

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1925

September Term, 2016

JAMES GILBERT

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: August 7, 2017

*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 in the Circuit Court for Baltimore City convicted James Gilbert, appellant, of wearing or carrying a firearm and of possession of a firearm by a prohibited person. Appellant was sentenced to ten years for the carrying conviction, the first year without the possibility of parole, and a concurrent eight years for the possession conviction, the first five without the possibility of parole.

He presents a single question for our review, which we revise for accuracy as follows:

Did the trial court err in failing to ask prospective jurors on *voir dire* the “any other reason” or “catch-all” question as requested by both the prosecution and the defense?

We conclude that the court did not abuse its discretion in declining to ask that *voir dire* question and therefore affirm the convictions.

FACTS AND LEGAL PROCEEDINGS

For purposes of this appeal, which focuses solely on *voir dire*, it is sufficient to briefly summarize the factual basis for appellant’s convictions. On February 3, 2015, appellant was arrested after a tip from a confidential informant prompted a foot chase during which appellant threw an object, which police later found and identified as an operable 9 millimeter handgun. When asked why he had a gun, appellant told a police officer that “a lot of people were being killed. He needed it for protection.” Although police never discussed with appellant what they found, during a recorded telephone call from jail the following day, appellant correctly identified the recovered object as a 9 mm handgun.

Before trial, the court asked members of the jury panel seventeen voir dire questions concerning standard matters, including their knowledge of the case, the parties, witnesses, and attorneys; their qualifications for service, including age, citizenship, residency, language, disqualifying convictions, and hardship; and their potential biases based on beliefs, attitudes toward police, and “the charges of wear, carry, transporting a handgun on the person and possession of a firearm by a prohibited person.” The court then asked counsel whether there was any objection to its voir dire.

The prosecutor pointed out that the court had not asked the “any other reason” question, referring to a question included in pattern voir dire examinations, asking prospective jurors whether there is any reason not covered by previous questions that they could not be fair and impartial in the case. The court responded that it “usually” excluded that question “[b]ecause that’s just a fishing expedition, in my opinion And I don’t ask it.” Defense counsel then joined with the prosecutor in objecting to that ruling, stating:

I would ask, and I know that the State already did, I would ask for the catch-all question. I understand the Court’s not going to give it, but I just want to make a record and I would note my exception.

DISCUSSION

Appellant contends that “the trial court erred in failing to ask prospective jurors on voir dire the ‘any other reason’ or ‘catch-all’ question as requested by the defense and the prosecution.” Asserting that “this ‘catch-all’ question is designed to reveal *specific* biases and prejudices not otherwise identified by its very lack of particularity,” appellant disputes the trial court’s determination that the question would merely be “a ‘fishing expedition’

designed to disclose information to be used only to exercise peremptory strikes.” In appellant’s view, asking this question appropriately places the burden “on the prospective juror to engage in a self-evaluation and divulge their own prejudice or bias not otherwise listed.” Appellant argues that,

[i]n light of the purpose of voir dire, along with the fact that such a self-identifying question serves the purpose of voir dire without being unduly time consuming, it is imperative in a case such as this one where the [question] was asked for by both parties. The trial court was wrong in not giving such a voir dire question and its failure requires reversal without more.

The State counters that appellant “does not and cannot point to any particular bias that the question would have uncovered if asked, and therefore its inclusion in voir dire was purely discretionary.” The trial court properly exercised its discretion, the State argues, because the catch-all question is a compound inquiry that does not seek to uncover case-specific bias and “improperly shifts the task of assessing bias to the venire members.”

The Court of Appeals has summarized the standards governing voir dire as follows:

An appellate court reviews for abuse of discretion a trial court’s decision as to whether to ask a *voir dire* question.

A defendant has a right to “an impartial jury[.]” U.S. Const. amend. VI; Md. Decl. of Rts. Art. 21. *Voir dire* (i.e., the questioning of prospective jurors) “is critical to” implementing the right to an impartial jury.

Maryland employs “limited voir dire.” That is, in Maryland, the sole purpose of *voir dire* “is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]” Unlike in many other jurisdictions, facilitating “the intelligent exercise of peremptory challenges” is not a purpose of *voir dire* in Maryland. Thus, a trial court need not ask a *voir dire* question that is “not directed at a specific [cause] for disqualification [or is] merely ‘fishing’ for information to assist in the exercise of peremptory challenges[.]”

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[.]”

Pearson v. State, 437 Md. 350, 356–57 (2014) (citations omitted).

When reviewing a *voir dire* challenge, appellate courts afford trial courts

significant latitude in the process of conducting *voir dire* and the scope and form of questions presented to the venire. “[N]o formula or precise technical test exists for determining whether a prospective juror is impartial.” And we have said repeatedly that the trial judge is vested with broad discretion in the conduct of *voir dire*, subject to reversal for an abuse of discretion. Yet, “[u]ndergirding the *voir dire* procedure and, hence, informing the trial court’s exercise of discretion regarding the conduct of the *voir dire*, is a single, primary, and overriding principle or purpose: to ascertain the existence of cause for disqualification.” “[W]e do not require perfection in its exercise.” 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.”

We have made equally clear that *voir dire* should not be “cursory, rushed, and unduly limited,” but instead should be “a comprehensive, systematic inquiry that is reasonably calculated, in both form and substance, to elicit all relevant information from prospective jurors.” The broad discretion that we accord judges in the conduct of *voir dire* “and the rigidity of the limited *voir dire* process are tempered by the importance and preeminence of the right to a fair and impartial jury and the need to ensure that one is empaneled.” We therefore would not fulfill our duty as a reviewing court if we were to grant “rote deference to the trial court’s decision based on the numerous cases in which we have held that a *voir dire* was properly within a trial court’s discretion.” In the end, “[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.”

Collins v. State, 452 Md. 614, 622-24 (2017) (citations omitted).

As a general rule, therefore, “[i]n the absence of a statute or rule prescribing the questions to be asked of the venirepersons during the examination, ‘the subject is left largely to the sound discretion of the court in each particular case.’” *Moore v. State*, 412 Md. 635, 644 (2010) (citation omitted). But such discretion dissipates when the “question is directed to a specific cause for disqualification”; when requested, those “question[s] must be asked and failure to do so is an abuse of discretion.” *Moore v. State*, 412 Md. 635, 654 (2010) (internal quotation marks and citation omitted). For example, this Court has held that a trial court is required to voir dire potential jurors regarding disqualifying convictions. *See Benton v. State*, 224 Md. App. 612, 623-24 (2015).

As appellant points out, the catch-all question proposed by both the prosecutor and defense counsel “is not new in Maryland criminal law.” The Maryland State Bar Association’s Committee on Voir Dire has published *Model Jury Selection Questions for Criminal Trials* that currently include the following question:

Is there anything not yet mentioned that could affect your ability to make a fair and impartial judgment in this case? In other words, is there anything you haven’t yet told us that could affect your ability to base your judgment solely on the evidence presented in the courtroom, or to follow the law as the court will instruct you?

[http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Committees/Voir_Dire/Criminal%20Voir%20Dire%20Model%20Questions%20\(2\).pdf](http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Committees/Voir_Dire/Criminal%20Voir%20Dire%20Model%20Questions%20(2).pdf). Versions of this question have been acknowledged by both the Court of Appeals and this Court. *See Stewart v. State*, 399 Md. 146, 157 (2007); *Dingle v. State*, 361 Md. 1, 16 n.9 (2000); *State v. Logan*, 394

Md. 378, 398 (2006); *Sanders v. State*, 194 Md. App. 162, 171 (2010), *vacated on other grounds*, 418 Md. 368 (2011).

Although there is no Maryland precedent barring such a generalized catch-all question, neither has any appellate court held that such a question must be given whenever it is requested. Appellant argues that a catch-all question is valuable, and necessary when requested, because it “shifts the burden of reporting onto the individual juror,” and thereby “is clearly designed to uncover biases and prejudices which would disqualify a juror from service.” Yet the catch-all question, by its very nature, is not targeted to a case-specific type of bias. For that reason, we agree with the State that the decision to use or forego a catch-all voir dire question lies within the discretion of the trial court. “[A] court abuses its discretion ‘where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding principles.’” *Thompson v. State*, 229 Md. App. 385, 404 (2016) (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007)).

In the circumstances presented here, where neither the prosecutor nor defense counsel articulated concern about a pertinent bias not covered by the prior voir dire questions, the court harbored a reasonable concern that asking a catch-all question would have been more of a “fishing expedition” designed to facilitate peremptory strikes, than an inquiry likely to disclose specific disqualifying biases. Indeed, by its very nature, the catch-all question is particularly susceptible to such misuse. We cannot say that it was unreasonable to foreclose that possibility.

Nor did the trial court act without reference to any guiding principles. In addition to preventing the catch-all question from being used as a tool for the exercise of peremptory strikes, the court’s ruling is consistent with precedent disapproving voir dire questions that call for self-assessments by members of the venire.

The Court of Appeals has expressly disapproved voir dire questions that invite prospective jurors to decide for themselves whether they harbor biases that, in their belief, prevent them from rendering a fair and impartial verdict in the case, because such questions improperly shift the burden of determining grounds for disqualification, from the court to venire members. For example, in *Bowie v. State*, 324 Md. 1, 23 (1991), the trial court improperly asked an “extremely broad” question “designed to elicit from prospective jurors their bottom line conclusions as to their ability to serve” in a death-penalty case, because that voir dire “shift[ed] to the prospective jurors, themselves, the responsibility to make the ultimate decision as to their ability to serve on a capital sentencing jury, thus, allowing the court to avoid the exercise of discretion.” In *Dingle v. State*, 361 Md. 1, 21 (2000), the trial court erred by instructing prospective jurors to respond “only if his or her answer [was] in the affirmative to both parts of a question directed at discovering the venire persons’ experiences and associations and their effect on that venire person’s qualification to serve as a juror,” because such a procedure “allows, if not requires, the individual venire person to decide his or her ability to be fair and impartial[,]” thereby improperly “shift[ing] from the trial judge to the venire responsibility to decide juror bias.” Similarly, in *Pearson v. State*, 437 Md. 350, 362-64 (2014), asking prospective jurors whether they had such strong

feelings about a particular crime that they would have difficulty being fair and impartial improperly required prospective jurors to assess their own impartiality. Because the proposed catch-all question would allow prospective jurors to assess their own biases, and to self-report if they decided they could not be fair and impartial, the trial court's refusal to ask the question comported with these guiding principles.

In these circumstances, the court did not abuse its discretion in denying the joint request for a catch-all voir dire question.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.