Circuit Court for Baltimore County
Case No. 03-K-18-003260

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 20

September Term, 2021

BRANDON ALEXANDER BROWN

v.

STATE OF MARYLAND

Arthur,
Leahy,
Reed,
JJ.

Opinion by Reed, J.

Filed: June 8, 2022

Following a jury trial in the Circuit Court for Baltimore County, appellant, Brandon Alexander Brown, was convicted of first-degree assault, use of a firearm in a crime of violence, and related handgun possession charges. The court sentenced him to an aggregate term of sixty years' imprisonment. Appellant filed a timely appeal and presents the following question for our review, which we have rephrased slightly:[1]

I. Did the trial court err in denying appellant's motion for a new trial?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 4:30 a.m. on July 7, 2018, Anthony Williams was shot outside the home of his friend, Ariel Henry. Williams had driven Henry home after she had been out at a club with her friends. As Henry exited Williams' car and approached her house, someone called out to her from a white Crown Victoria with the window down and asked her to "come here, let me talk to you for a minute." Though Henry recognized appellant as the person who had called out to her, she and Williams entered her house without responding to him.

Williams left Henry's house a short time later and returned to his car, where he was approached by a white Crown Victoria. The driver told Williams that he wanted to speak to him and displayed a handgun. As Williams began to drive away, he heard a gunshot and the sound of his rear window breaking before he was shot in the shoulder.

[1] Appellant presents the following question:

1. Did the lower court err in denying Mr. Brown's Motion for a New Trial?

At the time of the shooting, Henry had been in a relationship with appellant for approximately one month. Appellant's cell phone records showed that he had called Henry's phone numerous times and sent her numerous text messages on the evening before the shooting, but she had not responded to his messages. Approximately thirty minutes after the shooting, police located appellant outside his home, cleaning the driver's window of his white Crown Victoria vehicle with rags and a spray bottle. Tara Helsel, an expert in gunshot residue examination and trace analysis, testified that laboratory analysis had revealed the presence of gunshot residue on the steering wheel of appellant's vehicle. During a search of appellant's residence, a nine-millimeter handgun was found under a couch cushion. Appellant was arrested and charged with the shooting of Williams.

During *voir dire*, the court asked: "Is any prospective juror related to or personally acquainted with the defendant Mr. Brandon Brown?" None of the prospective jurors responded. The court inquired further: "I'm going to ask Mr. Brown to stand and face the jury, and ask if any member of the jury panel knows Mr. Brown, is related to him, has any knowledge of him whatsoever, any relationship whatsoever, if so, please stand, give me your juror number." The record reflected that none of the prospective jurors responded to the court's questions regarding appellant.

After trial, appellant sent a handwritten note to the trial judge regarding one of the jurors, stating:

> During the reading of my verdict I noticed when the "only" black female juror (w[ith] the Johns Hopkins shirt) adjusted her mask (and exposed her face) I recognized her. The juror[']s] name is [redacted]. She use[d] to date my older brother, they had a very [b]ad break up. I tried to inform my "[f]ill-in counsel" but she blew me off. I know for sure this juror [b]efore and during

> my trial she knew exactly who I was and said nothing, this juror watched me grow up and in 2017/18 I played keyboard and drums [at] her church. This juror being on my jury compromised my trial. It was asked of "all" jurors did any of them know me. I'm requesting a new trial based on this issue. I even informed Deputy Saunders, he told me to inform my attorney Mr. MacVaugh A.S.A.P.

On November 16, 2020, defense counsel filed a formal request for a new trial, which stated:

> At pronouncement of verdict and polling of the jury, the juror seated in the second row, seat 5, momentarily removed her mask, and was recognized by the defendant as a former family member by relationship, named [redacted], whom (sic) might bear animosity towards the defendant due to the end of the relationship, and whom (sic) neglected to mention knowing the accused during voir dire. Due to the Covid precautions, the defendant had no earlier opportunity to observe the juror's face.

On December 17, 2020, the State filed an answer along with a supporting exhibit, identified as a letter written by the subject juror. The letter indicated that the juror had been contacted by appellant's brother, "D.P.", after trial, stating, in pertinent part:

> We had a conversation and he mentioned to me, I wanted to inform you that my brother [appellant] is trying to have some of his associates do something to you. And I didn't understand why and I expressed that to [D.P.] I don't even know your brother I didn't even know that was your brother as the defendant.
>
> If I known him personally and known he was a family [member] of yours and I had relations dealing with him as your family I would have immediately inform[ed] the judge. I also mentioned to [D.P.] it's not like your brother and I used to hang out or I was around him or we hung around each other I don't know him.
>
> When we first ever dated or went out you mentioned about your adopted family and it was a hello and I went on. I never paid any attention to your adopted brother [appellant] and this was almost 20 years ago!

The court ordered that appellant's motion for a new trial be heard on February 5, 2021, the date of appellant's disposition hearing.

At the hearing on appellant's motion for a new trial, it was the defense's position that "[the juror] had concealed the fact that she had contact with appellant because she wanted to be on the jury." The defense argued that, had the juror alerted the defense that "she had at least tangential contact with [appellant]," the defense would have replaced her with another prospective juror. The defense asserted that the juror's failure to disclose that she knew appellant "tainted the jury pool and [appellant] didn't get a fair trial."

The court denied appellant's motion, stating:

> But I will say overwhelmingly I agree with just about everything that the State has put forward in its response and argument. This was a fair and impartial jury.
>
> And I will just add that, you know, this is on [appellant]. You know, this isn't on the juror. Her letter clearly states, you know, she didn't know him. She does not remember him. She had a relationship with his foster brother some 20 years ago.
>
> But I will point out, as my recollection is pretty clear on this because of the unusual nature of our jury selection in this particular case, that at your request and [appellant's] request, we gave him his own copy of the jury list for him to review. He saw her name on there.
>
> * * *
>
> So he had the opportunity to see her name if he knew her or recognized her. The other thing is I had her brought up directly in front of us to be presented to him. That's on him, not on you, not on the State or anybody else.
>
> To come in after the fact and say that there was some misconduct on behalf of this juror, that she had some vendetta against him or that – because of some bad breakup or something like that, it's just totally contrary to her letter and contrary to the way this trial was conducted. He had ample opportunity if he truly knew her.
>
> And that's the other thing, is, you know, I – maybe it's colloquial, but, you know, the mere fact that someone knows of someone doesn't mean that they

> know them, does not mean that they have a personal relationship with them. That does not disqualify someone from jury service.
>
> I think this is, you know, a red herring, and it's not based in any way on any meritorious claim that he's entitled to a new trial or that this juror committed some level of misconduct. I think she's been quite open about how this was brought to her. It was only after the verdict had been rendered and she was contacted by someone close to [appellant] that this was even brought to her attention.
>
> So, the Motion for New Trial is denied.

Appellant filed a timely notice of appeal.

DISCUSSION

Appellant argues that it was error for the court to deny his motion for a new trial based on information contained in the juror's written statement. Appellant further contends that the court erred in failing to question the juror in person to determine whether the juror was biased against appellant.

The State responds that appellant waived these arguments by failing to raise them at the hearing on his motion for a new trial. Specifically, the State argues that appellant failed to object to the juror's letter and failed to argue that the court was required to *voir dire* that juror before deciding his motion for new trial. The State asserts that because appellant's arguments were not presented to the court below, they are unpreserved for our review.

A defendant has a fundamental right to be tried by an impartial jury. *Jenkins v. State*, 375 Md. 284, 299 (2003). This fundamental right is rooted in the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, which provide for the right to trial "by an impartial jury." *Id.* An impartial juror is one "without

bias or prejudice for or against the accused." *Williams v. State*, 394 Md. 98, 106 (2006) (internal quotation marks and citation omitted).

Prospective jurors are questioned using the *voir dire* process to root out potential bias or prejudice. *Id.* at 107 (citing *Jenkins*, 375 Md. at 331) ("[O]ne of the ways to protect a defendant's constitutional right to an impartial jury is to expose the existence of factors which could cause a juror to be biased or prejudiced through the process of *voir dire* examination."); *Dingle v. State*, 361 Md. 1, 9 (2000) ("Voir dire, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and impartial jury, guaranteed by Art. 21 of the Maryland Declaration of Rights . . . is given substance.") (internal citations omitted). The guarantee of impartiality requires that a defendant be entitled to rely on the expectation that prospective jurors answer the questions applicable to them truthfully. *Williams*, 394 Md. at 112. When, either as the result of inattention or inadvertence, *voir dire* fails to reveal a basis for potential juror bias that is discovered later in the trial or after a verdict has been rendered, the defendant may be entitled to a new trial. *See id.* at 113-15.

Generally, the decision whether to grant or deny a motion for new trial is within the sound discretion of the trial court. *Washington v. State*, 424 Md. 632, 667 (2012). The trial court's discretion includes "matters concerning juror misconduct or other irregularities that may affect the jury" and the exercise of that discretion will not be disturbed absent "the most extraordinary and compelling reasons." *Owens-Corning Fiberglas Corp. v. Mayor & City Council of Baltimore City*, 108 Md. App. 1, 29 (1996) (citations omitted). This discretion "'is not fixed and immutable; rather, it will expand or contract depending upon

the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.'" *Washington*, 424 Md. at 668 (citing *Merritt v. State*, 367 Md. 17, 30 (2001) (quoting *Buck v. Cam's Broadloom Rugs, Inc*., 328 Md. 51, 58-59 (1992)).

Appellant argues that *Williams* is dispositive in this case. In *Williams*, the defendants moved for a new trial after the State informed the defense that a juror had failed to disclose in *voir dire* that she was related to an employee of the State's Attorney's Office. *Williams*, 394 Md. at 103. The State represented that it did not know whether the juror's non-disclosure was intentional or inadvertent, and the juror was not called to testify at the hearing on the motion. *Id*. at 104-05. The circuit court denied the motion, concluding that the possibility that the juror's relationship with the State resulted in bias was "pretty remote". *Id*. at 105.

While Williams' appeal was pending in this Court, the Court of Appeals issued a writ of certiorari on its own initiative. *Id*. In reversing the judgment of the circuit court, the Court of Appeals explained that when an issue of potential juror bias is discovered, the court must *voir dire* the juror to determine whether the nondisclosure was intentional or inadvertent. *Id*. at 113. If, following the *voir dire*, the court makes a factual determination that the non-disclosure was inadvertent and any potential bias did not affect the outcome of the case, the court may, in its discretion, decide whether the defendant is entitled to a new trial. *Id*. at 113 (citing *Burkett v. State*, 21 Md. App. 438, 445-46 (1978) (affirming trial court's denial of defendant's motion for a new trial following an evidentiary hearing

where the court inquired as to the juror's reason for the non-disclosure before exercising its discretion to decide the motion) and *Leach v. State*, 47 Md. App. 611, 618-19 (1981) (affirming trial court's denial of defendant's motion for a new trial and motion to strike juror where juror was questioned regarding the non-disclosure of a childhood relationship to a detective, non-disclosure was inadvertent, and the court found that the juror's impartiality was not affected by the relationship)). Where, however, the juror is not available for questioning and is not voir dired, there is no basis for the circuit court to conclude whether the non-disclosure was intentional or inadvertent and no basis for the court to exercise its discretion in determining whether the juror was unbiased or impartial. *Id*. In such a case, the defendant is entitled to a new trial. *Id*. at 114.

This Court will "[o]rdinarily . . . not decide an[ ] . . . issue unless it plainly appears . . . to have been raised in or decided by the trial court[.]". MD. RULE §8-131(a); *DeLeon v. State*, 407 Md. 16, 30 (2008) (arguments "not raised by [appellant], or ruled upon by the court, [ ] are waived for purposes of appeal."). The primary purpose of MD. RULE §8-131(a) is to ensure fairness by requiring that all parties bring their positions to the attention of the trial court so that court has an opportunity to rule upon the issues presented. *Wajer v. Baltimore Gas and Elec. Co.*, 157 Md. App. 228, 236-37 (2004); *Robinson v. State*, 410 Md. 91, 103 (2009) ("The purpose of Md. Rule 8-131(a) is to ensure fairness for all parties in a case and to promote the orderly administration of law" (citation and internal quotation marks omitted)); *DeLeon*, 407 Md. 21 (the preservation rule exists "(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to

prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation." (citation and internal quotation marks omitted).

Here, appellant did not express concern to the trial court regarding the subject juror until a few days after trial, when he informed the court that he had recognized a juror as someone who "might" bear animosity toward him and who "neglected" to mention knowing him during *voir dire*. At the hearing on his motion, appellant did not object to the unsworn letter submitted by the State or request that the letter be stricken. Appellant did not request that the juror be subpoenaed to testify in person, nor did he request that the court conduct an evidentiary hearing to *voir dire* the juror. At no point did appellant assert before the trial court that, pursuant to *Williams*, an evidentiary hearing was required. Because appellant failed to argue to the circuit court that it was required, on its own initiative, to *voir dire* the juror, that argument is not preserved for review on appeal. *See Ley v. Forman*, 144 Md. App. 658, 683 (2002) (concluding that appellee failed to preserve argument that hearing was required on post-trial motion, where appellee failed to raise that argument before the court).

We find no support for appellant's contention that the burden was exclusively upon the State to produce the juror as a witness to rebut the presumption that he was entitled to a new trial once he had "proffered the *bona fide* existence of potential bias". Here, the burden was on appellant, as the moving party, to request an evidentiary hearing to *voir dire* the juror. Where no party had requested *voir dire* of the juror, the circuit court was not obligated to order, *sua sponte*, that the juror be voir dired. "Courts very seldom err for not doing something that no one asks them to do." *Silver v. Greater Baltimore Med. Ctr., Inc*.,

248 Md. App. 666, 711 (2020); *see also Jones v. State*, 410 Md. 681, 700 (2009) (holding that the defendant was not entitled to a new trial on the ground that the trial court did not *sua sponte* recall child witness for additional cross-examination). We discern no error in the court's failure to conduct *voir dire* of the subject juror where appellant did not seek to compel the juror's testimony or request an evidentiary hearing.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.