

Circuit Court for Baltimore City  
Case No. 119045017

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1370

September Term, 2019

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BARRY HORTON, JR.

v.

STATE OF MARYLAND

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Graeff,  
Leahy,  
Salmon, James P.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Salmon, J.

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Filed: July 27, 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.

A jury, in the Circuit Court for Baltimore City, convicted Barry Horton, Jr., appellant, of carjacking, motor-vehicle theft, theft, and unauthorized removal of property.

The Court sentenced Mr. Horton to a total term of 15 years' imprisonment. In this appeal, Mr. Horton presents a single question for our review, which we have rephrased<sup>1</sup> as:

Pursuant to the Court of Appeals' decision in *Kazadi v. State*, 467 Md. 1 (2020), is Mr. Horton entitled to a reversal of his convictions based on the trial court's refusal to propound *voir dire* questions requested by the defense regarding the presumption of innocence, the State's burden of proof, and the defendant's right not to testify or produce evidence?

For reasons to follow, we hold that Mr. Horton is entitled to a reversal of his convictions based on the trial court's refusal to propound the requested *voir dire* questions.

### **BACKGROUND<sup>2</sup>**

Mr. Horton was arrested and charged following a carjacking that occurred on Hamilton Avenue in Baltimore City. Prior to trial, Mr. Horton submitted a list of proposed *voir dire* questions which included the following:

18. In a criminal case, like this one, each side may present arguments about the evidence, but the State has the only burden of proof. The defendant need not testify in his own behalf or present any evidence at all.

- a. Would you tend to believe or disbelieve the testimony of a witness called by the defense more than the testimony of a prosecution witness?
- b. Would you hold it against a defendant if he chooses not to testify or present any evidence?

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<sup>1</sup> The question as phrased was “Did the trial court commit reversible error by not asking mandatory *voir dire* questions requested by the defense?”

<sup>2</sup> In light of the narrow question presented, a recitation of the facts proven at trial is unnecessary. *Elliot v. State*, 185 Md. App. 692, 699 n.3 (2009).

19. You must presume the defendant innocent of the charges now and throughout this trial unless and until, after you have seen and heard all of the evidence, the State convinces you of the defendant’s guilt beyond a reasonable doubt. If you do not consider the defendant innocent now, or if you are not sure that you will require the State to convince you of the defendant’s guilt beyond a reasonable doubt, please stand.

On the first day of trial, during its *voir dire* of prospective jurors, defense counsel asked the judge to propound question 18 and the following occurred. The Court said, “I’m going to decline to give defense 18, but your exception is noted.” Defense counsel then requested that question 19 be asked. The trial court said: “[S]ame.”

We interpret the judge’s statement that “your exception is noted” as an acknowledgment that defense counsel was objecting to the court’s failure to ask the two questions. The State does not argue otherwise.

Later, at the conclusion of jury selection but before the jury was sworn, the court clerk asked if the jury was “acceptable to the defense.” Defense counsel responded to that question in the affirmative.

Mr. Horton was ultimately convicted, as noted. This timely appeal followed.

### **DISCUSSION**

Mr. Horton contends that, pursuant to the Court of Appeals’ holding in *Kazadi v. State*, 467 Md. 1 (2020), the trial court erred in not propounding his requested *voir dire* questions regarding the presumption of innocence, the State’s burden of proof, and the defendant’s right not to testify or produce evidence. The State’s sole argument in this appeal is that Mr. Horton waived his objection by accepting the jury without qualification.

“*Voir dire*, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and impartial jury, guaranteed by Art. 21 of the Maryland Declaration of Rights, is given substance.” *Dingle v. State*, 361 Md. 1, 9 (2000) (citations and footnote omitted). 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 v. State*, 437 Md. 350, 356 (2014) (quotation marks and citation omitted). “There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a collateral matter [is] reasonably liable to have undue influence over a prospective juror.” *Id.* at 357 (quotation marks and citation omitted). Generally, the scope and form of the questions presented during *voir dire* rest solely within the discretion of the trial court. *Washington v. State*, 425 Md. 306, 313 (2012). But, if a party requests a question and that 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.” *Smith v. State*, 218 Md. App. 689, 699 (2014) (quotation marks and citations omitted).

In *Twining v. State*, 234 Md. 97 (1964), the Court of Appeals held that *voir dire* questions regarding certain rules of law, such as the presumption of innocence and the burden of proof, were inappropriate. *Id.* at 100. In *Kazadi*, the Court overturned that holding and concluded that, in a criminal case, three rights - the State’s burden of proof, the presumption of innocence, and a defendant’s right not to testify - were so critical to a fair jury trial that a defendant should be entitled to *voir dire* questions aimed at uncovering

biases regarding those rights, as such questions could elicit responses that would uncover a specific cause for disqualification. *Kazadi*, 467 Md. at 46-47. The Court held, therefore, 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 presumption of innocence, the burden of proof, and the defendant’s right not to testify.” *Id.* at 48. The Court further held that its holding applied “to this case and any other cases that are pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellate review.” *Id.* at 47.

This appeal was pending when *Kazadi* was decided. Here, Mr. Horton’s requested *voir dire* questions, which asked whether prospective jurors would be able to comply with the principles of the presumption of innocence, the State’s burden of proof, and the defendant’s right not to testify or produce evidence, fell within the ambit of questions that a trial court must ask pursuant to *Kazadi*. Moreover, when the trial court refused to ask those questions, defense counsel objected, thus preserving the issue for appellate review. *See Smith*, 218 Md. App. at 700-01 (“An appellant preserves the issue of omitted *voir dire* questions ... by telling the trial court that he or she objects to his or her proposed questions not being asked.”). Therefore, Mr. Horton should be entitled to the benefit of the *Kazadi* holding.

The State argues that Mr. Horton waived his objection by accepting the jury without qualification. We disagree. That exact argument was considered, and rejected, by this Court in *Foster v. State*, 247 Md. App. 642, 650-52 (2020) (holding that objection to trial

court’s refusal to ask requested *voir dire* question was sufficient to preserve issue where defendant later accepted empaneled jury without qualification). Very recently, the Court of Appeals, in *State v. Ablonczy*, \_\_\_ Md. \_\_\_, No. 28, Sept. Term 2020, at \*15-16 (filed June 23, 2021), reached the same conclusion as that reached in *Foster*. In *Ablonczy*, as in this case, the *voire dire* questions that were requested by the defendant, was number eighteen and, in substance, the requested questions that were rejected in the case *sub judice*, were the same as the ones rejected by the trial judge in *Ablonczy*, where the Court of Appeals concluded:

As this Court set forth in [*State v.*] *Stringfellow*[, 425 Md. 461 (2012)], objections that relate to the determination of a trial court to not ask a proffered *voir dire* question are not waived by later acceptance, without qualification, of the jury as empaneled. Respondent noted an objection to the decision of the trial court not to ask proffered *voir dire* question number eighteen. For the reasons expressed previously, Respondent did not waive that objection by accepting the jury as empaneled without repeating his prior objection. Accordingly, we shall affirm the decision of the Court of Special Appeals.

*Id.*

Because the issue was preserved, we hold, pursuant to *Kazadi*, that the trial court erred in not propounding Mr. Horton’s requested *voir dire* questions regarding the presumption of innocence, the State’s burden of proof, and the defendant’s right not to testify or produce evidence. We therefore reverse Mr. Horton’s convictions and remand for a new trial.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR BALTIMORE CITY REVERSED;  
COSTS TO BE PAID BY THE MAYOR AND  
CITY COUNCIL OF BALTIMORE.**