Circuit Court for Baltimore City
Case No.: 116341020

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1822

September Term, 2017

ANTHONY JOHNSON

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Meredith, J.

Filed: March 16, 2020

A jury in the Circuit Court for Baltimore City convicted Anthony Johnson, appellant, of first-degree sexual offense, first-degree assault, use of a handgun in the commission of a crime of violence, and unlawful possession of a regulated firearm. The trial court sentenced Johnson to life imprisonment with all but 50 years suspended for the first-degree sexual offense count, a concurrent term of 25 years for the first-degree assault count, a consecutive term of 20 years for the use of a handgun in the commission of a crime of violence count, and a concurrent term of 15 years for the unlawful possession of a regulated firearm count. In this appeal, Johnson presents the following questions for our review:

1. Did the court err in denying appellant's *Batson* challenge where the prosecutor's reason for striking two black jurors included that the jurors lived in "bad zip code[s]"?

2. Did the court err in denying appellant's mistrial motion after the lead detective testified that he determined that appellant's twin brother was a fraternal twin which the court subsequently struck because the source of that evidence was a statement by the prosecutor in this case, the only evidence linking appellant to the crimes was DNA evidence which would be identical for an identical twin, and no other evidence in the case demonstrated whether appellant's twin was fraternal or identical?

3. Is the evidence sufficient to sustain appellant's convictions where the evidence showed that appellant had a twin brother, there was no evidence regarding whether the twin was fraternal or identical, the DNA expert testified that identical twins have the same DNA, and the only evidence regarding the twin was the lead detective's testimony that the twin "was apparently incarcerated"?

For the reasons set forth below, we affirm the judgment of the circuit court.

FACTUAL BACKGROUND

On July 27, 2016, S.N., who was sixteen years old, walked to a Walgreen's near her home in Baltimore City to pick up a prescription for her great-grandmother. On her way home, S.N. walked past the Hartford Heights Elementary School, where she was approached by a man with a silver gun. The man grabbed S.N.'s arm and led her down the steps to the back of the school. The man asked her what was in the bag and she replied that it was her grandmother's medicine. The man asked S.N. if she had any money, and when she replied that she only had five cents, he told her "to have sex with him and [she] told him no."

The man led S.N. to the school playground, insisting that she have sex with him, but she repeatedly refused. S.N. told him that she had her period and the man said, "let me see," and she responded "no." S.N. testified that the man told her that she was "going to have to do something for him." The man asked S.N. if she wanted to live or die and told her that she had to get on her knees and perform oral sex. The man pointed the gun at her head and she complied. She testified that he ejaculated on her face, pushed her down and walked away. S.N. ran, crying, back to her great-grandmother's house.

Louise Dudley testified that on July 27, 2016, she asked S.N., her great-granddaughter, to pick up a prescription for her at Walgreen's on Greenmount Avenue. When S.N. returned approximately thirty minutes later, she was "crying" and "screaming" and "trying to wash her face" because she said that she had just been sexually assaulted. Ms. Dudley instructed S.N. not to wash her face and called the police.

Baltimore City Police Detective Cesar Mohamed responded to the emergency call from Ms. Dudley. Upon arrival, Detective Mohamed observed S.N. to be crying and "extremely upset." Because S.N. did not respond to Detective Mohamed's questions, he called for assistance from a female officer, who arrived and interviewed S.N. Detective Mohamed then transported S.N. to Mercy Hospital.

Forensic Nurse Jennifer Breads examined S.N. on July 27, 2016, in the Mercy Hospital emergency department. Ms. Breads observed S.N. to be calm and cooperative, and, at times, tearful. S.N. explained to Ms. Breads that she had been forced to perform oral sex at gunpoint and that her assailant had ejaculated on her face. Ms. Breads observed a "diffuse, white, flaking semen-like substance" on S.N.'s face. Ms. Breads viewed S.N.'s face under an alternate light source and observed "fluorescence," consistent with the presence of a bodily substance, such as semen. Ms. Breads took photos and collected swabs, which she submitted to the crime lab for analysis.

Dana Picco, an expert in serology for the Baltimore Police Department, tested the swabs from S.N.'s face, nose and mouth, and found sperm present on S.N.'s face swabs. Ms. Picco then submitted those swabs for DNA analysis.

Thomas Hebert, a DNA analyst for the Baltimore Police Department, testified as an expert in forensic analysis. Mr. Hebert analyzed S.N.'s face swabs and determined that "[t]he sperm fraction of the swab, it [is] a single source male DNA profile. And Anthony Johnson is the source of that DNA profile." Mr. Hebert testified:

> So for the sperm fraction, Anthony Johnson is the source of the DNA profile, which means that based on a world population of approximately 7.5 billion, a random match would probably be greater than one in 7.14 or 7.9 trillion will show at least 99.9 percent confidence that that profile is unique. So, basically, there is a 99.9 percent [confidence] that that profile is unique to just Mr. Johnson or greater than that.

On cross-examination, Mr. Hebert explained that the DNA profile for identical twins is "exactly the same," whereas fraternal twins, like siblings, share only 25% of the same DNA. Mr. Hebert was not informed whether Johnson had a twin. Mr. Hebert testified that, if Johnson had an identical twin, the statistical analysis of his report would remain the same, but he would include a cautionary statement that he could not "include [Johnson] at the exclusion of his identical twin." "[I]f he had an identical twin, there would be another person that would have the same DNA as him."

Detective Nathan Roles, Jr., interviewed S.N. at the police station, where she provided a recorded statement. S.N. described her assailant as taller than she was (she testified that she was five feet tall), and she said that he had a silver gun. She further described him as being in his 20's, wearing black Adidas pants with stripes and a dark hat. S.N. told Detective Roles that she did not see the assailant's face. During the course of the interview, S.N. vomited on the table.

On November 10, 2016, approximately four months after the assault, Detective Justin Stinnett of the Baltimore Police Department showed S.N. a photographic array, which included a photograph of Johnson. S.N. was unable to identify her assailant from the array.

At trial, the parties stipulated that Johnson had previously been convicted of an offense that prohibited him from having a firearm in his possession.

DISCUSSION

I.

Johnson's *Batson* Challenge

During jury selection, Johnson challenged the State's use of its peremptory strikes against five African American jurors, and the following colloquy ensued:

> [DEFENSE COUNSEL]: Your Honor, I'd raise [an] issue under Batson, I think that the State struck five African American jurors, two of which have not answered any voir dire questions. I think there's been a –
>
> THE COURT: Which one are you talking about in particular[?]
>
> [DEFENSE COUNSEL]: No. 67, No. 11, I mean all of them, there's 138, 77, and 31.
>
> THE COURT: Oh, okay, all of them. Okay, all right, so let's start with 67. Why did you strike 67?
>
> [PROSECUTOR]: Juror No. 67 indicated when you, she indicated she was sleepy. I don't like her zipcode [hereinafter "zip code"], and she indicated she was a victim of sexual assault 12 years ago but the way she indicated it was rather flippant, as if it didn't have any meaning to her. That's why I didn't like her.
>
> THE COURT: Okay, all right, I'll accept that. Eleven?
>
> [PROSECUTOR]: Juror No. 11, has a pending case for an assault. Which I thought that was too close and I marked it right away.
>
> THE COURT: All right, very well. I'll accept that, 138?
>
> [PROSECUTOR]: Unemployed.

THE COURT: Okay. All right, I'll accept that. 77[?]

[PROSECUTOR]: Seventy-seven. He, I made note of the fact that [Johnson] has tattoos all about his person. This person had tattoos on his arm. I couldn't discern what they were but in an abundance of caution I wasn't going to take any chances with this case.

THE COURT: All right, I'll accept that, 31?

[PROSECUTOR]: Unemployed and bad zip code.

THE COURT: Okay. All right, well I don't hear anything that[], has to do with race, gender, or ethnicity so your motion is denied.

[DEFENSE COUNSEL]: Your Honor, I would like to, just for the record, point out that bad zip code, I think, is analogous in this City.

THE COURT: Well that is not anything to do with race, gender, or age or anything, so –

[PROSECUTOR]: May I qualify that for the record, Your Honor?

* * *

THE COURT: Well you can say whatever you want to say about zip code, but I've already ruled, so your motion is denied. You can go back, thank you.

[DEFENSE COUNSEL]: Yes.

[PROSECUTOR]: Just in case there's an issue may I just --

THE COURT: Yes, go ahead.

[PROSECUTOR]: Thank you. So when I say bad zip code what I'm referring to is the crime rates. I actually examined the crime rates in each zip code and looked at areas where the crime was particularly high and particularly violent. I'm looking for murders in nature that kind of correlate to this case, and I'm concerned that there might be some issues if you live in an area like that and you're forced with judging a case like this. And that's why I made the decision I made. It had nothing to do with race.

* * *

> [DEFENSE COUNSEL]: I think saying zip code in a city this segregated I think that leads to race.
>
> THE COURT: No, this is what I'm trying to explain to you is, … you come up, the person that makes the Batson charge, I go to them for your grounds.
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: You put your grounds on the record. I went to the State and he told me the reason why he struck each one of these jurors. I didn't find anything that had to do with race, age, or ethnicity so I denied your motion. You said something about the zip code afterwards, which you really shouldn't do after the judge has ruled. But the State went on and put on his argument for why he picked those zip codes. It really doesn't matter whether you think it's flimsy or whatever, it has nothing to do with the three reasons why I would find a Batson challenge. Okay.
>
> [DEFENSE COUNSEL]: It's not that it's flimsy, it's just that I think that in this city zip code is analogous to race. That's my whole thing. Saying I think somebody - -
>
> THE COURT: Well I don't think so. I mean I think that there are areas where there are probably more predominately black people than white people, but I don't know that has anything, that he picked them because there are a lot of people on this jury that are from those very same zip codes . . . . So I can't really say that's analogous to race. So your motion is denied.

Johnson claims that the trial court was clearly erroneous in finding that the prosecution's striking of Jurors No. 67 and 31—which the prosecutor admitted was based, in part, on the jurors' zip code—was not based on the jurors' race under the circumstances of this case. Johnson contends that, "in a city as racially segregated as Baltimore, 'bad zip code' is merely a pretext for race." The State responds that the trial court did not err in denying Johnson's *Batson* challenge, arguing that a juror's zip code is

a race-neutral reason for striking a potential juror. Alternatively, the State argues that, even if a juror's zip code is not deemed race-neutral, the trial court's denial of Johnson's *Batson* challenge was not erroneous because the prosecutor provided other racially-neutral explanations for the strikes.

The Court of Appeals has recognized that, under *Batson*, the use of a peremptory challenge to strike a potential juror "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). Once a party raises a *Batson* challenge, the trial court must engage in a three-step process to evaluate whether a peremptory challenge was based on race, gender or ethnicity. *Id*. First, the party raising the challenge must make a *prima facie* showing by producing some evidence that the peremptory challenge had a discriminatory purpose or motive. *Id*. at 436. At that point, the burden shifts to the party exercising the strike to give an explanation that is "neutral as to race, gender, and ethnicity." *Id*. "[A] neutral explanation has been defined as 'an explanation based on something other than the race of the juror. **Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.**'" *Edmonds v. State*, 372 Md. 314, 332 (2002) (emphasis added) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)).

At step three, the trial court must determine "'whether the opponent of the strike has proved purposeful racial discrimination.'" *Ray-Simmons*, 446 Md. at 437 (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995)). At this point, "'the trial court must evaluate

not only whether the [striking party's] demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the [striking party].'" *Id*. (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). This final step involves evaluating "the persuasiveness of the justification" proffered by the striking party, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768. *Accord Johnson v. California*, 545 U.S. 162, 171 (2005).

A trial court's grant or denial of a *Batson* challenge is a factual finding that is "afforded great deference and will only be reversed if it is clearly erroneous." *Ray-Simmons*, 446 Md. at 437 (emphasis added). *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.'" (quoting *Bailey v. State*, 84 Md. App. 323, 328 (1990))).

In this case, the trial court did not expressly address whether Johnson had established a *prima facie* case of discrimination, but instead, immediately asked the prosecutor to explain each of the five challenged strikes. Under those circumstances, the first step of the *Batson* analysis became moot when the prosecutor proceeded to proffer race-neutral explanations for each of the strikes. *See Ray-Simmons*, 446 Md. at 442-43 (Whether a party has established a *prima facie* case is moot once the striking party offers

an explanation for the strike (citing *Hernandez*, 500 U.S. at 359; *Davis v. Baltimore Gas & Elec. Co.*, 160 F.3d 1023, 1027 (4th Cir. 1998); *Edmonds*, 372 Md. at 332)).

The Supreme Court has explained that, "[u]nless a discriminatory intent is inherent in the [defense counsel's] explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360. *See also Purkett*, 514 U.S. at 769, ("[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."). An explanation need not be "persuasive or plausible" to be considered race-neutral, so long as a discriminatory intent is not "inherent in the explanation." *Ray-Simmons*, 446 Md. at 436 (citing *Edmonds*, 372 Md. at 330).

The prosecutor provided the following explanations for the strikes: Juror No. 11 had a pending assault case; Juror No. 138 was unemployed; Juror No. 77 had tattoos on his arms; Juror No. 67 was sleepy, had a bad zip code and a "rather flippant" demeanor; and Juror No. 31 was unemployed and also had a "bad zip code."

Johnson does not challenge the prosecutor's explanations for striking Jurors No. 11, 138, and 77, but maintains that the trial court erred in accepting the prosecutor's explanations for striking Jurors No. 67 and 31 because, he contends, a juror's "zip code" is not a race-neutral basis for striking a potential juror in a highly segregated area like Baltimore City.

Johnson suggests that this Court could "take judicial notice [pursuant to Maryland Rule 5-201] of the pervasiveness of racial segregation by geographic areas roughly delineated by zip codes in Baltimore City." But our task on appeal is to examine whether

the trial judge's finding was clearly erroneous, not to conduct *de novo* fact finding, *Khan, supra*, 213 Md. App. at 568, and we have been directed to no place in the record in which the trial judge was asked to take judicial notice of such facts. When defense counsel asserted, without offering supporting evidence, that "I think saying zip code in a city this segregated[,] I think that leads to race," the trial judge pointedly rejected that assertion. And when defense counsel said, "I think that in this city zip code is analogous to race," the court said, "Well I don't think so. . . . [T]here are a lot of people [actually, two] on this jury that are from those very same zip codes that are on the jury. So I can't really say that's analogous to race."

Johnson urges us to find support for his challenge in two out of state cases: *Commonwealth v. Horne*, 635 A.2d 1033 (Pa. 1994), and *Congdon v. State*, 424 S.E.2d 630 (Ga. 1993). But we are not persuaded that either of these cases compels reversal. The *Congdon* decision was later distinguished in *Smith v. State*, 448 S.E.2d 179 (Ga. 1994), a case in which the Supreme Court of Georgia found residency in a particular public housing project that was plagued by gang activity to be a non-discriminatory reason for excusing a potential juror. And the Pennsylvania decision was issued by a highly divided court.

Courts from other jurisdictions have found that a person's residence in a high crime area is a race-neutral reason for striking a prospective juror. *See, e.g.*, *People v. Johnson*, 578 N.E.2d 1274, 1287 (Ill. App. Ct. 1991) (prosecutor's reason for excluding potential juror based on juror's residence in the "inner city" was not a *Batson* violation);

People v. Harvey, 568 N.E.2d 381, 388 (Ill. App. Ct. 1991) (no *prima face* case established where black venireperson was challenged on the basis that she lived in a high drug crime area and she did not establish eye contact with prosecutor); *People v. Jenkins*, 545 N.E.2d 986, 1003-04 (Ill. App. Ct. 1989) (holding that trial counsel was not ineffective for failing to raise a *Batson* challenge where reasons given for the exclusion of potential juror were that he lived in a high-crime area, dressed inappropriately for coming to court and had a cavalier attitude); and *Taitano v. Commonwealth*, 358 S.E.2d 590, 592-93 (Va. Ct. App. 1987) (Virginia Court of Appeals found that the prosecutor's explanation for striking four potential jurors because they lived near the defendant or near the scene of the crime, or in areas of high crime was a "clear and specific non-racial reason" for strikes).

The trial court's final assessment of whether the prosecutor's decision to strike Jurors No. 67 and 31 was racially motived was a credibility determination which is entitled to great deference. As the Supreme Court said in *Hernandez*:

> [T]he decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S. at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, (1985)). *See also Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (A trial court's decision on the question of whether the prosecutor was motivated by a discriminatory intent is "entitled

to great deference.") (internal quotation marks and citation omitted); *Elliot v. State*, 185 Md. App. 692, 714 (2009) (because the trial court's evaluation of a *Batson* challenge is essentially a factual inquiry, its decision is afforded deference and will not be reversed unless clearly erroneous).

Johnson contends that the prosecutor's "bad zip code" explanation was "clearly false given that other jurors from the same zip code were seated on the jury." (The record indicates that Jurors No. 152 and 146 shared the same zip code (21229) as Juror No. 67, but were not stricken by the prosecutor.) But, in our view, the prosecutor's decision not to strike all prospective jurors from that zip code is simply one additional fact the trial court was entitled to consider and weigh in coming to the conclusion that the challenged strikes were not based on the race of Juror 67. We are not persuaded that the trial judge's finding was clearly erroneous. The presence of other jurors on the jury with the same "bad zip code" as Juror No. 67 supports the trial court's finding that the prosecutor's reasons for striking Jurors No. 67 and 31 were not motivated by a "discriminatory intent" to exclude African American jurors based on their race.

We conclude that the circuit court was not clearly erroneous in finding that the State's reasons for challenging Jurors No. 67 and 31 were race-neutral and non-pretextual.

II.

Denial of Motion for a Mistrial

Johnson contends that the circuit court abused its discretion in denying his motion for a mistrial after Detective Roles, the lead detective in the case, testified that he had learned from the prosecutor in the case that Johnson's twin was fraternal. Johnson asserts that whether his twin was identical or fraternal was central to his defense because the case rested entirely on DNA evidence, the conclusiveness of which would be dramatically different depending on whether his twin brother was fraternal or identical. Johnson argues that the prejudicial effect of Detective Roles's testimony—which was the sole evidence that the twins were fraternal—could not be cured by the instruction given by the circuit court because (a) the court's instruction was imprecise, and, perhaps more importantly, (b) "it was unreasonable to expect the jury to disregard the evidence especially given that the source of the information was the prosecutor[.]" Accordingly, he contends that "[a] mistrial was the only appropriate remedy."

The State asserts that the trial court properly exercised its discretion in denying Johnson's motion for a mistrial and instructing the jury to disregard the testimony. With respect to Johnson's contention that the curative instruction failed to cure the prejudice because it was imprecise, the State points out that the argument is not preserved because Johnson did not object to the instruction after it was given, citing Maryland Rule 4-325(e). Regarding the general effectiveness of a curative instruction, the State argues that the trial court properly instructed the jury with a "clear directive" to disregard the

testimony, and "[t]he jury is presumed to understand and follow the court's instructions," citing, *inter alia*, *Whittington v. State*, 147 Md. App. 496, 534 (2002). But we find most persuasive the State's argument that the fraternal nature of the twins became insignificant after Detective Roles testified, without objection, that Johnson's twin brother was "apparently incarcerated" at the time of the sexual assault. That assertion was never countered by Johnson, and it made the theoretical possibility that he was an identical twin a moot point.

On cross-examination, defense counsel questioned Detective Roles about the basis for his statement that Johnson had a twin brother:

> [DEFENSE COUNSEL]: And you testified on direct that Mr. Johnson's twin is a fraternal twin; is that correct?
>
> DETECTIVE ROLES: Yes.
>
> [DEFENSE COUNSEL]: And did you conduct a DNA analysis on him to verify that?
>
> DETECTIVE ROLES: No, I did not.
>
> [DEFENSE COUNSEL]: Did you – were you there when they were born?
>
> DETECTIVE ROLES: I don't think so.
>
> [DEFENSE COUNSEL]: Okay. So what's your basis for thinking that they are fraternal as opposed to identical twins? Did you interview Mr. Johnson?
>
> DETECTIVE ROLES: No, I did not.
>
> * * *
>
> [DEFENSE COUNSEL]: What makes you think they're fraternal twins?

> DETECTIVE ROLES: Just based on my investigation and what I've read.
>
> [DEFENSE COUNSEL]: What part of your investigation revealed that they're fraternal twins?
>
> DETECTIVE ROLES: I read during the I2 . . . [t]hat Mr. Johnson has a twin…[.][1]

After reviewing the I2 report at defense counsel's request, Detective Roles acknowledged that it did *not* state that Johnson had a fraternal twin, but stated only that Johnson was a twin. Nevertheless, Detective Roles claimed that, based on that information, he investigated further, including speaking to the prosecutor who was trying the case, and the prosecutor advised him that Johnson and his brother are fraternal twins.

Defense counsel then moved to strike "all of that about fraternal twins since there's no basis and knowledge for it. And it wasn't in the report he cited." The court acknowledged that "one of the main issues in the case is whether [Johnson] is fraternal or identical" because "if he's identical, there's another person in the world that could match the DNA" but "if he's fraternal that excludes him." The court explained that, if Detective Roles only learned that Johnson was a fraternal twin from the State's Attorney's Office, it was "an issue." At that point, Detective Roles literally suffered a seizure in the courtroom. The court recessed for lunch and assisted the detective.

[1] An "I2" is apparently a "rap sheet."

After a lunch recess, the court denied the State's request to present additional witnesses as to the issue of Johnson's twin, and the court ruled that any testimony about what the detective had learned from others would be inadmissible hearsay. The court then instructed defense counsel to state on the record the relief he requested. Defense counsel stated:

> Your Honor, first of all, I request a mistrial because of the facts that were put out that are severely prejudicial against my client that are without evidentiary foundation. That [sic] is he – or is not this fraternal twin or is not an identical twin when there's no basis for the assertion in evidence. Short of that, if the Court does not want to grant a mistrial, I'll ask the Court to strike and give an instruction to the jury they're not to – they're to disregard any position as to whether or not Mr. Johnson's twin is fraternal or identical. That he's got a twin and it's – that's all that we know so far. And that's what my request would be.

Detective Roles was unable to resume testifying that afternoon, and the trial was continued to the following day. On the morning of the second day of trial, the court denied Johnson's motion for a mistrial but granted Johnson's motion to strike Detective Roles's testimony that the twin was "fraternal" and agreed to give an instruction to the jury. The court explained its ruling outside the presence of the jury as follows:

> As to the issue we were speaking about yesterday as to Detective Roles testifying that he learned from [the prosecutor] that Mr. Anthony Johnson's twin was a fraternal twin, it is – the burden is on the State in any criminal case to prove that the offense was committed and that the Defendant is the person who committed it. In this particular case, what the Court has discerned is that the only evidence connecting Mr. Johnson, the Defendant in this case, to the assault is through DNA.
>
> Throughout – it was brought out through the testimony of Mr. Hebert, the DNA analyst, that if there was a twin, and speaking of an identical twin, that he would've put in his report that the twin could not

> have been excluded because therefore there would've been two people in the world with the same DNA. Through the testimony of Detective Roles, he testified that he learned from [the prosecutor who was trying the case] that the twin was fraternal.
>
> The Court finds that because [Johnson] does not have the opportunity now to cross[-]examine the [prosecutor] in this case, that I will strike that testimony from the record.
>
> When the jury entered the courtroom, the court then instructed the jury:
>
> [L]adies and gentlemen, yesterday during Detective Roles'[s] testimony, he testified that he had learned that the twin of Mr. Johnson was fraternal from the State's Attorney in this case, [the prosecutor]. You are to disregard that testimony. That testimony has been stricken from the record.

Johnson did not object to the court's ruling or the curative instruction.

The decision as to whether to grant a mistrial lies within the sound discretion of the trial court. *Winston v. State*, 235 Md. App. 540, 570, *cert. dismissed*, 461 Md. 509 (2018). *See also Nash v. State*, 439 Md. 53, 69 (2014) (stating that "declaring a mistrial is an extreme remedy not to be ordered lightly"). We recognize that, "'[i]n the environment of the trial[,] the trial court is peculiarly in a superior position to judge the effect of any . . . alleged improper remarks.'" *Howard v. State*, 232 Md. App. 125, 161 (quoting *Simmons v. State*, 436 Md. 202, 212 (2013)), *cert. denied*, 453 Md. 366 (2017). We have explained the rationale for extending deference to a trial judge's ruling regarding a motion for a mistrial as follows:

> "The fundamental rationale in leaving the matter of prejudice *vel non* to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel

> to inadmissible matters. That is to say, the judge has [her] finger on the pulse of the trial."

Washington v. State, 191 Md. App. 48, 103 (2010) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

In assessing whether a mistrial is warranted, the trial judge must first determine whether the prejudicial impact of the inadmissible evidence can be cured. *Walls v. State*, 228 Md. App. 646, 668 (2016). In deciding whether to give a curative instruction or declare a mistrial, the trial court will generally consider the following factors:

> whether the reference to the [inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists. . . .

Washington, 191 Md. App. at 103 (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). But these factors are merely a non-exclusive guide to help the court evaluate prejudice to the defendant and no single factor is determinative. *Kosmas v. State*, 316 Md. 587, 594-95 (1989); *McIntyre v. State*, 168 Md. App. 504, 524-25 (2006).

In *Kosmas, supra*, 316 Md. at 594, the Court of Appeals held that the trial court abused its discretion in denying the defendant's motion for a mistrial where a law enforcement officer testified that the defendant had refused to take a lie detector examination. The Court of Appeals concluded that "the damage in the form of prejudice to the defendant transcended the curative effect of the instruction." *Id*. The Court determined that it seemed "highly likely" the witness was aware that evidence concerning

lie detectors was inadmissible, the defendant's credibility was at issue in the case, and the State's case against the defendant was "not overwhelming." *Id*. at 594, 596-98. *See also Guesfeird*, 300 Md. at 666-67 (holding, in a sexual assault case, that the complaining witness's inadvertent reference to the fact that she had taken a polygraph test was so prejudicial that it denied the defendant a fair trial and could not be cured by an instruction); *Parker v. State*, 189 Md. App. 474, 494-96 (2009) (trial court erred in not granting a mistrial after prosecutor mentioned an inadmissible prior conviction of defendant, and the case turned on defendant's credibility).

Here, Detective Roles was not the principal witness upon whom the prosecution's case depended, although the State's case was dependent upon the DNA evidence linking Johnson to the sexual assault. Detective Roles's assertion that Johnson was a fraternal twin was prompted by the State, but the court instructed the jury to disregard the statement. Moreover, the court and the jury also heard Detective Roles's un-objected to statement that Johnson's brother was incarcerated at the time of the assault.

The court gave a timely instruction to the jury to disregard Detective Roles's testimony that he learned that Johnson had a fraternal twin from the prosecutor, informing the jury that the testimony had been struck from the record. After the court granted Johnson's request to strike the testimony and give a curative instruction, Johnson did not object to the content of that instruction.

Maryland Rule 4-325(e) provides that "[n]o party may assign as error the giving [of] an instruction unless the party objects on the record promptly after the court instructs

the jury." By failing to object to the court's instruction, Johnson's waived his argument that the curative instruction was too "unclear" to cure the prejudice resulting from Detective Roles's testimony. *See Paige v. State*, 222 Md. App. 190, 200-201 (2015) (defendant's failure to object to curative instruction resulted in waiver of argument challenging the instruction); *Drake and Charles*, 186 Md. App. 570, 588-89 (2009) (holding that the defendants affirmatively waived their challenge to the contents of the court's curative instruction when they failed to object to the instruction).

In closing arguments, the State made no effort to persuade the jury that the twin was not identical, but emphasized the absence of any evidence contradicting Detective Roles's assertion that the twin brother was incarcerated at the time of the attack upon S.N. The prosecutor argued:

> Now, there is no question that the Defendant is the person who attacked [S.N.]. This argument about a twin is really irrelevant because the testimony was that the Defendant's twin was incarcerated at the time of this incident. He was physically incapable of being in a position where he could have attacked [S.N.] in this way.
>
> The DNA evidence in this case is overwhelming, overwhelming, and there's no other rational explanation for how the Defendant's DNA got on the face of [S.N.] but for the fact that he is the one who attacked her. An exam of the DNA evidence, it's a mixture of two people, a male and a female. The female was found to be [S.N.]. The male, the testimony was, was the Defendant.
>
> And if you look at the numbers again, the strength or intensity of the indication, 7.1 sextillion times more likely, 5.88 sextillion times more likely. The testimony was it would take thousands of earths, thousands of earths to find another match, and again, Defense Counsel, I'm sure, will stand up and argue, oh, there's a twin and we don't know what the twin is –

this or that. It doesn't matter because the twin was incarcerated at the time of the attack.

* * *

And then who? Again, the Defendant. There's only 7.5 billion people on the planet earth. Even if the Defendant has a twin, not necessarily identical, but either way, it doesn't matter because that person was incarcerated. They were essentially removed from the possibility, and so all that's left is the Defendant. The evidence is overwhelming.

In its closing argument, the defense emphasized the meager quality of the State's evidence regarding the twin brother:

It's a willful blindness in this prosecution and it's a repeating theme in this prosecution.

So what does that leave us with? This DNA from this DNA guy who says, "Oh, yeah, you know, one in a trillion billion," and I said, "Well, would you want to know if he had a twin?" Well, yeah. "I may have made a little small addendum, no big deal." Okay. Well, what's that addendum? "Well, that addendum's that I can't exclude him."

[Objection overruled.]

[DEFENSE COUNSEL]: That in and of itself is reasonable doubt because for the State to carry their burden, I would offer to you that it needs to be definitive, no exceptions, no hedging, no qualifying statements, and that's not what they've delivered.

Now, the State said, oh, well, it couldn't have been him because he was in jail. Okay. See any proof of that? See a computer printout, a true test copy of a court case, general roster, anything, any proof at all or is this just another throwing it up there, going through the motions, halfway case? Because that's what they do. They do about half the work.

Now, I could sit up here and I can tell you this stuff all day long, but the problem is this. They chose not to verify. Their detective chose to withhold information from their DNA analyst. They chose not to give you any proof that this other guy was in jail. They created the doubt. Their

> actions create reasonable doubt, and that's what happens when you only do half the work because you know what their plan is, we'll just go in here, throw it at them, and put it on the jury, put it on the jury, and that's not how it works.
>
> It's not for you to connect the dots and make assumptions that make their case. That's what they want you to do. They want you to believe things that they've offered without proof. They want you to assume had they got those videos, that she would be on it. They want you to make all kinds of assumptions. If the State's asking you to mak[e] an assumption as a jury, that's reasonable doubt every time.

In rebuttal, the prosecutor again reminded the jury that the evidence of the twin's incarceration was uncontradicted:

> Now, again, Defense Counsel ignores the fact that testimony from the witness stand is evidence. The testimony from the witness stand from Detective Roles was that he looked into the Defendant's brother. He examined that and he found that he was incarcerated at the time of the incident. There has been no evidence generated to contradict that statement, none, and that's the evidence in this case.

Under the circumstances, we are not persuaded that the trial judge abused her discretion in denying Johnson's motion for a mistrial.

III.

Sufficiency of the Evidence

Johnson contends that the evidence was insufficient to sustain his convictions because the State failed to conclusively prove that the DNA evidence linking him to the assault was his DNA, and not that of his twin brother. Johnson further argues that no rational trier of fact could have concluded that he committed the assault in light of the fact that he had "distinctive and numerous tattoos," and S.N. did not report that her

assailant had any tattoos. The State responds that there was sufficient evidence from which the jury could have reasonably concluded that Johnson, and not his twin brother, committed the sexual assault on S.N. In addition to the DNA evidence, the jury also heard S.N.'s account of the assault and description of the assailant.

The standard for our review of evidentiary sufficiency is "'whether, 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 crime beyond a reasonable doubt.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Tracy v. State*, 423 Md. 1, 12 (2011) (citation omitted). We therefore "defer to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence." *State v. Mayers*, 417 Md. 449, 466 (2010).

Viewed in the light most favorable to the State, there was sufficient evidence to permit the jury to find that Johnson had sexually assaulted S.N. at gunpoint. The DNA evidence before the jury established that there was a 99.9 percent chance that Johnson was the source of the DNA in the semen found on S.N.'s face. According to the testimony of Mr. Hebert, the expert in DNA analysis, in the event that Johnson had an identical twin, that twin could not be excluded as the source of the DNA because

identical twins share identical DNA profiles. The existence of an identical twin therefore would not exclude Johnson as the source of the DNA, it would simply include the twin as a possible source who shared the same statistical probability as Johnson for contributing the DNA.

As Johnson notes, the only evidence before the jury as to whether Johnson had an identical or fraternal twin was the testimony of Detective Roles that the trial judge struck. But Detective Roles also testified that, in the course of his investigation, he learned that Johnson had a twin brother who, at the time of the sexual assault on S.N., "was apparently incarcerated." Johnson did *not* object to, or move to strike, that portion of Detective Roles's testimony. And although Detective Roles's testimony that Johnson's twin was fraternal was struck from the record, the admissible evidence before the jury permitted an inference that Johnson's twin brother, regardless of whether fraternal or identical, did not commit the assault on S.N. because he was incarcerated at the time of the assault.

As Judge Moylan explained in *Ross v. State*, 232 Md. App. 72 (2017), in regard to evaluating circumstantial evidence:

> . . . if two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the fact-finding jury and not that of a court assessing the legal sufficiency of the evidence. The State is **NOT** required to negate the inference of innocence. It is enough that the jury must be persuaded to draw the inference of guilt.

Id., at 98 (capitalization and bold in original).

Johnson's argument that the evidence was insufficient to support his convictions because S.N. did not describe any tattoos on her assailant goes, again, to the weight and not legal sufficiency. The weight of the evidence and the credibility of the witnesses are within the exclusive domain of the jury. In this regard, we "give great deference to the trier of facts' opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Pinkney v. State*, 151 Md. App. 311, 329 (2003); *see also Mayers*, 417 Md. at 466 ("[w]e defer to any possible reasonable inference the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence" (citations omitted)). It is not the task of this Court to "reweigh the evidence or substitute our own judgment, but only [to] determine whether the verdict was supported by sufficient evidence to convince the trier of fact of the defendant's guilt beyond a reasonable doubt." *Pinkney*, 151 Md. App. at 329.

Johnson was not entitled to an exculpatory inference because he believed that S.N.'s description of her assailant excluded him. *See Cerrato–Molina v. State*, 223 Md. App. 329, 351 ("At the end of the case and with respect to the burden of production, the exculpatory inferences do not exist. They are not a part of that version of the evidence most favorable to the State's case." (footnote omitted)), *cert. denied*, 445 Md. 5 (2015).

We conclude that the evidence adduced at trial was sufficient to sustain Johnson's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.