UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0335

September Term, 2015

WILLIAM SPEARS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: January 20, 2016

Appellant, William Spears, was convicted by a jury in the Circuit Court for Baltimore City, Maryland of assault in the second degree and sentenced to thirty months' incarceration, with all but ten months suspended. His timely appeal presents the following question for our review:

> Despite requests by both parties, did the trial court err in failing to ask the mandatory State-Witness question of prospective jurors?

For the following reasons, we shall reverse.

BACKGROUND

Alvin Chalmers, a supervisor at A Step Forward, Incorporated in Baltimore City, testified that appellant was assigned to work for him by the Department of Social Services. On the day in question, September 30, 2014, appellant returned to work late from lunch. Chalmers told appellant that, in the future, he needed to apprise Chalmers of his lunch breaks. When appellant became "abusive," "agitated," and "irate," Chalmers told appellant that his services were no longer required and that he should go to the office and sign out. Chalmers then walked away towards a storage area.

Appellant followed him into that isolated area, "screaming obscenities," and calling out Chalmers's name. According to Chalmers, appellant "cornered" him, produced a "switchblade-type knife" with an eight-inch blade, and stated "I should kill you. I should stab you." When appellant "lunged" at him a couple of times, Chalmers believed that he was going to be stabbed. After appellant walked away, Chalmers told other employees about the incident, filed a report, and called the police.

Chalmers also testified that the day before he testified at trial, he saw appellant in the courthouse. At that time, appellant followed Chalmers into a restroom and told him that he "should have stuck me, stabbed me, when he had the chance."

Officer Garrett Miller, of the Baltimore City Police Department, responded to A Step Forward and took an incident report from Chalmers. Chalmers advised him of the altercation with appellant, informing him that appellant approached him, displayed a folding knife, and threatened to stab him. Officer Miller obtained a warrant for appellant's arrest. When Officer Miller contacted appellant, appellant blurted "I didn't pull a knife on him," without any questioning on the subject.

Appellant, testifying on his own behalf, confirmed that he and Chalmers spoke on the day in question, shortly after appellant's lunch break. After exchanging words, Chalmers told appellant to come back to the storage area. According to appellant, the initial conversation was not "heated," but Chalmers got upset when appellant said Chalmers had "a crack head mentality." According to appellant, he followed Chalmers, at Chalmers's direction, and that Chalmers told him he wanted to fight him. Appellant then told Chalmers to wait for him and that he would "be right back." Apparently in response, Chalmers stated "[y]ou can sign out. Your services are no longer needed." Appellant then left and went home.

Appellant denied that he had any further interaction with Chalmers and denied approaching Chalmers in the courthouse and threatening to stab him. Appellant also

acknowledged that someone called him at home after the initial incident, and thinking it was the police, he stated "[w]hatever he's telling you is not true."

Voir Dire of the Prospective Jurors

The sole issue on appeal concerns the trial court's failure to ask a particular question during *voir dire* of the prospective jurors. Pertinent to that issue is the following:

> THE COURT: Now. Now, what – counsel, what I like to do in these situations is simply ask the attorneys to tell His Honor what questions you think are really important that you want to [sic] asked? I don't ask all of these questions.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: But, I do ask questions that counsel think are of significance.
>
> [DEFENSE COUNSEL]: Right. I mean, I – for me, they're questions about whether someone is more likely to believe a State's witness, believe a prosecution witness, because they think they're more likely to be credible than defense witnesses.
>
> [PROSECUTOR]: And, Your Honor, I would just take exception to that and ask –
>
> THE COURT: To which? To that question?
>
> [PROSECUTOR]: To ask the particular question.
>
> THE COURT: Well, what I ask normally – what I –
>
> [PROSECUTOR]: (Inaudible) I guess is more neutral to include both sides.
>
> [DEFENSE COUNSEL]: That's fine.

THE COURT: Yeah. What I normally ask is I have a variation on that theme.

[DEFENSE COUNSEL]: Um-hum.

After asking the State if it had anything to add, the court continued as follows:

THE COURT: While you're doing that, I'll ask this.

Ladies and gentlemen, I think many of you know, if not all, that the basic principles of a criminal trial are – are simple; but important. So, if anyone has any reservation about them, this is the time to tell us.

First of all, every defendant is presumed innocent and the State has the burden of proving guilt beyond a reasonable doubt, and the jury must be unanimous in their decision.

Secondly, if there's any bias that you have that was not touched upon in the last round of questions; but, somehow, you have some fundamental concern about serving in a criminal jury trial, now is the time for you to tell us about that.

For example, some people from time to time have some religious issue and this is the time to tell us of other things. In other words, another way to look at this question is: Is there a question you are sitting there wishing I would ask you, because it would touch on something that is close to you; but we're not asking you properly?

The court then heard from several prospective jurors, none of whom indicated that they would tend to favor the State's witnesses over the defense's witnesses. The following then transpired:

THE COURT: Anything else –

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: – (continuing) that you think I should cover? I'm willing to do it.

[DEFENSE COUNSEL]: Oh, with respect to voir dire?

THE COURT: Um-hum.

[PROSECUTOR]: The only questions I would ask are just the jurisdictional questions, which would be if anyone isn't – is under the age of 18, not a U.S. citizen, and not a resident of Baltimore City.

THE COURT: Has this been an experience for you all?

[PROSECUTOR]: I'm sorry?

THE COURT: Has this been an experience for the State?

[PROSECUTOR]: No.

THE COURT: I have never asked that question.

[PROSECUTOR]: Oh.

THE COURT: No, no, no. I did ask it; but very rarely, and I'm just curious about why. It provokes me to think what they're having a problem with this, you know?

[PROSECUTOR]: I think that if – it just – like is said, if it came out later, that juror is not qualified to serve and being placed on a –

THE COURT: All right. No, it's a good precaution. I'll ask that. Anything else?

[PROSECUTOR]: All right. Thank you.

[DEFENSE COUNSEL]: No, Your Honor.

[PROSECUTOR]: No.

> THE COURT: One last question, ladies and gentlemen. I think you were told this earlier, that in order to have the privilege of serving on a jury here, you have to be a citizen of Baltimore, Maryland and USA; and if you're not, that is a disqualifier. We like to ask that up front, so to speak.
>
> Okay, I see no response. I'm looking forward to the next phase of this jury selection, which will take very little time. The attorneys here are experienced, and they will not waste your time.

The prosecutor then reminded the court that the parties needed to review the list of jurors who were excused for cause. Both attorneys and the court then considered which jurors needed to be excused prior to jury selection. At the conclusion of this discussion, when the prosecutor stated "I'm satisfied to proceed," defense counsel responded, "Yeah." But, immediately thereafter, the following discussion occurred:

> [PROSECUTOR]: Or we can call for a small panel to pick the alternate –
>
> [DEFENSE COUNSEL]: In the morning.
>
> [PROSECUTOR]: – (continuing) in the morning.
>
> [DEFENSE COUNSEL]: Yeah. I will just say, for the record –
>
> THE COURT: Sure.
>
> [DEFENSE COUNSEL]: – (continuing) I'm not sure; but – on my client's behalf, I – I don't think that we have enough to pick; and there are some jurors who we, sort of, saved and put at the end, and I think that's because we had questions about their ability to serve.
>
> So, that, coupled with the small number that we have, you know, it makes me concerned that we can't pick a fair and impartial jury.

THE COURT: Do you have any question about the possibility – about the feasibility of picking what we can?

[PROSECUTOR]: I would just ask that we pick the jury and then reserve on the alternates tomorrow; and call for a limited panel. Because, even if those jurors are added, I don't think that they're going to make it to the box, anyway. So, it'd just be selected for the purpose of alternates.

THE COURT: Let's see what happens. Let's move on. It'll only take a few minutes to find out that we can't.

[PROSECUTOR]: Okay.

[DEFENSE COUNSEL]: Certainly.

THE CLERK: All right.[1]

DISCUSSION

Appellant contends that the trial court erred by not asking his requested State-Witness question during *voir dire* examination of the prospective jurors. Specifically, appellant asserts that "no State-Witness question was asked on *voir dire*, and no question that could possibly be considered 'a variation on that theme' was asked."

The State concedes that, upon defense counsel's request, a State-Witness question was mandatory and that the trial court was required to ask the prospective jurors "whether they will be more or less likely to believe the testimony of prosecution witnesses, merely because they were called by the State." However, the State argues that we should not consider the issue because it was not properly preserved for appellate review. In support, the State argues

[1] A jury and one alternate were then selected.

that, following the request, defense counsel "acquiesced in the trial court's suggestion that he would ask a variation of the requested inquiry" and "had three opportunities to make known to the trial court that its questions were not an acceptable substitute and to object on grounds that his proposed question was not asked." The State further asserts that any error was not plain enough to warrant reversal. The State also notes that, to the extent that the court erred in not asking the requested State-Witness question "[t]he fact that the State cannot prove harmlessness beyond a reasonable doubt in no way supports Spears's high burden of establishing plain error."

The right to an impartial jury is guaranteed by the Sixth Amendment of the United States Constitution as made applicable to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights. *See Wright v. State*, 411 Md. 503, 507 (2009). And, the "overarching purpose of voir dire in a criminal case is to ensure a fair and impartial jury." *Id.* at 508 (quoting *Dingle v. State*, 361 Md. 1, 9 (2000)). Maryland has adopted a "limited *voir dire*," the "sole purpose of [which] is to ensure a fair and impartial jury by determining the existence of cause for disqualification." *Washington v. State*, 425 Md. 306, 312-13 (2012); *accord Pearson v. State*, 437 Md. 350, 356 (2014). "[A] trial court need not ask a *voir dire* question that is 'not directed at a specific [cause] for disqualification [or is] merely 'fishing' for information to assist in the exercise of peremptory challenges[.]'" *Pearson*, 437 Md. at 357 (quoting *Washington*, 425 Md. at 315). There are two areas that may reveal cause for disqualification: "(1) examination to determine whether the prospective

juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington*, 425 Md. at 313 (citing *Davis v. State*, 333 Md. 27, 35-36 (1993)).

The manner of *voir dire* is governed by Maryland Rule 4-312 and, with respect to questions to the prospective jurors, Maryland Rule 4-312(e)(1) states:

> The trial judge may permit the parties to conduct an examination of qualified jurors or may conduct the examination after considering questions proposed by the parties. If the judge conducts the examination, the judge may permit the parties to supplement the examination by further inquiry or may submit to the jurors additional questions proposed by the parties. The jurors' responses to any examination shall be under oath. On request of any party, the judge shall direct the clerk to call the roll of the array and to request each qualified juror to stand and be identified when called.

In other words, *voir dire* "entails examination of prospective jurors through questions propounded by the judge (or either of the parties, if allowed by the judge) to determine the existence of bias or prejudice, and literally translated, means 'to say the truth.'" *Charles v. State*, 414 Md. 726, 733 (2010). Determining the specific questions to be asked "is left largely to the sound discretion of the court in each particular case." *Moore v. State*, 412 Md. 635, 644 (2010) (citation and internal quotation marks omitted). The trial court's discretion "extends to both the form and the substance of questions posed to the venire." *Wright*, 411 Md. at 508; *see also Wagner v. State*, 213 Md. App. 419, 449 (2013) ("We review a trial court's refusal to propound a requested voir dire question under the abuse of discretion

standard."). "That discretion, however, is circumscribed by the defendant's right to have questions propounded to prospective jurors on their voir dire, which are directed to a specific cause for disqualification." *Wagner*, 213 Md. App. at 450 (quoting *Shim*, 418 Md. at 44-45) (internal quotation marks omitted).

According to the Court of Appeals:

> It is the responsibility of the trial judge to conduct an adequate voir dire to eliminate from the venire panel prospective jurors who will be unable to perform their duty fairly and impartially and to uncover bias and prejudice. [*State v. Logan*, 394 Md. 306, 396 [(2012)]; [*White v. State*, 374 Md. 232, 240 (2003)]. To that end, the trial judge should focus questions upon "issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered." [*State v. Thomas*, 369 Md. 202, 207-08 (2002)]. In reviewing the court's exercise of discretion during the voir dire, the standard is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present. *White*, 374 Md. at 242 . . . On review of the voir dire, an appellate court looks at the record as a whole to determine whether the matter has been fairly covered. *Logan*, 394 Md. at 396, . . . ; *White*, 374 Md. at 243[.]

Washington, 425 Md. at 313-14.

Similar to the rule governing instructions under Maryland Rule 4-325(c), the court need not give the specific requested question if the issue is "fairly covered" by the questions that are actually given. *Burch v. State*, 346 Md. 253, 293 (1997) (citing Rule 4-325(c), and addressing the court's decision not to give requested questions during *voir dire*). In other words, the court "must adapt the questions to the particular circumstances or facts of the case, the ultimate goal, of course, being to obtain jurors who will be 'impartial and unbiased.'" *Moore*, 412 Md. at 645 (quoting *Dingle*, 361 Md. at 9).

Here, appellant requested that the court ask the venire if they would favor the State's witnesses over defense witnesses. The Court of Appeals explained the state of the law concerning such an inquiry in *Moore, supra.* In that case, defense counsel requested and the trial court declined to ask the following questions during *voir dire*:

> 21. Would any prospective juror be more likely to believe a witness for the prosecution merely because he or she is a prosecution witness?
>
> 22. Would any prospective juror tend to view the testimony of a witness called by the defense with more skepticism than witnesses called by the State, merely because they were called by the defense?

Moore, 412 Md. at 642. In holding that the trial court abused its discretion and committed reversible error by not asking these requested questions, the Court of Appeals reviewed its prior decisions in *Langley v. State*, 281 Md. 337 (1977), and *Bowie v. State*, 324 Md. 1 (1991). *See Moore*, 412 Md. at 644-668.

In *Langley*, the Court of Appeals reversed because the trial court failed to ask the requested question, "Is there anyone here who would give more credit to the testimony of a police officer over that of a civilian, merely because of his status as a police officer?" *Langley*, 281 Md. at 338. The *Langley* Court explained:

> "[A] party is entitled to a jury free of all disqualifying bias or prejudice without exception, and not merely a jury free of bias or prejudice of a general or abstract nature." Accordingly, we hold that in a case such as this, where a principal part of the State's evidence is testimony of a police officer diametrically opposed to that of a defendant, it is prejudicial error to fail to propound a question such as that requested in this case. However, in the words of [*Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964)], we suggest that "the phrasing of the court's inquiry should include whether any juror would

> tend to give either more or less credence [merely] because of the *occupation* or *category* of the prospective witness."

Langley, 281 Md. at 348-349 (emphasis added) (quoting *Casey v. Roman Catholic Archbishop of Baltimore*, 217 Md. 595, 607 (1958)).

In its review of *Langley*, the *Moore* Court commented:

> [T]he underlying issue of prejudgment encompassed more than police officers, that many more occupations and categories potentially were implicated. To be sure, it was the nature of the issue and who the witnesses were that would determine which questions, about which occupations and categories, had to be asked to uncover prejudicial or disqualifying bias.

Moore, 412 Md. at 649.

In *Bowie,* the trial court declined to ask the following requested questions:

> 1. Many of the State's witnesses will be police officers. Do you believe that a police officer will tell the truth merely because he or she is a police officer?
>
> 2. Would any of you be more or less likely to believe a police officer than a civilian witness, solely because he or she is a police officer?
>
> 3. Would any of you tend to view the testimony of witnesses called by the Defense with more skepticism than witnesses called by the State, merely because they were called by the Defense?"

Bowie, 324 Md. at 6.

The Court of Appeals agreed that it was error, and moreover, not harmless error, not to ask these questions or, otherwise, to address in *voir dire* the issue raised by the proposed questions. *Bowie,* 324 Md. at 11 (rejecting the State's harmless error argument). In its review of *Bowie*, the *Moore* Court explained:

> [F]avoring a witness on the basis of that witness's category or affiliation poses the same threat to the defendant's right to a fair and impartial trial as favoring a witness on the basis of occupation or status; in other words, we were clear, there is not just one way that prejudgment could manifest.

Moore, 412 Md. at 653.

In reversing and remanding for further proceedings, the *Moore* Court further explained:

> [C]onsistent with case law, the questions proposed must relate to uncovering bias that could arise, given the facts of the case. Accordingly, as a prerequisite to asking the question, there must be a qualifying witness, one, who, because of occupation or category, may be favored, or disfavored, simply on the basis of that status or affiliation. Where, therefore, no police or other official witnesses will be called by the State, the occupational, or status, question need not be asked. On the other hand, if the case is one in which one or more police or official witnesses will be called to testify, the occupational witness question(s) must be asked, if requested. Similarly, if there are no defense witnesses, there will be no need for a Defense-Witness question. Where, however, there will be one or more defense witnesses, then it follows that the Defense-Witness question must be asked. Because the State always has the burden of proof and there usually will be State's witnesses, it seems clear, that in such cases, the State-Witness question always is also required. Of course, where there are defense and State witnesses, including police testimony, then the questions sanctioned in *Bowie* should be asked. The goal being to uncover any bias a venireperson might have towards a witness, an inquiry spanning category and status is necessary, where requested.

Moore, 412 Md. at 654-55.[2]

Appellant in this case, anticipating the State's non-preservation argument, directs our attention to Maryland Rule 4-323(c). That rule "governs the 'manner of objections during

[2] The *Moore* Court also concluded that failure to ask the requested questions was not harmless error. *Moore*, 412 Md. at 667-68.

jury selection,' including objections made during *voir dire*[,]" *Smith v. State*, 218 Md. App. 689, 700 (2014) (citation omitted), and 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 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).

Because of its similarities to this case, *Smith* invites further discussion. There, defense counsel requested the following question be asked: "Is there any member of the panel who would be less likely to believe a witness simply because they were called by the defense?" *Smith*, 218 Md. App. at 699. The court declined to ask this question because it believed it was both fairly covered by another question and was "inappropriate." *Id.*

At the conclusion of *voir dire*, after the court asked for exceptions, defense counsel again objected to the court's failure to ask the requested Defense-Witness question:

> [COUNSEL FOR MR. SMITH]: And then [the Defense-Witness *voir dire* question].
>
> [COUNSEL FOR THE STATE]: You've already asked that question. If you'll believe the credibility equally on both sides.
>
> THE COURT: That issue has been covered, just different words[.]

Smith, 218 Md. App. at 699-700 (alterations in original).

This Court noted that during jury selection the trial court asked defense counsel three times if it was satisfied with the jury and, each time, counsel indicated his satisfaction, subject to the prior exceptions. *Smith*, 218 Md. App. at 700. On appeal, both the defense and the State agreed that the Defense-Witness question was mandatory, that defense counsel had asked for it, and that the trial court's refusal to ask the requested question ordinarily required reversal. *Id.* at 698-99. The State nevertheless argued that "Mr. Smith waived any complaint about the omission by 'inviting' the court's error when defense counsel did not catch and correct the State's misstatement to the court." *Id.* at 699.

We concluded that the issue was preserved for appellate review. *Id.* at 701. Relying primarily on Maryland Rule 4-323(c), which provides 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," as well as Rule 4-323(d), which does not require a formal exception, we stated:

> In past cases involving excluded *voir dire* questions, we have interpreted Rule 4-323 to require objectors only to notify the trial court of their objections, not to explain or pursue their objections. The Court in [*Newman v. State*, 156 Md. App. 20 (2003), *rev'd on other grounds*, 384 Md. 285 (2004)] did not require such an "objection to be stated with particularity or specific language" to meet the requirements of Rule 4-323. 156 Md. App. at 51 [(parallel citation omitted)]. An appellant 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. [*Marquardt v. State*, 164 Md. App. 95, 143 (2005)].

Smith, 218 Md. App. at 700-01; *see also Benton v. State*, 224 Md. App. 612, 620-22 (2015) (concluding that, by joining in the State's request for a specific *voir dire* question, appellant preserved the issue for review and "had no obligation to state the grounds for the objection, because the court did not direct him to do so"); *Baker v. State*, 157 Md. App. 600, 610 (2004) (concluding that the issue concerning court's failure to read requested written questions during *voir dire* was preserved, and recognizing that counsel was not required to state basis for objection, absent the court directing him to state his grounds).[3]

Here, unlike *Smith*, after counsel requested the State-Witness question, the court agreed that a question aimed at the bias in favor of the State's witnesses was appropriate and indicated that it would ask "a variation" on that theme. It is not, however, clear from the record whether the trial court then forgot to give a State-Witness question, or whether the trial court intended that the following statements and question to be its "variation" on the State-Witness "theme:"

> [I]f there's any bias that you have that was not touched upon in the last round of questions; but somehow, you have some fundamental concern about serving in a criminal jury trial, now is the time for you to tell us about that.

[3] In *Smith*, we also noted that, in *State v. Stringfellow*, 425 Md. 461 (2012), "an objection to a judge refusing to ask a proposed *voir dire* question" is "not waived by the objecting party's unqualified acceptance thereafter of the jury." *Smith*, 218 Md. App. at 701 n.4 (quoting *Stringfellow*, 425 Md. at 470-71). And, we also rejected the State's argument under the "invited error" doctrine. *Smith*, 218 Md. App. at 701-03. In this case, the State concedes that acceptance of the jury did not waive the present issue, and does not advance an invited error argument.

> For example, some people from time to time have some religious issue and this is the time to tell us of other things. In other words, another way to look at this question is: Is there a question you are sitting there wishing I would ask you, because it would touch on something that is close to you; but we're not asking you properly?

A court does not err by asking a question that "fairly covers" a question requested by a party. And, here, defense counsel was prepared to accept a more "neutral" occupational or status bias question. *Gilmer v. State*, 161 Md. App. 21, 33-34, *vacated on other grounds*, 389 Md. 656 (2005) (concluding that the "trial court did not abuse its discretion in declining to ask the exact question requested by appellant and asking, instead, a differently phrased question that achieved the same goal"). But, even assuming that the State-Witness issue was not simply forgotten, the court's intended "variation" does not, in our view, fairly cover the bias concern in the State-Witness question requested by defense counsel. The court asked the jury if they had "any bias that was not touched upon in the last round of questions." By way of elaboration, the court directed the venire's consideration to "some religious issue" or "a question you are sitting there wishing I would ask you, because it would touch on something that is close to you?" Given that there were two State's witnesses, one of whom was a police officer, and one defense witness, i.e., appellant, who denied the allegations, we are persuaded that the court's inquiry was overly broad and not specific enough to ferret out any potential bias the prospective jurors might have that would favor the State to the prejudice of the defense.

Nevertheless, the State argues that this issue was waived by appellant's acquiescence to the trial court's suggestion that he would ask a variation of the requested inquiry. It has been held that where a party acquiesces in a court's ruling, there is no basis for appeal from that ruling. *See Grandison v. State*, 305 Md. 685, 765 ("By dropping the subject and never again raising it, [appellant] waived his right to appellate review of this issue."); *see also Ray v. State*, 206 Md. App. 309, 342 n.20 (2012) (observing that waiver "is actually a term of art that refers specifically to 'the intentional relinquishment or abandonment of a known right[.]'"(quoting *Savoy v. State*, 420 Md. 232, 240 (2011)).

Although not cited by either party, *Gilmer, supra*, is instructive. There, counsel requested that the court ask the venire "[d]o you believe that evidence produced by the Defendant in his defense is less credible than evidence produced by the State?" *Gilmer*, 161 Md. App. at 31-32. The court declined to ask that question, and instead, asked the venire: "Is there anyone here that has prejudged the evidence, that is as to what the [S]tate may give or the defense may give as to what is credible without hearing it in this case? If so, please stand." *Id.* at 32 (alteration in original). The court also asked if the prospective jurors had "any known bias that might affect their ability to render a fair and impartial verdict." *Id.* As here, the trial court in *Gilmer* then asked the parties if they had anything further to add, and defense "counsel responded that he did not." *Id.* We concluded that any issue as to the failure to ask Gilmer's specific question was waived:

> On this record, appellant has waived any challenge to the court's refusal to propound his requested *voir dire* question. He did not challenge the question the court subsequently asked, *which captured the essence of the question he requested*. When later asked by the court whether he had anything to add, appellant stood silent, evincing his satisfaction with the question the court posed. Under these circumstances, appellant cannot now complain about the court's refusal to ask the exact question he requested. *See Gilliam v. State*, 331 Md. 651, 691 (1993) [(parallel citation omitted)] ("As Gilliam did not object to the course of action proposed by the prosecution and taken by the court, and apparently indicated his agreement with it, he cannot now be heard to complain that the court's action was wrong.")[.]

Gilmer, 161 Md. App. at 32-33 (emphasis added).

Here, after the State asked for a more "neutral" question directed at witness bias, and after the court indicated it would ask a "variation" of defense counsel's requested question, the record reflects that counsel replied: "Um-hum." To the extent that the State cites this as evidence of appellant's acquiescence, we instead interpret defense counsel's response as akin to an initial understanding of the trial court's proposed action, and not as a blanket agreement to an open-ended inquiry. And, regarding counsel's silence after the court finally completed *voir dire*, we are not persuaded that this silence was evidence of counsel's acceptance of the court's question. We come to this determination in light of the fact that, to borrow a phrase from *Gilmer*, the court's version here did not "capture the essence" of the requested State-Witness question.

In further support of its waiver argument, the State observes that the trial court in this case, after the possible "variation" question had been asked, gave defense counsel the opportunity to object by asking, two separate times, if there was "[a]nything else?" Defense

counsel replied "[n]o, Your Honor" in response to both of these queries. In addition, at the end of *voir dire* after the trial court stated that it was asking "[o]ne last question," defense counsel raised no exception.

A similar argument was raised in *Wardlaw v. State*, 185 Md. App. 440 (2009). There, defense counsel moved for a mistrial after learning that a juror had conducted internet research during deliberations. *Id.* at 445. Instead of ruling on this motion for mistrial, the court gave a curative instruction, reminding the jury that they were not to conduct or consider any outside sources of information. *Id.* at 445-46. On appeal, the State contended that defense counsel acquiesced to the court's response to the alleged misconduct and that further appellate review was unwarranted. *Id.* at 446. This Court disagreed as follows:

> After the trial court addressed the jury regarding questions raised in two different notes, including the question about the internet research, the jury was excused to continue its deliberations. The transcript then continues with the following colloquy:
>
> THE COURT: Any other questions.
>
> [STATE]: No Your Honor.
>
> THE COURT: Problems.
>
> [DEFENSE COUNSEL]: No Your Honor.
>
> Appellant asserts that this exchange was not indicative of any acquiescence by the defense to the trial court's ruling to deny the motion for mistrial and give the curative instruction instead, but rather was a response by counsel to any "other" questions or problems counsel might wish to address on the record. We agree. *See Beverly v. State*, 349 Md. 106, 118 (1998) ("[O]nce [defense counsel] realized that the court was not going to change its

> mind, defense counsel, having vigorously argued the matter, politely continued on with the matter of the day. To deem [that] behavior acquiescence would be to ignore the reality of what goes on at the trial level.").

Wardlaw, 185 Md. App. at 446-47 (alteration in original) (parallel citation omitted); *see also Church v. State*, 408 Md. 650, 660 (2009) (concluding that counsel did not acquiesce in court's ruling such that it was not preserved for review where, "after clearly stating his objection, [he] deferred to the trial court's ruling, about which counsel had no choice").

Likewise, we are not persuaded that asking, "anything else," was the equivalent of the court asking if counsel was satisfied that it had adequately addressed the appellant's earlier objection requesting the State-Witness question. As in *Wardlaw*, that exchange arguably concerned other matters counsel might wish to address before the conclusion of *voir dire*.

There is no dispute that appellant asked for, and was entitled to, a State-Witness question during *voir dire*. We conclude that, whether the court neglected to ask such a question or asked an insufficient variation of the question, the court erred. And, because that error was not harmless beyond a reasonable doubt, reversal is required.

JUDGMENT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.