Circuit Court for Baltimore City
Case No. 119053002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 300

September Term, 2020

AMIT KUMAR

v.

STATE OF MARYLAND

Berger,
Gould,
Wilner, Alan M. (Senior Judge),
Specially Assigned,

JJ.

Opinion by Wilner, J.

Filed: April 13, 2021_____

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*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.

Appellant was convicted by a jury in the Circuit Court for Baltimore City of first-degree murder and wearing or carrying a knife openly with intent to injure, for which he was sentenced to imprisonment for life plus three years. He complains in this appeal that:

(1) The trial court abused its discretion by refusing to ask two requested questions on *voir dire* regarding the presumption of innocence, the State's burden of proof, and his right to remain silent;

(2) The trial court erred in refusing to instruct the jury on self-defense;

(3) The trial court abused its discretion in refusing to postpone the sentencing hearing; and

(4) The evidence was legally insufficient to sustain the conviction for openly wearing or carrying a knife with intent to injure, and, even if the evidence was sufficient, that conviction should merge with the murder conviction.

THE FACTS

The victim in the case was appellant's wife, Ankita Verma, who was stabbed to death in the apartment that the couple shared. The apartment was upstairs from a bar where Ankita worked. The bar was co-owned by two men – Ranjit Chahal and Dilbag Singh. What precipitated the dispute that led to Ankita's death were the facts that (1) she had engaged in an affair with Singh, (2) appellant found out about the affair, apparently after it had ended, had told Chahal about it, and wanted to reveal it to Ankita's family, and (3) Ankita became upset that appellant had disclosed the affair to Chahal because she feared that Chahal would tell other people. She did not want that affair to become public knowledge or revealed to her family.

Because appellant and Ankita were alone in the apartment when the episode leading to her death occurred, the only evidence as to what happened, other than forensic evidence as to Ankita's wounds, her blood alcohol content, and blood stains on the bedroom door, came from appellant, first in a recorded interview with detectives and later at trial. Ankita's body was found on January 11, 2019 by Singh, who, as a landlord, had a key to the apartment and investigated when Ankita failed to report for work and he was unable to reach her by telephone. He found her dead, lying on the bedroom floor, and called the police.

In her report, the Medical Examiner identified seven stab wounds and 48 cutting wounds on Ankita's body – on her face, neck, chest, abdomen, back, arms, and hands. The Medical Examiner stated that all the wounds together culminated in Ankita's death but identified three in particular that would have resulted in her death within a few minutes to an hour if untreated – a stab wound to her left back and two connected stab wounds to her right elbow and forearm. The Medical Examiner determined that the death was a homicide. Ankita's blood alcohol content at the time of death was 0.07. Appellant was formally charged the next day, on January 12.

Appellant had left the State but, on the advice of his brother, he surrendered to the police in Syracuse, New York. Detectives from Maryland went to Syracuse and interviewed appellant there. The interview was recorded and played for the jury. Appellant said that he and Ankita were from India and that, after moving first to the United Kingdom and then to Canada, they came to Baltimore. He discovered Ankita's

affair with Singh in August 2018 and had discussed it with both Singh and Chahal. Ankita learned about the disclosure to Chahal on January 10 and was very angry.

Appellant said that when he and Ankita had argued in the past Ankita had taken to cutting herself, so that night he hid their knives in or on their washing machine. She found one of the knives, however, which he described as a large kitchen knife, and told appellant that, if he told anyone about the affair, she would hurt him or herself. Appellant said that Ankita had been drinking and was intoxicated, that she locked herself in the bedroom and cut herself on her hand with the knife. He said that he called his brother, who advised him to break through the door, which he did.

Upon entering the bedroom, appellant said that he saw Ankita cutting herself and that she then turned the knife on him, waving it "like that, like crazy." He said that, in self-defense, he "took the knife" but did not stab her with it. According to him, both of them were holding the knife. When he left the apartment, Ankita was lying down in the bedroom, unconscious from her injuries. Before leaving, he washed his hands and the knife. He had suffered no wounds other than being scratched by Ankita. He did not call 9-1-1 because his telephone was not working and he did not know the password to Ankita's phone. He took a taxi to Washington and then a bus, first to New York, then to Vermont, and eventually to Syracuse.

Appellant's trial testimony, in some important respects, was inconsistent with what he had told the detectives. In the interview, he said that, although Ankita was intoxicated, he was not – that he drank only one beer. In court, he said that he had

consumed a half-pint of Hennessy, had smoked some marijuana, and that he did not remember what happened after the fight over the knife "because he was drunk and high when this occurred." He added that, although he had been prescribed psychotropic medications, he was not taking them but was self-medicating with alcohol and marijuana.

In the interview, he said that he hid the knife in or on the washing machine. In court he said that he had used the knife to cut some carpet and could not remember whether he left the knife out or tried to hide it. After breaking into the bedroom, he saw that Ankita was bleeding from her hand. He said that he initially backed off but then tried to get the knife out of her hand and "tried to hold her, but she was "moving fast" and he tried to get the knife away from her. The next thing he remembered was being scared and getting into a taxi. He said that it was when he got to Vermont that he learned that Ankita was dead and that the police were looking for him. He then went to Syracuse, where his brother was living, and turned himself in to the police.

DISCUSSION

***Voir Dire* Examination – *Kazadi* Questions**

Trial in this case occurred in November 2019. The verdicts were returned on November 8. Sentencing was delayed, however, until February 21, 2020. It was then that the trial was complete, and an appealable judgment of conviction was entered. This appeal was filed on March 20, 2020.

At the time of jury selection and all throughout the trial before the jury, Maryland law, established in *Twining v. State*, 234 Md. 97, 100 (1964), was that a trial court was not required to ask, on *voir dire*, whether prospective jurors would give the defendant the benefit of the presumption of innocence, accept the requirement that the State must prove guilt beyond a reasonable doubt, and accept that the defendant is not required to testify or present any evidence at all.

There having been no departure from that ruling by the Court of Appeals in the meanwhile, it necessarily was applied by this Court in *Kazadi v. State*, 240 Md. App. 156 (2019), filed in February 2019. Its continued vitality was at least placed in some doubt, however, when, in May 2019, the Court of Appeals granted one of Kazadi's two petitions for *certiorari* to determine whether, upon request, a criminal defendant was *entitled* to *voir dire* questions seeking to identify prospective jurors who would be unable or unwilling "to apply the principles that the State has the burden of proving the defendant guilty beyond a reasonable doubt, that the defendant is presumed innocent, that the defendant has the right to remain silent and refuse to testify, and that no adverse inference may be drawn from the defendant's silence." *Kazadi v. State*, 467 Md. 1, 22 (2020).

Sensing the winds of change, appellant, and many other criminal defendants, continued to request those kinds of questions, not always so precisely worded, even though, at the time, granting those requests was not required and was, at best, discretionary with the trial court. In this case, appellant requested the following questions:

"15. You must presume the defendant innocent of the charges now and throughout this trial unless and until, after you have seen and heard all of the evidence, the State convinces you of the defendant's guilt beyond a reasonable doubt. If you do not consider the defendant innocent now, or if you are not sure that you will require the State to convince you of the defendant's guilt beyond a reasonable doubt, please stand.

16. In a criminal case, like this one, each side may present arguments about the evidence, but the State has the only burden of proof. The defendant need not testify in his/her own behalf or present any evidence at all.

a. Would you tend to believe or disbelieve the testimony of a witness called by the defense more than the testimony of a prosecution witness?

b. Would you hold it against a defendant if [he/she/they] chooses not testify or chose not to present any evidence?"

The trial court denied those requests which, under *Twining* and this Court's reported Opinion in *Kazadi*, it had discretion to do.[1] The case proceeded to trial and, as noted, appellant was convicted. On January 24, 2020, the Court of Appeals filed its Opinion in *Kazadi*, overturning *Twining* and reversing this Court's decision in *Kazadi.* Its holding was clear: With respect to the three fundamental rights at issue – the presumption of innocence, the State's burden to prove guilt beyond a reasonable doubt, and the defendant's right not to testify and not to present any evidence at all – the Court held that, on request, a defendant "should be entitled to *voir dire* questions that are aimed

[1] Without correction by counsel, the trial court believed that the *Kazadi* case was still pending in this Court. Actually, our Opinion in that case had been filed seven months earlier, in February 2019.

at uncovering a juror's inability or unwillingness to honor these fundamental rights." *Kazadi, supra*, 467 Md. at 46.

Making those questions mandatory, on request, the Court added, will "help ensure that a juror's inability or an willingness to follow instructions involving these three important fundamental rights will be discovered before trial" and provide the defendant "the opportunity to move to strike prospective jurors for cause on the ground of an unwillingness or inability to adhere to these fundamental rights." *Id.*

Although appellant refers several times in his Brief to the trial court's rejection of his questions as being an abuse of discretion (which was the test under *Twining* but not under *Kazad*i), we think that, in asserting that *Kazadi makes* the rejection an abuse of discretion, he really means that asking those questions was required.

The State clearly accepts *Kazadi* as applicable. Its sole defense of the trial court's refusal to propound the requested questions is that appellant either waived the issue or failed to preserve it. The State acknowledges in its Brief its agreement "that Kumar's Defense Questions # 15 and 16 qualify as *Kazadi*-type questions, *i.e*. questions that, if requested, would trigger the trial court's obligation under *Kazadi*."

That is an enticing concession, but we are not bound by concessions of law. *Greenstreet v. State*, 392 Md. 652, 667 (2006); *Tamara A. v. Montgomery County*, 407 Md. 180, 187-88, n. 5 (2009). We must apply the law as *we* see it.

In its original January 24, 2020 slip Opinion, the Court of Appeals announced:

> "Additionally, consistent with this Court's case law, although we provide Kazadi 'with the benefit of the holding [ ] in this case, we determine that our holding [ ] shall apply prospectively as of the date on which this opinion is filed.' [citation omitted]. In other words, our holding exclusively applies to this case and future trials, and this opinion should not be construed as giving rise to any grounds for relief in cases in which *voir dire* occurred before today – *i.e.*, cases in which trial courts operated under the assumption that Twining, 234 Md. at 100, 198 A.2d at 293, remained good law."

That clearly would have made its *Kazadi* ruling inapplicable to this case.

On January 31, 2020, however, an *amicus* in the *Kazadi* case, Patrick Soule, who had his own petition for *certiorari* pending that raised the same issue, moved to supplement his petition to take advantage of the *Kazadi* ruling and asked that that ruling be applicable to all cases pending appeal where the issue had been preserved for appellate review. With that motion, he filed a "Line" in the *Kazadi* case calling attention to his motion.[2]

That produced an Order by the Court, entered on March 2, 2020, that amended the January 24 Opinion to delete the applicability provision therein and state instead that the new ruling would apply to Kazadi and "any other cases that are pending on direct appeal when this opinion is filed." In light of that, the Court dismissed the amicus's "Line" as moot.

[2] Although the word "line" is occasionally used by lawyers in Maryland as a caption to a paper not otherwise captioned that is filed with the clerk in a case, it is not an officially defined term in the Maryland Rules or in Black's Law Dictionary. Rule 1-202 refers to filings as being either a "pleading" or a "paper." *See* Rule 1-202 (t) and (v). Nonetheless, it has been an accepted practice for many years, and judges and clerks have accepted papers captioned as a "line."

The March 2 Order was not a new Opinion; the only Court of Appeals Opinion in the case is the January 24 Opinion, as amended. The Court's mandate in *Kazadi* was issued on March 2. The problem is that appellant's appeal, which was filed on March 20, 2020, was not pending, either on January 24 or on March 2, 2020 because it had not yet been filed.

The obvious intent and the major impact of the revision by the Court of Appeals was to *expand* the class of defendants who would benefit from the *Kadazi* ruling by including those whose trial had occurred before January 24 but who had filed a direct appeal that was pending on that date. Unfortunately for appellant, however, that does not help him, because his appeal was not pending on that date. His case remains controlled by *Twining*. We therefore can find no error in the trial court's denial of appellant's Questions 15 and 16. Nor do we find an abuse of discretion in that ruling; the court was following what was then settled law. We therefore need not address the State's waiver or failure-to-preserve arguments, which are moot.

Instruction on Self-Defense

The issue of self-defense arose first in connection with appellant's motion for judgment of acquittal. The argument consisted of one sentence: "We have testimony that – from Mr. Kumar that when he's arguing with his wife, she grabs the knife first, and so I believe that's enough to generate a self-defense, at least imperfect self-defense instruction."

The court rejected that argument. Although noting that the issue of self-defense is normally a question of fact, it found that, in this case, "the level of force that was used was so grossly excessive that as a matter of law the defendant is not entitled to that instruction." The court relied on the Medical Examiner's testimony that there were 55 wounds, at least seven of which "were wounds of a depth that would indicate, logically, that a person would be unable to stab themselves that many times in those areas, almost to the bone, such that . . . that defense cannot be generated."

The issue was raised again during the discussion over jury instructions, seemingly based on a claim of provocation by Ankita. Appellant argued that he had a right to be where he was and had no duty to retreat, that she came at him with the knife and he had a right to defend himself. The court noted that, after the fracas began, appellant locked himself in the bathroom while Ankita had locked herself in the bedroom, but that he came out of the bathroom and broke into the bedroom, where the killing actually occurred. The court denied the instruction for the reasons it gave earlier.

We generally apply an abuse of discretion standard in reviewing the denial of a requested jury instruction, but that standard is subject to the requirement that a trial court must give a requested instruction if "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions given." *Cost v. State*, 417 Md. 360, 368-69 (2010), quoting from *Dickey v. State*, 404 Md. 187, 197-98 (2008). The only issue here is whether the requested instruction was applicable to the facts of the case. It was

denied solely on the court's determination that the issue of self-defense, perfect or imperfect, was not sufficiently raised.

Whether, in a particular case, the evidence supports the giving of a requested instruction "is a determination subject to a relatively low threshold that must be met." *McMillan v. State*, 428 Md. 333, 355 (2012). As first stated in *Dykes v. State*, 319 Md. 206, 217 (1990) and confirmed in *Wilson v. State*, 422 Md. 533, 542 (2011), the evidence need not rise even to a preponderance:

> "The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense, the defendant has met his burden. Then, the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the defendant did not kill in self-defense."

To support a requested instruction on self-defense, the evidence required must relate to the elements of that defense. For what we regard as "perfect" self-defense, that evidence must tend to show that (1) the defendant had reasonable grounds to believe him/herself in apparent imminent or immediate danger of death or serious bodily harm from the assailant; (2) the defendant must have in fact believed him/herself in danger; (3) the defendant must not have been the aggressor or provoked the conflict; and (4) the force used must not have been unreasonable and excessive, that is more force than the exigency demanded. *Dykes, supra*, 319 Md. at 211, citing *State v, Faulkner*, 301 Md. 482, 485 (1984).

To support an instruction on "imperfect" self-defense, the evidence must tend to show the last three of those items, the difference being only that the defendant's actual belief that he/she was in imminent danger need not be objectively reasonable, but the effect of imperfect self-defense does not warrant a full acquittal but merely reduces the offense from murder to voluntary manslaughter. *Dykes*, at 213.

On the record in this case, we believe that appellant produced "some" evidence of three of those requirements. Ankita's waving a kitchen knife that appellant had just used to cut carpet at him while she in a highly emotional state could reasonably make her the initial aggressor and cause appellant reasonably to believe he was in imminent danger. That danger was interrupted, however, when Ankita withdrew and locked herself in the bedroom and appellant locked himself in the bathroom. He was under no duty to retreat or leave the apartment (although he ultimately did so), but the homicide with which he was charged occurred when he broke through the locked bedroom door to again confront Ankita, who still had the knife.

That is the point at which the four factors came back into play. Appellant testified that, when he entered the bedroom, Ankita was holding the knife and was bleeding from her *hand*. When asked what she did with the knife, he said "I don't remember. . . I had too much to drink, and I was smoking weed." When asked whether there was a time when he got the knife, his response was "I don't remember." He admitted trying to get the knife from Ankita but did not remember "when, like, I got the knife onto my hand."

Nor did he remember how Ankita came to suffer seven stab wounds and 48 cutting wounds, about which there was no dispute.

The defense of self-defense necessarily presumes that the defendant committed the acts that caused Ankita's death; the sole function of the defense is to convince the trier of fact that he had a right – a legal justification – to do so. Except for whatever may have caused Ankita to have blood on her hand, for purposes of this defense, we must assume that appellant committed the butchery that occurred in that bedroom that led to Ankita's death by homicide. We cannot find any evidence to support a rational jury finding that the lethal stab and cutting wounds inflicted at that point were not more – grossly more – than the exigency demanded. We therefore find no error in the court's refusal to give a self-defense instruction.

Postponement of Sentencing

The verdicts in this case were returned on November 8, 2019. Sentencing was postponed at that time until February 21, 2020, so the parties had three-and-a-half months to prepare for the sentencing hearing. No request for postponement was made prior to the day of the hearing. Rather, at the outset of the hearing, appellant moved for an additional two-month postponement because (1) he had not participated in the preparation of the presentence investigation report that had been prepared, and (2) the Public Defender's Social Workers Division had not completed its work on a mitigation report. The State did not object to a postponement but deferred to the court's discretion. The court denied the request, noting that the PSI investigator had gone to the facility where appellant was

being held to meet with him and appellant refused to participate and that the defense had plenty of time to prepare its mitigation report.

Appellant complains that the court abused its discretion in denying the postponement, which he claims denied him the right to present mitigation evidence and have a meaningful sentencing hearing. We disagree. He was not denied the right to present mitigation evidence. After three-and-a-half months, he had no mitigation evidence to offer.

Wearing or Carrying A Dangerous Weapon

Appellant makes two arguments with respect to his conviction for violating Md. Code, § 4-101(c)(2) of the Criminal Law Article, which prohibits a person from wearing or carrying a dangerous weapon openly with the intent or purpose of injuring an individual in an unlawful manner. He claims that the evidence was insufficient to sustain that conviction and, even if the evidence *was* sufficient, the two convictions should merge under the rule of lenity. Appellant's motion for judgment of acquittal on those grounds was denied.

Appellant's argument is based largely on *Chilcoat v. State*, 155 Md. App. 394, *cert. denied*, 381 Md. 675 (2004) and *Thomas v. State*, 143 Md. App. 97, *cert. denied*, 369 Md. 573 (2002).

Chilcoat arose when a woman's former boyfriend showed up at her house while she was entertaining her current boyfriend and an argument ensued between the two men.

The former boyfriend, Chilcoat, picked up a beer stein and hit the new boyfriend with it five times on the back of his head, causing two skull fractures. Chilcoat was charged with, and convicted of, assault and carrying a weapon openly with intent to injure and, as does appellant here, he claimed that there was insufficient evidence that he wore or carried the weapon and that, if the evidence did establish that, the two offenses should merge for sentencing purposes.

There was no doubt that Chilcoat had carried the beer stein some distance – apparently not more than a few feet – and the issue was whether that very limited asportation, which was solely for the purpose of and incidental to the assault, constituted the additional crime of carrying a weapon with intent to injure. In reversing the "carrying" conviction, the Court relied on language from *State v. Stouffer*, 352 Md. 97 (1998), which involved the question of whether, when a victim is seized, transported some distance, and then killed, the defendant can lawfully be separately convicted of kidnapping based on the seizure and asportation.

Relying on cases throughout the country, the *Stouffer* Court said that it depends on the circumstances – whether the asportation was "merely incidental" to the other offense: did it have some independent purpose? The *Chilcoat* Court held that the Legislature did not contemplate that merely holding the beer stein while moving toward the victim to commit the assault would constitute the additional crime of carrying the weapon. *Chilcoat*, 155 Md. App. at 412. In light of that holding, the Court did not need to address the question of merger and did not do so.

Thomas presented a situation closer to what we have here – a mutual affray involving a couple in their apartment while one or both were drunk or near-drunk. The woman died from her injuries, which allegedly were inflicted with a hammer and a serrated cheese knife, and the defendant was convicted of murder and carrying a weapon with intent to injure. The State attempted to justify the carrying conviction on the ground that the mere use of the hammer and knife constituted a violation of the statute. This Court rejected that argument, holding that "the State was required to prove more than mere use of the weapons by appellant or recovery of them in his one-room residence, in the vicinity of the victim." *Thomas*, 143 Md. App. at 123.

The State, in turn, relies on *Biggus v. State*, 323 Md. 339 (1991), in which the defendant was convicted of a third-degree sexual assault under what is codified now in § 3-307 (a)(3) of the Criminal Law Article – engaging in sexual contact with a victim under the age of 14 – and the "carrying" offense now codified in § 4-101 of that Article. The Court held that those convictions did not merge, either under the "required evidence" test or under a rule of lenity, noting, as of then (1991) that "Maryland cases have uniformly refused to merge [§ 4-101] convictions into convictions for other offenses where such merger was not mandated by the required evidence test." *Id.* at 357.

Apart from the fact that that statement is no longer accurate (*see Abeokuto v. State*, 391 Md. 289, 355 (2006)), we do not need to reach the issue of merger. We see *Chilcoat* and *Thomas*, though cases from this Court rather than the Court of Appeals, as addressing

the relevant question of whether there was any evidence of appellant having actually carried the knife within the meaning of the statute.

Other than when he tried to hide the knives by putting them in or on the washing machine, there is no clear evidence that appellant ever had sole possession of the knife until he entered the bedroom. The State argues that the fact that there were bloodstains on the bedroom door that were traced to Ankita sufficed to allow the jury to conclude that appellant "had chased [Ankita] throughout the apartment, ultimately breaking down the bedroom door, pursuing her into the bedroom and killing her." State's Brief at 26. There was no evidence of that, and it cannot reasonably be inferred merely from bloodstains on the bedroom door. There was no evidence of bloodstains anywhere else in the apartment.

It is true that the narrative of what occurred came from appellant, and the jury did not have to believe all or any of what he said, but to sustain a conviction, the State must show, beyond a reasonable doubt, what happened, and it cannot manufacture that out of simply disbelieving the defendant's version. *See Grimm v. State*, 447 Md. 482, 507 (2016) ("Mere disbelief of testimony is not proof of facts of an opposite nature or tendency").

The only evidence was that, when the altercation started, and up to the point when it ended, it was a struggle for possession of the knife, either with both of them holding the knife or with the knife in Ankita's sole possession. At some point, in the bedroom, appellant obviously gained control of the knife, which he then used to kill Ankita. Appellant's possession was not one of asportation, but of unlawful use. This was not a

merger issue for sentencing purposes. The trial court erred in not granting the motion for acquittal on the carrying count.

JUDGMENT ON SECOND COUNT (UNLAWFUL CARRYING) REVERSED; JUDGMENT ON FIRST COUNT (MURDER) AFFIRMED; COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND MAYOR AND CITY COUNCIL OF BALTIMORE.