Circuit Court for Washington County
Case No. C-21-CR-18-462

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2076

September Term, 2019

RAOUL JERMAR SMITH

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: March 5, 2021

A jury in the Circuit Court for Washington County convicted Raoul Jermar Smith, appellant, of multiple assault and firearms offenses against two bar patrons with whom he had argued. Smith raises the following challenges to his convictions and sentences:

1. Did the circuit court abuse its discretion in declining to ask defense counsel's proposed voir dire question number 24?

2. Did the circuit court err or abuse its discretion in disallowing two defense witnesses to testify?

3. Must the sentence for wearing and carrying a handgun merge into the sentence for use of a firearm in a crime of violence?

The State makes a series of concessions regarding the first issue, which are collectively dispositive of this appeal. Specifically, in its brief to this Court, the State concedes the following:

- Under *Kazadi v. State*, 467 Md. 1 (2020), a Court of Appeals decision that was filed after this case was tried on August 21, 2019, but while this appeal was pending, the trial court was required to ask particular voir dire questions that defense counsel requested. *See generally id*. at 8-9 ("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").

- The Court of Appeals instructed that its holding in *Kazadi* applied to that case "and any other cases that are pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellant review." *Id*. at 54.

- Before voir dire in this case, defense counsel requested that the trial court ask a voir dire question that was "sufficiently connected to prospective jurors' ability or willingness to apply the presumption of innocence to invoke the trial court's obligation under *Kazadi*." When the trial court indicated that it would not ask that question because "the State has an obligation to prove the Defendant guilty beyond a reasonable doubt" and "anything like that will be covered by the jury instruction[,]" the court also noted for the record, "[y]ou have your objection."

- At the close of the voir dire examination of the venire, the trial court asked defense counsel, "other than the objection you noted up at the bench, do you have any

additions or corrections to the voir dire given?" Defense counsel answered that he did not. After 12 jurors were empaneled, defense counsel accepted the jury without qualification.

- This appeal was pending when *Kazadi* was decided, so if Smith preserved this voir dire issue for appellate review, *Kazadi* requires reversal here.

The State contends that, despite defense counsel's objection to the unpropounded *Kazadi* question, counsel's later acceptance of the empaneled jury, without qualification, waived Smith's prior request for a *Kazadi* question. Yet the State further concedes that this Court has expressly rejected that position, holding first in an unreported opinion, *Ablonczy v. State*, No. 3219, Sept. Term 2018, 2020 WL 3401190, *4-5 (Md. App.) (filed June 19, 2020), and later in a reported opinion, *Foster v. State*, 247 Md. App. 642, 650-51 (2020), that a criminal defendant's acceptance of an empaneled jury does not operate to waive a previous defense objection to a trial court's refusal to ask a requested *Kazadi* question.

This Court's rationale for reversing convictions in both *Ablonczy* and *Foster* distinguishes between propounded and unpropounded voir dire questions, so that a defendant's acceptance of an empaneled jury waives only prior objections to propounded voir dire questions, not prior objections to unpropounded questions that the trial court refused to ask. *See Foster*, 247 Md. App. at 650-51. Both *Ablonczy* and *Foster* apply lessons from *State v. Stringfellow*, 425 Md. 461, 472-23 (2012), where the Court of Appeals differentiated between an improperly propounded voir dire question that presumptively prejudices venirepersons who heard it, and an "unpropounded voir dire question [that], like a defused bomb, cannot likewise prejudice the venire[.]" Citing that distinction, this Court

held in *Foster* that when a trial court denies a request to ask a *Kazadi* question over defense objection, "no additional objection is required when the jury is empaneled." *Foster*, 247 Md. App. at 650 (citing *Stringfellow*, 425 Md. at 473).

The State, conceding that under *Kazadi* and *Foster*, reversal would be mandatory in this appeal, points out that before this Court's decision was filed in *Foster* on October 6, 2020, the Court of Appeals, on September 30, 2020, granted *certiorari* in *Ablonczy v. State*, 471 Md. 102 (2020) (No. 28, Sept. Term 2020), on the question of whether "accepting a jury as ultimately empaneled waives any prior objection to the trial court's refusal to propound voir dire questions?" The *Ablonczy* parties briefed that issue and argued it to the Court of Appeals on January 4, 2021.

In *Ablonczy*, the State seeks reversal, contending that waiver by jury acceptance, as addressed in *Stringfellow*, encompasses not only propounded voir dire questions, but also unpropounded *Kazadi* questions. In addition, the State has argued that application of such established waiver principles may be fairly applied to Ablonczy and other pending cases. Ablonczy has counterargued that under the principles articulated in *Stringfellow*, he did not waive his prior objections to unpropounded *Kazadi* questions. But even if the Court of Appeals rules that accepting an empaneled jury waives prior objections to unpropounded *Kazadi* questions, Ablonczy maintains that would be a change in precedent that should be applied prospectively, so as not to punish Ablonczy or any other defendant whose counsel accepted an empaneled jury, in reliance on *Stringfellow* as grounds for accepting the jury without expressly renewing prior *Kazadi*-related objections.

In this appeal, the State, anticipating a decision by the Court of Appeals in *Ablonczy*, asserts in its brief that it "preserves the issue of omitted voir dire questions" and "respectfully maintains waiver as a basis for decision in this case in the event that the Court of Appeals adopts the State's position" that a criminal defendant may waive his or her objection to unpropounded *Kazadi* questions by accepting an empaneled jury without qualification. Smith presents the same arguments successfully advanced in *Foster* and *Ablonczy*, arguing that by accepting the empaneled jury, he did not waive his right to challenge the denial of his requests for a *Kazadi* question regarding presumption of innocence. In addition, Smith argues that

> [e]ven if the Court of Appeals were to rule in the State's favor in [*Ablonczy*], the likelihood is that a change in the preservation rule requiring a defendant to now object to the jury as ultimately empaneled in order to preserve his complaint for appellate review would be applied prospectively and therefore would have no bearing on this case.

We must reverse and remand for a new trial. Following our decision in *Foster*, which in turn follows *Stringfellow* and other precedent from the Court of Appeals and this Court, we hold that Smith's acceptance of the empaneled jury did not waive his objection to the trial court's refusal to ask a voir dire question that was made mandatory by *Kazadi*. If, while this appeal remains pending, the Court of Appeals reverses in *Ablonczy*, and applies that ruling to cases pending on appeal, the State may reassert the waiver contention it has preserved in this Court.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT

WITH THIS OPINION. COSTS TO BE PAID BY WASHINGTON COUNTY.