Circuit Court for Wicomico County
Case No. C-22-CR-19-000156

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1277

September Term, 2019

KEVIN LEE GRAVENOR

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: January 25, 2021

* 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.

On August 19, 2019, a jury sitting in the Circuit Court for Wicomico County convicted Appellant Kevin Lee Gravenor of second-degree assault. He filed a timely notice of appeal on September 13, 2019. In the meantime, the Court of Appeals decided *Kazadi v. State*, 467 Md. 1 (2020). In *Kazadi*, the Court overruled *Twining v. State*, 234 Md. 97 (1964), and held that it was reversible error for a trial court to decline to ask *voir dire* questions concerning whether prospective jurors would be unwilling or unable to follow jury instructions on the "fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify." *Kazadi*, 467 Md. at 36

Citing *Kazadi*, Mr. Gravenor contends he is entitled to a new trial because the circuit court refused to ask *voir dire* questions he requested regarding the presumption of innocence and the absolute right to remain silent. The State doesn't dispute that *Kazadi* applies to this case and entitled him to have those questions asked, but contends that he waived the objection by accepting the jury without qualification. After the briefs were filed in this case, though, we decided *Foster v. State*, 247 Md. App. 642 (2020), which resolves that issue in Mr. Gravenor's favor. We reverse the judgments and remand for further proceedings.

I. BACKGROUND

A. Background

Mr. Gravenor and Jessica Orozco share a teenage son. (Trial Tr. 50) On the evening of January 21, 2019, after an outing at a park, Mr. Gravenor and his girlfriend, Carrie Gibbons, dropped the son off at Ms. Orozco's house (the "Quantico House"). (Trial Tr. 40,

45) Ms. Orozco lives at the Quantico House with her boyfriend, Russell Neff. (Trial Tr. 50) Shortly after, Mr. Gravenor and Mr. Neff engaged in a series of heated telephone calls about how Mr. Neff had treated the son. (Trial Tr. 40, 52) At one point, Mr. Neff "challenge[d]" Mr. Gravenor, stating that "if he came up there . . . [he] was going to . . . beat his ass." (Trial Tr. 53) Mr. Gravenor "accepted and drove back" to the Quantico House with Ms. Gibbons. (Trial Tr. 40) Upon arriving, Mr. Gravenor "jumped out of the car . . . and a fight ensued" between Mr. Gravenor and Mr. Neff. (Trial Tr. 40)

Ms. Orozco, Hillary Szewcyk, Ms. Orozco's roommate and friend, and Gavin Merrill, Ms. Szewcyk's boyfriend, attempted to separate them. (Trial Tr. 40) It didn't work: a larger fight broke out among the group, including Ms. Szewcyk and Ms. Gibbons. (Trial Tr. 107) Mr. Gravenor, seeing Ms. Szewcyk's "hands on his girlfriend," got into his car and "plow[ed]" Ms. Szewcyk multiple times. (Trial Tr. 41–42) Ms. Szewcyk suffered numerous injuries, including "road rash" and a "hole in the bottom of [her] right foot." (Trial Tr. 81) Ms. Szewcyk sought medical treatment twice. (Trial Tr. 90) The second time, she spent several days in the hospital on antibiotics. (Trial Tr. 91)

While the fight ensued, Mr. Gravenor maintained that he was "there to secure his son" and "had no intention to do anything other than get away from the situation." (Trial Tr. 45–46) Mr. Gravenor, Ms. Gibbons, and the son left the scene together. (Trial Tr. 89) Mr. Merrill and Ms. Orozco called the police. (*Id.*) At trial, Deputy Dylan Tawes, the responding officer, testified that none of the parties "mentioned" a physical fight, so his report "didn't record one instance" of a physical alternation. (Trial Tr. 148)

B. Mr. Gravenor's Trial and the *Voir Dire* Process

On August 19, 2019, Mr. Gravenor's case came up for trial. (Trial Tr. 1) During *voir dire*, the defense asked the court to "propound some version of defendant's 18 regarding the presumption of innocence" and "some version of defendant's 19" and "defendant's 20." (Trial Tr. 22) Mr. Gravenor provided the circuit court with a document entitled "Defense Requested Voir Dire" that listed defendant's 18, 19, and 20 as follows:

> 18. The defendant is presumed innocent of the charges against him. This presumption alone is enough for you to find a defendant not guilty unless the State proves beyond a reasonable doubt that he committed the alleged offenses. Would any of you have reservations about finding a defendant not guilty based solely upon the presumption of innocence?
>
> 19. The defendant has an absolute right to remain silent, and to not testify in this case. Would you find it more difficult to vote to acquit any defendant who decides not to testify?
>
> 20. Is there any member of the prospective jury who believes that because a charge is brought by the police and prosecuted by the State's Attorney's Office, the charge is probably correct and the defendant is probably guilty?

(Appellant Br. 8; Appellee Br. 2) The circuit court denied Mr. Gravenor's request for defendant's 18 and 19 but agreed to ask defendant's 20. (Trial Tr. 22) The court stated that defendant's 18 would "be an instruction for the jury, not a request on voir dire." (*Id.*) The defense reiterated its request and objected again to the court's "denial of [the] proposed questions." (*Id.*) After the jury was selected, the circuit court asked the State and Mr. Gravenor if "the jury [was] acceptable . . . ?" (Trial Tr. 33) The State answered, "[t]he State is satisfied, Your Honor." (*Id.*) The defense responded similarly, "Yes, Your Honor." (*Id.*)

Once alternates were selected, the court again asked if "the jury and alternate[s] [were] acceptable . . . ?" (Trial Tr. 35) Again, the State answered in the affirmative. (*Id.*) The defense responded, "[i]t is, Your Honor," (*Id.*) and the jurors were sworn in by the courtroom clerk. (*Id.*)

Mr. Gravenor was charged with first- and second-degree assault and attempted first- and attempted second-degree murder. (Trial Tr. 36) The court granted Mr. Gravenor's motion for judgment of acquittal for the first- and second-degree attempted murder charges, (Trial Tr. 151–54) the jury convicted him of second-degree assault, and the court sentenced him to six years' incarceration. (Trial Tr. 183, 194) Mr. Gravenor appeals, (Appellant Br. 2) and we supply additional facts as needed below.

II. DISCUSSION

Mr. Gravenor argues the circuit court committed reversible error when, during *voir dire*, it declined his request to ask the panel questions about the presumption of innocence and a defendant's right to remain silent. We "review[] for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Pearson v. State*, 437 Md. 350, 356 (2014) (*citing Washington v. State*, 425 Md. 306, 314 (2012)). A court abuses its discretion if "'no reasonable person would take [its] view' . . . or when the court acts 'without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (2014) (*quoting North v. North*, 102 Md. App. 1, 13 (1994)). In this case, though, the issues are purely legal—whether the court was required to ask the questions Mr. Gravenor identified and, if it was, whether he waived any objection by accepting the jury as seated.

The United States Constitution guarantees criminal defendants the right to "an impartial jury." U.S. Const. amend. VI; *see also* Md. Const. Maryland Declaration of Rights art. 21; *see also Collins v. State*, 452 Md. 614, 617 (2017). The Court of Appeals recognized that "[v]oir dire is critical to assure that the Sixth Amendment . . . guarantees to a fair and impartial jury will be honored." *Washington*, 425 Md. at 312 (*quoting State v. Logan*, 394 Md. 378, 395 (2006)). 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*, 437 Md. at 356 (*quoting Washington*, 425 Md. at 312); *see also Charles v. State*, 414 Md. 726, 733 (2010).

In *Twining v. State*, 234 Md. 97, the Court of Appeals held that "jury instructions on the presumption of innocence and the burden of proof obviate the need to ask during *voir dire* whether any prospective jurors would not honor those fundamental rights," *Kazadi*, 467 Md. at 36 (*citing Twining*, 234 Md. at 100), and courts since then had denied requests to ask potential jurors about these duties during *voir dire*. That changed last year, though, when the Court determined that the premise underlying *Twining* no longer held. In *Kazadi*, the Court noted that "not all jurors are willing and able to follow jury instructions on the presumption of innocence and the burden of proof." *Id.* at 36–38 (finding that "jury instructions on the presumption of innocence and the burden of proof are not an effective remedy for a prospective juror who is unwilling or unable to follow such jury instructions") (*citing Twining*, 234 Md. at 100). In response, the Court held that if a defendant requests a trial court to ask *voir dire* questions that are "likely to reveal a cause for disqualification . . .

over a prospective juror," the court is bound to do so. *Id.* at 45.

To be fair to the circuit court, *Kazadi* had not yet been decided at the time of Mr. Gravenor's trial. Nevertheless, the rule the Court adopted in *Kazadi* applies to "any other cases that [were] pending on direct appeal when [the] opinion [was] filed, where the relevant question [was] preserved for appellate review," including this case. *Id.* at 47 (*citing Hackney v. State*, 459 Md. 108, 119 (2018)). And to its credit, the State acknowledges as much. *See* Appellee Br. 7 n.3. All else being equal, then, the trial court's decision not to ask the *voir dire* questions Mr. Gravenor requested require us to reverse his convictions and remand for further proceedings consistent with this opinion.

Although the State doesn't dispute Mr. Gravenor's *Kazadi* argument on the merits, it contends that Mr. Gravenor waived his objection to the circuit court's decision when he accepted the jury without qualification. *Kazadi* itself didn't need to address preservation, but in the time since we have considered and rejected the argument the State makes here. In *Foster v. State*, the defendant was convicted by a jury of driving without a license. 247 Md. App. at 647. Like Mr. Gravenor, Mr. Foster requested a number of *voir dire* questions, including a question required by *Kazadi*, and the circuit court rejected his request. *Id.* at 646–47. Mr. Foster objected during *voir dire*, and even noted that *Kazadi*, "a case addressing that very issue was pending before the Court of Appeals." *Id.* at 647. And as in this case, the circuit court asked both parties after jury selection if the jury was acceptable, and both parties "indicated their unqualified acceptance of the jury." *Id.*

A defendant must object to a court's ruling to "preserve any claim involving a trial court's decision about whether to propound a voir dire question." *Id.* "[I]f the claim involve[d] the court's decision to ask a voir dire question over a defense objection, the defendant must renew the objection upon the completion of jury selection." *Id.* at 647–48. And if a defendant fails to object to a court's refusal to read a proposed *voir dire* question, the objection is waived for appeal:

> (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 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.

Md. Rule 4-323(c). But the one last step was not a trap: by objecting throughout the *voir dire* process, we held, Mr. Foster had "ma[d]e known to the trial court what he wanted the court to do," *Foster*, 247 Md. App. at 648, and he "did not waive his *Kazadi* claim through his unqualified acceptance of the empaneled jury." *Id.* at 651. Put another way, there was "nothing more [the defendant] was required [to do] to preserve the issue for review." *Id.* at 648 (*citing Marguardt v. State*, 164 Md. App. 95, 143 (2005)).

To be fair to the State, *Foster* hadn't yet been decided when the briefs in this case were due. But now it has been, and it compels us to hold that Mr. Gravenor preserved his objection to the circuit court's refusal to ask the *voir dire* questions mandated by *Kazadi*.

And because *Kazadi* entitled Mr. Gravenor to have the court ask potential jurors the questions he requested, we reverse his conviction and remand the case for further proceedings consistent with this opinion.

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