

Circuit Court for Howard County
Case No. C-13-CR-18-000645

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 855

September Term, 2020

ZACHARY POTTS

v.

STATE OF MARYLAND

Kehoe,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: January 26, 2022

*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.

Convicted by a jury in the Circuit Court for Howard County of illegal possession of a regulated firearm and related offenses, Zachary Potts, appellant, presents for our review two questions: whether the court abused its discretion in refusing to ask a proposed voir dire question, and whether the court abused its discretion in responding to a jury question. For the reasons that follow, we shall answer Mr. Potts’s first question in the affirmative, reverse the judgments of the circuit court, and remand the case for a new trial.

During voir dire, the court asked the prospective jurors the following questions, among others:

- “Does any prospective juror disagree with the principle of American justice that declares all persons to be presumed innocent unless proven guilty beyond a reasonable doubt?”
- “Are there any prospective jurors who believe that if the [d]efense called no witnesses the [d]efendant is guilty?”
- “Are there any prospective jurors who are unable or unwilling to apply the principle of American justice that the [d]efendant has a right to remain silent and refuse to testify and that no adverse inference may be drawn from the [d]efendant’s silence?”

Following voir dire, defense counsel requested that the court ask the prospective jurors: “[A]re there any prospective jurors who are unable or unwilling to apply the principle that the State bears the entire burden of proving the [d]efendant guilty beyond a reasonable doubt?” Declining defense counsel’s request, the court stated:

With respect to those I mean I think the questions fairly covered those? Frankly, I was pretty liberal I think in granting you those legal questions. I think the cases probably fall the other way. That those questions talking about what are essentially jury instructions are not necessary to give. And I think [t]he [c]ourt went probably [err]ing on your side above and beyond what I needed to, but I’m willing. I did that.

Mr. Potts contends that the court abused its discretion in denying the request. The State counters that the fact that “the burden . . . belonged to the State . . . was manifestly implied by the by-now culturally familiar language ‘presumed innocent *unless* proven guilty beyond a reasonable doubt,’” and the court’s “additional questions tested prospective jurors’ beliefs about a defendant’s obligations at trial in a manner that would have identified those likely to assign any portion of the burden of proof mistakenly to [Mr.] Potts.” The State further contends that the “chance that the court’s chosen questioning allowed prospective jurors to segregate their sincerely held ideals about the American justice system from their actual willingness to apply the principle in this case is too insubstantial to declare that no reasonable jurist would rule as the trial court did here.”

We agree with Mr. Potts. The Court of Appeals has stated 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.” *Kazadi v. State*, 467 Md. 1, 35-36 (2020). Although a “trial court is not required to use any particular language when complying with [such] a request,” the “questions should concisely describe the fundamental right at stake and inquire as to a prospective juror’s *willingness and ability to follow* the trial court’s instruction as to that right.” *Id.* at 47 (emphasis added). Here, the court asked such a question with respect to Mr. Potts’s right not to testify, but failed to ask such a question with respect to the State’s burden of proof when requested to do so. Under *Kazadi*, this failure constitutes an abuse of

discretion, and accordingly, we reverse the judgments of the court and remand the case for a new trial.¹

**JUDGMENTS OF THE CIRCUIT COURT
FOR HOWARD COUNTY REVERSED.
CASE REMANDED TO THAT COURT
FOR A NEW TRIAL. COSTS TO BE PAID
BY HOWARD COUNTY.**

¹Mr. Potts's second contention is that the court abused its discretion in allowing the jury to consider a hotel key card holder, which was not entered into evidence, but was discovered by the jury, during deliberations, inside a backpack that had been entered into evidence. As these circumstances are unlikely to re-occur on remand, we decline to address the contention.