Circuit Court for Baltimore City
Case No. 116133005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 934

September Term, 2019

DERRICK WESLEY

v.

STATE OF MARYLAND

Meredith,
Arthur,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: July 13, 2020

In 2016, a jury in the Circuit Court for Baltimore City convicted Derrick Wesley of possession of heroin and the trial court sentenced him to four years in prison. After Wesley's trial attorney failed to file a notice of appeal, the State agreed that Wesley had received ineffective assistance of counsel and consented to post-conviction relief in the form of a belated notice of appeal.

The trial court vacated Wesley's four-year sentence, imposed a new sentence of four years, all suspended, with a term of 18 months' supervised probation, and ordered that Wesley be permitted to file a belated notice of appeal. This appeal followed.

Wesley asks us to consider the following questions:

1. Did the trial court err during *voir dire* by denying defense counsel's request to ask the jurors whether they could be impartial in light of Mr. Wesley's age, gender, and appearance, in addition to his race?

2. Did the trial court err, or plainly err, in failing to prevent the State from making improper closing arguments in rebuttal?

For the reasons that follow, we affirm the judgment of the trial court.

FACTS

On April 22, 2016, from a covert location on South Smallwood Street, Baltimore Police Sergeant Frank Friend observed a woman approach a man, later identified as Wesley, and engage him in conversation. Sergeant Friend then saw Wesley walk away from the woman, reach into the back of his pants, and pull out a clear plastic bag containing "numerous small objects … consistent with the size of narcotics sold in that area." Wesley took several items from the bag and conducted a "hand-to-hand transaction" with the woman as she re-approached him. Believing "a street level distribution" of narcotics was

occurring, Sergeant Friend alerted his arrest team, but the officers were unable to stop the woman.

Continuing surveillance, Sergeant Friend saw Wesley walk along Smallwood Street, stop at an apartment stoop, place a "small object" on the step, and walk away. A man, later identified as Ernest Izzard, approached the step, retrieved the object Wesley had set down, and walked away. Sergeant Friend characterized the transaction as another "street level distribution" of narcotics, although neither money nor conversation was exchanged between the men. Two arrest teams then stopped and searched Izzard and Wesley. Police recovered one clear gel capsule of suspected heroin from Izzard's pants pocket. Police recovered $38 in cash and a clear plastic bag containing 20 gel capsules of suspected heroin from Wesley's person. The gel capsules found on Wesley matched the one recovered from Izzard and the substance in the gel capsules was later confirmed to be heroin.

DISCUSSION

I. *VOIR DIRE*

Wesley avers that the trial court abused its discretion in declining to ask the prospective jurors during *voir dire* whether they could remain impartial in light of his race, age, gender, and appearance. In Wesley's view, because his proposed question was directed toward racial bias, a proper cause for disqualification from jury service, the trial court was required to ask it. The State responds that Wesley abandoned, waived, or otherwise failed to preserve this argument for our review because defense counsel agreed with the trial

court's suggestion that it instead ask about racial bias, failed to object to the court's decision not to ask the requested question, and indicated satisfaction with the court's *voir dire*.

A. Preservation

We begin our analysis by addressing the State's preservation argument. Objections made during jury selection are governed by Maryland Rule 4-323(c), which states 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." A defendant "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." *Smith v. State*, 218 Md. App. 689, 700-01 (2014). "If a defendant does not object to the court's decision to not read a proposed question, he cannot 'complain about the court's refusal to ask the exact question he requested.'" *Brice v. State*, 225 Md. App. 666, 679 (2015) (quoting *Gilmer v. State*, 161 Md. App. 21, 33 (2005)).

During a discussion about *voir dire* questions, the following exchange took place:

> THE COURT: … Then, [defense counsel], you had a question here about race, age, appearance, or gender. The closest I can come to that question would be, would any member of the panel be inclined to consider the Defendant's race in this case. And the Defendant has identified himself—and I—you have to tell me how he identifies himself, if you wish for me to ask that question. Is that acceptable?
>
> * * *
>
> [DEFENSE COUNSEL]: You want to say—you want to take out age, appearance, or gender?
>
> THE COURT: Yes. And I don't believe that there's anything in the law that you can provide for me other than me to find out

> about his race to ask about his gender or his age that is applicable to this case, but I would be willing to ask, would any member of the panel be inclined to consider the Defendant's race in this case that I'm certain that I have to ask.
>
> [DEFENSE COUNSEL]: Yes, Your Honor. Yes, and we would ask the Court to—
>
> THE COURT: To ask—
>
> [DEFENSE COUNSEL]: —ask that question. Yes, Your Honor.
>
> THE COURT: Okay. And how does your client identify himself. Do you identify yourself—
>
> [DEFENSE COUNSEL]: African-American.

At the end of the discussion, defense counsel specifically stated she had no objection to the trial court's proposed *voir dire*. Again, prior to conducting *voir dire*, the trial court asked if there was "anything else" to deal with before the prospective jurors entered. The prosecutor said, "No," and defense counsel asked to put a conversation regarding discovery on the record—nothing about *voir dire* was mentioned.

The trial court later asked the prospective jurors the following:

> Would any member of the panel be inclined to consider the Defendant's race as you are listening to the facts in this case and deliberating? The Defendant has and does identify himself as African-American. If so, please stand and give me your number. There is no response.

After asking all the *voir dire* questions, the trial court called the parties to the bench and asked, "Is there any objection to the *voir dire* as the Court has rendered it?" Both defense counsel and the prosecutor answered, "No."

Here, Wesley failed to preserve his right to challenge the trial court's decision not to ask the age, gender, and appearance question pursuant to Rule 4-323(c) because he did not object when the court ruled that it would not ask the question, instead appearing to acquiesce in the court's offer to give the racial bias question. Defense counsel's failure to object, alone, is sufficient to demonstrate that Wesley's challenge is not preserved.[1] Defense counsel compounded the preservation failure by stating she had no objection to the trial court's proposed *voir dire* questions or *voir dire* as conducted.

In short, Wesley's challenge is not properly before this Court, because (1) defense counsel failed to object when the trial court refused to ask the requested question; (2) defense counsel made an explicit waiver by responding she had no objections to the proposed *voir dire* questions; and (3) defense counsel never raised the issue of the age, gender, and appearance question or objected to the court declining to ask it after *voir dire*. Accordingly, the argument is not preserved for our review.

B. Merits

Even if we were to consider the merits of Wesley's argument, we find no abuse of discretion. In Maryland, "the trial court has broad discretion in the conduct of *voir dire*, most especially with regard to the scope and form of the questions propounded, and … it

[1] To the extent that defense counsel's statement, "[W]e would ask the Court to … ask that question," is ambiguous about which question she wished the trial court to ask—the original age, gender, and appearance question or the race question as suggested by the trial court—we point out that Wesley never suggests that he objected to the trial court's decision not to propound the age, gender, and appearance question. Instead, he asserts that he preserved the issue by making it known to the trial court that he wanted the question asked, simply by submitting the proposed question. This, however, is not sufficient to preserve the issue for our review.

need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification." *Dingle v. State*, 361 Md. 1, 13-14 (2000). As such, "the trial judge is not required … to ask specific questions requested by trial counsel," except where it involves a number of recognized exceptions, including: race, ethnicity, or cultural heritage; religious bias; capacity to convict on circumstantial evidence in capital cases; undue weight given to police officer credibility; violations of narcotics law; emotional feelings regarding sexual assault against a minor; racial bias; and inability or unwillingness to honor fundamental rights of presumption of innocence, burden of proof, and right not to testify. *Stewart v. State*, 399 Md. 146, 160-62, n.5 (2007); *Kazadi v. State*, 467 Md. 1, 46-7 (2020). "Questions not directed to a specific ground for disqualification but which are speculative, inquisitorial, catechizing or "fishing," or those asked in aid of exercising peremptory challenges, may be refused in the discretion of the court, even though it would not be error to ask them." *Stewart*, 399 Md. at 162.

Here, acknowledging that the trial court properly inquired about the prospective jurors' racial bias, Wesley asserts that he was also entitled to a related *voir dire* question concerning "their ability to be impartial in light of [his] age, gender, and appearance." As noted above, however, trial courts are not obligated to ask any specific questions requested by counsel, except in certain required areas, and bias against one's age, gender, and appearance is not among them.

Moreover, Wesley does not specify how his age, gender, and appearance might independently be the cause of a prospective juror's partiality, nor does he provide any description of his age or appearance. Wesley's contention that prospective jurors "may

have a stronger bias" against a young African-American male who "appears in a certain way—whether wearing certain clothing or having a certain haircut," than against a defendant who simply identifies as African-American, is unsupported by any facts in the record. We find no evidence suggesting that the *voir dire* as conducted failed to probe potential racial bias against Wesley. Given Wesley's failure to cite any facts relevant to his specific case warranting suspicion that any prospective or seated juror held a particular bias against young African-American men who appear "a certain way," the question offered was of a speculative and tangential variety that trial courts may, within their sound discretion, opt to refuse to propound. *See Stewart*, 399 Md. at 163 (noting that questions should not be argumentative, cumulative, or tangential).

II. CLOSING ARGUMENT

Wesley also contends that the trial court erred in permitting the State, during rebuttal closing argument, to: (1) shift the burden of proof by suggesting that the defense failed to elicit an explanation about the timing of Wesley's arrest; (2) denigrate defense counsel by telling the jury that counsel had saved information to use in closing to plant a seed of suspicion; and (3) vouch for State witnesses by applauding the police for arresting Wesley and saying he hoped the jurors felt the same way about him. Acknowledging that he objected only to the first two statements, thereby failing to preserve his argument related to the third statement for our review, Wesley urges us to review the cumulative prejudicial effect of the comments, pursuant to the plain error doctrine. We decline to consider the statement to which Wesley did not object and determine that the statements to which he did object—which were sustained by the trial court—do not warrant further action.

In her closing argument, defense counsel focused on "the case being based on the officers' say so," in light of the lack of body worn camera footage, CCTV recordings, cell phone videos, or photos of the two transactions Sergeant Friend believed to have been "hand-to-hand distributions" of narcotics. Defense counsel then attempted to create reasonable doubt by calling into question the timing of the alleged drug transaction as it related to the seizure of heroin from Izzard and Wesley:

> And [Sergeant] Friend says this all takes about, what, 15 to 20 minutes he's watching Mr. Wesley. And then the other officers are there in ten seconds, 20 seconds to make the stops and the arrests. Well, if you look at the State's exhibit, the chemistry report and what they submitted, Officer Simonyan writes that the seizure happened at 6:00. That's an hour and a half later. That's a pretty significant difference because based on what [Sergeant] Friend says, this was just 15 to 20 minutes and then he called in the arrest teams. Boom, they came in. They stopped Mr. Wesley. Well, if you look at the exhibit, it lists [Wesley]. It lists that it's a seizure. It lists the date and the time and the place. And the time listed is 1800. And that's 6:00. And then the drugs aren't even submitted until 10:30 that—10:22 that night. That's all on the form.

In rebuttal, the State countered defense counsel's claims, with the emphasized portions comprising Wesley's complaints of error:

> So [the State's witnesses are] testifying to what they saw. They're not making things up. They're no[t] embellishing their story to make it sound better for you. They're … telling you the truth. And unfortunately, the truth isn't perfect and memories aren't perfect, but that's what happened and that's why they're testifying to it.
>
> *Now, as to the form saying 6:00 on it, Madam Defense Attorney had all the time in the world to ask Officer Simonyan about what that meant, what that indicated, but she chose not to because she was saving it to use in closing to try to plant a seed of—*

> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [STATE]: —*suspicion*.
>
> THE COURT: Sustained. Sustained. Move on.
>
> [STATE]: Ladies and gentlemen of the jury, the officers testified honestly and they testified that they recovered drugs from [Wesley], and that they saw [Wesley] conduct a hand-to-hand transaction with a female who they weren't able to catch, and that they saw [Wesley] leave an item on a staircase that was picked up by a person named Mr. Izzard, who they decided not to arrest. Now, I'm all for not arresting buyers and going after drug dealers. *And it seems that in this case that's precisely what the officers did and I … applaud them for it. I hope you feel the same way about me and I hope you return a verdict for guilty for the Defendant, who is a drug dealer*. (Emphasis added). [2]

The trial court sustained defense counsel's objection to the first two statements about which Wesley now complains—that defense counsel had "all the time in the world

[2] This issue was not preserved for our review, as Wesley failed to object. *See* MD. RULE 8-131(a) (stating that this Court will not decide an issue unless it "plainly appears by the record to have been raised in or decided by the trial court"). In any event, the prosecutor's comments did not, as Wesley claims, amount to improper vouching for himself and the police officers involved in Wesley's arrest. "'Prosecutorial vouching' endangers a defendant's right to a fair trial and generally occurs where the State 'places the prestige of the government behind a witness through personal assurances of the witness's veracity … or suggests that information not presented to the jury supports the witness's testimony." *Johnson v. State*, 452 Md. 702, 705 n.4 (2017) (quoting *Spain v. State*, 386 Md. 145, 153 (2005)). We agree with the State that the prosecutor's strategy was to focus on the "drug dealer," rather than the buyer and that the prosecutor hoped the jury would agree that the State was correct in focusing on the "bigger fish," so to speak. Based on the context of the argument, the prosecutor's statement was not a personal opinion that the police witnesses' testimony was truthful, nor did it suggest the existence of facts not in evidence that bolstered their, or his, credibility. *See Spain*, 386 Md. at 156 (finding that the State is not improperly vouching when its comments do not express any "personal belief or assurance on the part of the prosecutor as to the credibility of the officer").

to ask Officer Simonyan" about the alleged discrepancy between the time of the arrest and the time of the seizure of the drugs but that she "chose not to because she was saving it to use in closing to try to plant a seed of … suspicion"—and gave the limiting instruction to "move on." Thereafter, defense counsel did not request any additional instruction, move to strike the prosecutor's comments, or request a mistrial. "Where an objection to opening or closing argument is *sustained,* ... there is nothing for this Court to review unless a request for specific relief, such as a motion for a mistrial, to strike, or for further cautionary instruction is made." *Lamb v. State*, 141 Md. App. 610, 644 (2001) (quoting *Hairston v. State*, 68 Md. App. 230, 236 (1986)). The record, therefore, indicates that the trial court immediately provided all the relief defense counsel requested. *Id*. at 645 (holding that in the absence of a request for further relief when the prosecutor made an inflammatory remark during closing arguments, "appellant did not properly preserve this issue for appellate review").[3]

[3] Even if the trial court overruled defense counsel's objection, we would find no error. Although Wesley claims that the statements impermissibly shifted the burden of proof to the defense and denigrated defense counsel, in our view, the State merely walked through the door defense counsel opened by questioning the timing of Wesley's arrest and the police investigation. *See Mitchell v. State*, 408 Md. 368, 388-389 (2009) (finding that defense counsel "permissibly drew the jury's attention" to the absence of certain witnesses, thereby "'open[ing] the door' for the prosecutor to offer an explanation" as to why the witnesses were not present). The State did not raise Wesley's failure to provide evidence of his innocence or impermissibly attack defense counsel personally. Rather, the State's remark calling attention to defense counsel's opportunity to question the officer was a tailored response to defense counsel's argument that the investigation was suspicious or faulty in some manner and the remark did not shift the burden of proof. The State's remark was a reasonable reply to defense counsel's attempt to raise reasonable doubt about the investigation.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.