Circuit Court for Anne Arundel County
Case Nos. C-02-CR-19-000309 & C-02-CR-19-000312

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0751

September Term, 2020

CALUM THOMAS

v.

STATE OF MARYLAND

Berger,
Zic,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: October 14, 2021

In two consolidated cases, a jury sitting in the Circuit Court for Anne Arundel County convicted Calum Thomas, appellant, of second-degree murder and related firearms offenses and acquitted him of first-degree murder. The court sentenced him to an aggregate term of 55 years, followed by five years supervised probation. Mr. Thomas appeals, presenting one question, which we have rephrased:

1. Did the trial court err by denying Mr. Thomas's *Batson*[1] challenge?

We answer that question in the negative and shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

The charges against Mr. Thomas stem from the January 2, 2017 murder of Terry Crouse, who was shot to death at close range in his backyard. Because the sole issue on appeal concerns the State's use of peremptory challenges during jury selection, we summarize those relevant facts.

The jury panel consisted of 97 prospective jurors, numbered sequentially. During voir dire, 29 prospective jurors did not answer affirmatively to any of the court's questions.[2] The court called the first 53 prospective jurors who had answered affirmatively to a question to the bench for further questioning, excused 12 of those

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

[2] They were jurors numbered 1, 2, 3, 4, 6, 19, 20, 25, 32, 33, 34, 43, 45, 46, 51, 52, 63, 69, 72, 74, 75, 76, 78, 80, 84, 87, 90, 92 and 93.

jurors for cause,[3] and then excused prospective jurors 73 through 97 without questioning any of them at the bench because the jury pool was sufficiently large to begin selection without them. Consequently, when jury selection began, the pool consisted of 60 prospective jurors, 19 of whom had not answered any questions at the bench.

Because Mr. Thomas faced a life sentence, the defense had 20 peremptory challenges and the State had ten peremptory challenges during selection of the regular jurors. Md. Rule 4-313(a)(2). With respect to the four alternate jurors, the State and defense received one and two strikes, respectively, to use for each alternate juror seat. Md. Rule 4-313(a)(4).

The State used its first three peremptory challenges to strike from the box prospective jurors 1, 2, and 6, none of whom had answered any questions posed by the court during voir dire. By then, defense counsel had already used two of her strikes to excuse jurors 3 and 4, who likewise had answered no questions at the bench. When the State exercised its fourth peremptory challenge to excuse juror 19, who also had answered no questions, defense counsel objected and asked to approach the bench. The following transpired:

> [THE COURT]: I think I know where you are going but I will hear you.
>
> [DEFENSE]: Thank you, Your Honor. This is the third African American that the State has struck from the panel. The Court's indulgence. The first one we never heard from.

[3] The court excused for cause prospective jurors numbered 5, 8, 13, 29, 30, 40, 49, 55, 66, 67, 68 and 71.

I don't believe we heard from this juror and I believe the other strike, but I could be wrong, we never heard from.

So aside from the racial component of the juror, I would like to know the State's grounds.

[THE COURT]: All right. What is the classification neutral reason that the State has chosen to strike this most recent juror?

[THE STATE]: The State is doing it right down the line and asked for numbers one. I don't believe I got a chance to ask for number two[4] but [defense counsel] did three, four, six and now I am on nineteen. *These are individuals which answered no questions whatsoever*.

[THE COURT]: All right. And okay. Were there any persons -- so the State has used how many strikes? Let's see.

[THE STATE]: I did not bring it up with me. I apologize.

[THE COURT]: I have one, two, three.

[THE STATE]: I think this would be the fourth.

[THE COURT]: This would be the fourth. And what is the -- let me just see the racial make-up of those persons.

[THE STATE]: *And believe me I wasn't even looking up. I was just going off my list.*

[THE COURT]: Right.

[DEFENSE]: I think all but one ---.

[4] The prosecutor was mistaken. He had used a peremptory challenge to strike prospective juror number 2.

> [THE COURT]: Yes. Three [of] four were African American[5] by my records of the four strikes that the State has used but for the record if the Court were to allow this present use of the p[er]emptory to take place, it would still leave three African Americans on the jury which is one clear indicia that the State's reasons are not -- the Court believes are not pre-textual because even though it is not a complete pattern, number one, it has not been established.
>
> But, number two, then they clearly would have had an opportunity to use p[er]emptories to canvas the jury where if left if its present composite, we do not know who the jury 12 would be but 3 of the 11 are and remain African Americans, both male and female. But in addition to that *I find that the reason proffered by the State is indeed true.*
>
> *I recall that none of those four persons answered a single question which absent basic vocational information and age leads both sides really ill-equipped to weigh in whether they would have any substantive latent biases and --- feelings, nature about the case, anything, bottom line.*
>
> And we asked a pretty broad swath or array of questions where a minority of persons did not answer questions. In other words, most people at least had one answer given. So for those reasons I find that (a) a perfect pattern has not been established; (b) that it is rebuttable or

[5] The transcript reflects that the court stated that "[t]hree *and* four were African American[.]" (emphasis added). In its brief, the State suggests that this may be a transcription error and that the court likely stated that "[t]hree [of] four were African American[.]"

The State's interpretation is consistent with defense counsel's proffer at the start of the bench conference, that the State struck three Black jurors from the panel, and its subsequent proffer that "all but one" of the four prospective jurors struck by the State were Black. The State did not dispute those proffers. We emphasize, moreover, that the court could not have been referring to the jurors by number—i.e., juror number three and juror number four—because defense counsel, not the State, had used peremptory strikes to excuse those two jurors. Viewed in this context, the transcript clearly is in error and we have corrected it.

> rebutted, I should say, by the fact that there are three African Americans remaining on the jury and number four, *I think that those reasons are significant which is -- and they are clearly race neutral.*
>
> *If someone does not answer a question, it allows both sides to speculate about what their inner thoughts might be or their feelings about the case.* And so for those reasons the --- challenge is denied.
>
> [DEFENSE]: Let me just note my objection for the record.
>
> [THE COURT]: So noted.
>
> [DEFENSE]: Thank you, Your Honor.

(emphasis added).

After the court denied defense counsel's challenge, the State used half of its remaining six regular peremptory challenges and two alternate peremptory challenges to strike prospective jurors who had not answered any questions during voir dire. The jury, as seated, comprised 11 regular jurors who had been questioned at the bench during voir dire and one who had not, and three alternate jurors who had been questioned, and one who had not.[6]

After jury selection was complete, the court called the parties to the bench and the following colloquy ensued:

> [THE COURT]: First, I have to complete the [*Batson*] record. The State chose I guess not to use the strike, however, you want to articulate it, another person who is a fourth African American. So now a quarter of the -- no, a

[6] The State attempted to strike the only alternate juror who had not answered any voir dire questions, but it already had used its one allotted strike for that seat.

> third of the 12 are African Americans so I just want that to be part of the record in the event that there is a conviction in this case and it became subject of a further discussion at any point in time.
>
> [DEFENSE]: I would note that the State did strike an additional African American after the challenge.
>
> [THE COURT]: Okay. So noted.
>
> [DEFENSE]: Thank you.
>
> [THE COURT]: But I am just describing the present state of the composite.
>
> [DEFENSE]: Sure.

The court did not ask, and defense counsel did not affirm, that the jury as seated was acceptable. After Mr. Thomas was convicted of second-degree murder and related charges, he noted this timely appeal.

DISCUSSION

I. STANDARD OF REVIEW

"[T]he exercise of peremptory challenges on the basis of race, gender, or ethnicity violates the Equal Protection Clause of the Fourteenth Amendment." *Ray-Simmons v. State*, 446 Md. 429, 435 (2016). The Court of Appeals has provided that:

> Absent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all. The peremptory challenge is, 'as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'

Edmonds v. State, 372 Md. 314, 335 (2002) (quoting *Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring)).

Here, Mr. Thomas contends that the State improperly exercised its peremptory challenges on the basis of race. To evaluate whether a party's use of peremptory strikes was racially discriminatory, we apply the "three-step process" set forth in *Batson*. 476 U.S. at 80; *Ray-Simmons*, 446 Md. at 435; *see also Bennett v. State*, __ Md. App. __, No. 1756, Sept. Term 2019, 2021 WL 4127205, at *3-4 (filed Sept. 10, 2021) (setting out the three-step test). First, the party challenging the strike must "make a prima facie showing—produce some evidence—that the opposing party's peremptory challenge to a prospective juror was exercised on one or more of the constitutionally prohibited bases." *Ray-Simmons*, 446 Md. at 436 (citing *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam)). To make that showing, the opposing party need only "show 'that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Ray-Simmons*, 446 Md. at 436 (quoting *Johnson v. California*, 545 U.S. 162, 168 (2005)). If that showing is made by a preponderance of the evidence, then the "burden of production [shifts] to the State and requires it to respond to the rebuttable presumption of purposeful discrimination that arises under certain circumstances." *Mejia v. State*, 328 Md. 522, 533 (1992) (quoting *Stanley v. State*, 313 Md. 50, 71 (1988)).

Second, if the objecting party meets its "preliminary burden" then the striking party must provide "an explanation for the strike that is neutral as to race, gender, and ethnicity." *Ray-Simmons*, 446 Md. at 436 (citing *Purkett*, 514 U.S. at 767)). The reasons

for the strike need not be "persuasive or plausible." *Edmonds*, 372 Md. at 330. "[U]nless a discriminatory intent is inherent in the explanation," "[a]ny reason offered will be deemed race-neutral." *Ray-Simmons*, 446 Md. at 436 (quoting *Edmonds*, 372 Md. at 330).

Third, if the striking party provides a race-neutral explanation, the court must decide "whether the opponent of the strike has proved purposeful racial discrimination." *Purkett*, 514 U.S. at 767; *Bennett*, 2021 WL 4127205, at *4. In performing this step, the Court of Appeals has explained:

> [The trial court may infer a] discriminatory purpose . . . from the totality of the circumstances and relevant facts. Among the factors the court may consider to determine whether the proponent intended to discriminate are: 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.

Edmonds, 372 Md. at 330 (citation omitted); *see also Bennett*, 2021 WL 4127205, at *4 (explaining that "[w]hether there has been purposeful discrimination is an issue of the credibility of the race-neutral explanation, which is measured by several factors, including counsel's demeanor, the reasonableness or improbability of the explanations, and whether the explanation is attributable to an accepted trial strategy"). The trial court's ultimate determination as to discriminatory intent is a factual finding that is "afforded great deference and will only be reversed if it is clearly erroneous." *Ray-Simmons*, 446 Md. at 437; *see also Khan v. State*, 213 Md. App. 554, 568 (2013) ("In

reviewing [a] trial judge's [*Batson*] decision, appellate courts do not presume to second-guess the call by the 'umpire on the field' either by way of de novo fact finding or by way of independent constitutional judgment.") (alterations in original) (quoting *Bailey v. State*, 84 Md. App. 323, 328 (1990)).

II. THE PARTIES' CONTENTIONS

Mr. Thomas contends that the trial court erred in the first and third steps of its analysis. First, he argues that the court erred by finding that he did not make a prima facie showing that the State's exercise of three of its first four peremptory challenges to strike Black jurors gave rise to an inference of discriminatory intent. Specifically, he asserts that the court improperly applied a heightened burden, requiring Mr. Thomas to show a "perfect pattern" and should not have considered the "relative demographic balance of the jury." Second, in assessing the State's race-neutral reason for its strikes, Mr. Thomas contends that the trial court clearly erred by crediting the State's "flimsy" justification that the prospective jurors had not answered any voir dire questions, which he asserts was evidently pretextual. Additionally, he argues that the court erroneously relied upon the composition of the jury in concluding that the State rebutted any prima facie showing.

The State responds that the preliminary determination of whether Mr. Thomas made a prima facie showing of discriminatory purpose is moot because the court requested that the State provide a race-neutral explanation for the strikes. Further, the State posits that the court was persuaded that the reason given was not pretextual and that

the State did not exercise its strikes with discriminatory intent. It asserts that the trial court did not clearly err by "crediting the State's proffered [race-neutral] reason as non-pretextual" and not being persuaded by Mr. Thomas's argument that the prosecutor was motivated by discriminatory intent.

III. ANALYSIS

As a threshold matter, we agree with the State that we need not decide whether the trial court erred by finding, in the alternative, that Mr. Thomas failed to make a prima facie showing of discriminatory intent. Because, if the striking party offers a "race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359. Here, the trial court asked the prosecutor to proffer a race-neutral reason for the strikes, the State complied, and, consequently, we are only concerned with whether the trial court clearly erred in crediting the reason given.

There is no dispute that the State offered a race-neutral justification for the three challenged strikes. The prosecutor explained that he used his peremptory strikes to remove three Black jurors (and a fourth juror whose race is not evident from the record) because they had not answered any of the court's voir dire questions. He asserted that he was just "going off [his] list" and that he was not "even looking up" at the jurors, instead striking jurors who had not answered any questions.

The trial court found this reason consistent with a reasonable trial strategy. *See Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (noting that consistency with accepted trial strategy is one factor in assessing discriminatory intent). It inferred from the State's explanation that it chose to remove jurors about whom it lacked any information beyond the basic information provided on the jury pool list. As the trial court reasoned, with respect to this class of prospective jurors both parties were "ill-equipped to weigh . . . whether they would have any substantive latent biases and—feelings, nature about the case, anything, bottom line." Thus, in the court's view, it was a reasonable trial strategy to strike jurors based upon a vacuum of information, in favor of selecting jurors about whom the State had a favorable impression.

The court further found that the reason given by the State was accurate and was applied consistently, regardless of race. At the time defense counsel made her challenge, she and the State, cumulatively, had used strikes to remove every juror who had not answered any questions during voir dire—jurors 1, 2, 3, 4, 6, and 19.[7] Thus, the State asserted its race-neutral reason for striking the jurors was consistent with its approach to using its strikes generally and was credible.[8]

[7] Mr. Thomas emphasizes that two jurors—numbers 20 and 25—who also had answered no voir dire questions remained in the box at that time. This was not relevant to the court's analysis, however, because the State was using its strikes sequentially and those jurors had numbers higher than the strikes at issue. Additionally, as mentioned, the State did elect to strike one of those jurors after the challenge was rejected.

[8] This case differs markedly from this Court's recent decision in *Bennett v. State*, 2021 WL 4127205, at *1. There, the reason offered by the State for exercising a peremptory strike to remove the only Black person in the venire—that the prospective

The court also considered the overall makeup of the jury both at the time defense counsel made her *Batson* challenge and again after jury selection was complete. At the time the challenge was made and rejected, there were three Black jurors seated in the box. At the end of jury selection, there were four Black jurors on the jury.[9] Though this factor was not dispositive, it was among the permissible factors the court could consider in assessing the credibility of the State's stated reasons. *See Edmonds*, 372 Md. at 330.

The trial court was not clearly erroneous in crediting the prosecutor's race-neutral justification and being unpersuaded by Mr. Thomas's position that the stated reason was pretextual. "[I]f any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Spencer v. State*, 450 Md. 530, 548 (2016) (quoting *Webb v. Nowak*, 433 Md. 666, 678 (2013)). Here, as explained, there was evidence showing that the State employed a consistent approach to exercising its strikes, regardless of race. The trial judge was best situated to assess the credibility of the State's stated reason for exercising its peremptory strikes. *See Ball v.*

juror might harbor distrust or animus toward the police or the State because her mother had been the victim of a crime and the perpetrator had not been convicted—applied more convincingly to White jurors who were seated on the jury without objection. *Id*. at *7-9. On that record, we concluded that "the prosecution failed to validly establish and articulate any significant differences between the selected White jurors and the excluded Black juror." *Id*. at *7 (quotation marks omitted). As explained above, in the instant case, the State's proffered reason for exercising its strikes was applied consistently irrespective of race.

[9] The record does not reveal how the makeup of the jury compared to the makeup of the jury pool. As the moving party, it was Mr. Thomas's burden to put on the record any facts supporting his position.

Martin, 108 Md. App. 435, 456 (1996) (explaining that the trial court, rather than an appellate court, should generally determine "the credibility of the proponent offering the reasons" for the strikes). For example, it is impossible for this Court to determine from the cold record on appeal whether the prosecutor was, as proffered, looking down at his list while making his strikes. Because it was Mr. Thomas's burden to persuade the trial court that the race-neutral justification for the strikes were pretextual, the trial court's findings to the contrary are entitled great deference on appeal and we decline to second-guess those findings. *See Starke v. Starke*, 134 Md. App. 663, 680 (2000) ("[I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded.")

The trial court's finding was also borne out by the prosecutor's conduct *after* the *Batson* challenge was heard and rejected. The State struck four more jurors who answered no questions during voir dire (three regular jurors and one alternate juror), ultimately using 70 percent of its initial peremptory strikes on jurors who had answered no questions,[10] and 57 percent of its total strikes on those jurors. Of the seven jurors struck by the State who had answered no questions in voir dire, at least three and possibly

[10] Mr. Thomas mistakenly states in his brief that the State used eight out of ten of its initial strikes on jurors who answered no questions. One of the jurors he lists—juror number 11—did, however, answer questions.

four were not Black.[11] Only one regular juror and one alternate juror who had answered no questions were seated, the latter of whom the State unsuccessfully tried to challenge. This bolsters the trial court's determination that the prosecutor's justification was not pretextual.

The out-of-state case cited by Mr. Thomas, *Hyman v. State*, 531 S.E.2d 708 (Ga. 2000), *overruled on other grounds by State v. Jackson*, 697 S.E.2d 757 (Ga. 2010), for the proposition that non-responsiveness during voir dire as a reason for exercising peremptory strikes is "insufficient to overcome an inference of discriminatory intent" is readily distinguishable. In *Hyman*, the Supreme Court of Georgia affirmed a trial court's determination that defense counsel evinced discriminatory intent in striking three jurors based upon their alleged "lack of responsiveness on voir dire[.]" *Id*. at 711. There, unlike in this case, that justification was not applied consistently to jurors of different races. *Id*. More significantly, the issue in *Hyman* was whether the trial court erred by finding that the moving party carried its burden of persuasion. *Id.* Here, we are concerned with whether the trial court erred in finding that Mr. Thomas did not carry his burden of persuasion and, as set out above, such a finding is rarely subject to a reversal for clear error. *See Starke*, 134 Md. App. at 680-81.

[11] The record is clear that the State struck one more Black juror after the *Batson* challenge was heard and denied. Defense counsel did not renew her objection at that time, however, and it is unclear whether that juror was among those who had answered no questions during voir dire.

For all these reasons, we conclude that the trial court did not err by rejecting Mr. Thomas's *Batson* challenge. Accordingly, we affirm the judgment of the circuit court.

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