UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0493

September Term, 2014

KEVON SPENCER

v.

STATE OF MARYLAND

Berger,
Nazarian,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

PER CURIAM

Filed: October 2, 2015

* 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.

For the reasons set forth in the attached opinions of Judges Nazarian and Berger, the judgment of the Circuit Court for Dorchester County is affirmed, except with regard to the conviction for malicious destruction of property valued over $500.00, which is reversed, and the case is remanded to the circuit court with instructions to enter a conviction for malicious destruction of property valued under $500.00 and an appropriate sentence. Judge Nazarian dissents in part to Judge Berger's opinion and would remand, without affirming or reversing, for further proceedings relating to the State's *Batson*[1] challenge to appellant's peremptory strikes.

JUDGMENT OF THE CIRCUIT COURT FOR DORCHESTER COUNTY REVERSED AS TO THE CONVICTION FOR MALICIOUS DESTRUCTION OF PROPERTY VALUED OVER $500, AFFIRMED IN ALL OTHER RESPECTS, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY.

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

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Opinion by Nazarian, J.

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Kevon Jamar Spencer appeals from his convictions in the Circuit Court for Dorchester County for attempted second-degree murder, two counts of second-degree assault, and malicious destruction of property with a value of over $500.00. Mr. Spencer contends that the circuit court inappropriately sustained a *Batso*n *v. Kentucky*, 476 U.S. 79 (1986), challenge to his peremptory strikes of three jurors, that he was convicted of attempted murder and assault on insufficient evidence, and that the court permitted the malicious destruction charge to go to the jury after he had been acquitted.

In this opinion, the panel holds unanimously that the evidence was sufficient to sustain Mr. Spencer's convictions for attempted murder and assault and, as the State agrees, that his conviction for malicious destruction of property valued over $500 must be reversed and the case remanded with instructions to enter judgment of conviction for malicious destruction of property valued under $500, along with an appropriate sentence. In a separate opinion by Judge Berger, which Judge Thieme joins, the majority rejects Mr. Spencer's *Batson* argument.

I. BACKGROUND

A. The Chase

On the afternoon of June 20, 2013, Mr. Spencer was driving a red Kia Soul on Sharptown Road in Dorchester County. At about the same time, Detective Priscilla Rogers of the Dorchester County Sheriff's Office was driving her patrol car on Route 14 (Eldorado Road). The Detective saw Mr. Spencer fail to stop at the stop sign on his side of the intersection of the two roads; she testified that she "had to slam on [her] brakes to avoid

having a collision." So she turned, pulled up behind the Soul, activated her lights and sirens, and attempted to initiate a traffic stop.

Unfortunately, the Soul sped up in response rather than stopping, and soon reached a speed of approximately 80 miles per hour as the two vehicles crossed over the Brookview Eldorado Bridge. The Detective radioed for backup and continued the pursuit. She testified that as the drive wore on, the Soul reached speeds of over 110 miles per hour, drove down the middle of a two-lane road, ran stop signs, and cut off other vehicles.

Four police units joined the pursuit: Corporal Garrison of the Sheriff's Office, an unnamed officer from the Hurlock Police Department, and Deputies Thomas and Tolley of the Sheriff's Office, each in his own car. After some maneuvering, Detective Rogers was able to position her cruiser in front of the Soul to try to slow it down, but the Soul hit the brakes as Detective Rogers was passing, and the back of the Soul struck the front bumper of the Detective's cruiser as she passed. She testified that when her vehicle was hit, the car sustained damage totaling $913.25.

Even with Detective Rogers in front, the Soul continued driving at a high speed, and around other cars in a serpentine pattern. The Soul struck Corporal Garrison's department-issued Chevy Tahoe soon after. When asked at trial, Corporal Garrison could not estimate the damage to his vehicle.

Keevin Robinson was one of three passengers in the Soul. He testified that when the pursuit began, he "panicked," and the passengers collectively screamed for the car to stop. "[It] felt like [to] me they wanted out," he said.

With opposing traffic on the two-lane road, and officers in front and behind, the Soul was "doing anything that [it] possibly could" to elude law enforcement, according to Detective Rogers. She testified that even in the face of opposing traffic, the Soul "was going from one shoulder of the roadway to the other shoulder of the roadway," and cars "were being forced to the sides of the roadway." Deputy Tolley described this driving pattern as "swerving violently from side to side," and testified that Detective Rogers was "swerving to try to block [the Soul] from going by." He said that the officers were "trying to just get around and box [the Soul] in, I guess, slow him down." Eventually, the Soul was able to get back in front of Detective Rogers, but Deputy Tolley pulled in front, and the Soul drove off of the roadway onto the grass shoulder.

At that point, the cars came up quickly on a cyclist, Andrew Kinn, who was walking his bike on the same shoulder on which the Soul was driving. Mr. Kinn wore a bright yellow shirt and multiple flags flew from the back of his bicycle. Detective Rogers testified she could spot Mr. Kinn from "the distance between two telephone poles." Corporal Garrison testified that he could spot Mr. Kinn from three telephone poles' distance, although he had a higher vantage point from his Tahoe than the Soul did. Detective Rogers testified that the officers "were slowing down [at that point] because we saw the bicyclist. The Kia Soul could have come back out onto the roadway." But even though Mr. Kinn "got off of his bicycle, [and] was trying to go across the ditch," Mr. Kinn "was ultimately struck by the Kia Soul":

> [W]hen the Kia was on the shoulder I could see that the pedestrian was trying to move over towards the ditch to get out of the way and then once he was on the grass I did not see the pedestrian, I just know that he was struck by the Kia Soul. . . .
>
> I saw the arm of the yellow shirt made impact into the front windshield of the Kia and then the pedestrian was flown, or flew off the windshield approximately 15 feet into the ditch.

Deputy Tolley offered a similar account:

> [A]s we're traveling west [Mr. Kinn is] over on the grass shoulder trying to get off the roadway away from us coming along. . . .
>
> At that time I'm slowing down to try to get the Kia to slow down as he goes onto the grass part of the shoulder . . . that leads down to the ditch. . . .
>
> At that point I knew that the bicyclist was extremely close. . . .
>
> At that time the Kia, [it] didn't appear to try to come back on the roadway or even drive down to the ditch, which would have been very easy to do to get away from striking the pedestrian with the bicycle. But [it] just continued straight on and hit [Mr. Kinn].

Deputy Tolley later acknowledged that if the Soul had driven into the ditch, it would have come to a stop.

Corporal Garrison saw the collision as well:

> A: The Kia Soul decided to get around Deputy Tolley, went down into the ditch, continued down into the grass, and just kept going and then finally struck the driver, the person on the bicycle, Mr. Kinn.
>
> Q: And could you see from where you were the bicycle and the pedestrian?

> A: Absolutely. My Tahoe sits a little higher than other vehicles, I could see everything from my vantage point. . . .
>
> ***
>
> Q: So [the cyclist] was clearly visible to you?
>
> A: Oh, absolutely, it's a real bright shirt, flags on the bike, you couldn't miss it.
>
> Q: And when you saw the pedestrian, he wasn't in the pathway at the time of the chase?
>
> A: No. At that time he was getting off the roadway going towards the ditch.
>
> Q: And so then what did you see happen?
>
> A: The Kia Soul struck Mr. Kinn as he was trying to make it down off the ditch up on the embankment where the cornfield starts.

He also testified on cross-examination that at the time Mr. Kinn was struck, Deputy Tolley was "a half of a car length roughly at this time in front of the Kia Soul," but "[the Soul] could have easily, if [it] wanted to go around him, go around him on the opposing lane," because there was no traffic at that time.[1]

Mr. Robinson testified initially that seeing Mr. Kinn "was a last minute thing. By the time I seen him, it was boom, he was hit." But in response to further questioning, he said that he saw Mr. Kinn *and warned the driver*. He also agreed that the Soul could have

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[1] Deputy Thomas, who stopped to tend to Mr. Kinn after he was struck, testified that he "just saw the bike fly and then the gentleman roll into the ditch."

driven into a ditch to avoid Mr. Kinn. He listed the amount of time between seeing Mr. Kinn and collision as "[n]o longer than two seconds."

Detective Rogers testified that the group of vehicles was traveling approximately 60 miles per hour when the Soul struck Mr. Kinn. Mr. Kinn, although brutally injured, survived and testified at trial. He didn't recall being struck: "all I know is I got struck from behind." Dr. Cory Carpenter of Peninsula Regional Medical Center, who treated Mr. Kinn on the day of the incident, testified that Mr. Kinn's injuries were consistent with being hit by a car, including "a couple of neck fractures" and "multiple back fractures in the thoracic area, which is the middle part." Dr. Carpenter believed that "the point of impact was likely his left leg, at least with the vehicle, flying onto the hood and resulting in probably most of the other fractures."

After striking Mr. Kinn, the Soul swung back to the head of the line. Deputy Tolley decided at this point that the chase "had to be ended," so he drove his cruiser "into the rear passenger side bumper of the Kia in an attempt to disable the vehicle." This forced the Soul into a ditch, where it stopped. At that point, "the driver and rear seat passenger bailed out," and Deputy Tolley quickly apprehended the driver, whom Officer Tolley, Detective Rogers, and Corporal Garrison all identified as Mr. Spencer.

According to Detective Rogers, the chase covered approximately 12 miles. She testified that her cruiser was not equipped with any surveillance equipment. Deputy Tolley similarly testified he had no surveillance for the pursuit. The other officers were not

questioned about surveillance equipment on their vehicles, and no video was ever entered into evidence.

Detective Rogers also testified that soon after Mr. Spencer was apprehended, she spoke with him briefly, but said that he was "act[ing] as if he was half asleep." After Mr. Spencer was transported to the police station, Detective Rogers tried to speak with him a second time—he asked "what happened?" and she responded by turning the question around. Mr. Spencer responded, according to the Detective, "excuse my language, his words, I'm still fucked up."

B. The Trial

Mr. Spencer was ultimately charged by criminal information with thirty-seven counts, seven of which were *nol prossed* on the first day of trial. He was tried over two days for attempted second-degree murder of Andrew Kinn and a group of lesser-included offenses, second-degree assault on Detective Rogers and Corporal Garrison, malicious destruction of property valued over $500 for both officers' patrol vehicles and for Mr. Kinn's bicycle, and numerous traffic offenses.[2] The charges never included malicious destruction of property valued under $500.00.

After *voir dire* of prospective jurors, the court allowed counsel to exercise peremptory strikes, and the defense exercised four strikes in quick succession. The State

[2] Mr. Spencer was also charged with several counts relating to his possession of a handgun, as well as several counts alleging that the Soul was a stolen vehicle. He was acquitted of these charges.

challenged the strikes, contending that all four stricken jurors were "white, mostly white males and females." The State asserted that none of these jurors had answered any questions, and asked the court "to require the defense to put on record the reasons for the strike." The Court required the defense to respond:

> All right. [Counsel], you've been playing with this for a long time in your other trials. The Court has noticed a pattern of striking white mostly male jurors, even jurors who have not answered a question. I'm going to require you to explain your rationale [for] striking.

Defense counsel then offered a rationale for striking each juror. As to three, he cited their employment—one was a farmer, one listed himself as "self-employed," and one was a mechanic. In addition, counsel explained that he struck the self-employed juror because of his age. He said that he struck the fourth juror because he knew one of the testifying officers. The court then inquired further:

> THE COURT: Let me ask you this. In your life experience do you tend to strike white people when a Defendant is a black person?
>
> COUNSEL: No.
>
> THE COURT: Are you telling me that as an officer of the court--
>
> COUNSEL: I am.
>
> THE COURT: --that race has played no part in your decisions to strike a juror notwithstanding the fact that every juror you struck has been white? Every juror you struck on our trial on Monday was white.

> COUNSEL: I don't have an actual recollection if that was true as to Monday, Your Honor, if you have an actual recollection.
>
> THE COURT: The Court's seen the pattern.

The Court reseated the three jurors the defense struck as a result of their employment, noting for the record—at the bench—that "the Court is making the finding that it appears by practice the defense attorney in this case is exercising peremptory challenges based on race."

At the close of the State's evidence, Mr. Spencer moved for judgment of acquittal as to all charges, although he did not articulate his reasoning as to count five, the second-degree assault of Corporal Garrison. Otherwise, Mr. Spencer argued that there was a failure of proof on attempted second-degree murder because attempted second-degree murder is a specific intent crime, and the State offered no proof that Mr. Spencer had intended to kill Mr. Kinn. The defense argued that assault against Detective Rogers was not possible because there was no proof that she had been "jostled" when the Soul came into contact with her cruiser. The defense also argued that the amount of damage inflicted on Corporal Garrison's vehicle was not documented or even estimated, and thus a conviction could not be sustained on malicious destruction of property over $500.00. However, counsel did agree with the court that a finding that the Soul struck the police vehicle without evidence of the value of the damage "would result in a finding of malicious destruction of property *under* $500.00." (Emphasis added).

The court denied Mr. Spencer's motion for acquittal as to the attempted murder and assault counts. The court found that there was sufficient evidence of intent for the attempted murder count to go to the jury, and that "striking a vehicle while moving" could reasonably be considered an assault. With regard to the malicious destruction count for Corporal Garrison's vehicle, the court ruled that there was evidence enough to get the question of malicious destruction to the jury, but "we do not have any value regarding the amount of the damage. So if convicted on [that count] the court necessarily would make that finding [of] malicious destruction of property under $500.00."

The court then instructed the jury. It read the following definition of assault in connection with the charges of second-degree assault against Detective Rogers and Corporal Garrison:

> Assault is an attempt to cause offensive physical contact. In order to convict [Mr. Spencer] of assault, at least to these two alleged victims, the State must prove: one, that [Mr. Spencer] actually tried to cause immediate offensive physical contact with Detective Priscilla Rogers or Corporal Wendell Garrison; two, that [Mr. Spencer] intended to bring about offensive physical contact; and three, that [Mr. Spencer's] actions were not consented to by Detective Priscilla Rogers or Corporal Wendell Garrison.

The court did not draw any distinction between the malicious destruction of property counts, nor did it note on the verdict sheet that the charge relating to Corporal Garrison's vehicle was for malicious destruction of property *under* $500.00.

After two hours of deliberation, the jury convicted Mr. Spencer of attempted second-degree murder, both counts of assault against the officers, malicious destruction of

property valued *over* $500.00 for Corporal Garrison's vehicle, and numerous other offenses. He noted a timely appeal.

II. DISCUSSION

Mr. Spencer raises four questions on appeal.[3] *First*, he argues the circuit court erred in reseating the three jurors he had stricken via peremptory challenges. He challenges the

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[3] His brief phrased the questions as follows:

> 1. Did the trial court commit reversible error by reseating three jurors who had been struck by the defense when there was no evidence to support a finding of racial discrimination, and where counsel's explanations—of age and employment—advanced the defense's strategy and have previously been accepted by this Court as valid, race-neutral explanations for striking a juror?
>
> 2. Was the evidence insufficient to support a finding of specific intent for a conviction of attempted second-degree murder when there was no evidence that Kevon Spencer saw or intended to kill Andrew Kinn, and the witnesses repeatedly testified that Spencer was focused on trying to escape law enforcement when he veered onto the shoulder and collided with the cyclist?
>
> 3. Was the evidence insufficient to support a conviction of second-degree assault (attempted battery) where the testimony showed that Kevon Spencer was trying to get away from the officers when the front bumpers of the officers' cars and the rear bumper of Spencer's car accidentally touched?
>
> 4. Must Kevon Spencer's conviction for malicious destruction of property over $500 (on the Chevy Tahoe SUV) be reversed where the trial court previously granted a defense motion for judgment of acquittal on that charge?

circuit court's conclusion that he struck the jurors on the basis of race, ethnicity or gender, and argues that the court erred in characterizing and relying on defense counsel's tactics in other cases to find pretextual the defense's reasons for striking the jurors.[4] *Second*, he argues that the evidence supporting his conviction for attempted second-degree murder was insufficient because there was no evidence that he saw, let alone intended to hit, Mr. Kinn, and because witnesses testified that Mr. Spencer was "only trying to escape." *Third*, Mr. Spencer argues that there was insufficient evidence to convict him of second-degree assault because there was no proof of intent. *And fourth*, Mr. Spencer claims that the trial court committed reversible error when it submitted the charge for malicious destruction of property valued over $500.00, for the damage to Corporal Garrison's Tahoe, to the jury.

The State responds that the trial court was within its discretion to find Mr. Spencer's reasons for striking the three jurors pretextual. It argues that although a conviction for attempted second-degree murder requires proof of specific intent to kill, the officers' testimony allowed the jury to infer that intent. It counters that Mr. Spencer's objection to his assault convictions is preserved only as to one officer, and that there was ample evidence to convict Mr. Spencer for at least two forms of assault. And although the State concedes that Mr. Spencer was acquitted for malicious destruction of property over $500.00 because the evidence of the value of the property damaged was insufficient, it

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[4] We note, as a housekeeping matter, that Mr. Spencer also moved—the day before argument—to unseal his counsel's notes from jury selection. We deny the Motion.

argues that we may reverse with instructions to enter a sentence for malicious destruction of property under $500.00 rather than vacating the conviction outright.

This opinion will address Mr. Spencer's second, third, and fourth arguments, and Judge Berger's opinion will address the first.

A. The Evidence Was Sufficient To Convict Mr. Spencer of Attempted Second-Degree Murder.

"The standard of review for appellate review of evidentiary sufficiency is whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt." *Harrison v. State*, 382 Md. 477, 487 (2004) (quoting *Moye v. State*, 369 Md. 2, 12 (2002)). Attempted murder in the second-degree is a specific intent crime. *Id.* at 488. To sustain a conviction, the State must prove beyond a reasonable doubt "the specific intent to murder, *i.e.*, the specific intent to kill under circumstances that would not legally justify or excuse the killing or mitigate it." *State v. Earp*, 319 Md. 156, 167 (1990). The State fails to prove the requisite intent if a defendant was provoked such that he would be guilty of manslaughter had the killing succeeded. *Glenn v. State*, 68 Md. App. 379, 408 (1986). We also will not sustain a conviction for attempted murder of a third-party when a defendant commits a full—though unsuccessful—attempt to murder his intended victim, and incidentally injures the third party. *State v. Brady*, 393 Md. 502, 523 (2006). Stated succinctly, then, the State must prove that Mr. Spencer intended to kill Mr. Kinn, without adequate provocation or legal justification.

Mr. Spencer's sufficiency challenge requires a more detailed than usual analysis of the law of intent. Intent can be hard to prove, but the State may prove intent to kill through circumstantial evidence. *Earp*, 319 Md. at 167. *Earp* holds that an intent to kill "may, under proper circumstances, be inferred from the use of a deadly weapon directed at a vital part of the human body." *Id.* In so doing, *Earp* imports reasoning from some of the many Maryland cases that examine circumstantial evidence of intent to kill in the assault-with-intent-to-murder context. *E.g.*, *Taylor v. State*, 238 Md. 424 (1965); *State v. Jenkins*, 307 Md. 501 (1986); *Abernathy v. State*, 109 Md. App. 364 (1996); *Harvey v. State*, 111 Md. App. 401 (1996); *Graham v. State*, 117 Md. App. 280 (1997).

But for this thin reed in *Earp*, the intent required for assault with intent to murder and the intent required for attempted second-degree murder have diverged, causing some confusion. The assault-with-intent-to-murder line of cases holds, for the most part, that an intent to do grievous bodily harm is sufficient to infer intent to murder. *Graham*, 117 Md. App. at 284 ("Evidence showing a design to commit grievous bodily injury, such as using a deadly weapon directed at a vital part of the body . . . gives rise to an evidentiary inference of intent to murder"); *Reed v. State*, 52 Md. App. 345, 355 (1982) ("Proof of specific intent to murder is not necessary to sustain a conviction for assault with intent to murder . . . All that need be shown is a specific intention to commit grievous bodily harm"); *James v. State*, 31 Md. App. 666, 674 (1976) ("A specific intent to murder is not necessary to sustain a conviction [for assault with intent to murder], it being sufficient if there was an intention

to commit grievous bodily harm"); *Tate v. State*, 236 Md. 312, 317 (1964) ("Specific intent to kill is not a necessary element for conviction of assault with intent to murder.").

Attempted murder cases, however, have stated clearly—at least recently—that a conviction cannot be sustained without proof of intent to *kill*:

> From the evidence before him in the instant case, the trial judge could have found that Earp harbored a specific intent to kill Lawrence. As we have earlier indicated, however, he did not draw that inference. His decision was based upon his finding that Earp had an intent to do grievous bodily harm, and upon the erroneous belief that this intent alone was sufficient to support a conviction on the charge of attempted murder in the second-degree. Accordingly, that conviction must be reversed.

Earp, 319 Md. at 167. *See also Smallwood v. State*, 343 Md. 97, 103 (1996) (holding that proof of attempted murder requires "the specific intent to murder." (quoting *Earp*, 319 Md. at 167)); *Abernathy*, 109 Md. App. at 373 ("The exclusive and indispensable *mens rea* of any of the inchoate criminal homicides is the specific intent to kill. In terms of its *mens rea*, the inchoate crime is far more austerely restricted than is the consummated crime."). Although, therefore, the intent may be inferred from circumstantial evidence, the State must prove specific intent to kill.

The vast majority of attempted murder cases in which an appellant raised a sufficiency challenge on the intent element concerned the use of conventionally deadly weapons. *Brady*, 393 Md. at 504 (gun); *Harrison*, 382 Md. at 480 (gun); *Abernathy*, 109 Md. App. at 367 (gun); *Poe v. State*, 341 Md. 523, 526 (1996) (gun); *Austin v. State*, 90 Md. App. 254, 259 (1992) (gun); *Earp*, 319 Md. at 160 (knife); *State v. Selby*, 319 Md.

174, 175 (1990) (knife); *State v. Wilson*, 313 Md. 600, 601-2 (1988) (gun). When a defendant draws a knife or gun, and thrusts or fires in the direction of the victim, his aim can speak to his intent. *Compare Selby*, 319 Md. at 177-78 (trial judge declined to find intent to kill where defendant stabbed victim through midsection to effectuate robbery) *with Harrison*, 382 Md. at 490 (specific intent could be inferred without more when Mr. Harrison fired *in the direction* of his intended victim).

This case involves a less obvious modality. If a person directs a moving car at a stranger's body in the midst of a police chase, without any more evidence of intent, could a reasonable jury infer an intent to kill? A car is not a deadly weapon *per se*, although surely it could be used to effect a killing, intentional or otherwise. And the details bearing on the intent underlying this particular collision are muddled. Four witnesses testified that Mr. Spencer could have avoided Mr. Kinn, but did not. Three of the officers who had been pursuing Mr. Spencer testified that there was room for him to come back into the roadway to avoid Mr. Kinn. The officers also testified that Mr. Kinn was dressed conspicuously. Perhaps most strikingly, Mr. Robinson testified as a passenger in the car that he warned Mr. Spencer to look out for Mr. Kinn.

Given the mayhem of the situation, and the speed at which the vehicles were traveling, the jury faced a close question about how much time Mr. Spencer had to react, and whether to infer intent to kill under the circumstances. Corporal Garrison claims to have seen Mr. Kinn from the farthest distance away—the space between three telephone poles. But he also admits that riding in a Chevy Tahoe afforded him a greater vantage

point than all the other vehicles. Detective Rogers, who was at ground level, said she spotted Mr. Kinn from two telephone poles away. As far as the record is concerned, that distance only exists as a relative term—the State did not seek to introduce evidence of the distance between telephone poles, nor did the circuit court take judicial notice of that fact, let alone how quickly that distance might be traveled at sixty miles per hour or more. The best estimate came from Mr. Robinson, who said that two seconds elapsed between the time he noticed Mr. Kinn and the collision, and that he shouted out to Mr. Spencer to watch out for him. But if Mr. Spencer had not seen Mr. Kinn before the warning, two seconds would be spent quickly while Mr. Robinson formulated his sentence and Mr. Spencer processed it.

Dr. Carpenter's testimony further complicates matters. Dr. Carpenter testified that the nature of Mr. Kinn's injuries suggests that the car came into contact with his left leg, and that he sustained fractures in his back and neck *after he hit the windshield*. Combined with Mr. Kinn's own testimony that the car hit him from behind, one could draw the inference that the Soul clipped Mr. Kinn on the left leg and flipped him up into the air, sending him into the windshield on his path over the car. Comparing the size of a four-passenger vehicle to a normal human body, only a relatively small portion of the car could be involved in a collision with only a left leg. In other words, reverse-engineering the crash from the details available suggests that a very small portion of the car came into contact with a small part of Mr. Kinn's body, resulting in brutal injuries mostly because of the high

rate of speed. Since this is the only evidence of the logistics of the crash, a reasonable jury could have found that Mr. Spencer lacked any intent to murder Mr. Kinn with the Soul.

But that is not the standard here. Instead, we look at whether "any rational trier of fact could have found the essential elements of the crime [] beyond a reasonable doubt," *Harrison*, 382 Md. at 487, and the evidence here was sufficient for a reasonable jury to find intent to kill. Three witnesses testified that Mr. Kinn was plainly visible during the chase. Mr. Robinson testified not only to seeing Mr. Kinn from the Soul, but to the realization that the Soul would need to move over to avoid hitting him. Officers testified there was room for Mr. Spencer to get back on the roadway in order to avoid the collision. From this evidence, the jury *could have* inferred that Mr. Spencer saw Mr. Kinn, *could have* avoided hitting him, chose not to avoid him, knew he would hit Mr. Kinn, and that hitting Mr. Kinn at sixty miles an hour would kill him. The jury might have decided the question either way, but the law and the evidence permitted the jury to infer from his actions that Mr. Spencer intended to kill Mr. Kinn, and that is enough to overcome his sufficiency challenge.

B. There Was Sufficient Evidence To Convict Mr. Spencer Of Assault.

Mr. Spencer argues next that his convictions for second-degree assault must be reversed because the evidence did not demonstrate a specific intent to harm Detective Rogers and Corporal Garrison. He argues that because the court instructed the jury only on the attempted battery form of assault, and because he was "merely trying to escape when the accidental contact occurred," the State failed to prove the requisite intent.

As a threshold matter, the State draws our attention to the fact that Mr. Spencer only moved for judgment of acquittal on his assault charge regarding Detective Rogers. The record bears this out, so we analyze Mr. Spencer's argument only with regard to Detective Rogers. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue [other than subject matter jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court."). But since the analysis would have been identical for the second-degree assault convictions regarding both officers, our ultimate conclusion doesn't change.

The State also counters that it need not have proven the attempted-battery form of assault because when Mr. Spencer moved for judgment of acquittal, the jury had not yet been instructed. The State posits that at the time the court ruled, "the entire universe of second-degree assault was before it." The State argues that we need only determine that there was sufficient evidence of any form of assault. We do not reach these arguments, however, because we hold that there was sufficient evidence to convict Mr. Spencer under the attempted battery form of second-degree assault.

There are three judicially recognized forms of assault in Maryland:

1. A consummated battery;
2. An attempted battery; and
3. A placing of a victim in reasonable apprehension of an imminent battery.

Lamb v. State, 93 Md. App. 422, 428 (1992). At trial, the jury was instructed only regarding the "attempted battery" form of assault:

> Assault is an attempt to cause offensive physical contact. In order to convict [Mr. Spencer] of assault, at least to these two alleged victims, the State must prove: one, that [Mr. Spencer] actually tried to cause immediate offensive physical contact with Detective Priscilla Rogers or Corporal Wendell Garrison; two, that [Mr. Spencer] intended to bring about offensive physical contact; and three, that [Mr. Spencer's] actions were not consented to by Detective Priscilla Rogers or Corporal Wendell Garrison.

Mr. Spencer claims there was not sufficient evidence to convict him on the attempted battery form of assault, and he leans heavily on *Snyder v. State*, 210 Md. App. 370 (2013). *Snyder* appears helpful at first blush because that case requires the State to prove that "(1) appellant actually tried to cause physical *harm*" and "(2) that [appellant] intended to bring about physical *harm*" in order to prove the attempted battery version of second-degree assault. *Id.* at 381 (emphasis added). Mr. Spencer argues from *Snyder* that he did not try to cause—nor cause—any injury to the officers when he collided with their vehicles. He simply wanted to escape, and the officers left unscathed.

But reading *Snyder* in its entirety rather than picking passages in isolation reveals that "harm" is a term of art. Just three pages after the excerpt above, we quoted approvingly from the Court of Appeals's decision in *Dixon v. State*, 302 Md. 447 (1985):

> [A]ny attempt to apply the least force to the person of another constitutes an assault. The attempt is made whenever there is any action or conduct reasonably tending to create the apprehension in another that the person engaged therein is about to apply such force to him.

Snyder, 210 Md. App. at 384 (quoting *Dixon*, 302 Md. at 458-59). Indeed, this broader understanding of "harm" squares more with the terminology we and the Court of Appeals

most often use to define the *actus reus* of battery: an offensive physical *contact*. *See Nicolas v. State*, 426 Md. 385, 403-04 (2012); *see also Cruz v. State*, 407 Md. 202, 209 n.3 (2009) (using the words "contact" and "harm" interchangeably in definition of assault); *Kellum v. State*, 223 Md. 80, 85 (1960) ("[I]t is well settled that any unlawful force used against the person of another, no matter how slight, will constitute a battery.").

We also have held that an assailant need not cause direct physical contact in order to perpetrate a battery. *Taylor v. State*, 52 Md. App. 500 (1982). In *Taylor*, the defendant had set the victims' house on fire while they slept. *Id.* at 500-01. He attacked his eventual assault conviction by claiming that the act of setting fire to a dwelling could not constitute an assault. *Id.* at 503. We disagreed and held that "[a] battery clearly may be committed by indirect means." *Id.* at 504. After looking at cases from several other jurisdictions, we held that the crime qualified as such a battery:

> We can find no meaningful distinction between setting one's person or clothing on fire directly and setting fire to one's house under the circumstances evident here. Asleep in their room at 4:00 in the morning, [the victims] were as likely (and intended) to be injured by the fire set in their home as they would if appellant had set the fire to their bed, or their linens, or their clothes. The arson was merely the instrument of appellant's attack on their persons, and thus, in this circumstance at least, the attack on the house was an attack on its occupants.

Id. at 506.

We note also that although attempted battery is an inchoate crime, it requires only the same intent to make offensive physical contact as a consummated intentional battery.

See Weiland v. State, 101 Md. App. 1, 40 (1994) ("A consummated intentional battery requires a general intent on the part of perpetrator to hit the victim. An attempted battery (assault) requires the same general intent to hit the victim and, therefore, to perpetrate the battery.").[5]

Mr. Spencer's assault conviction here falls into the same analytical category as *Taylor*. He concedes that in the midst of the chase, he hit the officer's car. We see no distinction in kind (maybe in degree, but maybe not) between hitting the officer's car and hitting the officer *with* his car. And because there is no difference of intent, if Mr. Spencer could be found to have committed a battery by bumping Officer Rogers's car, he could be found to have *attempted* to commit the same battery.

Mr. Spencer argues that he lacked the requisite intent to commit a battery because he was merely trying to escape. But the question before us is not whether he possessed intent in absolute terms. "When reviewing a conviction for sufficiency of the evidence, this Court must be satisfied that, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

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[5] Mr. Spencer's Reply discounts *Weiland*, claiming that its characterization of attempted battery as requiring a "general intent" is at odds with the more recent cases of the Court of Appeals. But Mr. Spencer misunderstands the analysis. *Weiland* explains that if a person *intends* to commit a battery and succeeds or fails—thus either consummating the battery, or merely attempting the battery—the intent is the same. This is not at odds with the Court of Appeals's holdings, even though the wording may be different. *E.g., Cruz*, 407 Md. at 209, n.3 (noting that the *mens rea* of attempted battery requires "the specific intent to bring about the offensive physical contact . . . to the victim").

crime beyond a reasonable doubt.'" *Snyder*, 210 Md. App. at 379 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Because intent may be proven by circumstantial evidence, *Jones v. State*, 440 Md. 450, 455 (2014), and because a fact-finder may "infer that the defendant intended the natural and probable consequences of a defendant's actions," *id.* at 457, Mr. Spencer's sufficiency challenge falls short.

C. Mr. Spencer's Malicious Destruction of Property Conviction Must Be Reversed.

Mr. Spencer and the State agree that he was not properly convicted of malicious destruction of property valued over $500.00 for Corporal Garrison's Tahoe after the circuit court agreed to reduce that count down to malicious destruction of property under $500.00. From there, though, they disagree about what we should do. Mr. Spencer argues simply that his conviction should be reversed. The State, relying on *Smith v. State*, 412 Md. 150 (2009) and *Brooks v. State*, 314 Md. 585 (1989), argues that we should reverse Mr. Spencer's conviction and remand with instructions to enter a conviction for malicious destruction of property under $500.00.

Neither *Smith* nor *Brooks* is not directly on point. In *Brooks*, Mr. Brooks had been convicted of robbery with a dangerous or deadly weapon. *Brooks*, 314 Md. at 587. All the evidence at trial, however, tended to show that Mr. Brooks perpetrated his robberies with a toy pistol. *Id.* at 588-89. The Court of Appeals reversed his conviction, holding that a toy pistol could not be a dangerous or deadly weapon, and thus the evidence was insufficient to convict Mr. Brooks. *Id.* at 600-01. All but the last paragraph of *Brooks*'s

sixteen-page opinion is dedicated to the analysis of this issue. At the end, the Court of Appeals instructed the circuit court to enter a conviction and sentence for simple robbery—a lesser-included offense that had been charged, and gone to the jury. *Id.* at 601. "When the jury convicted Brooks of armed robbery, it necessarily convicted him of simple robbery as well." *Id.* This sentence, and a string cite to cases almost entirely from other jurisdictions, comprised the Court's analysis in *Brooks* regarding convicting on a lesser-included offense.

Smith also concerns an armed robbery conviction that was reversed. Mr. Smith was convicted of robbery with a dangerous weapon at the circuit court, and we reversed because he had been acquitted of first-degree assault, which produced an inconsistent verdict. 412 Md. at 156. We had also remanded with instructions for the circuit court to enter a guilty verdict for misdemeanor theft, "an offense that was neither explicitly charged nor pursued at trial." *Id.* at 154. The Court of Appeals reversed our opinion on two grounds, holding *first* that the reversed conviction for robbery could not provide the basis for conviction on a lesser-included offense, *id.* at 167-68, and, *second*, that the lesser-included offense could not be returned to the judge in a bench trial where the offense had not been charged, argued, or agreed to by either party. *Id.* at 169-71. Reviewing its holding in *Hagans v. State*, 316 Md. 429 (1989), the Court explained:

> In *Hagans,* we . . . held that a judge, sitting in a jury trial, may only submit a lesser included offense to the jury if either the defendant or the State requests or affirmatively agrees to the submission. *Hagans,* 316 Md. at 455. We concluded that the ultimate decision whether to submit such an offense to the jury

> "is a matter of prosecution and defense strategy which is best left to the parties," but we did not prohibit the judge from initially raising the issue of a lesser included offense. *Hagans,* 316 Md. at 455.

Id. at 170. The Court then held that such reasoning did not apply to a bench trial, and rejected the State's request for instructions to convict on the lesser offense:

> This case does not, however, present the appropriate circumstances for such a remand. The State has, in effect, proposed the following rule: a judge, sitting as the trier of fact in a bench trial, may convict a defendant of a lesser included offense of one of the charged offenses even though the lesser included offense was neither expressly charged nor mentioned at trial. Under this rule, a trial judge could convict a defendant of a lesser included offense even though neither party nor the judge had uttered a single word about that offense before the verdict was announced. The defendant's first opportunity to present an argument regarding the lesser included offense would be in an appellate proceeding. As a matter of fairness and judicial economy, we reject this rule. Instead, we hold that a trial court may not convict a defendant of an uncharged lesser included offense unless the parties are given an opportunity to present arguments on that offense in the trial court.

Id. at 171-72.

Hagans, the case discussed in *Smith*, was a consolidation of two cases with the same appellate issue: "whether, as a matter of Maryland common law, a defendant ordinarily can be convicted of an offense which is not charged but which is a lesser included offense of one that is charged." 316 Md. at 433. At the close of evidence in Mr. Hagans's trial for burglary:

> [T]he trial judge indicated that he intended to submit to the jury, as a lesser included offense of burglary, the offense of attempted breaking and entering a dwelling house of another.

> Defense counsel objected to the submission of the attempted breaking and entering offense to the jury, but the prosecuting attorney argued in favor of the submission. Thereafter, the trial judge instructed the jury on attempted breaking and entering a dwelling house of another.

Id. at 434. Mr. Hagans was acquitted of burglary, and convicted of attempted breaking and entering the dwelling house of another. Similarly, Derek Allen was charged with theft of items valued over $300.00. *Id.* at 435. At the close of evidence, the prosecutor requested the court to instruct on theft of items worth less than $300.00. *Id.* at 436. Defense counsel objected, but the court agreed. *Id.* Mr. Allen was acquitted of theft over $300.00, but convicted of theft under $300.00. *Id.* at 437.

The Court of Appeals affirmed the practice of sending a lesser-included offense to a jury if requested, with some caveats; among them:

> [T]he trial court ordinarily should not give a jury an instruction on an uncharged lesser included offense where neither side requests or affirmatively agrees to such instruction. It is a matter of prosecution and defense strategy which is best left to the parties. There is no requirement that the jury pass on each possible offense the defendant could have committed. We permit, for example, the State to nolle prosse an offense, and we allow plea bargains. When counsel for both sides consider it to be in the best interests of their clients not to have an instruction, the court should not override their judgment and instruct on the lesser included offense.
>
> Finally, where the State enters a nolle prosequi as to an uncharged lesser included offense, or where the charging document is drawn so as necessarily to exclude the lesser included offense, it would obviously be inappropriate to submit the lesser included offense to the jury.

Hagans, 316 Md. at 455.

The present case doesn't fit squarely into any of these holdings. But piecing the reasoning together, we hold for the State. Malicious destruction of property valued under $500.00 was not charged, but was raised by the court at the close of the State's case. Defense counsel agreed that charge could go to the jury, seemingly on the understanding that Mr. Spencer would be acquitted on malicious destruction of property valued over $500.00. The court appeared to agree. However, the court erroneously sent the greater charge to the jury, which returned a conviction. The reasoning from *Brooks* is persuasive here, because a conviction on malicious destruction of property valued over $500.00 must mean the jury found the necessary elements for malicious destruction of property under $500.00—the only difference is the perceived value of the property, and the value was never at issue. And entering a conviction for Mr. Spencer on this lesser-included offense would put him in no worse position than he expected to be in at the time of the bench conference.

Therefore, we reverse Mr. Spencer's conviction for malicious destruction of property valued over $500.00 and remand to the circuit court with instructions to enter a conviction for malicious destruction of property valued under $500.00 and to enter an appropriate sentence.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0493

September Term, 2014

KEVON SPENCER

v.

STATE OF MARYLAND

Berger,
Nazarian,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.
Dissenting Opinion by Nazarian, J.

Filed: October 2, 2015

* 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.

In this opinion, we address, and reject, Mr. Spencer's contention that the circuit court erred in relying on his impressions of the past pattern of discriminatory practices by defense counsel in determining whether defense counsel had struck three jurors as a result of their race.

In *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment forbids the State from using peremptory strikes to exclude jurors on the basis of race and that "[p]urposeful racial discrimination in the selection of the venire" denies a criminal defendant "the protection that a trial by jury is intended to secure." 476 U.S. 79, 86 (1986). The defendant's rights, however, are not the only ones implicated by race-based jury selection. "[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror," and "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* at 87. This triptych of Equal Protection interests in jury selection laid the foundation for *Georgia v. McCollum*, in which the Court applied the same principle to peremptory challenges exercised by defendants. 505 U.S. 42 (1992).

The Court of Appeals first applied *Batson* in *Stanley v. State*, 313 Md. 50 (1988), and then *Gilchrist v. State*, 340 Md. 606 (1995), followed *McCollum*. *Stanley* prescribed, and *Gilchrist* affirmed in appropriately modified form, a three-step analysis for challenging

peremptory strikes as race-based. *Stanley*, 313 Md. at 59-63; *Gilchrist*, 340 Md. at 625-26.[1] *Gilchrist* held that when a prosecutor accuses a defendant of discrimination in the use of peremptory strikes, the prosecutor must make out a *prima facie* case of unconstitutional discrimination. If the State meets that burden, the defendant must articulate non-racially discriminatory reasons for the strikes. And finally, the court must decide, as a matter of fact, whether the defendant's explanation is a pretext for discrimination:

> First, the complaining party has the burden of making a *prima facie* showing that the other party has exercised its peremptory challenges on an impermissibly discriminatory basis, such as race or gender. . . .
>
> Second, once the trial court has determined that the party complaining about the use of the peremptory challenges has established a *prima facie* case, the burden shifts to the party exercising the peremptory challenges to rebut the *prima facie* case by offering race-neutral explanations for challenging the excluded jurors. The explanation must be neutral, related to the case to be tried, clear and reasonably specific, and legitimate. The reason offered need not rise to the level of a challenge for cause . . . It is insufficient, however, for the party making the peremptory challenges to merely deny that he had a discriminatory motive or merely affirm his good faith.
>
> Finally, the trial court must determine whether the opponent of the strike has carried his burden of proving purposeful discrimination. This includes allowing the complaining party an opportunity to demonstrate that the reasons given for the peremptory challenges are pretextual or have a discriminatory impact. . . .

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[1] The Supreme Court up to that point had not yet fleshed out the process of weighing *Batson* challenges, but later in 1995, it adopted a test analogous to our own in *Purkett v. Elem*, 514 U.S. 765 (1995).

> While the complaining party has the ultimate burden of proving unlawful discrimination, and therefore should be offered the opportunity to demonstrate that the reasons offered were merely pretextual, the court may find that the reasons offered were pretexts for discrimination *without such demonstration from the complainant*.

Id. at 625-27 (emphasis added) (internal quotations and citations omitted).

Notably, in the present case, there is no dispute that the State satisfied its burden to prove a *prima facie* case of race discrimination or that the defense offered a race-neutral explanation for each peremptory strike. We are concerned in this case only with the third step in the *Batson* analysis, that is, whether the State carried its burden of proving that defense counsel's explanation for the use of his peremptory challenges were pretextual.

Because the determination of whether a party's explanation is pretextual is a finding of fact, "[a]n appellate court will not reverse a trial judge's determination as to the sufficiency of the reasons offered unless it is clearly erroneous." *Gilchrist v. State*, *supra*, 340 Md. at 627. *See also Edmonds v. State*, 372 Md. 314, 331 (2002) ("The trial judge's findings in evaluating a *Batson* challenge are essentially factual and accorded great deference on appeal."). We accord this deference whether the trial court accepts or rejects a party's race-neutral explanation. *Compare Bridges v. State*, 116 Md. App. 113, 135 (1997) ("[T]he only question is whether there was *any* legally sufficient basis for [the trial judge] finding that the peremptories were not racially motivated.") (emphasis in original), *with Berry v. State*, 155 Md. App. 144, 163 (2004) ("The court in the instant case discredited defense counsel's facially neutral explanation for the strike of the juror,

believing instead that the strike was race-based. We ought not and therefore do not second-guess the trial court's assessment of defense counsel's credibility on that point.").

The third stage of a *Batson* challenge requires the judge to act as a finder of fact in determining whether the opponent of a strike carried his burden of proving purposeful discrimination. Here, the State challenged the defense's use of peremptory strikes, claiming that there was a defense pattern of striking white male jurors in violation of *Batson*. As we shall explain, we hold that the trial court did not abuse its broad discretion in declining to accept three of defense counsel's strikes in what appeared to him to be exercised in a racially discriminatory fashion.

In this case, the defense exercised six peremptory strikes early in the selection process, and the State objected, noting that four of the strikes had been applied to white males, some of whom had given no affirmative answers to any voir dire questions. The court made an express finding that there was a "pattern of striking white mostly male jurors, even jurors who have not answered a question." The court then moved to the second *Batson* step, asking defense counsel to offer his rationale for the use of his peremptory strikes. Defense counsel did so, claiming that he routinely struck anyone who was a farmer,[2] anyone who was a "mechanic," anyone who was self-employed, and anyone who

[2] The peculiarity of striking all farmers from jury service in a rural, agricultural jurisdiction such as Dorchester County is underscored in this case by the fact that the court noted it had a policy of allowing poultry farmers to keep their chicken house alarms in chambers. Further, residents of Dorchester County are over 600 percent more likely to be employed in agriculture than the Maryland population overall. Industries (continued…)

was "older." The court expressed some skepticism of the genuineness of counsel's explanations. Indeed, the State noted that the defense had not objected to seating African American jurors who were older than the white juror the defense struck for being too old. The court further observed that defense counsel had not requested any additional voir dire of the self-employed juror, which would have addressed counsel's expressed concern that "self-employed" did not give him sufficient information. Moreover, at least one (African American, older) juror who was seated by the defense had similarly given no information about his prior employment, listing his occupation as simply "retired."

The court found that defense counsel's "race-neutral" explanations for striking three of the four challenged jurors were not sufficiently credible to rebut the *prima face* case of improper jury strikes presented by the State. The court also noted that while all of the defense peremptories had been exercised against white veniremen, it did find that the defense had rebutted the claim of race-based strikes in one instance, explaining:

> For the record the Court is finding that it appears by practice the defense attorney in this case is exercising peremptory challenges based on race. The Court's articulated that previously hereto there are several challenges that have been made by the defense that the defense was able to give another reason that the Court found it reasonable to exercise a challenge, even though the challenges have uniformly been exercised against white individuals.

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in Dorchester County, Maryland, http://statisticalatlas.com/county/Maryland/Dorchester-CCounty/Industries (last visited September 24, 2015).

The court then seated three of the challenged jurors.

The burden, therefore, rested on Spencer to show that the court was "clearly erroneous" in deciding that defense counsel's proffered justifications for striking white male jurors were not sufficiently credible to overcome the *prima facie* case of race-based strikes presented in this case. We hold that under the circumstances of this case, the circuit court judge's decision to find a *Batson* violation was not clearly erroneous, and the judgments should be affirmed.

The Court of Appeals has explained:

> [T]here are several factors the trial judge can use to evaluate the legitimacy of the prosecutor's [or defense counsel's] explanations. These factors include . . . a past pattern of discriminatory practices by a prosecutor's office . . . .

Stanley, *supra*, 313 Md. at 78-79 (internal quotation and citation omitted). As the dissent acknowledges, a court may consider counsel's history of misusing peremptory strikes when evaluating, at *Batson* step three, whether a race-neutral explanation for a strike is pretextual.

The dissent's view, however, is that the history of defense counsel's pattern of discrimination should be objectively verifiable for it to be a proper consideration in the *Batson* step three analysis. In our view, it would be difficult—if not impossible—to objectively verify a trial court's determination based on the credibility of defense counsel.

In this case, we must consider the context of the trial judge's comment about defense counsel's past practices of the use of race for his peremptory strikes. The court's first

observation about defense counsel's propensity for seemingly race-based peremptory strikes was not made in the context of defense counsel's explanations. When the State first presented its *Batson* challenge, it pointed out the pattern of strikes in this case, and the court responded:

> [Counsel], you have been playing with this for a long time in your other trials. The Court has noticed a pattern of striking white mostly male jurors, even jurors who have not answered a question. I'm going to require you to explain your rationale [f]or striking.

Spencer does not, on appeal, contend that the court erred in finding a *prima facie* case of race-based strikes in this case; as the court noted, in this case, defense counsel only struck white jurors, including those who had not answered any voir dire questions. Critically, the court's reference to "other trials" was made before Spencer's attorney was even asked to present the race-neutral reasons for his strikes.

The next reference to prior trials was made after counsel had proffered, and debated at some length, his various explanations, and the court had moved on to the third *Batson* step, i.e., determining whether the reasons presented adequately rebutted the apparent case of improper strikes. After discussing the various explanations given by counsel, the court asked if defense counsel "tend[ed] to strike white people when a Defendant is a black person[.]" Defense counsel denied this, and the court then pointed out that in this case, "every juror you struck has been white[.] Every juror you struck on our trial on Monday was white . . . . The Court's seen the pattern."

After some further discussion, the court then stated:

> It's surprising to the Court that if your decision is not color based, as you say, that you have been unable really to articulate any other reason that this Court finds acceptable. You first laid it on age.
>
> [* * *]
>
> And you can maintain it, you can maintain what you want.
>
> [* * *]
>
> But the Court doesn't agree with that being the pattern *in this particular case*.

(emphasis added).

The record, therefore, does not support Spencer's appellate claim that the court's ruling on the *Batson* claim "was derived largely on the judge's experience in previous cases[.]" Indeed, the vast majority of the discussion on the *Batson* challenge related to the specifics of that particular venire and the particular strikes made in this case. In short, the appellant points us to two references to prior trials out of fifteen pages of transcript. We, therefore, reject the appellant's claim that the trial judge erred in improperly considering prior trial experiences with defense counsel in determining whether to grant the State's *Batson* challenge. In our view, it distorts the record to select these two references out of the record and claim that the *only* reason the court refused to give defense counsel's race-neutral explanations more weight was because of prior trials involving defense counsel.

The dissent cites *Stanley v. State*, *supra*, 313 Md. 50, for the unassailable principle that a trial judge may consider counsel's (or an office's) history of misusing peremptory strikes when evaluating, at *Batson* step three, whether a race-neutral explanation for a strike

is pretextual. We are in firm agreement with this portion of the dissent's analysis, but unpersuaded by the method suggested for our consideration of an attorney's use of peremptory strikes in previous cases.

We hold that it is unnecessary that any and all history of inappropriate use of peremptory challenges be objectively verified for clear error. The dissent argues that "[u]nlike in-the-moment credibility determinations, a record of the peremptory strikes from Monday's trial, or strikes from past trials, could and should exist." It is simply not reasonable for trial courts to expect the parties to present evidence on whether a particular attorney has a practice of striking jurors of a particular race or gender.

Moreover, even if one were able to detail on the record the attorney's practice of striking certain jurors on the basis of illegitimate reasons, such a practice could lead to a trial-within-a-trial of an attorney's use of peremptories in previous cases. In our view, this has the potential to cause real problems for the trial courts. Would a court, when presented with a *Batson* issue involving an attorney's prior peremptories, need to recess in order for the attorneys to gather their notes and allow time for the court to gather the case files from previous trials? All while the prospective jurors are waiting? Further, we have additional reservations about the remedy suggested upon remand.[3]

[3] On remand, are the parties to submit memoranda and attach exhibits? Is an evidentiary hearing required or even necessary? Or, is the trial court permitted to explain its reasoning more thoroughly, but on the record already established?

Critically, credibility determinations and assessments of demeanor lie particularly within the province of the trial judge. As the dissent points out, "a reviewing court, analyzing only the transcript of the voir dire, is 'not as well positioned as the trial court to make credibility determinations.'" *Berry v. State*, 155 Md. App. 144, 163 (2004) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003)). As a result, the determination of whether a party's explanation is pretextual is a finding that we, upon review, accord great deference. See also *Edmonds v. State*, 372 Md. 314, 331 (2002) ("The trial judge's findings in evaluating a *Batson* challenge are essentially factual and accorded great deference on appeal.").

Moreover, an appellate challenge to the trial court's decision to accept or reject the proffered reasons for a peremptory strike is rarely successful, because "the credibility of the proponent offering the reasons is, as it is generally, for the trial court -- not an appellate court -- to determine." *See Jeffries v. State*, 113 Md. App. 322, 376 (1997) ("[A]ppellate courts must be highly deferential and will not presume to overturn a trial judge's findings on [a *Batson*] issue unless they are clearly erroneous."). We, therefore, defer to the fact-based credibility determinations of the seasoned trial judge who sustained the State's challenge under *Batson*. We, therefore, hold that the circuit court was not clearly erroneous in finding that defense counsel's reasons for striking the reseated jurors was pretextual. Accordingly, we affirm the judgments of conviction.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0493

September Term, 2014

KEVON SPENCER

v.

STATE OF MARYLAND

Berger,
Nazarian,
Thieme, Raymond G.
(Retired, Specially Assigned),

JJ.

Dissenting Opinion by Nazarian, J.

Filed:

For all of the opinions in this case, the three of us disagree on very little relating to Mr. Spencer's *Batson* question. We agree on the fundamental *Batson* analysis and on the circuit court's handling on the first two steps. We agree as well that once Mr. Spencer's counsel offered facially neutral reasons for his peremptory strikes, the court was required to assess for itself whether those reasons were, in fact, pretextual. We part company only in the way we apply those principles to the facts of this case. Before today, no Maryland appellate opinion had addressed the contention that a trial judge's reasons for upholding a *Batson* challenge came, wrongly, from outside the trial record. I would hold that the court erred in relying here on its impressions—not because they are an impermissible source of data for a pretext finding, but because there was no support in this record and no way for us to review, even for clear error, the court's findings regarding counsel's tactics in other cases.

1. Credibility and Context in *Batson* Challenges

The third stage of a *Batson* challenge requires the judge to act as finder of fact in a unique procedural space. A *Batson* challenge does not require counsel to swear an oath and subject himself to cross-examination regarding his reasons for strikes—a bench conference is sufficient. *Gray v. State*, 317 Md. 250, 258-61 (1989). *Gray* noted that attorneys in Maryland have a duty of candor to the court, and thus that a judge calling on counsel "to explain his challenges has every right to expect total candor without resorting to the administration of an oath." *Id.* at 258. But the structure of the *Batson* analysis presupposes that counsel could well be walking this line finely, and might even be representing a race-conscious jury selection strategy as race-neutral. After all, what would

be the point of requiring the court to assess pretext independently unless some race-neutral explanations were given for strikes that were not, in fact, race-neutral? We expect and *need* counsel on both sides to represent their clients zealously—the pretext analysis ensures that legitimate advocacy does not stray beyond constitutional bounds, and gives trial courts a standard against which to measure it.

At this fact-finding stage of the *Batson* analysis, the judge has a narrower-than-usual range of tools to assess pretext. In *Edmonds*, the Court of Appeals listed five factors for a court to consider:

> [T]he 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.

372 Md. at 330. These divide into two analytical categories: context and credibility. *First*, the impact of a party's peremptory strikes and the racial breakdown of the jury pool set the factual context.[1] Context is more susceptible to review for clear error because the facts on which the court relies should be discernible from the trial court record. If a trial judge were to make an erroneous context determination—for instance, to find that a party used half of

[1] I don't mean remotely to suggest that all potential jurors fit into one defined racial category, or that anyone's race necessarily is discernible. *See Mejia v. State*, 328 Md. 522, 531-32 (1992) (noting a conflict about whether or not a struck venire member was "Hispanic," and our characterization of the definition offered as "amorphous and imprecise.").

his strikes on white venire members when he, in fact, used all of them to strike white jurors—an appellate court could identify and evaluate that mistake.

Second, an attorney's persuasiveness and demeanor bear on the credibility of the race-neutral reasons he offered for a strike. In contrast, these are not so visible in an appellate record, and "a reviewing court, analyzing only the transcript of the voir dire, is 'not as well positioned as the trial court is to make credibility determinations.'" *Berry*, 155 Md. App. at 163 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003)). Maryland appellate courts have never second-guessed a credibility determination on a *Batson* challenge, and this Court has even suggested that such decisions are effectively unreviewable. *See Ball v. Martin*, 108 Md. App. 435, 455 (1996) (citing approvingly from Justice O'Connor's concurrence in *Hernandez v. New York*, 500 U.S. 352 (1991), that "evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province," and that once a credibility determination has been made "there seems nothing left to review.").

No Maryland case has explicitly endorsed the context/credibility dichotomy, but the Supreme Court did in *Snyder v. Louisiana*, 552 U.S. 472 (2008). Justice Alito, writing for a 7-2 majority, reversed the decision of a Louisiana trial court that had accepted a prosecutor's facially neutral explanations for a peremptory strike. *Id.* at 476. The prosecutor, who struck a young African-American male juror, offered two reasons: that the juror "looked nervous," and that the juror was a student teacher with school responsibilities who "might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't

be a penalty phase." *Id.* at 478. The Court analyzed each of these proffered reasons differently. Citing *Hernandez*, the Court "recognized that . . . determinations of credibility and demeanor lie 'peculiarly within a trial judge's province,' and [the Court has] stated that 'in the absence of exceptional circumstances, [it] would defer to [the trial court].'" *Id.* at 477. The Court then cited approvingly the Louisiana Court's finding that "nervousness cannot be shown from a cold transcript, which is why . . . the [trial] judge's evaluation must be given much deference."[2] *Id.* at 479.

In contrast, the Court scrutinized the prosecutor's contextual explanation more closely. The Court compared the juror's professional responsibilities with the responses of white jurors who were not struck, noting that one white juror had obligations that were "substantially more pressing." *Id.* at 482-85. Ultimately, the Court reversed on the basis of this context analysis, holding that the prosecutor's explanation was "implausib[le]," *id.* at 483, and "[gave] rise to an inference of discriminatory intent." *Id.* at 485.

As I read the transcript of jury selection, the circuit court's finding that the strikes were pretextual flowed from finding that defense counsel had used peremptory challenges to strike white jurors in other cases, and indeed that he had demonstrated a pattern of doing so. At the threshold, I have no quarrel with the idea that a court *may* consider counsel's

[2] The Court ultimately held that the trial judge did not explicitly find that the struck juror had had a nervous demeanor, and therefore there was no credibility determination at issue. *Id.* at 479.

(or an office's) history of misusing peremptory strikes when evaluating, at *Batson* step three, whether a race-neutral explanation for a strike is pretextual. *Edmonds* did not list counsel's prior history with the court specifically as a factor to consider in the third *Batson* step, although counsel's history with a court or a judge could bear on his persuasiveness. But *Stanley* did mention counsel's past behavior as a potential factor. 313 Md. at 78-79 ("[T]here are several factors the trial judge can use to evaluate the legitimacy of the prosecutor's explanations. These factors include . . . a past pattern of discriminatory practices by a prosecutor's office" (citation omitted)).

That said, any consideration of counsel's history with peremptory strikes necessarily brings into play facts and circumstances from outside the record of the particular case. Although counsel's demeanor in past cases may bear on his credibility, his "past pattern of discriminatory practices" is not really a demeanor question. It relies on *history*. Whether or not counsel has discriminated in the past may not be objectively verifiable—the transcript does not reveal counsel's thoughts during jury selection, only his words. But the fact that counsel or his office has, for example, been *found* in the past to have misused peremptory strikes is a historical circumstance that could, *if considered on a proper record*, bear on a court's credibility analysis.

It is on this notion of a proper record that the majority and I diverge. In my view, the trial record must support, and allow for an appellate court to review, the court's reliance on any facts or behavior or patterns that form the context for its pretext analysis, whether the facts or behaviors or patterns that occurred within or outside the trial itself.

2. Counsel's Past Conduct Could be a Proper Basis for a Credibility Determination, but Not Without a Record.

The defense used peremptory strikes to strike three white jurors that the court ultimately reseated. Counsel justified the strikes by citing the jurors' professions, and in one instance, cited the age of the juror as well.[3] The circuit court did not accept these explanations, and found that counsel had struck these jurors on the basis of their race.[4]

In the bench conference leading up to the court's ruling, the court referred specifically to what it characterized as defense counsel's "pattern" of striking white male jurors:

> All right. [Counsel], you've been playing with this for a long time in your other trials. The Court has noticed a pattern of striking white mostly male jurors, even jurors who have not answered a question. I'm going to require you to explain your rationale [for] striking.

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[3] The majority cites "[t]he peculiarity of striking all farmers from jury service in a rural, agricultural jurisdiction such as Dorchester County" as a reason that the court might perhaps have been skeptical of counsel's rationale. Slip op. at 4 n.3. But the verifiable prevalence of farmers in Dorchester County doesn't tell us anything about the racial makeup of farmers in general or in Dorchester County in particular—for all we know from this record, the racial impact of a policy of striking all farmers from jury pools could cut either way or have no impact at all. And without actual data connecting those dots (or some other *Batson*-relevant dots, such as their gender demographics) *Batson* would not restrict counsel from using peremptory strikes in that manner, or to strike jurors of any other occupation.

[4] Contrary to Mr. Spencer's arguments, particularly in his Reply, the court did explicitly find that his counsel's reasons for striking the ultimately reseated jurors were pretextual, and stated on the record at the conclusion of bench conference that "the Court is making the finding that it appears by practice the defense attorney in this case is exercising peremptory challenges based on race."

Later, in the same bench conference, the court referred again to counsel's "pattern" of striking white jurors:

> THE COURT: Let me ask you this. In your life experience do you tend to strike white people when a Defendant is a black person?
>
> COUNSEL: No.
>
> THE COURT: Are you telling me that as an officer of the court--
>
> COUNSEL: I am.
>
> THE COURT: --that race has played no part in your decisions to strike a juror notwithstanding the fact that every juror you struck has been white? Every juror you struck on our trial on Monday was white.
>
> COUNSEL: I don't have an actual recollection if that was true as to Monday, Your Honor, if you have an actual recollection.
>
> THE COURT: The Court's seen the pattern.

These excerpts reveal the factual context underlying the court's finding of pretext: the court said it had observed in past trials counsel striking "white[,] mostly male jurors," including a trial only two days previously (jury selection in this case took place on a Wednesday). And such a pattern *could* be a perfectly acceptable factor to consider at *Batson* Stage Three. The problem, however, is that there is no record whatsoever to support the court's finding or on which an appellate court could review it. Unlike in-the-moment credibility determinations, a record of the peremptory strikes from Monday's trial, or strikes from past trials, could and should exist. Here, the record reveals nothing about the

cases on which the court based its observations or the behavior on the part of counsel to which the court was reacting—or, for that matter, whether the strikes the court remembered from earlier trials happened at all.

In the *Batson* sphere, we have rejected a step-one challenge when an incomplete record prevented us from fully assessing it. *Bailey v. State*, 84 Md. App. 323, 330-33 (1990) (holding that record was "fatally incomplete" when it demonstrated that seven of ten peremptory challenges were used against black venire members without demonstrating what proportion of the venire was black). And this case presents the same problem. We don't know from this record whether the court made any *Batson* findings in the other cases the court had in mind—the exchanges suggest that it didn't—or even to which cases the court referred.[5] Had the cases been identified and the court entered an order or made rulings on the record there, we could review those rulings from the trial record of this case, or the court's description of those proceedings, or perhaps could take judicial notice of the relevant portions. But they weren't, so we can't—the court's impressions might be well-taken, but they might not. *See Jarvis v. Mayor and City Council of Baltimore*, 248 Md. 528, 532 (1968) (holding that when neither party introduced city ordinances at the trial court, they were "not properly before" the Court of Appeals); *Iverson v. Illinois*, 149 Md.

[5] We don't know whether the strikes in the other cases even drew a *Batson* challenge from opposing counsel, or, if they had, whether the court found the strikes to be race-based or counsel's reasons to be pretextual.

522 (1926) (holding that a New York statute copied into appellant's brief would not be considered because it was not proved below). Moreover, since the defense disagreed (respectfully) with the court's characterization of the prior proceedings, we are left only with an abstract dispute and no way to conduct even a deferential appellate review.[6] And so deferring, as the majority does, to a pretext finding grounded in an unreviewable contextual premise, is effectively to hold that *Batson* Stage Three decisions are unreviewable.

The majority expresses the legitimate concern that my approach would put trial courts to a difficult burden when parties or the court seek to rely on facts coming from outside the record of the particular case. I am sensitive to that concern (although I also am confident that trial courts could navigate it). But I am more troubled by the alternative—that altogether unsupported "facts" or allegations or accusations, whether from the court or opposing counsel, can support a finding of pretext—is worse. Imagine a situation in which a judge is known to think badly of a lawyer who appears regularly in the court. The genesis of the judge's views doesn't matter, but to sharpen the hypothetical, imagine that they grow out of matters entirely outside the courtroom. And then imagine the same exchange here:

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[6] This analysis should not be read as prescribing any particular form of evidence or quantum of proof—this case doesn't afford us an opportunity on which to chart those ultimate boundaries with precision. My view here is driven entirely by the total *absence* of a record to support the circuit court's finding of pretext.

counsel offers a race-neutral explanation for striking jurors, and the court responds by finding the lawyer's explanation to lack credibility, by citing a general "pattern" of misusing peremptory strikes grounded in no facts or details. I don't mean to suggest that the court's impressions here fit those descriptions, or that anything untoward or inappropriate happened here. But it troubles me to think that my hypothetical *Batson* exchange would be wholly unreviewable—even assuming the best of motives on the part of all involved, there should be some accountability for facts coming in from outside the record in the *Batson* context, particularly since material from outside the record normally (and properly) isn't allowed at all.

For these reasons, I respectfully dissent from the majority's decision to affirm the circuit court's decision to unseat the jurors Mr. Spencer challenged.

* * *

Finally, and for what it's worth, I offer one additional observation about the remedy I would have ordered had my view ruled the day. Mr. Spencer, not surprisingly, asked us to reverse his convictions and remand. But in other cases finding errors at *Batson* Step One, the Court of Appeals has remanded, without affirming or reversing, with directions that the circuit court undertake the appropriate *Batson* inquiry. *Mejia*, 328 Md. at 540-41; *Gray*, 317 Md. at 254; *Stanley*, 313 Md. at 75-76. The Court has not previously had the opportunity to address the appropriate remedy when the error arises at the pretext phase of the *Batson* analysis, but other courts that have faced this issue have overwhelmingly ordered the same limited remand. *See, e.g., Barnes v. Anderson*, 202 F.3d 150, 157 (2d

Cir. 1999) (noting that the typical remedy when a trial court fails to engage in *Batson* Step Three analysis is to remand, but declining to do so where the trial judge had passed away in the intervening time); *see also Coombs v. Diguglielmo*, 616 F.3d 255, 262-63 (3d Cir. 2010) (holding, on a *habeas* petition, that "[w]here the state court fails to undertake a full step three analysis, as required by *Batson,* we will remand for the district court to engage in independent fact-finding"); *U.S. v. McAllister*, 693 F.3d 572, 581-83 (6th Cir. 2012) (remanding for *Batson* step three hearing where totality of court's response to race neutral reasoning was the phrase "all right"); *U.S. v. Rutledge*, 648 F.3d 555 (7th Cir. 2011) (remanding for *Batson* Step Three where court failed to weigh the credibility of prosecutor's race neutral explanation). I note too that the court grounded the remand in *Rutledge* on a gap in the record similar to the gap in this record:

> Because we must find out what the [trial] court perceived before we can resolve a *Batson* denial on appeal, we remanded [a previous case] for further findings. In other words, when we confront an evidentiary gap at step three, the ultimate *Batson* issue cannot be resolved without a remand.

Id. at 560 (internal quotation marks and citation omitted).

For the same reasons that a trial court should have the opportunity to remedy a *Batson* challenge concluded prematurely at Step One, I would hold that, in the first instance, the circuit court here should have the opportunity to make a record to support its finding that defense counsel's reasons for striking the reseated jurors were pretextual. If the court could do so, Mr. Spencer's convictions could stand, and I would leave it to the court to decide whether to request or accept briefing, hold a hearing, take additional

evidence, or undertake whatever other steps it deemed appropriate. If, however, the court could not articulate or reconstruct the factual bases and reasons underlying its finding of pretext, I would hold that Mr. Spencer is entitled to a new trial.