UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 535

September Term, 2016

LEWIS DESMOND JAMES

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: June 8, 2017

*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.

A jury in the Circuit Court for Prince George's County convicted appellant Lewis Desmond James of first-degree assault and carrying a concealed knife. The jury acquitted James of attempted second-degree murder, attempted voluntary manslaughter, and openly carrying a weapon.

The court sentenced James to 15 years' incarceration for the assault and a concurrent three years for the weapons offense. He presents three questions for review:

> 1. Did the trial court err in failing to propound Appellant's requested voir dire question, which inquired whether the venirepersons had been charged with or convicted of a serious offense?
>
> 2. Did the trial court err in denying Appellant's motion for a new trial?
>
> 3. Did the trial court err in sentencing Appellant to 15 years for first degree assault where Appellant was acquitted of voluntary manslaughter?

In accordance with *Benton v. State*, 224 Md. App. 612, 616 (2015), the State concedes that the trial court abused its discretion when it refused to ask prospective jurors whether they had been charged with or convicted of a serious criminal offense that might have disqualified them from serving on the jury. For that reason, we shall vacate the judgments and remand for a new trial.

FACTS AND LEGAL PROCEEDINGS

Because this case concerns an error that occurred during voir dire, our focus is on that aspect of the proceedings, rather than on the evidentiary record.

Before trial began, defense counsel submitted a list of proposed voir dire questions, including the following question, which was designated as Question 6:

> Have you, any members of your immediate family, or close personal friends ever been the victim of a crime, a witness to a crime; or arrested for, charged with, or convicted of a crime, excluding routine motor vehicle violations?

The State proposed a nearly identical voir dire question that added: "especially crimes involving controlled dangerous substances."[1]

The trial judge completed his voir dire questions without inquiring about the criminal histories of the prospective jurors. When the judge inquired whether counsel had any exceptions, defense counsel responded that he understood why the court had not asked whether a prospective juror has ever been the victim of a crime, because *Pearson v. State*, 437 Md. 350, 359 (2014), held that that question was unnecessary. Counsel, however, objected to the court's failure to read the portion of the question concerning whether a prospective juror had been "arrested for, charged with, or convicted of a crime, excluding routine motor vehicle violations." Counsel proposed to limit that portion of the question to crimes of violence, but the court declined to ask it.

Six days after the court refused to ask the voir dire questions proposed by both defense counsel and the prosecutor, and four days after the jury rendered its verdicts, this Court filed the decision in *Benton v. State*, 224 Md. App. 612 (2015). *Benton* held that a court committed reversible error when it refused to ask prospective jurors whether they had been charged with or convicted of a serious crime that might disqualify them from

[1] The State does not explain the proposed reference to controlled dangerous substances in a case that does not involve such substances.

jury service under Md. Code (1974, 2013 Repl. Vol.), § 8-103(b)(4)-(5) of the Courts and Judicial Proceedings Article ("CJP").[2]

The *Benton* Court explained that "[t]he voir dire question requested by the parties was directed at a 'specific cause for disqualification.'" *Id.* at 626 (quoting *Moore v. State*, 412 Md. 635, 654 (2010)). "The court would have been obligated to dismiss any member of the venire whose responses to the proposed voir dire question revealed that [he or she] had a disqualifying prior conviction or disqualifying pending charges." *Id.* (citing CJP § 8-103(b)(4)-(5)). "Given that a mandatory area for voir dire inquiry is 'to determine whether the prospective juror meets the minimum statutory qualifications for jury service,'" *id.* (quoting *Washington v. State*, 425 Md. 306, 313 (2012)), the *Benton* Court concluded that the "refusal to ask the potential jurors whether any of them were currently charged with or had previously been convicted of a serious offense constituted reversible error." *Id.* (citing *Kegarise v. State*, 211 Md. App. 473, 487 (2013)).

Notably, in *Benton*, as in this case, the trial court seems to have misunderstood *Pearson v. State* to mean that a court need not ask prospective jurors whether they have been the victim of a crime *and* whether they have been charged with or convicted of certain serious crimes. In fact, *Pearson*, 437 Md. at 359, holds only that a court need not ask questions concerning whether a juror has been the victim of a crime.

[2] Section 8-103(b)(4)-(5) provides that "an individual is not qualified for jury service if the individual . . . [h]as been convicted, in a federal or State court of record, of a crime punishable by imprisonment exceeding 6 months and received a sentence of imprisonment for more than 6 months; or . . . [h]as a charge pending . . . for a crime punishable by imprisonment exceeding 6 months." *See Benton*, 224 Md. App. at 624-26.

Citing *Benton*, James moved for a new trial. The trial court initially granted his motion, but later vacated that decision and denied the motion. James noted this timely appeal.

DISCUSSION

James contends that "the trial court erred in failing to propound [his] requested voir dire question, which inquired whether the venirepersons had been charged with or convicted of a serious offense." He argues that what happened in this case was "identical" to what happened in *Benton*, "down to the numbering of the State's proposed voir dire question," the identity of the trial judge, and the "flawed reasoning" for excluding the requested voir dire question regarding the prospective jurors' criminal histories. According to James,

> [a] review of the questions asked [during voir dire] reveals no such query that was even remotely related to the defendant's requested question, much less one that would have substantially covered the subject matter. The judge's objection to the form of the question, based presumably on the same misinterpretation of *Pearson* that [he] made in *Benton*, requires the same result in this appeal, reversal.

The State concedes that "[t]he subject matter of defense counsel's proposed criminal history question was not addressed by any of the other questions posed to the venire during *voir dire* and therefore the circuit court should have asked it." "To the extent that the proposed question was 'overbroad,'" the State concedes that, in accordance with *Benton*, 224 Md. App. at 626, "it was 'incumbent upon the trial court to rephrase' it because it 'encompasse[d] a mandatory *voir dire* question'" and the "circuit

court's failure to tailor the question in that manner and propound it to the jury amounted to an abuse of discretion."

"Maryland law has made clear that if a question is directed to a specific cause for disqualification then the question must be asked and failure to do so is an abuse of discretion." *Moore*, 412 Md. at 654 (internal quotation marks and citation omitted); *see Benton*, 224 Md. App. at 623-24. Our independent review of the record confirms that the trial judge refused to ask the same voir dire question that we determined, in *Benton,* contains a mandatory inquiry "directed to a specific cause for disqualification," *i.e.*, whether any venireperson was statutorily excluded from serving on a jury based on pending charges or prior convictions under CJP § 8-103(b)(4)-(5). *See Benton*, 224 Md. App. at 624-26.

Because *Benton* was filed while this case was still pending in circuit court, and because that decision applies settled principles without declaring new law, it governs our disposition of this appeal. *See generally Allen v. State*, 204 Md. App. 701, 721 (2012) (if a decision in the criminal law area "does not declare a new principle, it is fully retroactive and applies to all cases"). We hold that, in accordance with *Benton*, the trial court abused its discretion in refusing to ask prospective jurors whether they had been "charged with or convicted of a serious offense" and in denying James's motion for a new trial based on *Benton*. *See generally Washington v. State*, 424 Md. 632, 667-68 (2012) (denial of motion for a new trial is an abuse of discretion when the judge "'acts beyond the letter or reason of the law'") (quoting *Campbell v. State*, 373 Md. 637, 665-66 (2003)). Consequently, we shall vacate the judgments and remand for a new trial, at which James

is entitled to have the court ask members of the jury panel whether they have been charged with or convicted of an offense that disqualifies them from serving on the jury.

Our decision moots James's remaining assignment of error, in which he challenges his assault sentence. James maintains that because his first-degree assault conviction arose from the same conduct that underlay the charge of attempted voluntary manslaughter on which he was acquitted, his assault sentence cannot legally exceed the ten-year maximum sentence for attempted voluntary manslaughter. Because we vacate James's convictions and sentences, we do not address that issue. *See, e.g.*, *Harris v. State*, 169 Md. App. 98, 108 (2006) (declining to address moot issues relating to vacated sentences).

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.