

Circuit Court for Baltimore County
Case No. 03-K-18-001670

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2439

September Term, 2018

ANTHONY RICHARD BARRESI

v.

STATE OF MARYLAND

Fader, C.J.,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: December 13, 2019

* 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 sitting in the Circuit Court for Baltimore County convicted the appellant, Anthony Richard Barresi, of second-degree assault. Mr. Barresi contends that the trial court erroneously found that a prospective juror was statutorily disqualified from jury service based on a criminal conviction for which the juror had received probation before judgment. By expressing satisfaction with the jury ultimately chosen, however, Mr. Barresi waived his objection. We will, therefore, affirm the judgment of the circuit court.

BACKGROUND

Mr. Barresi faced charges of assault arising from a domestic incident. In response to *voir dire* questioning, Juror 12 informed the court that in 2017 he had been charged with “carrying a handgun,” for which he received probation before judgment. After the court had excused several other jurors for cause, the State initiated a discussion of whether Juror 12 should also be struck. The court ultimately struck Juror 12 as a result of the probation before judgment he received on the handgun charge.

After the parties exercised their peremptory challenges and the jury was seated, both the State and Mr. Barresi’s defense counsel affirmed that they were satisfied with the jury panel:

CLERK: Is the jury panel as presently constituted acceptable to the Defense?

[DEFENSE COUNSEL]: Acceptable to the Defense.

CLERK: Okay.

THE COURT: You can ask the State.

CLERK: And acceptable to the State?

STATE: Acceptable to the State.

Once alternate jurors had been selected, counsel reaffirmed the acceptability of the panel:

CLERK: Is the . . . jury panel as presently constituted acceptable to the State?

STATE: Acceptable to the State.

CLERK: Acceptable to the Defense?

[DEFENSE COUNSEL]: Acceptable to the Defense.

After briefly addressing those prospective jurors who had not been selected, the court requested that counsel approach the bench. During the ensuing bench conference, the court asked whether there were “any objections to the jury selection?” Both the State and defense counsel answered, “No, Your Honor.”

DISCUSSION

I. MR. BARRESI WAIVED HIS OBJECTION TO JUROR 12’S DISCHARGE BY HIS UNQUALIFIED ACCEPTANCE OF THE JURY PANEL.

Mr. Barresi argues that the court committed reversible error by excluding Juror 12 for cause. The State counters that Mr. Barresi waived that contention when his counsel expressed unqualified satisfaction with the jury at the conclusion of jury selection. We agree with the State.

When a party’s *voir dire* objection is “aimed directly at the . . . exclusion of a prospective juror”—and is not merely incidental to that juror’s exclusion—that party’s later expression of “unqualified acceptance [] of the jury panel” waives the earlier objection. *State v. Stringfellow*, 425 Md. 461, 470 (2012); *see also Gantt v. State*, 241 Md. App. 276, 306-07 (2019). “[A]ccepting 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.’” *Stringfellow*, 425 Md. at 470 (quoting *Gilchrist v. State*, 340 Md. 606, 618 (1995)).

Here, Mr. Barresi’s objection was aimed directly at the exclusion of Juror 12. Because he subsequently waived that objection by expressing unqualified satisfaction with the entire jury as seated—on three separate occasions—he has not preserved that objection for our review.

II. EVEN IF WE WERE TO REACH THE MERITS OF MR. BARRESI’S CONTENTION, WE WOULD NOT REVERSE.

Even if we were to reach the merits of Mr. Barresi’s claim, and even if we were to agree with him that the circuit court erred in excluding Juror 12, reversal still would not be warranted. As Mr. Barresi concedes, “[g]enerally, when a trial judge has abused her discretion and there is insufficient cause to excuse a potential juror, it does not amount to reversible error if the jurors actually seated were unobjectionable.” (citing *Hunt v. State*, 321 Md. 387, 420 (1990)). Mr. Barresi does not argue that any of the jurors actually seated were objectionable. Instead, relying on *King v. State*, 287 Md. 530 (1980), Mr. Barresi claims that this case satisfies an exception to that general rule that applies when the reasons for the exclusion are not particular to an individual juror, but are “endemic to a ‘general class of people.’” We agree with the State, however, that Mr. Barresi has neither claimed nor established that such an exception applies.

In *King*, the Court of Appeals applied this exception in a case where the defendant was accused of simple possession and possession with the intent to distribute marijuana.

Id. at 531-32. There, the trial court excused two jurors for cause on the basis of their belief “that the criminal laws relating to marijuana should be modified.” *Id.* at 536. The Court found that the trial court had “excluded an entire class of prospective jurors” based on their beliefs about marijuana laws, and held that the trial court had committed reversible error in “automatically exclud[ing]” those jurors. *Id.* at 538-39. That, the Court held, had frustrated the requirement that the jury “shall be selected at random from a fair cross section of the citizens of the State.” *Id.* at 537 (quoting Md. Code Ann., Cts. & Jud. Proc. § 8-102(a) (1980 Repl.)).¹ The Court therefore ordered that the judgments be reversed and the case remanded for a new trial.

Section 8-104 of the Courts Article provides: “Each jury for a county shall be selected at random from a fair cross section of the adult citizens of this State who reside in the county.” In determining whether a court has violated that right, we apply the “cognizable group” test, which involves a three-step analysis:

[First,] there must be some factor which defines and limits the group. . . . Secondly, the group must have cohesion. There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of juries hearing cases in which group members are involved. That is, the group must have a community of interest which cannot be adequately protected by the rest of the populace.

¹ The General Assembly recodified without substantive change former § 8-102(a) of the Courts and Judicial Proceedings Article in what is now § 8-104 of that Article. The statute originally was enacted in 1969 and codified in former Article 51, § 1 of the Annotated Code of Maryland. *See* 1969 Md. Laws, ch. 408.

Wilkins v. State, 270 Md. 62, 67 (1973) (quotation omitted). Although individuals who have received probation before judgment for handgun offenses satisfy the first step of this analysis, they do not satisfy the second or third steps. While proponents of legislative reform of marijuana laws like those at issue in *King* share “attitudes or ideas or experience . . . which cannot be adequately represented if the group is excluded from the jury selection process,” *id.*, especially in a case charging a violation of the State’s marijuana laws, the same is not true of individuals who have received probation before judgment. Indeed, Mr. Barresi does not even purport to identify what any such “attitudes or ideas or experience” might be, much less any possibility that the exclusion of such individuals would result in a partial or biased jury here. Thus, even were we to reach the merits of his challenge, we would not reverse Mr. Barresi’s conviction.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**