but he later accepted the jury

¹ Rule 4-323(c) provides:

(c) Objections to Other Rulings or Orders. For purposes of review by the trial court or on appeal of any other ruling or order, 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. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no

without qualification. Slip op. at 6. Applying *State v. Stringfellow*, 425 Md. 461 (2012), we concluded that Foster “did not waive his *Kazadi* claim through his unqualified acceptance of the empaneled jury,” so reversal of his conviction was required. Slip op. at 6.

Here, Auble requested that the trial court propound a *voir dire* question regarding the presumption of innocence and the State’s burden of proving the charges beyond a reasonable doubt. The trial court declined to propound the question, and upon completion of *voir dire*, defense counsel asked that the court so inquire of the venire panel. The trial court accepted the defense’s implicit objection and reiterated that the question was 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.

We therefore reject the State’s waiver argument and hold that Auble’s request that the court propound the subject *voir dire* question was preserved at the time the request was made and then denied by the court. Therefore, *Kazadi* requires that Auble’s convictions be vacated.² We will remand the matter for a new trial, where Auble’s proposed *voir dire* question regarding the presumption of innocence and burden of proof may be presented to the jury venire.

opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

² In light of *Kazadi*’s clear holding that a trial court is required to propound the requested *voir dire* question upon request, we also reject the State’s alternate argument that the questions the trial court actually asked fairly covered the fundamental principles of the presumption of innocence, the State’s burden of proof, and the defendant’s right not to testify.

**JUDGMENTS OF THE CIRCUIT COURT
FOR WORCESTER COUNTY VACATED;
CASE REMANDED FOR A NEW TRIAL;
COSTS ASSESSED TO WORCESTER
COUNTY.**