Judge Vitale Pupilage Group

INNS OF COURT – VOIR DIRE

Voir Dire Issues Explored in Maryland Reported Cases in the Past Five Years:

What is a "compound question" and why are they not allowed?

Robson v. State

How do you properly preserve an objection to a voir dire question?

Brigido Lopez-Villa v. State and Foster v. State

When is a "strong feelings" questions mandatory?

Colkley v. State and Collins v. State

What is a *Kazadi* voir dire question and what is the policy debate behind this? (This may spark up interesting discussion)

Kazadi v. State

May 2023 Opinion - Todd Arthur Robson v. State of Maryland, No. 764, September Term 2022, Opinion by Judge Moylan

- **Voir Dire Question** – "Do any of you have such a close association with a law enforcement officer or organization that it would in any way impair your ability to be fair and impartial?"
- **Permissible?** – No.
- **Why?** – Compound Question. "In this case, the protasis inquired about a subject that could have established a valid challenge for cause. Prospective jurors, by their failure to respond, answered that question in the negative. The parties and the trial judge never knew, with respect to any prospective juror, whether the protasis was true or not. In any case that might have led to a challenge for cause, therefore, the trial judge never got to make a ruling. The only decision about a challenge for cause, if such a decision was ever made, was made by the prospective juror himself and not by the trial judge. Properly preserved, this would have been reversible error."

April 2022 Opinion - Brigido Lopez-Villa v. State, No. 22, September Term, 2021. Opinion by Judge Hotten

- **Issue** – Are voir dire objections properly preserved by submitting proposed questions and the Judge simply choosing not to use them without further objection by counsel?
- **Facts --** Petitioner was convicted of one count of sexual abuse of a minor and four counts of third-degree sexual offense, following a four-day jury trial in the Circuit Court for Anne Arundel County. Prior to trial, both Petitioner and the State submitted proposed voir dire questions to the trial court, two of which arguably implicated *Kazadi*. At a bench conference prior to voir dire, the trial court told defense counsel that it was not inclined to ask one of the questions, and that it would ask a modification of the other question. In both instances, defense counsel made no objection to the court's decision, but instead inquired about other proposed questions. After voir dire, the court asked both sides if it missed any questions, and in particular asked defense counsel "anything? --- what you previously objected to, which I will preserve for the record[,]" to which defense counsel replied "[n]o."
- **Ruling --** This Court held that pursuant to the preservation requirement under Md. Rule 4-323(c), Petitioner failed to preserve an objection to the trial court's decision to not ask the proposed voir dire questions at issue because defense counsel did not object or indicate disagreement when the court made its decision. This Court reasoned that simply because the trial court was aware of Petitioner's proposed questions and made rulings contrary to them does not mean that Petitioner made the court aware that he objected or disagreed with the court's ruling.

Colkley v. State, 251 Md.App. 243, 253 A.3d 1107 (Md. App. 2021) Opinion by Judge Reed

- **Voir Dire Question Requested by Defense Counsel** – "Do you have strong feelings about illegal drugs?"
- **Was it within the Judge's discretion to not ask that question?** – Court of Special Appeals held that trial judge properly used its discretion in not asking it.
- **Reasoning** -- Because Appellant's proposed voir dire question was not related to jurors' strong feelings ***about the crime with which Appellant was charged***, we hold that the trial court did not err in declining to propound Appellant's proposed voir dire question.

- Pursuant to *Pearson v. State* (2014 case), on request, a trial court must ask a voir dire question if and only if the voir dire question is reasonably likely to reveal specific cause for disqualification. 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. The latter category is comprised of biases directly related to the crime, the witnesses, or the defendant.
- Appellant insists that the present case was inextricably linked to drugs because 'State's evidence painted Appellant as a player who was involved in a war between two rival drug-distribution organizations, with the rivalry providing the motive for the murder'. Additionally, Appellant notes that Horsey testified that Appellant 'bought drugs from him shortly before the shooting on Port Street and continued to buy drugs from him until he was arrested.' This case certainly included references to drugs. ***However, those references did not specifically relate to any of the crimes with which Appellant was charged.***

Foster v. State, 247 Md.App. 642, 239 A.3d 741 (Md. App. 2020), Judge Arthur

- **Question** – Is a proper objection to a voir dire question preserved if it is made initially, but there is then no objection to the empanelment of the jury?
- **Answer** – Yes, it is still preserved.
- **Facts** – The question proposed by the Defendant in a traffic case was "Every person accused of a crime has an absolute constitutional right to remain silent and not testify. If a defendant chooses not to testify the jury may not consider his/her silence in any way in determining whether he/she is guilty or not guilty. Knowing this, do you believe that a defendant who chose not to testify had something to hide? Would you need to hear a defendant testify before returning a verdict of not guilty?" After the Judge declined to use that question, defense counsel objected. "Upon the conclusion of jury selection, the circuit court asked whether the empaneled jury was acceptable. Both parties indicated their unqualified acceptance of the jury.
- **Court's Explanation** – The court noted that while the question was clearly a *Kazadi* question that must be asked when requested, the appellate court had to determine whether the objection was properly preserved? The court looked at past case law and decided that an objection that is only 'incidental' to the inclusion or exclusion of a prospective juror or the venire 'is not waived by accepting a jury panel at the conclusion of the jury-selection process; rather, such an objection is preserved for review on direct appeal. The court reasoned that because the trial judge refused to ask the question, rather than ask a question that was improper, it was incidental to the empaneling of the jury.

Kazadi v. State, 467 Md. 1, 223 A.3d 554 (Md. App. 2020) (Judge Watts)

- **Holding** -- The Court overruled the holding in *Twining*, and concluded that, on request, during voir dire, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the 16 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.
- **Why?** -- The Court pointed out that, in the decades since the Court decided Twining, it had become apparent that not all jurors are willing and able to follow jury instructions on the

presumption of innocence and the burden of proof. The Court also found that giving jury instructions on the presumption of innocence and the burden of proof is, by definition, not an effective remedy for a prospective juror who is unwilling or unable to follow such jury instructions.

- **Important Note** -- The Court pointed out that it continued to stand by the well-established principle that Maryland employs limited voir dire—that is, in Maryland, voir dire's sole purpose is to elicit specific cause for disqualification, not to aid counsel in the intelligent use of peremptory strikes.

Collins v. State, 463 Md. 372, 205 A.3d 1012 (Md. App. 2019) (Judge Watts)

- **Questions asked by the trial judge that were analyzed:**
  - "Does anyone on this panel have any strong feelings about the offense of burglary to the point where you could not render a fair and impartial verdict based on the evidence?"
  - "Does any member of this panel have strong feelings about the offense of theft to the extent that it would make you unable to be fair and impartial and base your decision only on the evidence in this case[?]..."
- **Questions not asked by the trial judge after counsel requested:**
  - "Does any member of this jury panel have strong feelings about the offense of burglary?"
  - "D]oes any member of this panel have strong feelings about the offense of theft?"
- **What happened after the jury was empaneled:**
  - The jury was seated and sworn, and heard preliminary jury instructions and opening statements. After a recess, the prosecutor advised the circuit court that the compound "strong feelings" questions were improper, and proposed that the circuit court ask the jury properly-phrased "strong feelings" questions. Over Collins's counsel's objection, the circuit court did so. None of the jurors responded.
- **Court's Analysis:** In this case, we reaffirm our holding in Pearson, 437 Md. at 354, 86 A.3d at 1234, that, on request, a trial court is required to ask a properly-phrased—i.e., non-compound—"strong feelings" question. In other words, under Pearson, during voir dire, on request, a trial court must ask: "Do any of you have strong feelings about [the crime with which the defendant is charged]?" We reiterate that, during voir dire, on request, a trial court must ask the "strong feelings" question in the form set forth above, and it is improper for a trial court to ask the "strong feelings" question in compound form, such as: "Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts?" We hold that, in this case, the circuit court abused its discretion by asking compound "strong feelings" questions and refusing to ask properly-phrased "strong feelings" questions during voir dire. We decline the State's invitation to determine that the other questions that the circuit court asked during voir dire could substitute for properly-phrased "strong feelings" questions, and we hold that the circuit court did not cure its abuse of discretion by later asking the selected jury properly-phrased "strong feelings" questions, after the conclusion of voir dire and opening statements.