UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0652

September Term, 2015

ANTHONY D. RICHARDSON

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Reed, J.

Filed: July 25, 2016

A jury in the Circuit Court for Anne Arundel County convicted Anthony D. Richardson, appellant, of first degree burglary, robbery with a dangerous or deadly weapon, robbery, reckless endangerment, theft between $1,000 and $10,000, and conspiracy to commit armed robbery.[1] He was sentenced to an aggregate of 20 years' imprisonment. Appellant filed a timely appeal and presents the following question for our review:

1. Did the trial court err in denying Mr. Richardson's *Batson* challenge during jury selection?

For the following reasons, we answer this question in the negative and shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On November 28, 2013, two individuals robbed Evaristus Nyambi during a home invasion. The State charged Mr. Richardson, and produced evidence that appellant had conspired with Nyambi's girlfriend and an un-identified co-conspirator to enter Nyambi's home and steal several items and cash at gunpoint. Specifically, the State offered credit card and cell phone records, and DNA evidence, all linking appellant to the home invasion. Appellant denied any involvement in the home invasion or robbery, offering alternative explanations to discredit the State's evidence. After a trial, a jury convicted appellant on charges of first-degree burglary, robbery with a dangerous or deadly weapon, robbery,

[1] The jury acquitted appellant on charges of first-degree assault, second-degree assault, and associated handgun charges.

reckless endangerment, theft between $1,000 and $10,000, and conspiracy to commit armed robbery.

During jury selection, the State sought to use a peremptory strike against an African-American, female juror ("Juror 26").[2] In response, defense counsel raised a *Batson* challenge against the State's attempted strike. The following bench colloquy ensued:

> THE COURT: Yes, sir.
>
> [Defense Counsel]: Your Honor (indiscernible) there's a very small amount of African Americans and my client is an African American. The State just struck an African American. Obviously (indiscernible) challenge in this case. (Indiscernible) challenge.
>
> THE COURT: Voir Dire?
>
> [Prosecutor]: Sure, Your Honor. Couple reasons. One – that I chose juror number 26. One, she would not make eye contact with me during our entire interaction. Number two, I know very little, if anything, about her. Number three, my concern is that she will (indiscernible) the defendant as her son. Fourth, I'm looking to get to another juror, so a strategy reason as well. But none of these are racially noted.
>
> THE COURT: Right. It's true the first struck me as (indiscernible) State struck (indiscernible). So we're (indiscernible).
>
> [Defense Counsel]: Thank you, Your Honor.
>
> [Prosecutor]: Thank you.
>
> THE COURT: All right.

[2] The prosecutor put on record that the State's four non-challenged peremptory strikes included one Hispanic female and three white individuals.

Thus, as the above colloquy demonstrates, defense counsel believed that, due to appellant's status as an African American as well as the small number of African Americans in the jury pool, the prosecutor's attempted strike was racially motivated. Therefore, the trial judge requested a race neutral justification for the prosecutor's peremptory strike. The State responded with four reasons for striking Juror 26: 1) her lack of eye contact during interactions with the prosecutor; 2) the fact that there was little, if any, biographical information known about her; 3) a concern that she would view the defendant as her son; and, 4) a strategic desire to seat a different juror. Although the lower court's reasoning is not entirely clear from the record, the trial judge accepted the State's justifications and denied the defense's *Batson* challenge.

Before the commencement of the trial, the State made the following proffer:

> [Prosecutor]: Your Honor, I just want to put on the record only because I've experienced this once before. With respect to the Batson challenge, I just wanted to put on the record that the State utilized five of its strikes. The fifth one was the one that defense counsel raised a Batson challenge on. I would just point out that with respect to the State's strikes, strike number 1 was utilized on a Hispanic female. The next three strikes were all utilized on Caucasian individuals, white individuals. So again, with the pattern in practice issue but I wanted to put on the record only because I know when things come down to it, at least be on the record. So there it is.
>
> THE COURT: Okay. All right.
>
> [Defense Counsel]: I have no response.

The case then proceeded to trial without Juror 26. The trial resulted in appellant being convicted and sentenced to an aggregate of 20 years' imprisonment. This appeal followed.

DISCUSSION

A. Parties' Contentions

Appellant argues that the circuit court erred in denying defense counsel's *Batson* challenge to the prosecution's use of a peremptory strike against Juror 26. Specifically, appellant argues that the State's proffered reasons for the strike are insufficient to overcome an inference of discriminatory intent. Primarily, appellant asserts that a lack of biographical information about a juror is not an acceptable justification for use of a peremptory strike. As the purpose of *voir dire* is to reveal "preconceived notions or biases that would affect the outcome of the trial," appellant reasons that a lack of responses to *voir dire* questions indicates nothing more than a lack of such prejudices. *Moore v. State*, 412 Md. 635, 664 (2010). Appellant further cites *Stanley v. State*, 313 Md. 50 (1988), to reinforce the notion that a lack of *voir dire* answers supports an inference of discriminatory intent for use of peremptory strikes.

Appellant also disputes the State's strategic reasons for striking Juror 26. While strategy could justify striking a juror, appellant contends it does not sufficiently explain why Juror 26 specifically needed replacing. Moreover, because the prosecutor did not know whether Juror 26 had a son, appellant rejects the State's suggestion that its concern about whether Juror 26 would identify the defendant as her son is a race-neutral reason for dismissal. Finally, appellant concludes that Juror 26's lack of eye contact is merely a pretext for the racially motivated peremptory strike. For these reasons, appellant contends that the decision in *Stanley* compels a new trial. *See* 313 Md. at 93.

The State argues that appellant has failed to present an adequate record upon which review can be conducted. As a presumption of regularity and correctness of the lower court exists, the State points out that appellant bears the burden of presenting an adequate record to conduct an efficient review of the proceedings below. *See Black v. State*, 426 Md. 328, 338 (2012) ("To overcome the presumption of regularity or correctness, the appellant or petitioner has the burden of producing a 'sufficient factual record for the appellate court to determine whether error was committed.'") (internal citation omitted). Because the transcript provided contains numerous indiscernible pieces of key jury selection discussions, the State argues that the matter is not appropriate for review.

Alternatively, if the matter is to be considered, the State asserts that the trial court did not abuse its discretion when denying appellant's *Batson* challenge. The State notes our decision in *Jeffries v. State*, 113 Md. App. 322, 346 (1997), which recognized the Supreme Court's instruction that, when reviewing *Batson* challenges, "appellate courts must be highly deferential and will not presume to overturn a trial judge's findings on this issue unless they are clearly erroneous."

Additionally, the State offers two justifications for the use of a peremptory challenge against Juror 26. First, the State argues that the four reasons forwarded by the prosecutor for the strike were all grounded in race-neutral intentions. The State cites one decision from the Court of Appeals and one from this Court to support this claim. *See Harley v. State*, 341 Md. 395, 403 (1996) (holding that the trial court did not err where it found that the strategy of striking prospective jurors in order to reach more desirable ones farther down

the venire list is a race neutral explanation); *Stanley v. State*, 85 Md. App. 92, 104 (1990) (recognizing that a juror's demeanor can serve as a race-neutral explanation for a peremptory strike). Second, the State points out that the trial court did not consider the prosecutor's reasons for striking Juror 26 to be pretextual. Instead, according to the State, the trial court accepted the reasons at face value. Thus, the State argues that if the *Batson* challenge issue is considered, then it must be determined that the trial court was not clearly erroneous in finding that the prosecutor's reasons for making the peremptory strike were race neutral.

B. Standard of Review

The Court of Appeals has laid out the appropriate standard of review for determining whether a party asserting a *Batson* challenge has met its burden of showing intentional discrimination in the use of peremptory strikes:

> The trial judge's findings in evaluating a *Batson* challenge are essentially factual and accorded great deference on appeal. *Harley* [*v. State*], 341 Md. [395,] 402, 671 A.2d [15 (1996)] (citing *Gilchrist* [*v. State*] 340 Md. [606,] 627, 667 A.2d [876,] 886 (1995)). Whether a reason is race-neutral rests in large part on a credibility assessment of the attorney exercising the peremptory challenge. *Hernandez* [*v. New York*] 500 U.S. [352,] 364-65, 111 S.Ct. [1859,] 1868-69, 114 L.Ed.2d 395 [(1991) (plurality opinion)]. The trial judge is in the best position to assess credibility and whether a challenger has met his burden. Accordingly, on appellate review, we "will not reverse a trial judge's determination as to the sufficiency of the reasons offered unless it is clearly erroneous." *Gilchrist*, 340 Md. at 627, 667 A.2d at 886.

Edmonds v. State, 372 Md. 314, 331 (2002). *See also Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) (holding that because a trial judge is best suited to judge the credibility of

an individual advocate, deference upon appellate review of peremptory challenges is necessary).

C. Analysis

The State's preliminary argument is that appellant has failed to present a record appropriate for review. Maryland Rule 8-411 requires an appellant to provide a transcript of all proceedings and testimony relevant to the appeal. Although the transcript provided is less than ideal, appellant has complied with his responsibilities to the best of his ability. "This Court will not ordinarily dismiss an appeal 'in the absence of prejudice to appellee or a deliberate violation of the rule.'" *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 202-03 (2008) (quoting *Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 348 (2007)). The alleged inadequacy in the record stems solely from the court stenographer's inability to transcribe certain portions of a bench conference. Because appellant has provided the most accurate record available, we will continue to address the merits of his claim.

In *Batson v. Kentucky*, the Supreme Court declared that the Fourteenth Amendment's Equal Protection Clause forbids a party from challenging potential jurors solely on account of their race. *See* 476 U.S. 79, 89 (1986). Because we believe the trial court did not abuse its discretion in denying the defendant's *Batson* challenge, we shall affirm the decision of the circuit court.

Batson outlined a three step process for trial courts to use to determine whether a proposed peremptory strike violates the Fourteenth Amendment's guarantee. *See id.* at 96-98. When bringing a *Batson* challenge, a defendant must first establish a *prima facie* case

of purposeful discrimination. To accomplish this end, a defendant must show that he or she is a member of a cognizable racial group and that the prosecutor has used a peremptory challenge to remove venire members of the defendant's race. *See id*. at 96. To move onto the second step, the defendant must only submit enough evidence to allow the trial judge to draw an inference that discrimination has occurred. *See Johnson v. California*, 545 U.S. 162, 170 (2005). Once a prosecutor offers justifications for the peremptory challenge, however, the issue of whether the defendant has made out a *prima facie* case of intentional discrimination becomes moot and the trial court may proceed to assessing the credibility of the prosecutor's asserted reasons for the strike. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion).

At the second step, "the burden shifts to the State to come forward with a neutral explanation for challenging" the specific jurors in question. *Batson*, 476 U.S. at 97. While the proffered justification need not rise to the level of a challenge for cause, a prosecutor may not simply deny the existence of discriminatory intent without providing a race-neutral explanation for the peremptory challenge. *See id.* at 97-98.

Finally, the trial court must evaluate the prosecutor's race-neutral justifications for use of a peremptory challenge. *See Miller-El*, 537 U.S. at 338-40. This Court has held that the trial court's findings deserve a great degree of deference, as the trial judge is in the best position to judge the credibility of a prosecutor's justifications for use of a peremptory challenge. *See Ball v. Martin*, 108 Md. App. 435, 456 (1996) (holding that *Batson* challenges stand little chance of success on appeal since the credibility of an advocate is a

factual determination best suited for the trial court).[3] The trial judge must make this determination from the totality of the circumstances. *See Edmonds*, 372 Md. at 330 (explaining that a court may consider factors like the disparate impact of the discriminatory strikes on a certain race, the racial make up of a jury, the persuasiveness of the justifications, the demeanor of the attorney exercising the challenge, and the consistent application of any policy for peremptory challenges). Ultimately, however, the burden remains with the defendant to refute the State's forwarded explanations and show intentional discrimination as the underlying motive for using the peremptory challenge. *See Stanley*, 313 Md. at 61-62.

Appellant argues that the State's proffered reasons for its use of a peremptory strike against Juror 26 were insufficient. We disagree. At the outset, appellant relies on the Court of Appeals' decision in *Stanley* to assert that a lack of biographical information is an insufficient reason to exercise a peremptory challenge. However, in *Stanley v. State*, 313 Md. 50, 72 (1988), the Court of Appeals noted that it was the unusually high proportion of strikes to African-American jurors (eight out of ten strikes), coupled with the lack of *voir dire* responses, that gave support to the inference of discriminatory intent. *See also Batson*, 476 U.S. at 97 (noting that a pattern of strikes against African American jurors in a venire may give rise to an inference of discrimination). In the present case, as the State has noted,

[3] This Court also suggested that appeals from a *Batson* challenge may only find success in situations where a prosecutor admits an improperly discriminatory motive behind the strike, and is still allowed to exercise that strike, or where a trial court incorrectly rejects a facially neutral justification for use of a peremptory strike. *Ball*, 108 Md. App. at 456.

the prosecutor only struck one African-American out of its five total strikes, in stark contrast to the pattern of discriminatory strikes in other cases. The other strikes were used against a Hispanic female and three white females.[4] By stating this on the record, the prosecutor sought to insure that no pattern of discriminatory intent could be established.

Furthermore, appellant disputes the race-neutrality of the State's desire to seat another juror in place of Juror 26. Recently, the Court of Appeals has provided instruction on this issue. *See Simmons & McGouldrick v. State*, 446 Md. 429, 444 (2016). "A desire to replace a juror with another unspecified member of the panel does not explain in any way, race-neutral or otherwise, the prosecutor's reasons for striking that particular juror." *Id*. However, in that case, that prosecutor admitted seeking to replace one African-American male juror with another African-American male juror, a justification the Court of Appeals considered to be based on race and gender. *Id.* at 445. Here, while the desire to replace Juror 26 with another juror existed, the prosecutor indicated that this desire was strictly for strategic trial purposes. The prosecutor also provided additional reasons for striking Juror 26 and explicitly rejected race as a motivating factor, making this case directly distinguishable from *Simmons & McGouldrick*. *See id*.

Appellant also argues that the prosecutor's fear that Juror 26 would view the defendant as her son was based solely on race and gender classifications. Appellant contends that because both he and Juror 26 are African Americans, this fear cannot be explained by anything except the shared racial backgrounds. However, the prosecutor

[4] Moreover, each of the other strikes were used against jurors who had provided at least one response to *voir dire* questions.

applied all five of his strikes to middle-aged and elderly women of different races, implying that this same concern existed regardless of the prospective juror's racial background. The record does not indicate whether Juror 26, or any other juror for that matter, had a son. We find it difficult to overturn the decision of the trial court that this constituted a race-neutral explanation without more evidence relating to Juror 26's background.[5]

Furthermore, a lack of eye-contact can be presented as a race-neutral validation for a prosecution's peremptory strike. *See Stanley*, 85 Md. App. at 104 ("The appearance and demeanor of a prospective juror has long been the actual basis for racially neutral peremptory challenges."). While these reasons may give rise to suspicion, "[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*, 340 Md. 606, 627 (1995). Without more evidence that these justifications were the product of intentional discrimination, we cannot say the trial court's findings were clearly erroneous.

Evaluating the factors laid out by the Court of Appeals in *Edmonds*, the totality of the circumstances do not indicate that the prosecutor acted based on race. *See* 372 Md. at 330. First, since the strikes were exercised on one African American female, one Hispanic female, and three white females, it is difficult to say that the prosecutor's strikes amounted to a disparate impact on a certain race. *See id*. Second, because the trial court denied the

[5] Had the prosecutor explicitly stated his fear that Juror 26 would view the defendant as her son was because they both were African Americans, the situation would be different. Additionally, if the prosecutor inconsistently applied this policy of striking jurors for this concern, a different result may be appropriate. *See Edmonds*, 370 Md. at 330 (holding that an inconsistent application of a policy for striking jurors may be evidence of race-based decision-making).

defense counsel's *Batson* challenge, the judge must have found the prosecutor's justifications to be persuasive enough to survive the challenge. *See Miller-El*, 537 U.S. at 339 (explaining that the trial judge must assess the credibility of the prosecutor's race-neutral justifications). Finally, there is nothing showing that the prosecutor inconsistently applied a certain policy relating to potential jurors. Had the appellant provided the racial make-up of the jury, it may have been easier to determine the impact of the prosecutor's peremptory strike against Juror 26. Without more evidence, however, we cannot say the trial court abused its discretion when denying the defense counsel's *Batson* challenge.

CONCLUSION

Upon reviewing a *Batson* appeal, "challenges must not be examined in a vacuum," but rather, each strike must be examined in light of the circumstances under which it was exercised. *Stanley*, 313 Md. at 77. Taking into consideration the less than perfect record and the prosecutor's proffered justifications, we cannot say the peremptory challenge to Juror 26 was grounded in racial motivations. Therefore, we hold that the trial court's findings were not clearly erroneous and affirm the decision of the circuit court.

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