Circuit Court for Wicomico County
Case No. C-22-CR-19-000641

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 119

September Term, 2021

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K'LIN CANTRELL GOOTEE

v.

STATE OF MARYLAND

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Berger,
Arthur,
Shaw,

JJ.

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Opinion by Berger, J.

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Filed: March 25, 2022

Appellant ("Gootee") was convicted in the Circuit Court for Wicomico County on twenty-one criminal charges relating to firearm possession, drug trafficking, and conspiracy. Gootee filed this timely appeal.

Gootee presents five questions for our review,[1] which we have rephrased, for clarity, as follows:

> I. Whether the trial court erred by not immediately conducting a Rule 4-215(e) colloquy after Gootee initially expressed a desire to discharge defense counsel.
>
> II. Whether the trial court abused its discretion in not granting a mistrial.

[1] Gootee's original questions presented are as follows:

> 1. Did the trial court err by failing to conduct a Rule 4-215(e) colloquy after defense counsel repeatedly expressed Gootee's desire to discharge defense counsel and defense counsel requested that the court conduct the colloquy?
>
> 2. Did the trial court err in denying defense counsel's motion for mistrial?
>
> 3. Did the trial court err in denying defense counsel's request for the venire to be proved clear masks during voir dire?
>
> 4. Must Mr. Gootee's multiple conspiracy convictions be vacated?
>
> 5. Must one of Mr. Gootee's two convictions for unlawful possession of a firearm be vacated, when the State presented evidence as to a single firearm?

III. Whether the trial court abused its discretion conducting voir dire when it denied defense counsel's request that the venire members wear clear face masks.

IV. Whether Gootee's multiple conspiracy convictions must be vacated.

V. Whether one of two of Gootee's convictions for unlawful possession of a firearm must be vacated.

For the reasons explained herein, we shall affirm the judgment of the Circuit Court for Wicomico County. Nevertheless, we shall vacate the judgments as to eleven of the twelve convictions for conspiracy and one of the two convictions for unlawful possession of a firearm.

## FACTS AND PROCEDURAL HISTORY

On October 10, 2019, Gootee was arrested pursuant to a search warrant after Detective Ronald Marzec of the Delmar Police Department observed suspicious activity at a hotel. Detective Marzec and other officers gained entry to the hotel room where Gootee and George Dyson ("Dyson") were seen entering and exiting. Upon entry, the officers observed Dyson flushing a bagged item down the toilet, which was recovered and later determined to be a mixture of heroin and fentanyl. The officers also recovered a backpack that contained a firearm, heroin, and documents bearing Gootee's name.

A pretrial hearing was held on March 9, 2020. During this pretrial hearing Gootee indicated to the court that he wanted to discharge his current defense counsel. Gootee ultimately obtained new counsel on May 6, 2020. We will reserve a more detailed description of the pretrial hearing record to Part I of this opinion.

The first day of trial was held on November 9, 2020. Voir dire was conducted, the jury was empaneled, and the trial began the following day. We will reserve a more detailed description of the trial record to Part II and III of this opinion.

Gootee was convicted and sentenced as follows: for count 1, firearm possession during and in relation to a drug trafficking crime: 20 years' imprisonment, five years mandatory; for count 3, possession with intent to distribute heroin: 15 years' imprisonment, consecutive to count 1; for count 4, possession with intent to distribute fentanyl: 20 years' imprisonment, concurrent with count 1; and for count 10, possession of a firearm after being convicted of a crime of violence: 5 years mandatory imprisonment, consecutive to count 3. Sentences for the remaining seventeen counts were merged with count 1. This timely appeal followed.

## DISCUSSION

### I. The circuit court did not commit reversible error by declining to immediately conduct a Rule 4-215(e) colloquy at the March 9, 2020 pretrial hearing.

Gootee asserts that the circuit court erred by failing to conduct what he contends was the necessary inquiry after his attorney informed the court at a pretrial hearing that he wished to discharge counsel. The issue arose in the following exchange:

> THE COURT: All right. And that [plea offer has] been rejected, is that correct?
>
> [DEFENSE COUNSEL]: Court's indulgence. Your Honor, Mr. Gootee has indicated to me that he wishes to reject this plea offer. But he has indicated that his mother may have retained private counsel as well.
>
> THE COURT: Which the Court has -- that's not before the Court --

[DEFENSE COUNSEL]: Correct.

THE COURT: -- anything with respect to private counsel --

[DEFENSE COUNSEL]: Correct.

THE COURT: -- at this time.

* * *

[DEFENSE COUNSEL]: Yes, Your Honor. The State's going to put my position -- originally, my position was I would under the circumstances that she explained to me I was going to defer to the Court but have her note that Mr. Gootee has been incarcerated since the offense date. However, in light of what he's saying indicating that he has a private attorney, he's going to need a postponement anyway.

THE COURT: All right. Well, for today, then the matter will be -- stay in for Trial on March the 11th.

[...]

THE COURT: All right. It will remain in for trial. All right. Anything else?

[STATE]: The only issue -- I apologize -- The only issue is the State was going to ask for a postponement of about a week and a half. If Mr. Gootee's going to be requesting new counsel --

THE COURT: Well, you've got to do this in writing. I can't rule on it.

[STATE]: Yes, Your Honor.

THE COURT: Nothing further, the Court will adjourn.

[DEFENSE COUNSEL]: Your Honor.

THE COURT: What?

[DEFENSE COUNSEL]: Mr. Gootee has indicated to me to just discharge me as counsel so I guess we have to go through the colloquy.

> THE COURT: Why don't we wait until he obtains counsel and so he'll have a counsel in place. All right. The Court will adjourn.

Days after the pretrial hearing had occurred, Maryland courts were largely closed due to the Covid-19 pandemic emergency. By the time the next hearing took place in October 2020, Gootee was represented by a different attorney. In this appeal, Gootee asserts that the circuit court's failure to resolve the discharge of counsel matter by immediately conducting a Rule 4-215(e) colloquy before the end of the March 9, 2020 hearing constitutes reversible error. As we shall explain, we are not persuaded.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to counsel. *Lopez v. State*, 420 Md. 18, 33 (2011). These constitutional guarantees encompass not only the right to assistance by an attorney but also the right of a defendant to reject counsel and represent himself. *Id.* Maryland Rule 4-215 implements the constitutional mandates for waiver of counsel and provides in section (e):

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the

> defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

The requirements of Rule 4-215 are considered mandatory in order "to protect the fundamental rights involved, to secure simplicity in procedure, and to promote fairness in administration." *Parren*, 309 Md. at 280. "[S]trict compliance" with the Rule is required, and "a trial court's departure from the requirements of Rule 4-215 constitutes reversible error." *Pinkney v. State*, 427 Md. 77, 87-88 (2012). "In evaluating the trial court's compliance with Rule 4-215(e), Maryland appellate courts generally apply a *de novo* standard of review." *Cousins v. State*, 231 Md. App. 417, 438 (2017).

Although strict compliance with Rule 4-215 is required, we are mindful that Rule 4-215 does not impose a specific requirement that a court immediately rule on a motion to discharge counsel at the precise moment that the matter arises. Indeed, the rule contains no language regarding the timing of the court's ruling. The Court of Appeals has expressly declined to read specific time limitations into Maryland rules when no time requirement is contained in the rule itself. *See, e.g.*, *Williams v. State*, 457 Md. 551, 568 (2018) ("Following these cardinal rules of interpretation we decline to read a fifteen-year limitation into Maryland Rule 5-404 where none exists.").

In this case, the circuit court did not decline to address Gootee's request to discharge counsel. Rather, the circuit court observed that Gootee could obtain new counsel prior to trial. Due to the Covid-19 pandemic emergency, the courts were shut down across the state only days after the March 9, 2020 hearing, and the next hearing in Gootee's case did not

occur until October 2020.[2] Notably, by the time Gootee appeared before the court at the next hearing, he was represented by a different attorney, obviating the need for an inquiry as to whether Gootee wished to discharge his prior counsel.

Gootee cites the case of *Gambrill v. State*, 474 Md. 292 (2014), in support of his assertion that the circuit court's failure to conduct an immediate Rule 4-215 colloquy constitutes reversible error. In our view, *Gambrill* is distinguishable from the present case. In *Gambrill*, when the parties appeared before the circuit court on the trial date, defense counsel notified the court that his client wished to hire private counsel and requested a postponement. The trial court denied the postponement request, and the jury trial commenced that afternoon. The critical issue on appeal was whether defense counsel's reference to his client's desire to hire private counsel constituted a request to discharge counsel requiring a Rule 4-215 inquiry.

[2] On March 12, 2020, the Chief Judge of the Court of Appeals susepended all jury trials throughout the State of Maryland on an emergency basis "[d]ue to the outbreak of the novel coronavirus, COVID-19." *See* The Court of Appeals of Maryland, Administrative Order on Statewide Suspension of Jury Trials (Mar. 12, 2020). The following day, the Court of Appeals issued an Administrative Order on Statewide Closing of the Courts to the Public Due to the COVID-19 Emergency (Mar. 13, 2020), closing "[a]ll courts in the Maryland Judiciary . . . to the public on an emergency basis, effective March 16, 2020" but continuing Judiciary operations "to the extent practicable" and providing for certain proceedings to be "heard in keeping with the urgency of those matters and consistent with statutory requirements, either in person or remotely." On March 20, 2020, the Chief Judge of the Court of Appeals issued an administrative order that authorized courts to conduct remote hearings in emergency and other matters. *See* The Court of Appeals of Maryland, Administrative Order on Remote Hearings Held During the COVID-19 Emergency (Mar. 20, 2020).

Unlike *Gambrill*, in this case, Gootee was not forced to go to trial while represented by an attorney he wished to discharge. Instead, Gootee's previous attorney was replaced before the parties appeared before the court again.[3] Indeed, a Notice of Substitution of Counsel entering the appearance of Assistant Public Defender David O. Weck in place of Assistant Public Defender Tamika Fultz was filed on May 6, 2020, less than two months after the hearing at which defense counsel informed the court that Gootee wished to hire a different attorney and over five months before the next hearing in the case. Because Ms. Fultz was no longer serving as Gootee's attorney after this time, the discharge of counsel request was rendered irrelevant. Accordingly, we hold that the circuit court did not commit reversible error in connection with defense counsel's statement at the March 9, 2020 hearing informing the court that Gootee wished to hire a different attorney.[4]

[3] It appears that the only limited action taken by Goatee's counsel after the March 9, 2020 hearing was the filing of a Motion for Bond Review on March 26, 2020, asking that the court set a bond hearing and/or release Gootee on personal recognizance in light of the spread of Covid-19 in correctional facilities.

[4] Goottee contends that a Rule 4-215 violation cannot be assessed for harmless error. He cites the case of *Brye v. State*, 410 Md. 623, 626-27 (2009), in which the Court of Appeals rejected the State's "quasi-harmless error analysis" in the context of a defendant who was given "conflicting and inaccurate advisements of the penalties for some of the charges then pending against the defendant" when the court accepted the defendant's waiver of counsel. The State had asserted that the advisements were correct for the one charge for which the defendant was convicted, and, therefore, the advisements did not warrant reversal. *Id.*

In this case, unlike in *Brye*, the focus is not on whether an alleged error affected certain convictions. Rather, the focus is on whether an immediate Rule 4-215(e) colloquy is required. We are not addressing whether any error was harmless. Rather, we hold that there was no error by the trial court when Gootee received the benefit of a postponement

## II. The circuit court did not abuse its discretion in denying Gootee's request for a mistrial.

Gootee argues that the trial court abused its discretion in denying his motion for a mistrial because it erred in resolving defense counsel's *Batson* challenges regarding two of the jurors. The record reflects the following regarding the selection of the jury.

During the voir dire, the State exercised its first strike to remove Juror 161. The following exchange occurred at the bench:

> [DEFENSE COUNSEL]: I just ask the State to enunciate a race neutral reason –
>
> THE COURT: You what?
>
> [DEFENSE COUNSEL]: I'm asking the State to enunciate a race neutral reason for having stricken juror 161.
>
> THE COURT: Has she struck more than one African-American?
>
> [DEFENSE COUNSEL]: She hasn't. I can object at any point.
>
> [STATE]: Your Honor, based on the educational level and profession.
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: Okay. I'd ask the record to reflect that this person is a physician with a doctorate degree.
>
> THE COURT: All right.

when courts were closed due to the Covid-19 pandemic emergency. After Gootee expressed his desire to discharge counsel, a different attorney was appointed to represent Gootee before the parties returned to the circuit court for the next hearing.

The State then used its second and final strike to remove Juror 497. Thereafter, twelve jurors were selected for service and the trial court asked if the jury was acceptable.[5] Defense counsel asked to approach the bench and the following exchange occurred:

> [DEFENSE COUNSEL]: I'm asking for the State to enunciate a race neutral reason for juror number 497.
>
> THE COURT: Number what?
>
> [DEFENSE COUNSEL]: Number 497, number nine on page one she excused.
>
> [STATE]: 497 on page one?
>
> THE COURT: Yes.
>
> [STATE]: Your Honor, if I could look at my notes.
>
> THE COURT: Yes.
>
> [STATE]: There was information provided to the State's Attorney Office regarding prior illegal activity.
>
> THE COURT: What's that?
>
> [STATE]: Information provided to the State's Attorney Office regarding prior illegal activity.
>
> [DEFENSE COUNSEL]: I would ask for –
>
> THE COURT: She gave her reason.
>
> [DEFENSE COUNSEL]: I'm asking for a larger proffer than that, Your Honor.
>
> THE COURT: Overruled. The State gave you a reason for prior criminal activities.

[5] Defense counsel noted an objection.

> [DEFENSE COUNSEL]: I'm asking the Court to retain the juror as the record will reflect that that individual is African-American. There are no African-Americans seated on this jury. The State exercised one of their challenges against African-American jurors.
>
> THE COURT: All right.
>
> [STATE]: Your Honor, that didn't have any bearing on the State. I don't even believe I turned around when that juror's name was called.
>
> THE COURT: Did you even know the juror was African-American?
>
> [STATE]: I'm sorry?
>
> THE COURT: You didn't know the juror was African-American?
>
> [STATE]: No, Your Honor.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Thank you.
>
> THE COURT: All right.

The selected jurors were then sworn, and the court took a recess.[6] When the proceedings resumed, defense counsel requested a mistrial:

> [DEFENSE COUNSEL]: I'm asking the Court to declare a mistrial. The reason I make that request is based upon the jury selection process. The Court heard from me as it related to my challenge to some of the strikes that were exercised by the State. The race neutral reasons that were provided by the State were, with respect to the State's first challenge, the State indicated that it was the nature of the person's education and employment that caused that person to be stricken.

[6] Defense counsel again noted objections prior to the swearing of the jury.

THE COURT: And she also indicated she didn't know the race of that person.

[DEFENSE COUNSEL]: No, that was the second person.

THE COURT: Oh, was that the second person?

[STATE]: Yes, Your Honor.

[DEFENSE COUNSEL]: The first person was an African-American physician with a doctorate degree. The State made no objection to juror number one being placed on the jury, a lady with a graduate degree.

The entirety of the jury is white.

The State's second challenge was with respect to, and the name of this person so the record is clear the State exercised challenge one against [Juror 161], 37-year-old African-American female.

The other challenge was to a 27-year-old African-American male that the State indicated that there was concern based upon law-enforcement contacts as well as described as. I reviewed records from the State of Maryland and as best I can tell, [Juror 497] of Salisbury, Maryland, 27-year-old African-American male, hasn't been even charged with anything in the State of Maryland let alone convicted, as best I can tell. So I think it's important for the Court to take that into account in deciding whether or not the explanation provided by the State ought be credited.

So what you have is a situation where you have, with respect to one of the individuals who is dismissed, is a person with a graduate degree, that person was let on the jury. If the State were to say, no, it's actually the nature of the person's employment, the State has allowed an RN on the jury without objecting, psychiatric tech, that's juror number 12, a 54-year-old white female. Allowed a psychiatric technician on the jury, a 63-year-old white female. Another registered nurse on the jury who is married to a physician, a 46-year-old female.

Another nurse, a 56-year-old white female. A pharmacy technician, a 37-year-old white male. In other words, the explanations provided by the State are called into serious question based upon the nature of jurors who were not stricken who all happen to be Caucasian.

It would be inappropriate to proceed to trial with this particular jury under those circumstances. I will make a request for a mistrial, will not make any claim that the case cannot be retried as it will be my motion, but I think that the Court should have very serious concerns proceeding to trial in this posture.

Gootee will remain incarcerated, we won't be asking for bond at this point.

THE COURT: Ms. Coletta.

[STATE]: Your Honor, with regard to juror number 161 that the State struck from the jury, based on the level of education that [Juror 161] has as well as her profession, she is a physician. There is testimony from a forensic chemist in this case. The State has some concern about the level of education, over thinking based on the profession that [Juror 161] currently engages in.

I know that there was a statement made by defense counsel regarding juror 445 who is number one on the jury list, they do have a graduate degree however they are employed as a teacher.

With regard to juror number 497 who is number nine on the jury list, I couldn't even tell you what race that person was. I have information from my office there were two contacts with the criminal justice system, one for marijuana and one for paraphernalia as well as traffic related offenses.

THE COURT: All right. I think the State has adequately given other reasons other than race for the striking of the jurors. The Court's going to deny the motion for mistrial.

All right, anything further before we bring in the jury?

> [DEFENSE COUNSEL]: Not at this time from me, Your Honor.

A peremptory challenge to strike a potential juror violates the Equal Protection Clause of the Fourteenth Amendment when the strike is made "on the basis of race, gender[,] or ethnicity." *Ray-Simmons v. State*, 446 Md. 429, 435 (2016). Once a party raises a *Batson* challenge to the strike, the trial court must engage in a three-step process to evaluate whether the peremptory challenge was improperly based on race, gender, or ethnicity. *Id.* First, the party raising the challenge must make a prima facie showing by producing some evidence that the peremptory challenge had a discriminatory purpose or motive. *Id.* at 436. The burden then shifts to the party exercising the strike to give an explanation that is "neutral as to race, gender, and ethnicity." *Id.* A neutral explanation is "based on something other than the race of the juror." *Edmonds v. State*, 372 Md. 314, 332 (2002) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reasons offered will be deemed race neutral." *Id.*

At step three, the trial court must determine "'whether the opponent of the strike has proved purposeful racial discrimination.'" *Ray-Simmons*, *supra*, 446 Md. at 437 (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995)). This final step involves evaluating "the persuasiveness of the justification" proffered by the striking party. *Purkett*, *supra*, 514 U.S. at 768. There are multiple factors which may determine the persuasiveness of the justification, these include: "the susceptibility of the particular case to racial discrimination, . . . the race of the victims and primary witnesses, . . . the prosecutor's

demeanor, . . . a past pattern of discriminatory practices by a prosecutor's office, . . . whether similarly situated white jurors were struck on identical or comparable grounds." *Spencer v. State*, 450 Md. 530, 559 (2016) (internal quotation marks and citations omitted).

A trial court's grant or denial of a *Batson* challenge is a factual finding that is "afforded great deference and will only be reversed if it is clearly erroneous." *Ray-Simmons*, *supra*, 446 Md. at 437; *see also Khan v. State*, 213 Md. App. 554, 568 (2013) ("'In reviewing a trial judge's *Batson* decision, appellant courts do not presume to second-guess the call by the 'umpire on the field' either by way of de novo fact finding or by way of independent constitutional judgment.'" (quoting *Bailey v. State*, 84 Md. App. 323, 328 (1990)). "A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it." *Anderson v. Joseph*, 200 Md. App. 240, 249 (2011) (internal quotation marks and citations omitted).

"Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard, because the 'trial judge is in the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised.'" *Dillard v. State*, 415 Md. 445, 454 (2010) (quoting *Allen v. State*, 89 Md. App. 25, 42–43 (1991)); *see also Carter v. State*, 366 Md. 574, 589 (2001) ("It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion."). Indeed, "[a]n abuse of discretion occurs where no reasonable person would take the view adopted

by the [trial] court or the trial court acts without any guiding rules or principles." *Li v. Lee*, 210 Md. App. 73, 96 (2013) (internal quotation marks and citations omitted).

Based on our review of the trial court record, and with the applicable standards of review in mind, we hold that the trial court did not abuse its discretion in denying Gootee's motion for a mistrial. The trial court determined that the State had "adequately given other reasons than race for the striking of the jurors." Indeed, the State offered race neutral reasons for striking each of the two prospective jurors: (1) Juror 161's doctorate level education and employment as a physician; and (2) Juror 497's prior contacts with the criminal justice system for drug related offenses.

Gootee argues that the trial court erred in resolving the *Batson* challenges because the totality of the circumstances indicated that the State's explanations "were implausible and were inconsistently applied such that similarly situated white jurors were not struck." Gootee asserts that the State's peremptory challenge for Juror 161 due to education level was inconsistent because the State did not challenge other similarly educated white jurors. Gootee further asserts that it is implausible that the State did not know the race of Juror 497.

Based on our review of the record of these proceedings, we hold that the trial judge did not err in denying defense counsel's *Batson* challenges. Gootee asserts that the State's challenge to Juror 161 because of education level was inconsistent. Notably, however, the State proffered a race neutral reason for the strike, i.e., that Juror 161 was the only medical physician in the venire. Furthermore, regarding Juror 497, although it may be implausible

under some circumstances that the State would not be aware of a juror's race, we will not second guess the trial court's determination of the State's credibility, especially considering the race neutral reason that the State proffered for striking Juror 497. Accordingly, we hold that the trial court's finding regarding the two *Batson* challenges was not clearly erroneous. We further hold that the trial court did not abuse its discretion in denying Gootee's motion for a mistrial.

## III. The circuit court did not err in evaluating Gootee's *Batson* challenges.

Gootee further asserts that the trial court erred in evaluating defense counsel's *Batson* challenges because it neglected to conduct each step of the analysis. Specifically, Gootee contends that the trial court failed to conduct step three of the analysis concerning Juror 161, and failed to conduct steps two and three of the analysis concerning Juror 497. We discuss Gootee's individual arguments in turn.

### *A. Juror 161*

Gootee argues that the trial court failed to engage in step three of the *Batson* analysis regarding Juror 161. At step three, the trial court must determine "'whether the opponent of the strike has proved purposeful racial discrimination.'" *Ray-Simmons, supra*, 446 Md. at 437 (quoting *Purkett, supra*, 514 U.S. at 767 (1995)). "[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338–39 (2003).

The record must reflect some indication of whether the trial court accepted the prosecutor's proffered justifications. *Edmonds v. State*, 372 Md. 314, 337–39 (2002). Accordingly, on appeal, when "[t]he record is unclear as to what, if anything, the trial judge may have ruled with respect to [certain] jurors . . . [w]e cannot conclude that the trial judge implicitly found the prosecutor's strikes . . . to be race neutral." *Id.* at 338–39. Nevertheless, "[s]ometimes the record is adequate for a reviewing court to find that the trial judge *implicitly* ruled on the pretextuality of a proffered race-neutral reasons." *Id.* at 337 n. 13 (emphasis in original).

After the State provided its justifications for striking Juror 161, the court succinctly responded, "All right." Later, at the conclusion of defense counsel's motion for a mistrial, the court stated, "All right. I think the State has adequately given other reasons other than race for the striking of the jurors." Despite the brevity of the court's announcements, there is no indication that the court rejected the State's justifications. Furthermore, the trial court did not make any conflicting or ambiguous statements regarding whether it accepted these justifications. *See Edmonds*, *supra*, 372 Md. at 338 (holding that a trial judge's inconsistent comments made it unclear whether the court found that the prosecutor's proffered justifications were credible.).

Our review of the record establishes that the trial court firmly believed and accepted the State's justification for challenging Juror 161. Critically, the record provides an adequate basis to conclude that the court implicitly ruled on any pretext that may have underlaid the State's justification because the court did not make any conflicting or unclear

statements regarding its justification. We cannot -- and will not -- second guess the trial court's resolution of a *Batson* challenge unless clearly erroneous. Because there was competent and material evidence to support the trial court's resolution of the *Batson* challenge, we hold that the trial court did not err in conducting the *Batson* analysis with respect to Juror 161.

*B. Juror 497*

Gootee argues that the trial court failed to engage in steps two and three of the *Batson* analysis with regard to Juror 497. Specifically, Gootee asserts:

> "Here, the trial court failed to satisfy step two of the *Batson* analysis as to Juror 497 because the court failed to determine whether the predicate fact underlying the prosecutor's explanation in fact existed -- the trial court never verified if the juror had contacts with the criminal justice system."

Under step two of a *Batson* analysis, "the burden of production shifts to the proponent of the strike to come forward with an explanation for the strike that is neutral as to race, gender, and ethnicity." *Ray-Simmons*, *supra*, 446 Md. at 436 (internal quotation marks omitted). It is a necessary requirement, however, that "[b]efore a trial judge can determine that a ground is racially neutral, he must be convinced that it exists in fact." *Chew v. State*, 317 Md. 233, 248 (1989).

Gootee argues that the trial court failed to conduct step two of the *Batson* analysis with regard to Juror 497 because it never verified whether the fact underlying the State's proffered reason for striking the juror actually existed. The State challenged Juror 497 because of "information provided to the State's Attorney Office regarding prior illegal

activity." In response, defense counsel asked for a more specific proffer. The trial court responded: "Overruled. The State gave you a reason for prior criminal activities."

In *Chew v. State*, the prosecutor struck a juror because "she appeared immobile, stone faced, and unsmiling . . ." *Chew, supra*, 317 Md. at 246–47 (internal quotation marks omitted). Defense counsel disagreed because "he had observed the juror and yet saw no such demeanor." *Id.* at 247. The Court of Appeals held that the trial court erred in conducting a *Batson* analysis because the trial court judge failed to resolve the factual dispute and confirm whether the juror actually had an undesirable demeanor. *Id.* at 248.

Accordingly, Gootee argues that the trial court erred in resolving the *Batson* analysis regarding Juror 497 because the court never confirmed that the juror had prior contacts with the criminal justice system. We disagree. *Chew* holds that "before a trial judge can determine that a ground is racially neutral he must be convinced that it exists in fact." *Chew, supra,* 317 Md. at 248. The facts of the case at hand, however, are distinguishable. In *Chew*, there was a legitimate factual dispute over whether a particular juror had an undesirable demeanor. *Id.* at 246–48. The Court of Appeals determined that the trial court erred because the trial judge overlooked evidence and testimony that contradicted the State's proffered reason for striking the juror, i.e., that the juror was not, "immobile, stone faced and unsmiling . . ." *Id.* at 246–47.

Here, Gootee asserts that the trial court failed to confirm that Juror 497 had prior contacts with the criminal justice system. Although the trial court did not independently confirm that this fact existed, it nevertheless accepted the State's proffer and the supporting

factual basis. Unlike in *Chew*, it does not appear that there was a factual dispute over whether Juror 497 had prior contacts with the criminal justice system. Defense counsel did not disagree with the State's proffered reason, but instead stated: "I'm asking for a larger proffer than that, Your Honor." This indicates that defense counsel was simply requesting more or additional reasons for the strike.

There was no dispute over whether Juror 497 had prior contacts with the criminal justice system such that the court had any reason not to believe that this predicate fact existed. The State, therefore, offered a satisfactory race neutral reason for striking Juror 497. Based on our review of the record, we hold that the trial court did not err in conducting a *Batson* analysis inasmuch as there was no factual dispute underlying the State's proffered reason for striking Juror 497.

## IV. The circuit court did not err in denying defense counsel's request that the venire be provided clear face masks during voir dire.

Gootee argues that the trial court erred in denying defense counsel's request that the court provide the venire with clear face masks instead of opaque masks so that he could view their full facial expressions. Gootee, therefore, asserts that the court infringed on his Sixth Amendment right to be present and participate in voir dire by denying defense counsel's request.

Shortly after the venire was sworn, Gootee's defense counsel raised an objection to the type of face masks that the jurors were wearing during voir dire:

> [DEFENSE COUNSEL]: Your Honor, the defense is objecting to the process that's being utilized by this Court. To proceed in this fashion affects his right to a speedy trial under the United

> States Constitution, the Maryland Declaration of Rights, and more specifically the case of Bedford versus State, which is 317 Maryland 659. It's a 1989 case that stands for the proposition that an individual needs to have the ability to view the face of individuals who may be seated on a jury. There's language in the case that says that specifically you need to be able to see people's facial expressions in order to render an appropriate decision. To deny us the ability to see the jurors'[] faces during the voir dire process when jurors are wearing opaque face masks denies him the right to the effective assistance of counsel to proceed in this fashion. I understand it's being done because of the COVID-19 pandemic but there's nothing that would preclude the Court from providing the jurors clear facial coverings so we can see their facial expressions. It's my understanding the Court is likely to do so once we get to the courthouse, at least that's been the practice so far. The only reason I can conceive of the fact as to why the Court is not providing these people with their facial coverings is because it would be expensive.
>
> THE COURT: Because we don't have them now.
>
> [DEFENSE COUNSEL]: Well, the Court has them, and I know the Court has them, it's just a question of whether or not the Court wants to utilize 50 or 60 of those versus the 14 when we get back to the courtroom. It's an abuse of discretion not to provide [clear] facial coverings.
>
> THE COURT: All right. In light of the pandemic, the Court deems that the safety of everybody involved takes precedence over your argument, therefore I deny your motion.
>
> [DEFENSE COUNSEL]: Thank you.

Again, during voir dire, defense counsel reiterated an objection that the venire members should be provided clear face masks:

> [DEFENSE COUNSEL]: Your Honor, at this point I just wanted to renew my objection to the procedure that we have been utilizing. All the jurors in the venire are wearing opaque

> [face] mask[s], I have not been able to view their facial expressions.
>
> THE COURT: You've already made that objection.
>
> [DEFENSE COUNSEL]: My understanding is I have to say it here as well.
>
> THE COURT: All right.

It is well established that a criminal defendant has the right to be present at trial and to participate in all stages of the proceedings. *Bedford v. State*, 317 Md. 659, 670 (1989). This includes the right to participate in voir dire. *Id.* This right is protected by the Sixth Amendment to the U.S. Constitution, Maryland common law, the Maryland Declaration of Rights, and Maryland Rule 4-231. *Reeves v. State*, 192 Md. App. 277, 288 (2010) ("It is well established in Maryland that a criminal defendant is entitled, as a constitutional right, under Maryland common law, and under Maryland Rule 4-231, to be present at trial.") (internal quotation marks and citations omitted).

Additionally, a criminal defendant has a "constitutional right not only to be present during voir dire, but also to have adequate opportunity to gain a good perception of the potential jurors." *Bedford, supra*, 317 Md. at 673. There is, however, no statute or uniform rule that regulates how voir dire should be conducted. Indeed, "the nature and extent of the [voir dire] procedure lies solely within the sound discretion of the trial judge." *Id.* at 670. Accordingly, we will review the trial court record to determine whether the court abused its discretion in conducting voir dire. *Collins v. State*, 463 Md. 372, 391 (2019).

Gootee contends that his right to be present for voir dire requires that he have the opportunity to view the venire members' faces and facial expressions. Gootee argues, therefore, that the trial court abused its discretion when it denied defense counsel's request that the venire members wear clear face masks. We shall address the case law addressing Gootee's argument.

In *Lewis v. U.S.* the Supreme Court considered whether a criminal defendant's right to participate in trial was violated when voir dire challenges were made when the defendant was not present. *Lewis v. U.S.*, 146 U.S. 370 (1892). The Supreme Court held that the defendant's right to participate in trial was violated because "[the] making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought *face to face* with the jurors at the time when the challenges were made . . ." *Id.* at 376 (emphasis added).

In *State v. Yancey* the Court of Appeals was required to determine whether a defendant's right to participate in trial was violated when he was excluded from bench conferences with a potential juror during voir dire. *State v. Yancey*, 442 Md. 616, 624 (2015). The Court determined that the defendant's rights were violated because he was absent from the bench conference when the potential juror responded to a pivotal question regarding bias. *Id.* at 629. The Court reasoned that the nature of the dialogue with the juror was "'intended to search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses' supports that a defendant 'have

the opportunity to assess the juror's facial expressions, demeanor and other subliminal responses.'" *Id.* (quoting *People v. Antommarchi*, 80 N.Y.S.2d 247 (1992)).

Finally, in *Bedford v. State* the Court of Appeals considered whether a criminal defendant's right to participate in voir dire was violated when the trial judge ordered that the defendant sit some ten or twelve feet away from defense counsel and the venire members. *Bedford*, *supra*, 317 Md. at 669. The Court noted that other courts have found that a criminal defendant's right to be present during voir dire must provide him with the "adequate opportunity to gain a good perception of the potential jurors." *Id.* at 673. The Court reiterated that the defendant "must be afforded every opportunity to 'size up' his jury and to fully examine each juror so as to assist counsel in determining which jurors should be disqualified for cause or even for no cause at all." *Id.* at 673–74 (citing *Bunch v. State*, 281 Md. 680, 688 (1978)).

The Court determined that "[t]he ability to effectively participate [in voir dire] is impaired when the defendant is *so far removed* that he cannot read the faces of the potential jurors." *Id.* (emphasis added). The Court surmised that the defendant's right to participate in voir dire was "hampered and undermined" when he was forced to sit apart from his defense counsel and was unable to scrutinize the potential jurors. *Bedford*, *supra*, 317 Md. at 675. The Court reversed the case on other grounds, however, and explicitly declined to issue a holding on whether the voir dire procedure under those particular circumstances was reversible error. *Id.*

Gootee argues that his right to be present at trial requires that he have the ability "to adequately observe the facial expressions of all the venire[]members during the entire voir dire . . ." We agree with Gootee's assertion that the right to be present for voir dire necessarily includes the right to have an adequate opportunity to "size up" the jury. *Bedford*, *supra*, 317 Md. at 673. Indeed, the purpose of the defendant's presence at voir dire is to have "the opportunity to read the faces of his jurors[]" and to "assist counsel in determining which jurors should be disqualified for cause or even for no cause at all." *Bedford*, *supra*, 317 Md. at 673. This overarching purpose could not be effectively fulfilled if the defendant was unable to see the venire members or hear their responses.

Nevertheless, we reject Gootee's argument that there is a constitutional requirement that the defendant must have a completely unobstructed view of the venire members' entire faces in order to adequately participate in voir dire. Gootee presents case law containing language that a defendant must be "face to face" with the potential jurors. *See Yancey*, *supra*, 442 Md. at 629; *see Lewis*, *supra*, 146 U.S. 370. The cases giving rise to this illustrative language, however, are not at all comparable to Gootee's situation. *Yancey* and *Lewis* were both decided under circumstances where the defendant was completely excluded from the voir dire proceedings. *See Yancey*, *supra*, 442 Md. at 629; *see Lewis*, *supra*, 146 U.S. 370.

Indeed, these cases utilize the phrase "face to face" to reinforce the basic requirement that the defendant must be present during voir dire and also have an adequate opportunity see and hear the potential jurors. *See Lewis*, *supra*, 146 U.S. at 370; *see*

*Yancey*, *supra*, 442 Md. at 629. This "face to face" language from *Lewis* -- and later developed in *Yancey* and *Bedford* -- is much more a colloquialism than a literal directive. *See Lewis*, *supra*, 146 U.S. at 370; *see Bedford*, *supra*, 317 Md. at 673; *see Yancey*, *supra*, 442 Md. at 629. In Gootee's case, "face to face" would need to be construed in its utmost literal sense in order for us to hold that there is a constitutional requirement that the defendant must have a completely unobstructed view of the venire members' entire faces. We believe that this language need not be literally applied. Furthermore, the unique circumstances of Gootee's situation do not violate the basic meaning of "face to face" as used in the cited cases because it is undisputed that Gootee was present throughout the voir dire and could see and hear the venire members.

The jury selection in this case is much more akin to *Bedford* which arose under factual circumstances when the defendant was present, but was seated a short distance away from his defense counsel and the venire. *Bedford*, *supra*, 317 Md. at 673. Our holding reflects the *Bedford* Court's admonition that "[t]he ability to effectively participate is impaired when the defendant is *so far removed* that he cannot read the faces of the potential jurors." *Bedford*, *supra*, 317 Md. at 674 (emphasis added). Indeed, we acknowledge *Bedford's* holding that "absent *an articulated and legally sufficient reason*, a judge should not deprive the defendant of the right . . . to scrutinize potential jurors . . ." *Bedford*, *supra*, 317 Md. at 675 (emphasis added).

Based on our review of the trial court record and the applicable case law, we hold that Gootee's ability to effectively participate during voir dire was not so impaired such

that his constitutional right to be present during trial was violated. Gootee was not so far removed from the venire merely because the lower half of the potential jurors' faces were covered. Gootee was present in the courtroom, he was able to hear the venire members' answers to inquiries, and he was able to assist defense counsel in selecting the jury. Crucially, Gootee was able to see the venire members' overall demeanor, bodily gestures, and some facial expressions, even if the lower portions of the venire members' faces were covered.[7]

Under these circumstances, we hold that Gootee was not so far removed from the venire members such that he was unable to effectively participate in voir dire. The constitution and our case law merely require that a criminal defendant be present during voir dire and "have adequate opportunity to gain a good perception of the potential jurors." *Bedford*, *supra*, 317 Md. at 673. The mere fact that Gootee was unable to view the lower portion of a potential juror's face does not limit his ability to "size up" the jury. *Id.* Gootee's presence during voir dire, ability to consult with counsel, and ability to see and

[7] Gootee presents scientific studies and arguments which assert that a substantial amount of human communication, emotion, and demeanor are conveyed by the lower half of the face. We need not delve into a scientific debate over which portion of the human face conveys the most emotional response, overt or subliminal. Accordingly, our holding need not hinge on an examination of any scientific studies. In short, Gootee's constitutional right to adequately observe the venire and size up potential jurors was not so severely hampered or undermined merely because the lower half of the venire members' faces were covered. The nose, mouth, and lips may convey a great deal of emotional response. It may also be true, however, that eyes, eyebrows, and forehead convey an equal if not greater amount of emotional response. After all, it has been said that "the eyes are the windows to the soul." (anonymous).

hear the venire members' overall demeanor presented him with an adequate opportunity to size up the potential jurors.

We further hold that the trial court acted within its discretion in denying defense counsel's request for clear face masks. Even if Gootee's ability to scrutinize the potential jurors was somehow limited, the court acted within its discretion in denying defense counsel's request because the trial court was acting on "an articulated and legally sufficient reason." *Bedford*, *supra*, 317 Md. at 675. The exceptional circumstances of the COVID-19 pandemic has forced courts to adapt jury trials in order to function safely and effectively. The trial court's masking requirement is based on the Centers for Disease Control and Prevention's guidance. *See*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html (accessed January 25, 2022), archived at https://perma.cc/4XSK-J2QL. There can be no doubt that the circumstances of the COVID-19 pandemic presented the court with "an articulated and legally sufficient reason" to exercise its discretion and deny Gootee's request to see the faces at the venire panel in order to scrutinize the potential jurors more fully. *Bedford*, *supra*, 317 Md. at 675.

Gootee argues that the trial court's refusal to provide clear face masks was an abuse of discretion because clear face masks were feasibly available for the voir dire proceedings. Nevertheless, the trial court's decision to decline to provide clear face masks was well within its discretion in conducting voir dire. *Bedford*, *supra*, 317 Md. at 673. We will not overturn a trial court's decision in conducting voir dire proceedings unless there is evidence of an abuse of discretion. *Collins*, *supra*, 463 Md. at 391. The trial court did not abuse its

discretion in declining to provide clear face masks under the unique circumstances of the COVID-19 pandemic when particular personal protective equipment was not available to the court at that time. Accordingly, we hold that the trial court did not abuse its discretion when it denied defense counsel's request to provide clear face masks for the venire.[8]

**V. Gootee's multiple conspiracy convictions.**

Gootee argues that his multiple conspiracy convictions must be vacated because the State failed to prove a separate agreement for each conspiracy. We agree. A criminal conspiracy is "the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose . . ." *Mason v. State*, 302 Md. 434, 444 (1985). "It is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit. The unit of prosecution is the agreement or combination rather than each of its criminal objectives." *Jordan v. State*, 323 Md. 151, 161–62 (1991). Accordingly, when the State seeks to prove multiple conspiracies, it must prove an individual agreement for each conspiracy. *Savage v. State*, 212 Md. App. 1, 15 (2013).

Gootee asserts, and the State concedes, that the State failed to prove multiple conspiracies and agreements. Furthermore, the jury was not instructed that it was required

[8] Gootee also argues that his right to a public trial was denied because the venire members' faces were masked. This argument, however, was not raised below before the trial court. *See Robinson v. State*, 410 Md. 91, 110 (2009) (holding "that a claimed violation of the right to a public trial must be preserved for appellate review by a timely objection at trial, notwithstanding that the allegation implicates structural error."). We, therefore, decline to address this argument on appeal.

to find evidence of multiple conspiracies and agreements. Accordingly, eleven of the twelve of Gootee's conspiracy convictions must be vacated. We, therefore, vacate Counts 15, 16, 18-20, 22, 24, 25, and 27-29, and affirm the conviction under Count 13 for conspiracy with George Dyson to possess a firearm in relation to a drug trafficking crime.

**VI. Gootee's multiple convictions for unlawful possession of a firearm.**

Gootee argues that one of his two convictions for unlawful possession of a firearm must be vacated because the State only presented evidence that he possessed a single firearm even though he was disqualified from possessing a firearm on multiple bases. The State agrees, but requests that the unlawful possession of a firearm conviction with the lesser penalty be vacated, leaving the conviction with the greater penalty. We agree.

A person who is charged with unlawful possession of a firearm when there are multiple bases for disqualification can only be convicted once when there is a single act of unlawful possession. *Clark v. State*, 218 Md. App. 230, 252–53 (2014). The unit of prosecution for unlawful possession of a firearm is the act of unlawful possession, not the disqualifying conditions. *Melton v. State*, 379 Md. 471, 502 (2004). Accordingly, because the State presented evidence that Gootee unlawfully possessed only one firearm, his conviction for unlawful possession of a firearm carrying the lesser offense must be vacated, even though there were multiple disqualifying conditions. We, therefore, vacate Gootee's conviction under Count 11 and affirm his conviction under Count 10.

**JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; JUDGMENT AS TO ELEVEN OF THE TWELVE CONVICTIONS FOR CONSPIRACY VACATED; JUDGMENT AS TO ONE OF THE TWO CONVICTIONS FOR UNLAWFUL POSSESSION OF A FIREARM VACATED. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.**