Circuit Court for Baltimore City
Case No. 116091026-27

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2733

September Term, 2016

FRED WHITING

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: October 1, 2018

A jury in the Circuit Court for Baltimore City convicted appellant, Fred Whiting, of first-degree murder (Michael Smith), attempted first-degree murder (Shawan Jackson), first-degree assault (Shawan Jackson), two counts of use of a handgun in the commission of a crime of violence, and possession of a regulated firearm after having been previously convicted of a disqualifying crime. Appellant was sentenced to a total of life plus twenty years in prison, the first five years without the possibility of parole. Appellant filed a timely appeal asking us to consider the following questions:

> 1. Did defense counsel render ineffective assistance of counsel when he withdrew his request to ask the venire whether anyone had strong feelings about the crimes with which Mr. Whiting was charged because he erroneously believed that the question had been fairly covered by another *voir dire* question?
>
> 2. Did the trial court err when it permitted the prosecutor to introduce inadmissible hearsay?
>
> 3. Did the trial court err and/or abuse its discretion when it overruled defense counsel's objection to a question that elicited irrelevant and unduly prejudicial testimony?
>
> 4. Did the trial court abuse its discretion when it overruled defense counsel's objection to remarks the prosecutor made during closing argument?

For the reasons that follow, we conclude that defense counsel rendered ineffective assistance of counsel, vacate the judgment, and remand the case for a new trial. We therefore decline to consider appellant's remaining questions presented because those issues may not recur at appellant's retrial.

FACTS AND LEGAL PROCEEDINGS

Because the basis of our decision pertains to the *voir dire* procedure employed in this matter, a lengthy recitation of the facts is not required. Nonetheless, we will briefly provide the background of the case.

On the night of May 19, 2015, Shawan Jackson and a friend went to Johnson's Lounge on the corner of North Pulaski Street and Edmondson Avenue in Baltimore City. Ms. Jackson recognized Michael Smith and stepped outside with him and a few other people to smoke cigarettes in an alley adjacent to Johnson's.

As Ms. Jackson and Mr. Smith smoked and talked, Ms. Jackson saw a man approach from the opposite side of the alley. The man suddenly fired several shots at the group. An off-duty Baltimore City police officer who was leaving the bar just before shots rang out witnessed the shooting in the rear-view mirror of his car. The officer saw two people discharge firearms in the direction of the bar and then run into the alley on the opposite side of the bar. Ms. Jackson was shot twice but survived. Mr. Smith was shot five times and died from his wounds.

The police department's crime scene technician recovered nineteen cartridge cases from the scene—three .45 caliber cartridge cases next to the bar and sixteen .9mm cartridge cases (from two different firearms) in the adjacent alley. According to a technician who testified at trial, the concentration of casings likely indicated where each shooter had been standing when firing his or her gun.

Although neither Ms. Jackson nor the off-duty police officer saw anyone in the group of smokers near the bar fire a gun at the shooters, some cartridge casings were

clustered near the bar and a blood trail led from the alley away from the bar. This led the police to surmise that a third person had fired back at the two shooters, hitting at least one of them.

Less than an hour after the shooting at Johnson's Lounge, appellant, accompanied by his girlfriend, Ronjilla Abny, arrived at Bon Secours Hospital with a gunshot wound to his leg.[1] Appellant told police officers that he had been shot at Ellamont and Westmont Avenues. The officers found no witnesses who had heard gunshots, nor any physical evidence of a shooting there.[2] Despite the lack of evidence of a crime scene at Ellamont and Westmont, appellant nonetheless continued to insist he had been shot there.

A few days later, the officers investigating the shooting of appellant learned he was a suspect in a different crime and suspected he was shot at the location of that crime. The police obtained a warrant for appellant's DNA.

The State's DNA analyst confirmed that the blood recovered from the blood trail leading from the alley and away from Johnson's Lounge was from a single known source—appellant. After receiving this information, the police presented a photo array to Ms. Jackson. After identifying two photographs as possibly depicting the shooter, Ms. Jackson went back to the photo of appellant and said, "it looks like the shooter." However, she did

[1] Bon Secours is the closest hospital, geographically, to Johnson's Lounge.

[2] Approximately twenty minutes after the police were notified of the gunshot victim at Bon Secours, Ms. Abny's son called 911 and reported shots fired at Ellamont and Westmont. The police were unable to corroborate any of the information relayed during the call.

(Continued)

not sign the photo array or definitively identify appellant as the shooter.[3] She also identified the dark basketball-type shorts with red trim that the shooter had been wearing, which matched the shorts taken from appellant at Bon Secours.

In appellant's defense, his girlfriend testified that on the night of the shooting, she picked appellant up from work at approximately 10:00 p.m. and took him to her house on West Lexington Street, about five blocks from Johnson's Lounge. After showering and changing his clothes, appellant left the house on foot to pick up Chinese food. When he did not return, his girlfriend went to sleep. At approximately 1:00 a.m., appellant called her, after which she proceeded to Bon Secours Hospital. On cross-examination, the girlfriend conceded that between 11:00 p.m. and 1:30 a.m., other than knowing appellant had been walking toward Edmondson Avenue and was shot, she had "no idea what happened" to him.

On March 8, 2016, the police charged appellant with first-degree murder (Mr. Smith), two counts of first and second degree assault (Mr. Smith and Ms. Jackson), attempted first-degree murder, two counts of reckless endangerment (Mr. Smith and Ms. Jackson), possession of a handgun in the commission of a crime of violence, and possession of a regulated firearm after having been previously convicted of a disqualifying crime. A Baltimore City jury convicted appellant of first-degree murder (Mr. Smith), attempted first-degree murder (Ms. Jackson), first degree assault (Ms. Jackson), two counts of use of a handgun in the commission of a crime of violence, and possession of a regulated firearm

[3] At trial, Ms. Jackson recognized appellant as having been at Johnson's on the night of the shooting, but she did not identify him as the shooter.

after having been previously convicted of a disqualifying crime. The appellant filed a timely appeal.

DISCUSSION

Appellant contends that defense counsel rendered ineffective assistance during the *voir dire* phase of his trial. Specifically, he argues that his trial counsel erred by not insisting that the trial court ask the prospective jurors whether anyone had strong feelings about the charged crimes because counsel erroneously believed that the issue had been fairly covered by other questions. By acquiescing to the court's improper decision not to ask the "strong feelings" question, appellant claims that defense counsel failed to preserve a meritorious issue for appeal, requiring a reversal of his convictions.

The State counters that a review of this issue on direct appeal is improper because the trial record is inadequate to assess whether defense counsel committed professional misjudgment or made a strategic choice in withdrawing his request. In the alternative, the State argues that, even if appellant were permitted to raise the issue on direct appeal, he could not show that defense counsel's trial performance was constitutionally deficient or that he suffered any prejudice from defense counsel's error. As we will show, we agree with appellant.

At the trial, the court explained to the venire panel that it would ask a series of questions and that if any prospective juror answered any question in the affirmative, he or she should stand up and give the court his or her juror number without answering the question. In its first question, the court explained the charged crimes:

> The Defendant in this case has been charged with the crimes of the murder of Michael Smith, the attempted murder of Shawan Jackson, and related handgun charges. These events occurred at or near the 500 Block of . . . North Pulaski Street, right outside of the Johnson's Lounge here in Baltimore City on or about May the 19th, 2015.
>
> Is there any member of the jury panel who has personal knowledge about these or any information other than what has been heard here in this courtroom about the facts or the location of the incident? If so, please stand.

There was no response to the question.

The court proceeded to ask the jurors if they were familiar with the parties, attorneys or witnesses; whether they would give more or less weight to the testimony of a police officer; if there were any religious reasons that would preclude serving on a jury; if they were unable to apply the law as explained by the court; if they, or an immediate family member, had been a victim or a perpetrator of a crime; whether they or any member of their immediate family was a law enforcement officer; whether they had any hardship that would preclude jury service; and if they had served on a jury before. Finally, the court propounded two "catchall" questions:

> 1. Is there any member of the jury panel who knows of any prejudice, bias or any other reason whatsoever without exception or limitation that would impact your ability to render a fair and impartial verdict based solely on the evidence in this case and nothing else? That would include the race, gender, religion or sexual orientation of any witness or the Defendant. If so, please stand.
> 2. Now, is there any person who believes for any reason for which they may not have already stood, that he or she cannot be fair in this matter? If so, please stand.

No one responded to the first question, but fourteen prospective jurors stood for the second question.

Thereafter, the court asked counsel if there were "any objections to anything," which prompted the following colloquy:

> [DEFENSE COUNSEL]: Just one addition.
>
> THE COURT: Uh-huh.
>
> [DEFENSE COUNSEL]: The nature of the crime.
>
> THE COURT: That wasn't in there.
>
> [DEFENSE COUNSEL]: I know.
>
> THE COURT: So what do you want me to say?
>
> [DEFENSE COUNSEL]: Just define—he's charged—well, you already said what he's charged with. Does anyone feel because of the nature of the crime, they could—would have a bias against him for whatever—
>
> THE COURT: But wouldn't that be covered with any reason whatsoever?
>
> [PROSECUTOR]: I think it's covered in that first question, anything concerning the facts or the charges that would affect your ability to be fair. I don't know if you want to specifically remind them again this is a murder case.
>
> THE COURT: I did—well, I'll tell you what. Let's wait until—let's get rid of some folks first.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: And then I'll ask that. Well, no, I don't want to do that.
>
> [DEFENSE COUNSEL]: I don't think too many people will stand.
>
> THE COURT: I do.
>
> [DEFENSE COUNSEL]: You do?
>
> [PROSECUTOR]: Well, I think it's probably already encompassed in a lot of their other—

THE COURT: I think I've already covered it.

[DEFENSE COUNSEL]: Okay.

THE COURT: That's the problem. I talked about—I introduced you and I told them it was a murder, family member, work, police, religious reason whatsoever.

[DEFENSE COUNSEL]: You did, number 1.

[PROSECUTOR]: Because I think question 1 covers—

THE COURT: Yeah.

[DEFENSE COUNSEL]: Yeah, you did.

[PROSECUTOR]: —it without specifically saying it.

THE COURT: So do you believe it's been covered, [Defense Counsel]?

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay.

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to the assistance of counsel at critical stages of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *Mosley v. State*, 378 Md. 548, 556 (2003). Integral to this right is the right to effective assistance of counsel. *Tetso v. State*, 205 Md. App. 334, 377 (2012).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* (quoting *Strickland*, 466 U.S. at 686). As the Court of Appeals explained in *In re Parris W.*, 363 Md. 717, 725-26 (2001):

> To prove deficient performance, the defendant must identify acts or omissions of counsel that were not the result of reasonable professional judgment. The standard by which counsel's performance is assessed is an objective one, and the assessment is made by comparison to prevailing professional norms. Judicial scrutiny of counsel's performance is highly deferential, and there is a strong (but rebuttable) presumption that counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable professional judgment. As we indicated in *Redman* [*v. State*], 363 Md. [298,] 310 [(2001)], "the inquiry has two foci: first, a performance evaluation under prevailing professional norms; and second, an inquiry into whether the defendant suffered prejudice as a result of deficient performance."
>
> In assessing the reasonableness of counsel's performance, the reviewing court should keep in mind that counsel's primary function is to effectuate the adversarial testing process in the particular case. Nonetheless, a single, serious error can support a claim of ineffective assistance of counsel.

(Internal citations omitted).

Generally, pursuant to the Maryland Uniform Post Conviction Procedure Act, Md. Code (2008 Repl. Vol., 2017 Suppl.) § 7-102 *et seq.* of the Criminal Procedure Article ("CP"), a defendant attacks a criminal conviction due to ineffective assistance of counsel during a post-conviction proceeding, rather than on direct appeal. *Id*. at 726. The Act "provides the defendant with the possibility of an evidentiary hearing, reflecting a recognition that 'adequate procedures exist at the trial level, as distinguished from the appellate level, for taking testimony, receiving evidence, and making factual findings thereon concerning the allegations of error.'" *Mosley*, 378 Md. at 560 (quoting *Wilson v. State*, 284 Md. 664, 675 (1979)). Maryland courts have long expressed a preference for adjudicating claims of ineffective assistance of counsel during post-conviction proceedings because the trial record rarely reveals why counsel acted or omitted to act, and post-conviction proceedings allow for fact-finding and the introduction of evidence directly

related to the allegations of the attorney's ineffectiveness. *Walker v. State*, 338 Md. 253, 262 (1995).

In *In re Parris W.*, however, the Court of Appeals acknowledged that the ordinary rule that ineffective assistance of counsel claims must be raised in post-conviction proceedings "is not absolute and, where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable." 363 Md. at 726. In other words, if the basis for the defendant's allegation of ineffective assistance of counsel is clear from the trial record, an appellate court may consider the claim on direct appeal.

In our view, this case falls within the exception. The trial record is developed sufficiently to permit our review and evaluation of the merits of appellant's claim, and none of the critical facts surrounding defense counsel's conduct at trial is in dispute. Because a collateral proceeding on the adequacy of counsel's performance is unnecessary, our refusal to address appellant's claim in this appeal would constitute a waste of judicial resources. Therefore, we will review appellant's claim that defense counsel provided ineffective assistance during jury *voir dire.*

Every criminal defendant has the constitutional right to a trial by an impartial jury, pursuant to the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. "*Voir dire* is the means by which the defendant may identify and challenge unqualified jurors." *Kegarise v. State*, 211 Md. App. 473, 479 (2013).

The *voir dire* process is "'critical' to assuring that the federal and state constitutional 'guarantees of a fair and impartial trial [are] honored.'" *Collins v. State*, 452 Md. 614, 622 (2017) (quoting *Stewart v. State*, 399 Md. 146, 158 (2007)). "Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id*. (quoting *Rosales–Lopez v. United States*, 451 U.S. 182, 188 (1981)). *Voir dire* covers "[t]wo areas of inquiry that may uncover cause for disqualification: (1) an examination to determine whether prospective jurors meet the minimum statutory qualifications for jury service; or (2) 'an examination of a juror . . . conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter *reasonably liable* to unduly influence him.'" *Davis v. State*, 333 Md. 27, 35 (1993) (alteration in original) (internal citation omitted) (quoting *Bedford v. State*, 317 Md. 659, 671 (1989)), *overruled on other grounds by Pearson v. State*, 437 Md. 350 (2014).

A trial court is "vested with broad discretion in the conduct of *voir dire*, subject to reversal for an abuse of discretion." *Collins*, 452 Md. at 623. The "trial court reaches the limits of its discretion only when the *voir dire* method employed by the court fails to probe juror biases effectively." *Id.* (quoting *Wright v. State*, 411 Md. 503, 508 (2009)). Ultimately, "[t]he standard for evaluating a court's exercise of discretion during the *voir dire* is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present." *Id.* at 623-24 (quoting *White v. State*, 374 Md. 232, 242 (2003)).

Concluding that a prospective juror's strong feelings about the crimes with which a defendant is charged may constitute specific cause for disqualification, the Court of Appeals, in *Pearson,* held that, "*on request*, a trial court *must* ask during *voir dire*: 'Do any of you have strong feelings about [the crime with which the defendant is charged]?'" 437 Md. at 363 (emphasis added). Two years later we explained, in *Thompson v. State*, 229 Md. App. 385, 406 (2016), that "observing that most citizens have a bias against proscribed criminal conduct is not extraordinary. Yet, a bias that is so strong against a particular criminal act that it distorts a juror's ability to render a fair and impartial verdict must be uncovered." (quoting *Singfield v. State*, 172 Md. App. 168, 173 (2006)). In *Thompson*, we held that in failing to ask a "strong feelings" question when requested, the trial court abused its discretion, requiring us to vacate the defendant's convictions and remand for a new trial. *Id*. at 411-12.[4]

In the present case, defense counsel requested the court to ask the "strong feelings" question, thus requiring the trial court to ask it of the prospective jurors. When the prosecutor and the court asserted their erroneous belief that the court had "already covered it" with other *voir dire* questions, defense counsel acquiesced to the court's reasoning. He agreed that the "strong feelings" question had already been covered, and abandoned any objection to the court's stated decision not to ask the question.

[4] We also held that "catchall" questions asking the prospective jurors if there were any reason not yet mentioned why they could not render a fair and impartial verdict was insufficient to address the particular bias the "strong feelings" question would reveal. *Id.* at 410.

The State suggests that, in withdrawing his request for the court to propound the question, "it appears that defense counsel made a strategic decision, based on the information available to him at the time," which would negate a finding of ineffective assistance. Indeed, our appellate courts have often declined to decide a claim of ineffective assistance of counsel on direct appeal because the reason for counsel's action may have been based on trial tactics that are not apparent from the trial record. *See, e.g.*, *Mosley*, 378 Md. at 571-72.

However, in *Coleman v. State*, 434 Md. 320, 338 (2013), the Court of Appeals stated that "[w]e do not see how trial counsel's failure to object because of his ignorance of the law could possibly be seen as sound trial strategy or a strategic choice." We likewise do not perceive any strategic basis for defense counsel's withdrawal of his request for a *voir dire* question the court, under our case law, was required to give. Moreover, it is apparent from the record that defense counsel simply acquiesced to the prosecutor's and court's erroneous statement that the "strong feelings" question had been asked. Therefore, in our view, the first prong of *Strickland's* test for ineffectiveness of counsel—performance by counsel that did not meet the prevailing professional norms—has been met.

The second prong of the *Strickland* test—whether the defendant suffered prejudice as a result of counsel's deficient performance—has also been met. In withdrawing his request that the trial court propound the "strong feelings" question, defense counsel waived appellant's right to challenge on appeal the court's failure to propound a required *voir dire* question. Had trial counsel preserved the issue for appellate review, appellant's convictions would likely be vacated. *Thompson, supra*; *see Brice v. State*, 225 Md. App.

666, 679 (2015), *cert. denied*, 447 Md. 298 (2016) (granting a new trial when trial court failed to ask venire a police witness question after defense counsel retracted waiver); *see also Gross v. State*, 371 Md. 334, 350 (2002) ("An advocate does render ineffective assistance of counsel, however, by failing to preserve or omitting on direct appeal a claim that would have had a substantial possibility of resulting in a reversal of petitioner's conviction.").

Finally, we pause to distinguish from the present case our recent decision in *Collins v. State*, ____ Md. App. ____, No. 1992, Sept. Term, 2017, (Ct. of Spec. App. Aug. 30, 2018). In *Collins*, the trial court asked *voir dire* questions about: whether the juror had "preconceived feelings" due to the juror's past experiences; whether any juror or member of the juror's immediate family had "ever been accused of a crime, been a victim of a crime, or a witness to a crime"; whether the juror "would allow sympathy, pity, anger or any other emotion" to influence the juror's verdict; and whether there was "any other reason" why the juror could not be fair and impartial. *Collins*, slip op at 8-9. Additionally, the trial court asked the "strong feelings" question, albeit in an improper compound form. *Id*. at 4-5. The *Collins* Court held that, "under the circumstances of this case, the sheer accumulation of the inquiries in their totality would have brought out anything significant that a direct question about 'strong feelings' could have brought out." *Id*. at 9-10. Here, the trial court asked the jurors (1) if they were familiar with the parties, attorneys, or witnesses; (2) whether they would give more or less weight to the testimony of a police officer; (3) if there were any religious reasons that would preclude serving on a jury; (4) if they were unable to apply the law as explained by the court; (5) if they, or an immediate

family member, were a victim or a perpetrator of a crime; (6) whether they or any member of their immediate family was a law enforcement officer; (7) whether they had any hardship that would preclude jury service; (8) if they had served on a jury before, and (9) the "catchall" questions. Unlike *Collins*, these questions, in our view, are inadequate to bring out any "strong feelings" potential jurors may have harbored concerning the emotionally-charged crimes related to shooting into a crowd of bar patrons for no apparent reason, including the charge of first-degree murder.

CONCLUSION

Because appellant has demonstrated both deficient performance by counsel and resulting prejudice, we conclude that the *Strickland* test for ineffective assistance of counsel has been satisfied without the necessity of a collateral proceeding. Accordingly, we are compelled to vacate appellant's convictions.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED FOR NEW TRIAL IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.