Circuit Court for Baltimore County
Case No. 03-K-16-005933

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 208

September Term, 2018

REGINALD K. BURGESS, JR.

v.

STATE OF MARYLAND

Meredith,
Shaw-Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: April 2, 2019

*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 Reginald K. Burgess, Jr. was convicted in the Circuit Court for Baltimore County of illegal possession of a firearm and of fleeing and eluding the police. Appellant presents the following question for our review:

> "Did the trial court err in denying Appellant's *Batson* challenge to the prosecution's use of all of its four peremptory strikes on African American venire panelists?"

Finding that the court did not err, we shall affirm.

I.

On February 21, 2018, a jury in the Circuit Court for Baltimore County convicted appellant of illegal possession of a firearm and fleeing and eluding the police. [1] The court sentenced him to a term of incarceration of five years for illegal possession of a firearm and six months, concurrent, for fleeing and eluding the police.

During the jury selection process, the court asked the members of the venire if there was "any member of the jury panel or any member of your immediate family who has ever been the victim of a crime or charged with or convicted of a crime?" Numerous venire persons responded affirmatively. The court questioned eight venire persons pertinent to this appeal.

Relevant to this appeal, four African American venire persons admitted to having family members who had been charged with or convicted of crimes. Juror Number 9 stated that her brother-in-law was incarcerated in a federal prison for a drug-based crime. Juror

[1] As this appeal asks us to review the jury selection process only, we need not relate the facts underlying appellant's conviction.

Number 14 stated that her brother was incarcerated for attempted murder. Juror Number 22 told the court that he had cousins who were "charged with different crimes," but did not elaborate as to the nature of the crimes. Juror Number 92 stated that "several" of her cousins were convicted of crimes that included burglary and firearms offenses. All four told the court that they could consider a case fairly and impartially despite their family members' contact with the criminal justice system.

Three white venire persons who were seated on the jury had family members who were convicted of crimes. Juror Number 26 told the court that her sister was incarcerated in a state prison for two years for a drug crime. Juror Number 64 stated that she had two nephews in two different states who were incarcerated for child pornography convictions. Juror Number 97 told the court that her step-son was convicted of destruction of property and a drug crime and her nephew was convicted of grand theft over $10,000.

The prosecutor exercised all four of the State's peremptory challenges to strike the four African American venire persons noted above. As a result, the three listed white venire persons were seated and sworn as jurors. Appellant objected to the prosecutor's use of his peremptory strikes, alleging racial discrimination in the jury selection process pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The court found that appellant had established a "pattern" of four racially disparate strikes, noting that "four in a row, to me, is a pattern."

The parties and the court then reviewed reasons for the prosecutor's strikes:

> THE COURT: First one was [Juror Number] 9.

[THE STATE]: Has a brother who's currently serving Federal time for drug charges, that was the reason for the strike. (inaudible).

* * *

THE COURT: [Juror Number] 14 . . .

[THE STATE]: Her brother is currently serving time for attempted murder.

* * *

THE COURT: Next was [Juror Number] 22.

[THE STATE]: [Juror Number 22] indicated in generalization he had many members or several members of his family who had been convicted of various crimes.

[DEFENSE COUNSEL]: I believe he said cousins.

[THE STATE]: I thought he said various family members. Is there one more or is that it?

[DEFENSE COUNSEL]: Yes. [Juror Number] 92.

[THE STATE]: [Juror Number] 92 (inaudible) various crimes.

THE COURT: Cousins what?

[THE STATE]: Convicted of burglary and various crimes and the State would indicate that all those reasons are (inaudible).

* * *

THE COURT: Where, where were, what were the numbers [of the white jurors not struck]?

[THE STATE]: [Juror Number] 64 (inaudible) was nephews that were out of state, (inaudible) some type of pornography charge, non-violent.

THE COURT: Who else?

[THE STATE]: Who else?

[DEFENSE COUNSEL]: [Juror Number] 26 had a sister convicted of drug charges.

[THE STATE]: Well, [controlled dangerous substance], it didn't say it was distribution or if she was serving time.

[DEFENSE COUNSEL]: But, it's the exact same reason that [Juror Number] 9 gave.

THE COURT: I'm sorry?

[DEFENSE COUNSEL]: It was, it was the same exact reason that [Juror Number] 9 gave, but [Juror Number] 26 was not stricken.

THE COURT: Well, did she say her, was her sister in jail?

[DEFENSE COUNSEL]: She said sister, Court's indulgence. I had sister convicted of drug charges.

[THE STATE]: *But it didn't indicate they were serving Federal time, that's the difference*.

THE COURT: So, it was 64, 26 and who else?

* * *

[DEFENSE COUNSEL]: [Juror Number] 97. [Juror Number] 92 was stricken, [Juror Number] 97 was seated.

* * *

THE COURT: Okay and what about her now?

[DEFENSE COUNSEL]: Stepson and nephew convicted of destruction of property, drugs and theft greater than ten thousand.

THE COURT: And Mr. Webster, what is your reason for not striking her?

[THE STATE]: As I've indicated, the people who I've stricken for crimes have been crimes, have been crimes of violence compared to the individuals who (inaudible) . . . The people who I've struck had individuals in their family who are convicted of crimes of violence, attempted murder, distribution, felony crimes. The three individuals which I've seated is an out of state person with a pornography charge, [Juror Number 97] has sons with malicious destruction, a stepson and a . . . nephew with malicious destruction charges and theft.

THE COURT: I believe that the, was the State out of strikes when [Juror Number] 97 was stricken?

* * *

[DEFENSE COUNSEL]: . . . The State was out of strikes on [Juror Number] 97.

* * *

THE COURT: They couldn't have stricken [Juror Number] 97. All right. What about [Juror Number] 92?

[THE STATE]: That was who I did strike.

THE COURT: Yeah.

[THE STATE]: And that was the individual that had cousins convicted of burglary, but more importantly, firearms charges.

* * *

THE COURT: The question is whether you have sufficiently articulated the reasons to strike [Juror Number] 14, attempted murder is different than a drug charge, *and [Juror Number] 9, I guess you could argue Federal prison is, makes it a worse offense than a State drug charge*. What was the other strike?

[THE STATE]: [Juror Number] 92 was the individual who had firearms charges.

> THE COURT: Had what?
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> [THE STATE]: Firearms, family member was convicted of firearms charges.
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> * * *
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> THE COURT: What, what's your reason for [Juror Number] 22?
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> [THE STATE]: He indicated vaguely my family, many family members convicted of crimes, and didn't elaborate as to what that was.
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> [DEFENSE COUNSEL]: It wasn't, it was, it was cousins, not even—
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> THE COURT: He did say many. Okay.
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> [DEFENSE COUNSEL]: And he wasn't specific.
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> THE COURT: *And he said there were many, I believe, were members.* I think that the State has articulated reasons for each of the strikes, so. I'll deny your motion.

Notably, the court found that Juror Number 22 said that he had "many" family members convicted of crimes, and the court acknowledged that "you could argue Federal prison . . . makes it a worse offense than a State drug charge." After denying the motion, the court swore the jury, provided introductory instructions, and dismissed the jury for lunch. Afterward, the court reviewed relevant case law and permitted the parties to reargue the *Batson* issue. Appellant emphasized again that Juror Number 22 was struck because his cousins "generally had been charged with crimes" and that the prosecutor struck Juror Number 9 for a federal drug sentence but did not strike Juror Number 26 for a state drug

sentence, which he said evidenced a discriminatory purpose. The prosecutor argued in reply as follows:

> [THE STATE]: . . . The differences that I'd point out to the Court was the individuals were struck for the family members that served time were violent crimes and firearm related charges. The two individuals that were Caucasian that [defense counsel] referenced one indicated that she had nephews out of state on some type of pornography charges. The other individual he said was a simple, was a possession of drugs and a malicious destruction and [regarding Juror Number 97] the State was out of strikes as to that third individual which the Court did see and I'll submit on that.

The court reiterated its finding that appellant made a *prima facie* showing of discrimination and that the prosecutor provided explanations that were "neutral, related to the case to be tried, clear and reasonably specific and legitimate." It then found as follows:

> THE COURT: The State struck four African Americans, [Juror Number] 14, and the reason given was the juror's brother was serving time for attempted murder and that is certainly a serious and violent crime. The State struck [Juror Number] 9 because that juror said [her] brother was in jail on a Federal offense. Again, this is a close relationship and someone accused of a serious crime, considering that it is, and that brother is serving time in Federal prison. The State struck [Juror Number] 92. That juror said their cousin had been convicted of firearms charges. The State's reason is that . . . this case involves firearms. So, again, I believe the strike was legitimate. And [Juror Number] 22 was stricken by the State. That juror said that there were members of his family, I don't remember how many he said, but it was definitely plural, members of the family—
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> * * *
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> THE COURT: . . . The relationship is cousins but . . . there were multiple persons and multiple crimes from which they were convicted.

> [DEFENSE COUNSEL]: That was the understanding.
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> THE COURT: So, given those circumstances of each one of those jurors . . . *I find that the State's reasons are not pretextual . . . but they were legitimate strikes and were race neutral explanations for challenging those excluded jurors*. Each one of them was . . . either a close relationship, being a brother, or being convicted of a serious crime or [Juror Number] 92, a firearms charge, which is involved in this case and even [Juror Number] 22, you have multiple members of the family and various crimes. So, I believe that they are all legitimate reasons for the State to exercise its peremptory strikes. The defense explanation or argument that the strikes or the reasons given were pretextual are that there were white jurors selected who also had family members who had been convicted of crimes . . . and who had not been stricken by the State. Juror Number . . . 64, who was a seated juror, a white juror, had a nephew convicted of some sort of pornography charge out of state, again, it's a nephew, not a close relation and it's pornography, it's not a violent crime and it's out of state. The State did not strike [Juror Number] 26, who was seated as a juror . . . . She said her sister had been convicted of a [controlled dangerous substance] conviction. The State's explanation for not striking her was a non-violent crime. . . .
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> * * *
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> THE COURT: And then [Juror Number] 97 was not stricken but the State was out of strikes by that time and . . . she was seated . . . . So, [if the State had a strike remaining], the charge was destruction of property. It wouldn't be the same as . . . a violent crime. So, in any event, I believe that this, given those reasons and circumstances for the State's exercising its strikes . . . against the African American jurors mentioned and not striking the white persons who were seated . . . I find that [appellant] has not carried . . . his burden of proving purposeful discrimination or proving that there was a pretextual reasons [sic] given by the State.

On that basis, the court denied appellant's request to seat the African American jurors the State had stricken.

The court seated the jury with eleven white jurors (including the three white venire persons listed above), one African American juror, and one white alternate juror. The jury convicted appellant, and the court imposed sentence. This timely appeal followed.

II.

Recognizing that the circuit court applied the three-step inquiry mandated by *Batson* and its progeny, appellant challenges only the court's determination at the third step: whether the challenging party proved purposeful racial discrimination. He challenges only the State's striking of two prospective jurors—Jurors Number 9 and 12. He argues that the State's facially neutral reasons for striking the two African American venire persons were pretexts for racial discrimination and asks that we reverse the circuit court on that basis.

Appellant recognizes that a court should examine the totality of the circumstances in evaluating a *Batson* challenge. He focuses his argument on "the consistent application of any stated policy for peremptory challenges," also known as a "comparative analysis" of jurors. He argues that the State's reason for striking Juror Number 9, which he characterizes as "drug charges," applied equally to Juror Number 26. Similarly, he argues that the prosecutor who excused Juror Number 22 for having "relatives convicted of 'various crimes'" should have excused Juror Numbers 26, 64, and 97, the three white jurors seated on the jury despite having family members convicted of various crimes. Based on that analysis, appellant argues that the court's finding at the third step of *Batson* was clearly erroneous.

The State agrees with appellant's initial premise that the correct analysis is the three-step inquiry from *Batson,* agreeing further that the circuit court applied correctly the first two steps of that test. The State acknowledges that comparative analysis is a proper tool for reviewing strikes in the third step but disagrees with appellant's analysis. The State argues that the prosecutor provided appropriate, consistently applied reasons for his peremptory strikes and that we should affirm the circuit court for those reasons.

The State distinguishes the four relevant African American venire persons, emphasizing that Juror Number 9's brother-in-law was incarcerated in a *federal* prison for a drug conviction, distinguishing her from Juror Number 26, whose sister was in *state* prison. The State contends that "[i]t is a fair inference that the brother in federal prison had committed a more serious crime than the sister who spent two years in what presumably was Jessup Correctional Institution, a State prison." Next, the State argues that the prosecutor struck Juror Number 14 because her brother was incarcerated for attempted murder. Regarding Juror Number 22, the State distinguishes his relatives "charged with different crimes" by their number (the court found that "many" of Juror Number 22's relatives faced criminal charges) and the fact that the prospective juror did not specify the crimes involved. Finally, the State argues that the prosecutor struck Juror Number 92 because her cousins had burglary and firearms convictions, and the defendant in the instant case was charged with a firearm offense. Given these race-neutral reasons, the State argues that we should affirm the judgment of the circuit court.

III.

The Equal Protection Clause of the 14th Amendment to the United States Constitution forbids the striking of a member of the jury venire based on race. *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005); *Edmonds v. State*, 372 Md. 314, 328 (2002). When a party discriminates based on race in jury selection, a defendant's right to a fair trial is compromised, the targeted racial group is harmed by reinforcing stereotypes in the courtroom, and the integrity of the court is undermined. *Miller-El v. Dretke* at 237–38. The United States Supreme Court set out the policy underlying this rule as follows:

> "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial . . . [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."

Batson, 476 U.S. at 87.

When a criminal defendant claims that the State discriminated based on race in striking members of the venire, Maryland courts apply the three-part test delineated by the United States Supreme Court in *Batson v. Kentucky*. In *Whittlesey v. State*, 340 Md. 30 (1995), the Court of Appeals explained the analytical process as follows:

> "When a criminal defendant raises a *Batson* claim, the trial judge must follow a three-step process. The burden is initially upon the defendant to make a *prima facie* showing of purposeful discrimination. If the requisite showing has been

> made, 'the burden shifts to the State to come forward with a neutral explanation for challenging [members of a distinct racial group].' "Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination."

Id., 46–47 (internal citations omitted). The defendant need not prove that the State discriminated with each strike; one purposeful discriminatory strike violates the Equal Protection Clause. *Edmonds*, 372 Md. at 328; *Stanley v. State*, 313 Md. 50, 89 (1988).

At the third step, the court may infer a discriminatory purpose from the totality of the circumstances at the time of the challenge. *Edmonds*, 372 Md. at 330. The court may consider "the disparate impact of the prima facie discriminatory strikes on any one race; the racial make up of the jury; the persuasiveness of the explanations for the strikes; the demeanor of the attorney exercising the challenge; and the consistent application of any stated policy for peremptory challenges" among other relevant facts. *Id.* As the circuit court's findings at each step are largely factual, and the third step typically requires a credibility determination, we accord the trial court great deference on appeal. *Id.* at 331. We reverse the court's third-step determination only when it is clearly erroneous. *Id.*

Before we analyze the facts of this case, we set out a brief explanation of the use of "comparative analysis" in jury discrimination cases. In a comparative analysis, the court applies the reasons used to strike venire persons of one protected class to the venire persons seated on the jury. *Miller-El v. Dretke*, 545 U.S. at 241. The Supreme Court of the United States and federal Courts of Appeals often apply a comparative analysis as a test for discrimination in jury selection. *See Miller-El v. Dretke*, 545 U.S. at 241; *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006) (". . . we do not hold that comparative juror analysis

always is compelled at the appellate level . . . [but], comparative juror analysis is an important tool that courts *should* use on appeal.) (internal citations omitted); *Bell v. Ozmint*, 332 F.3d 229, 241 (4th Cir. 2003) (". . . comparative juror analysis clearly is a relevant consideration in the *Batson* analysis . . .").

Before *Batson v. Kentucky*, the Supreme Court required proof of repeated "perversion" of the jury selection process to prove racial discrimination—the facts of an appellant's case alone were held to be insufficient evidence to overcome a presumption of non-discrimination. *Batson*, 476 U.S. 90–93. When the *Batson* ruling removed in 1986 the requirement of evidence beyond the appellant's trial, *id.* at 95, the federal courts quickly began to apply comparative analysis (though not explicitly under that name) when reviewing alleged racial discrimination in a jury selection. *E.g.*, *Davidson v. Harris*, 30 F.3d 963, 965 (8th Cir. 1994) (analyzing strike of African American venire person because she had young children); *Jones v. Ryan*, 987 F.2d 960, 973 (3rd Cir. 1993) (analyzing strikes of African American venire persons for having children the same age as the defendant and being "the same approximate age" as the defendant); *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989) (analyzing strikes of Hispanic venire persons for their residences and ages). By the mid-1990s, it was considered a "well-established tool" used by courts to review *Batson* challenges. *Turner v. Marshall*, 121 F.3d 1248, 1251 (9th Cir. 1997) (*overruled on other grounds by Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999) (en banc)).

The Supreme Court recognized comparative analysis in *Miller-El v. Cockrell* in 2003 but found it unnecessary to apply in that case. *Id.*, 537 U.S. 322, 343 (2003). Two

years after *Miller-El v. Cockrell*, the same defendant reached the Supreme Court for a second time, arguing the same *Batson* issue in 2005's *Miller-El v. Dretke*. The State of Texas argued that the prosecutor exercised peremptory strikes against African American venire persons because of their views on rehabilitation and the death penalty. *Id.* at 244, 248. The Court, again recognizing the usefulness of comparative analysis, applied those reasons to white venire persons. *Id.* It determined that a consistent, non-racial use of the prosecutor's stated reasons should have resulted in strikes to several white venire persons unchallenged by the State, as they expressed strong views that the prosecutor found objectionable when offered by African American venire members. *Id.*[2] The Court noted that comparative analysis was "[m]ore powerful" than a simple statistical analysis, *id.* at 241, and it reversed the United States Court of Appeals for the Fifth Circuit's holding that the prosecutor did not discriminate based on race in the jury selection. *Id.* at 266.

Maryland courts apply comparative analysis in assessing discrimination in jury selection. *See e.g.*, *Jones v. State*, 105 Md. App. 257, 268–69 (1995), *aff'd*, *Jones v. State*, 343 Md. 584 (1996); *Spencer v. State*, 450 Md. 530, 562 (2016); *see also Evans v. State*, 396 Md. 256, 392 (2006) (Bell, C.J., dissenting). Unlike the federal courts, however, we ordinarily refer to it as a test for "consistent application" of the reasons for the challenged peremptory strikes. *E.g.*, *Edmonds*, 372 Md. at 330.

[2] At the time of the decision, Texas granted 15 peremptory challenges to each party in a capital case in which the State sought the death penalty.

For example, in *Jones*, the defendant struck five white venire persons.[3] *Jones*, 105 Md. App. at 267. In response to a *Batson* challenge, defense counsel told the court that he made the challenged strikes for multiple reasons, including the venire persons' affluent neighborhoods and ages. *Id.* at 267–68. On appeal, this Court applied the defendant's stated reasons to the venire persons seated on the jury. *Id.* at 268. We determined that non-discriminatory application of those reasons should have resulted in strikes of at least two African American jurors the defendant did not strike. *Id.* at 269. Based upon that analysis and the circuit court's findings, we affirmed the circuit court's finding of a *Batson* violation. *Id.* at 270.

Maryland and federal courts apply the same test, and we shall refer to it as a comparative analysis to clarify that Maryland's jurisprudence on this issue parallels that of the United States Supreme Court.

In this case, the State does not challenge the circuit court's finding that appellant satisfied the first step of *Batson* by establishing *prima facie* discrimination. The parties agree further that the prosecutor presented a facially race-neutral reason for the strikes. Therefore, we proceed to review of the third step of the analysis.

At the third step of *Batson*, the court must consider the totality of the circumstances in deciding whether the challenging party proved purposeful discrimination. Before this Court, appellant performs a comparative analysis using the reasons that the prosecutor

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[3] In *Jones v. State*, 105 Md. App. 257 (1995), we reviewed the *defendant's* violation of *Batson* because he appealed the circuit court's remedy for the violation and argued also that *Batson* did not apply to discrimination against white jurors. *Id.* at 267.

provided for striking Jurors Number 9 and 22. He argues that the prosecutor struck an African American juror for a relative's drug conviction and another for relatives "charged with different crimes." He argues that those reasons should have led to strikes of three white jurors—Jurors Number 26, 64, and 97—and that his analysis shows the circuit court's error in finding that the prosecutor did not discriminate.

We disagree with appellant's characterization of the prosecutor's stated reasons. Based on a careful reading of the record, we recognize that the circuit court conducted an informal comparative analysis using the following reasons for the strikes, which it deemed acceptably race-neutral.[4] The prosecutor emphasized that Juror Number 9's brother-in-law was incarcerated in a federal rather than state prison. The circuit court found that that "you could argue Federal prison . . . makes it a worse offense than a State drug charge" before rejecting appellant's *Batson* challenge. Although Juror Number 26's sister was incarcerated for drug crimes, she was incarcerated in state prison. The circuit court accepted that distinction, and we see no clear error in its acceptance.

The circuit court found also that Juror Number 22 had "many" family members charged with unknown crimes.[5] Though portions of Juror Number 22's answers are

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[4] Because the circuit court's findings in this case amounted to a comparative analysis, our review differs from appellate courts' typical comparative analysis of the venire persons involved in a *Batson* challenge. Rather than using the trial court's findings of fact to perform a comparative analysis, we review the trial court's analysis for clear error, the standard mandated for the third step of *Batson* in *Edmonds v. State*, 372 Md. 314, 328 (2002).

[5] We use the prosecutor's stated reason of the number of family members rather than concerns with "uncertainty" as to the type of crimes—the State appears to present the issue of uncertainty for the first time in its brief.

inaudible, the court and the parties agreed at the time of the challenge that a relatively large quantity—defined at various points as "many" or "several"—of Juror Number 22's family members were convicted of crimes. None of the white jurors at issue had more than two family members convicted of crimes, and thus the circuit court rejected appellant's challenge. Again, we see no clear error in the circuit court's finding. Additionally, the circuit court found that the prosecutor's reasons for striking Jurors Number 14 and 92 (family members convicted violent crimes and firearms offenses) did not apply to any of the white jurors at issue, a finding we do not understand appellant to contest on appeal.

In conducting its informal comparative analysis, the circuit court found that the prosecutor's reasons for striking the four African American venire members did not mandate his striking other, white venire members, and it denied appellant's challenge. The circuit court was in the best position to evaluate the prosecutor's credibility and other relevant factors, and it did so in two separate *Batson* analyses at the time the prosecutor struck the African American venire persons. We defer to the circuit court's finding that appellant did not prove purposeful discrimination.

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