

Circuit Court for Baltimore City
Case No. 118344005

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2164

September Term, 2019

SANDRA FLEEK

v.

STATE OF MARYLAND

Reed,
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: July 8, 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.

On June 26, 2017, Mr. Anthony Pappagallo was stabbed with a knife by Sandra Fleek (“Appellant”) after denying her demands for money. Appellant was indicted by a grand jury on nine counts including attempted first-degree murder, attempted second degree murder, first degree assault, and armed robbery. Appellant pled not guilty to all charges and jury trial proceedings commenced July 19, 2019. During pretrial proceedings, the trial court declined to propound two of Appellant’s proposed *voir dire* questions, which concerned the presumption of innocence and the State’s burden of proof. On July 24, 2019 Appellant was acquitted of attempted first degree murder, attempted second degree murder, and first-degree assault but convicted of armed robbery, second degree assault, and reckless endangerment. As a result, Appellant was sentenced on December 6, 2019 to ten years imprisonment. This timely appeal followed.

In bringing her appeal, Appellant presents one question for appellate review, which we have rephrased¹:

- I. Pursuant to the Court of Appeals holding in *Kazadi v. State*, 467 Md. 1 (2020), did the trial court abuse its discretion when it declined to ask Appellant’s proposed *voir dire* questions?

For the following reasons, we vacate Appellant’s convictions and remand for further proceedings.

¹ Appellant presents the following question on appeal

1. Whether the trial court abused its discretion in denying [Appellant’s] requests to ask potential jurors questions about the presumption of innocence and the State of Maryland’s (the “State”) burden of proof during *voir dire*.

FACTUAL & PROCEDURAL BACKGROUND

On June 26, 2017 Sandra Fleek (“Appellant”) visited the home of an acquaintance², Anthony Pappagallo requesting money. After denying Appellant’s repeated requests for money, Mr. Pappagallo showed Appellant his extensive knife collection and allowed Appellant to hold a few of the knives. Appellant then refused to return one of the knives, told Mr. Pappagallo that there was a “pimp” waiting outside for money, and that the pimp would harm them both if she did not get any money. When Mr. Pappagallo turned to check outside for the pimp, Appellant stabbed him.

Appellant was indicted by a grand jury on nine counts³ including attempted first degree murder, attempted second degree murder, first degree assault, and armed robbery. Appellant pled not guilty to all charges and jury trial proceedings commenced July 19, 2019. During pretrial proceedings, Appellant’s counsel proposed several questions for *voir dire*, including questions 9 and 10 which stated:

9. A Defendant in every criminal case is presumed innocent. Unless you are satisfied beyond a reasonable doubt of the accused’s guilt solely from the evidence presented in this case, the presumption of innocence alone requires you to find the accused not guilty. Is there any member of the jury panel who is unable to uphold and abide by this rule of law?

10. In every criminal case, the burden of proving the guilt of a Defendant

² Mr. Pappagallo testified at trial that Appellant frequently gave him rides every week to a methadone clinic for his drug treatment.

³ Appellant was indicted by a grand jury on the following counts: 1) attempted first degree murder, 2) attempted second degree murder, 3) first degree assault, 4) armed robbery, 5) robbery, 6) second degree assault, 7) reckless endangerment, 8) carrying a deadly weapon with intent to injure, and 9) theft less than \$100.

rests solely and entirely on the State. A Defendant has no burden and does not have to prove his innocence. Is there any member of the jury panel who is unable or unwilling to uphold and abide by this rule of law?

The trial court denied Appellant’s request to propound questions 9 and 10 to the prospective jurors without explanation. On July 24, 2019 Appellant was acquitted of attempted first degree murder, attempted second degree murder, and first-degree assault but convicted of armed robbery, second degree assault, and reckless endangerment. As a result, Appellant was sentenced on December 6, 2019 to ten years imprisonment.

STANDARD OF REVIEW

Examining prospective jurors to determine if cause for disqualification exists is critical to ensure that the “right to a fair and impartial jury, guaranteed by Article 21 of the Maryland Declaration of rights” is honored. *Dingle v. State*, 361 Md.1, 9 (2000). The core purpose of *voir dire* is to “uncover venireperson bias.” *Moore v. State*, 412 Md. 635, 663 (2010). “Under Maryland law, if a 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) (quoting *Moore*, 412 Md. at 654) (internal quotations omitted).

DISCUSSION

A. Parties’ Contentions

Appellant contends the trial court abused its discretion when it refused to propound her proposed questions 9 and 10 during *voir dire*. Appellant asserts that, pursuant to the Court of Appeals decision in *Kazadi v. State*, 467 Md. 1 (2020), the trial court’s refusal to

propound the proposed questions constituted reversible error. Specifically, Appellant contends her proposed questions 9 and 10 are “effectively identical to those at issue in *Kaza[d]i*.” Accordingly, Appellant argues she is entitled to relief under the *Kazadi* holding which states “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*, 476 Md. at 35-36. (emphasis added) The State counters that Appellant waived her objection to the trial court’s ruling on her *voir dire* questions when she accepted the jury panel without qualification.

B. Analysis

As a preliminary matter, we note that this Court granted Appellant’s Unopposed Motion to Correct the Record on October 16, 2020 to include the Defense Request for Voir Dire as part of the record for this appeal. Thus, we rely on the corrected record in consideration of the issue. Additionally, the State requested that we delay our decision on this matter pending the Court of Appeals’ decision in *State of Maryland v. Anthony George Ablonczy*, -- A.3d. ----, 2021 WL 2562312 (June 23, 2021).⁴ We shall provide an overview of the Court’s decision in that case prior to addressing the merits of the case at bar.

I. Ablonczy Decision

⁴ On October 6, 2020 the Court of Appeals granted *certiorari* to determine a similar issue decided by this Court in another case pending appeal, *Marquis Elloss Lang Foster v. State of Maryland*, 247 Md. App. 642 (2020); namely, whether a defendant waives any prior objection to the trial court’s refusal to propound required *voir dire* questions by accepting a jury as ultimately empaneled.

Anthony Ablonczy was arrested and charged with armed robbery, robbery, first and second-degree assault, and theft of less than one thousand dollars. *Ablonczy v. State*, No. 3219, Sept. Term, 2018, 2020 WL 3401190, at *1 (Md. Ct. Spec. App. June 19, 2020). Prior to trial, defense counsel proposed several voir dire questions to be propounded to the jury, including question eighteen which stated:

18. There are certain legal principles governing a criminal case by which you must abide once you have taken your oath as a juror. If you have any difficulty in understanding these principles, or in accepting these principles, you must inform the Court at this time. It is imperative that you be absolutely honest and open about your feelings.

a. Presumption of Innocence

One of the fundamental principles of our legal system is that when a person is brought to Court charged with a crime, he must be presumed to be innocent unless, and until, the prosecution presents evidence that convinces you beyond a reasonable doubt that he is guilty. If you are selected as a juror in this case, will you have difficult[y] in accepting and/or applying the rule of law the defendant must be presumed to be innocent?

b. Burden of Proof

The prosecution has the burden of proving that the defendant is guilty beyond a reasonable doubt. This burden never shifts to the defense. The Defendant never has to prove that he is innocent. A defendant is not required to present any evidence. If the prosecution does not prove every element of an offense beyond a reasonable doubt, the jury must find the Defendant not guilty of that offense. Will you have any difficulty accepting and/or applying this legal principle?

c. Right to Remain Silent

In every criminal case, the Defendant has an absolute Constitutional right not to testify.

- i) Does any member of the jury panel believe that a Defendant who does not testify is more likely to be guilty?
- ii) If the Defendant presented no evidence at all in his defense, would this affect your ability to presume him innocent?

d. Beyond a Reasonable Doubt

One of the fundamental principles of our system is that the prosecution has

the burden of proving that the Defendant is guilty beyond a reasonable doubt. Will you have difficulty accepting and/or applying this legal principle?

During a bench conference regarding Respondent's proposed voir dire questions, the following colloquy ensued:

THE COURT: [] All of these questions about the law, [] I don't believe they are appropriate under Maryland law.

[DEFENSE COUNSEL]: that's fine, over my objection, I understand.

THE COURT: Sure. That will be just so counsel knows, that is question 18 which [is] recitations of presumption of innocence, burden of proof, right to remain silent, beyond a reasonable doubt. I've done some research actually beforehand on this, and ... those are really questions of law that aren't necessary or required under Maryland [law].

Ablonczy, No. 3219, Sept. Term, 2018, 2020 WL 3401190, at *2-3. When the trial court declined to ask the question, defense counsel objected but the objection was overruled and voir dire continued. *Id.* at 3. Once jury selection concluded, the trial court asked if either party objected to the jury as empaneled and defense counsel responded in the negative. *Id.* *Ablonczy* was convicted and sentenced to a total term of 20 years' imprisonment. *Id.* at 1. On appeal, *Ablonczy* argued the trial court committed reversible error by failing to ask his proposed voir dire question eighteen as mandated by the Court of Appeals decision in *Kazadi v. State*, 467 Md. 1 (2020). *Id.* at 3. The State countered that *Ablonczy* failed to preserve the issue by waiving his objection after accepting the jury without qualification once the voir dire process concluded. *Id.*

This Court held, pursuant to *Kazadi*, that the trial court abused its discretion in not posing *Ablonczy*'s question eighteen, reversed the trial court's decision, and remanded for a new trial. *Id.* In reversing the trial court, we held that by objecting after the trial court

declined to pose his voir dire question, Ablonczy preserved the issue for appeal and acceptance of the jury in its final composition, after defense counsel’s objection, “[did] not constitute acquiescence to the previous adverse ruling.” *Id.* at 4. The State appealed to the Court of Appeals, which granted certiorari.

To determine if accepting a jury as “ultimately empaneled” waived Ablonczy’s prior objection to the trial court’s refusal to propound his proposed voir dire question, the Court of Appeals looked to its analysis in *State v. Stringfellow*, 425 Md. 461 (2012). *State of Maryland v. Anthony Ablonczy*, -- A.3d. ----, 2021 WL 2562312, at *6-8 (June 23, 2021). In *Stringfellow*, the Court of Appeals explained that while unqualified acceptance of the jury panel following an objection direct to the inclusion or exclusion of prospective jurors is waived, an objection indirectly related to inclusion or exclusion of prospective jurors post unqualified acceptance is not waived:

Objections related to the inclusion/exclusion of prospective jurors are treated differently for preservation purposes because accepting the empaneled jury, without qualification or reservation, “is directly inconsistent with [the] earlier complaint [about the jury]” which “the party is clearly waiving or abandoning.” *Gilchrist*, 340 Md. at 618. Objections related indirectly to the inclusion/exclusion of prospective jurors are not deemed likewise inconsistent and are deemed preserved for appellate review. Although the difference between the two categories of objections may appear slight, it is important in light of the waiver implications.

425 Md. at 469-70. (citing *Gilchrist*, 340 Md. at 617-18). The Court held that “an objection to a judge refusing to ask a proposed voir dire question” falls within the realm of “objections deemed incidental to the inclusion/exclusion of prospective jurors and, therefore, not waived by the objecting party’s unqualified acceptance thereafter of the jury panel.” *Id.* at 470-71. Relying on *Stringfellow*, the Court held Ablonczy’s objection, which

was incidental to the inclusion/exclusion of prospective jurors, was not waived after his unqualified acceptance of the jury thus affirming this Court’s decision and leaving the principles of *Stringfellow* undisturbed. *Ablonczy*, -- A.3d. ----, 2021 WL 2562312, at *8.

II. Pursuant to the Court of Appeals Decision, Fleek Must Prevail

In the current case, Appellant relies on *Kazadi* in support of her argument that the trial court abused its discretion in failing to ask her requested questions during *voir dire*. In that case, the Court of Appeals addressed the longstanding rule established in *Twinning v. State*, 234 Md. 97 (1964), which held it is not an abuse of discretion when a trial court declines a request to propound questions regarding presumption of innocence and the State’s burden of proof to prospective jurors. In overruling *Twinning*, the Court of Appeals held 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*, 476 Md. at 35-36. A trial court’s failure to ask such questions is an abuse of discretion. *Id.* at 48. Moreover, the Court established that its holding in *Kazadi* applies to “any other cases that are pending on direct appeal when” the opinion was filed, provided “the relevant question has been preserved for appellate review.” *Id.* at 47.

Although the instant case was pending appeal when *Kadazi* was decided, and thus the Court of Appeals holding in *Kazadi* is controlling here, the State contends Appellant is not entitled to a reversal of her convictions because she waived her request to propound *voir dire* questions related to the presumption of innocence and the State’s burden of proof

when she accepted the jury panel without qualification. We disagree. While *Kazadi* did not provide requirements to preserve this type of claim for appellate review, we addressed the issue in *Foster v. State*, 247 Md. App. 642 (2020). In that case, Foster requested a *voir dire* question, now mandated by *Kazadi*, that was rejected by the trial court. *Foster*, 247 Md. at 646-48. Pursuant to Md. Rule 4-323(c) ⁵ Foster objected to the trial court not asking his requested question but later accepted the jury without qualification. *Id.* In reaching our decision in *Foster*, we also applied *State v. Stringfellow*, 425 Md. 461, 470 (2012):

There is no dispute in this case that the circuit court declined Foster’s request to ask a *voir dire* question that is now mandated by *Kazadi*. Nor is there any dispute that, when the circuit court declined Foster’s request, he objected as required by Rule 4-323(c), but that he later accepted the empaneled jury without qualification. The only question is the effect, if any, of Foster’s unqualified acceptance of the jury on the preservation of his claim. Applying *Stringfellow*, we conclude that Foster did not waive his *Kazadi* claim through his unqualified acceptance of the empaneled jury.

Foster, 247 Md. at 650-51. Identical to the instant case, the trial court declined to ask Appellant’s requested *voir dire* questions, now mandated by *Kazadi*, and Appellant objected pursuant to Md. Rule 4-323(c):

⁵ Maryland Rule 4-323(c) provides:

(c) Objections to other rulings or orders. For purposes of review by the trial court or on appeal of any other ruling or order, 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. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

- [Defense Counsel] In this, the *voir dire* that I provided to the court, I would be asking for my question number nine, which is a Defendant in every criminal case is presumed innocent.
- [Trial Court] Okay.
- [Defense Counsel] And it continues on from there.
- [Trial Court] I'll deny that.
- [Defense Counsel] I'm also requesting my question number ten.
- [Trial Court] Okay and I'll deny that request.
- * * *
- [Defense Counsel] One other thing I want to add, again, I'm renewing my request for the questions I asked regarding the *voir dire* initially.
- [Trial Court] Okay, noted.
- [Defense Counsel] So I'd object to the court not asking those questions.
- [Trial Court]: Okay, thank you.

Clearly, Appellant properly preserved her objection and did not waive appellate review of the trial court's refusal to ask her requested questions. Therefore, we reject the State's waiver argument and hold, pursuant to *Kazadi*, the trial court abused its discretion when it refused to ask Appellant's requested *voir dire* questions regarding the fundamental principles of the presumption of innocence and the State's burden of proof.

CONCLUSION

Accordingly, we vacate Appellant’s convictions and remand the matter for a new trial where Appellant’s proposed *voir dire* questions on the presumption of innocence and burden of proof be presented to the jury as required under *Kazadi*.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY VACATED;
CASE REMANDED FOR A NEW TRIAL;
COSTS ASSESSED TO MAYOR AND CITY
COUNCIL OF BALTIMORE.**