Circuit Court for Baltimore City
Case No. 118190020

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1805

September Term, 2019

CHRISTOPHER RATHER

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Wells,

JJ.

Opinion by Nazarian, J.

Filed: December 3, 2020

Christopher Rather was convicted in the Circuit Court for Baltimore City of second-degree murder and carrying a dangerous weapon openly with intent to injure. On appeal, he argues that the circuit court erred in refusing to ask certain *voir dire* questions, in allowing the State to admit certain DNA evidence, in placing the burden on him during a *Frye-Reed* hearing, and in admitting the testimony of an expert in the field of "per call measurement data." Two recent opinions—*Kazadi v. State*, 467 Md. 1 (2020), by the Court of Appeals and *Foster v. State*, 247 Md. App. 642 (2020), by this Court—resolve the first issue definitively in Mr. Rather's favor and require us to reverse his convictions and remand for further proceedings. As a result, and especially in light of recent developments in the law surrounding the qualification and admission of expert witness testimony, we do not address Mr. Rather's other contentions.

I. BACKGROUND

Given our narrow resolution of this appeal, a detailed recitation of evidence and testimony from trial is unnecessary. *Elliot v. State*, 185 Md. App. 692, 699 n.3 (2009). It will suffice for present purposes that in June 2018, a body was discovered in the empty bleachers of a football field on Westfield Avenue in Baltimore. Mr. Rather, the victim's former boyfriend, was ultimately arrested, charged, and convicted of her murder. Mr. Rather noted a timely appeal.

We supply additional procedural details as necessary below.

II. DISCUSSION

Mr. Rather identifies four errors on appeal.[1] He contends *first* that the circuit court erred in denying his request to ask prospective jurors during *voir dire* about the State's burden of proof and a defendant's right not to testify. *Second*, he contends that the circuit court erred in admitting DNA evidence in violation of his right to confrontation. *Third*, he contends that the circuit court erroneously placed the burden on him during a *Frye-Reed* hearing. And *fourth*, he contends that the circuit court erred in admitting the testimony of an expert in the field of "per call measurement data," a field that Mr. Rather claims is neither reliable nor generally accepted in the scientific community. The first of these issues resolves the appeal in Mr. Rather's favor.

[1] Mr. Rather phrased his Questions Presented as follows:

> 1. Pursuant to the Court of Appeals' decision in *Kazadi v. State*, 467 Md. 1 (2020), is Appellant entitled to a reversal of his convictions based upon the trial court's refusal to propound *voir dire* questions requested by the defense regarding the State's burden of proving the charges beyond a reasonable doubt and the defendant's right to remain silent?
>
> 2. Did the trial court err in allowing the State to admit DNA evidence in violation of Appellant's right to confrontation?
>
> 3. Did the circuit court err in placing the burden on Appellant during a *Frye-Reed*/Rule 5-702 hearing?
>
> 4. Is the testimony of an "expert" in the field of per call measurement data ("PCMD") admissible, where that field is not generally accepted in the scientific community and where there has been no showing that PCMD is reliable?

A. The Circuit Court Erred In Refusing To Propound Mr. Rather's Requested *Voir Dire* Questions About The State's Burden Of Proof And A Defendant's Right Not To Testify Or Present Evidence.

Ahead of trial, Mr. Rather submitted a list of proposed *voir dire* questions that included the following:

> 17. The Court will instruct you that the State has the burden of proving the Defendant guilty of the offenses charged beyond a reasonable doubt. Are there any of you who would be unable to follow and apply the Court's instructions on reasonable doubt in this case?
>
> * * *
>
> 20. Under the law the Defendant has an absolute right to remain silent and to refuse to testify. No adverse inference or inference of [guilt] may be drawn from the refusal to testify. Does any prospective juror believe that the Defendant has a duty or responsibility to testify or that the Defendant must be guilty merely because the Defendant may refuse to testify?

The court declined, however, to pose either of these questions during *voir dire*. At the conclusion of the court's *voir dire*, defense counsel objected and requested that Mr. Rather's questions 17 and 20 be propounded. The court again refused the request. Mr. Rather argues that the circuit court erred in refusing to ask these *voir dire* questions. This dispute was an open one at the time of trial, but it isn't now.

"*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) (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) (alterations in original) (*quoting Washington v. State*, 425 Md. 306, 312 (2012)). "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 (alteration in original) (*quoting Washington*, 425 Md. at 313). Generally, the scope and form of the questions presented during *voir dire* lie solely in the discretion of the trial court. *Washington*, 425 Md. at 313. 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) (*citing Moore v. State*, 412 Md. 635, 654 (2010)).

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. But in *Kazadi v. State*, 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 is entitled to *voir dire* questions aimed at uncovering biases because those 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 fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify." *Id.* at 9. This holding applies "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.

Mr. Rather requested, and the circuit court declined to ask, two *voir dire* questions: one that asked whether prospective jurors would be unable to follow the court's instructions on the State's burden of proof, and another that asked whether prospective jurors believed that a defendant had a duty to testify. Both questions are now required under *Kazadi*. When the circuit court refused to ask those questions, defense counsel objected and preserved 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."). *Kazadi* applies to this case, and its holding requires us to reverse Mr. Rather's convictions.

The State argues that Mr. Rather waived his *Kazadi* objection by accepting the jury without qualification at the conclusion of jury selection. We considered and rejected that argument in *Foster v. State*, No. 462-2019, slip op. at 3–8 (Md. App. Sept. 30, 2020) (holding that objection to a trial court's refusal to ask a requested *voir dire* question was sufficient to preserve the issue, where defendant later accepted empaneled jury without qualification). *Foster* issued not only after trial in this case but after the briefs were submitted in this appeal, but it too applies to this case and resolves the State's preservation argument in Mr. Rather's favor.

In sum, then, the *voir dire* questions Mr. Rather requested were mandatory, and the issue was preserved. And for these reasons, the judgments are reversed, and the case is remanded for further proceedings consistent with this opinion.

B. We Do Not Address Mr. Rather's Remaining Claims.

Mr. Rather raised three other claims that, under these particular circumstances, we will not address. His *second* claim, which concerns the admission of trial testimony in violation of his right to confrontation, involves a trial error that won't necessarily recur—the witness who was unavailable due to a medical emergency may well be available at a retrial, and if not, the trial court will have an opportunity to address the issue. *See Pearson*, 437 Md. at 364 n.5 ("Generally, where an appellate court reverses a trial court's judgment on one ground, the appellate court does not address other grounds on which the trial court's judgment could be reversed, as such grounds are moot."). Mr. Rather's *third* and *fourth* claims, which concern the admission of expert testimony under the *Frye/Reed*[2] standard, may also not recur. If they do, they'll need to be analyzed against a new standard, *see Rochkind v. Stevenson*, 471 Md. 1 (2020), *reconsideration denied* (Sept. 25, 2020)

[2] "[T]he standard enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and adopted by [the Court of Appeals] in *Reed v. State*, 283 Md. 374 (1978), . . . makes evidence emanating from a novel scientific process inadmissible absent a finding that the process is generally accepted by the relevant scientific community." *Clemons v. State*, 392 Md. 339, 343–44 (2006). That standard is sometimes referred to as the "*Frye-Reed* standard." *Id.* at 344.

(rejecting the *Frye/Reed* standard and adopting the *Daubert* standard[3]), and the trial court should perform that analysis in the first instance.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[3] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court of the United States held that the "general acceptance" standard for the admission of expert testimony enunciated in *Frye v. United States*, 293 F. 1013, had been superseded by the adoption of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 586–87. In place of the *Frye* standard, the Supreme Court outlined a series of flexible factors to aid trial courts in determining the reliability and admissibility of expert testimony. *Id.* at 587–98.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1805s19cn.pdf