UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1842

September Term, 2015

TYRELL H. OLIVER

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: August 17, 2016

A jury in the Circuit Court for Worcester County convicted Tyrell H. Oliver, appellant, of second degree assault, reckless endangerment, possession of heroin, possession of cocaine, possession of Suboxone, and a plethora of traffic offenses, following a high speed pursuit that occurred near Whaleyville, Maryland, on July 11, 2014. The court sentenced appellant to terms of imprisonment of ten years for second degree assault, a consecutive four years for possession of cocaine, a consecutive four years for possession of heroin, a concurrent four years for possession of Suboxone, and a consecutive year for eluding a police officer.

Appellant raises three issues for our review, which we have slightly rephrased:

1. Did the trial court err in failing to comply with Maryland Rule 4-215?

2. Did the trial court err in denying appellant's motion to dismiss on *Hicks* grounds?

3. Did the trial court err in denying defense counsel's *Batson* challenge?

For the reasons that follow, we answer these questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

Although not relevant to the issues raised on appeal, we provide the following background for contextual purposes.

On July 11, 2014, Maryland State Police Trooper First Class ("TFC") Andrew Broadwater was conducting laser speed enforcement on U.S. Route 50 at its intersection with Hall Road. Around 2:45 p.m., TFC Broadwater observed a Lexus that appeared to be

going above the posted speed limit of 55 mph. Indeed, TFC Broadwater's laser gun indicated that the car was travelling at 80 mph. When the driver of the vehicle failed to pull over at TFC Broadwater's direction and even accelerated in an apparent attempt to run over TFC Broadwater, a high speed pursuit ensued.

TFC Broadwater followed the Lexus as it turned right onto Maryland Route 610. During the course of the pursuit, which lasted "[s]ix to seven miles," according to TFC Broadwater, the Lexus crossed the double yellow lines numerous times, passed vehicles on the shoulder, drove through a flashing red signal without stopping, and reached speeds of 130 mph. The pursuit ended when the driver of the Lexus attempted to turn right onto U.S. Route 113 and lost control; the vehicle rolled onto the grassy shoulder. TFC Broadwater exited his vehicle and ran to the crash site.

TFC Broadwater observed the driver, whom he later identified as appellant, lying on the ground, having been ejected from the vehicle. Maryland State Police Corporal Antal[1] arrived shortly thereafter to assist TFC Broadwater. Appellant was placed under arrest, and a search of his person revealed folds of wax paper suspected to contain heroin. After appellant was transported to the hospital, TFC Broadwater recovered several items of suspected contraband that had been thrown from the vehicle along with appellant. Later, Amber Teves, the forensic manager of the chemistry section of the Maryland State Police

[1] The record does not reflect Corporal Antal's first name.

Forensic Sciences Division, confirmed that appellant was transporting quantities of cocaine, heroin, and Suboxone.[2]

In a thirty-count indictment, the State charged appellant with a bevy of offenses, the most serious of which were first degree assault and possession with the intent to distribute cocaine. The State *nol prossed* three of the traffic offenses, and the court granted appellant's motion for a judgment of acquittal as to first degree assault and the traffic offenses related to driving without a license. The jury acquitted appellant of possession with the intent to distribute cocaine and one of the traffic offenses, but convicted him of the remaining offenses. The sentencing court declined to impose sentences for several of the traffic offenses, merged one of appellant's convictions for eluding a police officer into the other conviction for the same offense, merged appellant's conviction for reckless endangerment into second-degree assault, and imposed a total of nineteen years' incarceration.

We will provide additional facts as necessary below.

DISCUSSION

I. Maryland Rule 4-215

At a motions hearing on May 14, 2015, appellant expressed a desire to discharge counsel. Appellant stated that his current counsel had represented his co-defendant in an unrelated case in 2001, and this presented a conflict of interest. Appellant also argued that

[2] The court accepted Teves as an expert in the fields of chemistry and the analysis of controlled dangerous substances.

his current counsel appeared to not care about his case, and he expressed a desire to proceed *pro se*. After the court questioned appellant about his desire to discharge counsel and inquired as to his understanding of the law, appellant requested a thirty-day continuance to look into hiring private counsel, which the court granted. Appellant also moved to dismiss the indictment for a *Hicks* violation, which will be discussed further below, and decided to retain his current counsel to argue such motion. The court advised appellant that in the intervening time between May 14th and June 8th—the day set for the motions hearing—he could hire other counsel.

After denying appellant's motion to dismiss on June 8th, the trial court addressed appellant's motion to discharge counsel in a separate hearing on June 10th. Appellant continued to argue that his counsel's representation of a co-defendant in a 2001 case presented a conflict of interest. Furthermore, appellant believed that his counsel was not communicating with him and did not care about the case. The court concluded that appellant's counsel's representation of a co-defendant in a 2001 case did not present a conflict of interest. The court explained the charges against appellant and questioned him as to his understanding of the proceedings to determine if appellant was knowingly and voluntarily waiving his right to counsel. Appellant requested time to do some research to determine if he could proceed *pro se*, and the court granted him two days.

At a hearing on June 12th, appellant stated that he had done some research and determined that he did not have the knowledge to proceed *pro se*. Appellant, however, told the trial court that he believed that his counsel was "making a game out of my life" because

his counsel had presented him with a plea deal offered by the State. When the court explained that appellant's counsel was ethically obligated to present the plea deal to him, appellant asked if the courtroom was a game show. Appellant, again, argued that his counsel's representation of a co-defendant in a 2001 case presented a conflict of interest. The court, again, explained that there was no conflict. Then, appellant asked the court to read the plea offer, to which his counsel objected, and the following colloquy occurred:

[APPELLANT]:	He's not my lawyer –
THE COURT:	—so I'm not going to look at [the plea offer].
[APPELLANT]:	—yet until I make the decision.
[DEFENSE COUNSEL]:	I've entered my appearance in writing on your behalf. And until that appearance is struck, I'm your lawyer.
[APPELLANT]:	But that's not what the hearing is for today. The hearing is for me to accept you as my lawyer.
THE COURT:	He is your lawyer.
[DEFENSE COUNSEL]:	And that's the question on the table.
THE COURT:	He is your lawyer. You asked for a postponement from Wednesday to determine whether, in fact, you wished to proceed with [defense counsel] or whether you wanted to discharge and proceed on your own and—or to hire an attorney.

[APPELLANT]:	Man, just do whatever you want to do, man.
THE COURT:	It's not my choice.
[APPELLANT]:	It is your choice, Your Honor.
THE COURT:	Sir, step back up to the trial table.
[APPELLANT]:	I'm not getting a fair trial in here.
THE COURT:	Well, step back up to the trial table, [appellant]. At this point, [defense counsel] is entered as your attorney. If you're not telling me that you're going to discharge him or wish to discharge him, he remains your attorney, and he will represent you at your trial date. Do you understand that?
[APPELLANT]:	**Yeah, I understand.**
THE COURT:	Okay.
[APPELLANT]:	I won't be here, though. It won't be no trial.
THE COURT:	Yes, you will.
[APPELLANT]:	No, I won't. I'm not coming to trial. They will have to hog tie me or do whatever they do. I won't be here.
THE COURT:	Well, if you choose to absent yourself from trial, you can be tried in *absentia*.
[APPELLANT]:	Okay. I won't be here.

[DEFENSE COUNSEL]: Now—

[APPELLANT]: If you're going to allow this to—this foolishness to continue, you're going to allow them to make a mockery out of my life—I'm facing 25 years, and you're going to allow them—I asked for you to read this plea, and they talking about it's a game show, and you just ignore the facts—

THE COURT: Okay.

[APPELLANT]: —I'm not coming in this courtroom like that.

THE COURT: [Defense counsel], anything you want to add?

[DEFENSE COUNSEL]: Yes.

[APPELLANT]: He never even came to the jail—

THE COURT: You can be quiet at this point. I'm speaking to [defense counsel].

[DEFENSE COUNSEL]: My recollection—and please correct me if I'm wrong—was that we were only a certain way through questioning [appellant] about whether he wanted to represent himself, hire a private lawyer, [or] go with the Public Defender. And I'm speaking now to ask, should those questions still be asked as part of the Court's questioning, given that we're getting ready to come

	for a jury hearing in the upcoming number of days?
THE COURT:	This is the way that I view that. I have reviewed the transcript—a transcript at which—I believe it was May the 14th—I fully and completely apprised him of the ramifications of choosing to proceed on his own, as I did Wednesday. So he's been apprised of that twice, that if he chooses to discharge you and proceed on his own. So he's fully aware of that, which—at which point, he indicated on Wednesday he needed a couple of days to think about it. That's why this was set back in for today. **As you are entered as his attorney, you can't be discharged unless he tells the Court that he doesn't want you to represent him. He hasn't told me that this morning. So as far as the Court is concerned, the case is set for trial, you are entered as his attorney, and you will proceed on the trial date.**

(Emphasis added).

On the day of trial, prior to jury selection, the following occurred:

[APPELLANT]:	Your Honor, I would like to address the Court before the jury comes in, please.
THE COURT:	Okay. What do you have to say?

[APPELLANT]: I don't feel—it's an investigation going on right now on my lawyer for misconduct.

THE COURT: Let me explain something to you so you understand exactly what I know, as soon as I find the pad where I wrote it down. You brought these same type of issues up.

You were advised back on July 17, 2014, of your rights to an attorney, and you signed a document saying you understood your rights to an attorney. That document provided that, if you wanted an attorney and wanted to hire a private attorney, you had to do so right away. If not, and you could qualify, you could have the Office of the Public Defender represent you. You were advised of that.

Again, on the 14th of May of this year you were advised of the nature—in a hearing in this courtroom, or some courtroom, advised of the nature of the charges and possible penalties. You indicated you understood that. At that time you tried to fire your public defender. I guess the same one. You were again advised of your rights to an attorney, and if you wanted to hire a private attorney or get another attorney, you had to do so right away.

	On June 10th of this year there was another hearing. The same issue with respect to your attorney was brought up. You were again advised of your rights, and you were also advised of the charges against you and the maximum penalties were explained to you. You said you understand all that. Then on June the 20th, [sic] 2015, you were again advised of your rights to and the importance of an attorney. I've got the transcripts of all those proceedings right here.
[APPELLANT]:	Yes, sir.
THE COURT:	**So you've already done what you're doing now three or four times, and it's finished. It's your choice, and you're going to say yes or no. Do you want this attorney?**
[APPELLANT]:	But it's a new—this is a new issue, though, Your Honor.
THE COURT:	**Do you want this attorney?** I don't care what the issue is. **Do you want this attorney, yes or no?**
[APPELLANT]:	**Yes; yes, sir.**

(Emphasis added).

On appeal, appellant contends that the trial court failed to comply with Maryland Rule 4-215, because it failed to inquire into appellant's new reasons for wanting to discharge counsel during the colloquy that occurred prior to jury selection. Appellant argues that the requirements of Rule 4-215 are mandatory, and, once a defendant conveys a request to discharge counsel, the court must comply with the rule. He contends that the court clearly understood his statement to be a request to discharge counsel, but then refused to listen to his reasons for desiring to do so.

The State argues that there was no need for the trial court to comply with Rule 4-215, because appellant failed to make a request to discharge counsel. The State contends that appellant's statement as to an investigation of his counsel was ambiguous, and that the court, in an effort to determine if appellant wanted to discharge counsel, pointedly asked him, "Do you want this attorney?" According to the State, when appellant responded in the affirmative, then the requirements of Rule 4-215 were not triggered, and no error occurred.

Rule 4-215(e), entitled "Waiver of Counsel," provides, in pertinent part: "If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request." The Court of Appeals has recognized that, "once a defendant makes an *apparent* request to discharge his or her attorney, the trial judge's duty is to provide the defendant with a forum in which to explain the reasons for his or her request." *State v. Taylor*, 431 Md. 615, 631 (2013) (emphasis added). "We review *de novo* whether the circuit court complied with Rule 4-

215. Strict compliance is required." *Gutloff v. State*, 207 Md. App. 176, 180 (2012). The Court of Appeals has noted that motions to discharge counsel pursuant to Rule 4-215(e) proceed in a four-step process: "(1) there must be a request to discharge counsel, (2) the court must 'permit the defendant to explain the reasons for the request[,]' (3) the court must consider those reasons, and (4) the court must determine whether the reasons given are meritorious." *State v. Graves*, 447 Md. 230, 245 (2016) (alterations in original) (quoting Md. Rule 4-215(e)).

The trigger, then, for Rule 4-215 is a request to discharge counsel. The Court of Appeals has noted that to trigger the trial court's duty pursuant to the Rule, "a defendant must provide a statement 'from which the court could reasonably conclude' that the defendant desires to discharge his or her attorney, and proceed with new counsel or self-representation." *Taylor*, 431 Md. at 632 (quoting *State v. Hardy*, 415 Md. 612, 622 (2010)). However, "[a] request to discharge counsel 'need not be explicit,' nor must a defendant 'state his position or express his desire to discharge his attorney in a specified manner' to trigger the rigors of [Rule 4-215]." *Gambrill v. State*, 437 Md. 292, 302 (2014) (citations omitted) (quoting *Williams v. State*, 435 Md. 474, 486 (2013)). "Where the court is unsure about whether the defendant is dissatisfied with his or her counsel, the court should clear up any ambiguity by questioning the defendant regarding the statement to avoid the risk of reversal on appeal." *Graves*, 447 Md. at 242.

Appellant contends that, when he referred to an investigation of his counsel for misconduct, he made a statement that the trial court should have reasonably understood as

a desire to discharge his current counsel. We disagree. Appellant said, "I don't feel—it's an investigation going on right now on my lawyer for misconduct." That is merely an oblique reference to a possible investigation for misconduct, without expressing any sort of desire to change or discharge counsel or postpone trial. The court, unclear as to appellant's motivation and guessing as to appellant's goal, reminded him of the previous hearings regarding the discharge of counsel and resolved any ambiguity by pointedly asking appellant, "Do you want this attorney, yes or no?" When appellant responded in the affirmative, the requirements of Rule 4-215 were not triggered, because there was no request to discharge counsel.

The instant case is distinguishable from *Graves*. In that case, Graves's counsel advised the trial court that Graves wanted to hire private counsel. *Graves*, 447 Md. at 244. The court declined to hear reasons from Graves or his counsel as to such request. *Id.* The Court of Appeals concluded that Graves's motion was "materially indistinguishable" from that in *Gambrill*, in which Gambrill's counsel stated, "Your Honor, on behalf of Mr. Gambrill, I'd request a postponement. He indicates he would like to hire private counsel in this matter." *Graves*, 447 Md. at 244; *Gambrill*, 437 Md. at 296. The requirements of Rule 4-215 were triggered in both cases, but the trial court in each case failed to permit the defendant to articulate the reasons for the discharge. *Graves*, 447 Md. at 244-45; *Gambrill*, 437 Md. at 296.

In Graves's case, the State argued that the trial court resolved any ambiguity when, *after* the court denied the motion for postponement, the court asked, "Do you want me to

fire [your counsel]?" *Id.* at 244. The Court of Appeals concluded, however, that that question did not resolve any ambiguity, because the court had clearly understood that Graves wanted to discharge his counsel; indeed, the trial court had explained that it could not grant the motion because to do so would mean granting a continuance. *Id.* at 245. The Court of Appeals concluded, therefore, that Rule 4-215 was triggered, and the court erred in not allowing Graves to articulate the reasons for discharging his counsel. *Id.* at 245-46. In this case, *prior* to any decision on any motion put forward by appellant—which, we note, is unclear because appellant made no such motion—the court asked, "Do you want this attorney?"

We are persuaded, therefore, that the trial court resolved any ambiguity as to appellant's motivation prior to ruling on appellant's motion. Accordingly, once appellant answered the court's question, indicating a desire to retain his current counsel, there was no request to discharge counsel, and thus the requirements of Rule 4-215 were not triggered.

Appellant, nevertheless, contends that the case *sub judice* is controlled by *Williams v. State*, 321 Md. 266 (1990), and *Hawkins v. State*, 130 Md. App. 679 (2000). These cases are, however, distinguishable. In *Williams*, Williams said, "I want another representative." 321 Md. at 267. The Court of Appeals concluded that this was a clear request to discharge counsel, triggering the requirements of the Rule. *Id.* at 272-74.

In *Hawkins*, at a status conference, Hawkins's counsel advised the trial court that Hawkins had told her that he wanted to hire private counsel. 130 Md. App. at 683-84.

When Hawkins arrived in the courtroom, the court asked if he wanted to discharge his current counsel, to which Hawkins responded, "*Yes*, but it is just that I never got a chance to talk to her about the case. That is why I sat there and told her that yesterday." *Id.* at 684 (emphasis added). After the court advised Hawkins that it was not going to inquire into the reasons why he wanted to discharge his counsel, the court asked again, "I am just asking you, do you want me to relieve [your counsel]?" *Id*. Hawkins replied, "No. I don't want to, but I want her to get a continuance so I can talk to her." The administrative judge later denied the motion for a continuance. *Id.* at 685. Hawkins then indicated that he would retain his current counsel "under complete duress." *Id.* The Court of Appeals concluded that, once Hawkins indicated a desire to discharge counsel, the trial court was obligated to listen to his reasons prior to ruling. *Id.* at 687-88.

Had appellant wanted to discharge his counsel in the instant case, he could have answered the court's question in the negative, thereby indicating a desire to discharge counsel. Such answer would have triggered the requirements of Rule 4-215. Having failed to make a request to discharge counsel, appellant failed to meet step one of the four-step process required under Rule 4-215(e). *See Graves*, 447 Md. at 245. There was, accordingly, no error.

II. The *Hicks* Violation

In Maryland, a criminal defendant has a statutory right to have a trial within 180 days of the earlier of the appearance of counsel or the defendant's first appearance in the circuit court. Md. Code (2001, 2008 Repl. Vol.), § 6-103(a) of the Criminal Procedure

Article ("CP"); Md. Rule 4-271(a)(1). "For good cause shown," however, "the county administrative judge or a designee of the judge may grant a change of the trial date." CP § 6-103(b); *see also* Md. Rule 4-271(a)(1). The Court of Appeals has held that "the time limitation prescribed by the statute and the rule is 'mandatory,' and that 'dismissal of the criminal charges is the appropriate sanction where the State fails to bring the case to trial' within the 180-day period, absent 'extraordinary cause justifying a trial postponement.'" *State v. Huntley*, 411 Md. 288, 290-91 (2009) (quoting *State v. Hicks*, 285 Md. 310, 318 (1979)).[3]

This Court has noted that "'[t]he critical order by the administrative judge, for purposes of the dismissal sanction, is the order having the effect of extending the trial date beyond 180 days.'" *State v. Barber*, 119 Md. App. 654, 659 (1998) (quoting *State v. Parker*, 347 Md. 533, 539 (1995)). "'The determination as to what constitutes a good cause, warranting an extension of the trial date beyond the [180-day] limit, is a discretionary one, which . . . carries a presumption of validity.'" *Barber*, 119 Md. App. at 659 (alterations in original) (quoting *Marks v. State*, 84 Md. App. 269, 277 (1990)). The appellant has the burden to demonstrate "'either a clear abuse of discretion or a lack of good cause as a matter of law.'" *Moody v. State*, 209 Md. App. 366, 374 (2013) (quoting *State v. Frazier*, 298 Md. 422, 454 (1984)).

[3] Hence, violations of this rule are sometimes known as *Hicks* violations, named after *State v. Hicks*, 285 Md. 310 (1979).

Here, appellant contends that the trial court erred in denying his motion to dismiss for a *Hicks* violation at the June 8, 2015 hearing. Appellant's counsel noted that he had entered his appearance on October 21, 2014, thereby starting the 180-day period by which the State must bring him to trial. Appellant argues that the court's reasoning in denying his motion at the June 8, 2015 hearing was legally incorrect and has no basis in Maryland law. In essence, appellant argues that the State never requested a continuance prior to the expiration of the 180-day period, and the court that granted the continuance was not the administrative judge or a designee, as required by the rule.

The State points out that it did, in fact, request a continuance for good cause prior to the expiration of the 180-day period. Moreover, in its motion for a continuance pursuant to Rule 4-271, the State noted that TFC Broadwater, a key witness, was unavailable on the scheduled motions date, and also that appellant had no objection to a continuance. Accordingly, the State contends that the court found good cause to continue the case beyond the *Hicks* limit, and there was no error.

Appellant is correct that the 180-day *Hicks* time period was triggered by his counsel's entry of appearance on October 21, 2014, notwithstanding appellant's incarceration in Delaware and absence from Maryland. *See* Md. Rule 4-271(a)(1). The *Hicks* date was, therefore, April 19, 2015. On April 13, 2015, the State filed a motion for continuance pursuant to Rule 4-271 and noted: 1) that TFC Broadwater was unavailable for the scheduled motions date; and 2) that appellant's counsel had no objection to a continuance.

The unavailability of a key witness is good cause to extend a case beyond the statutory 180-day limit. *See Marks*, 84 Md. App. at 278 ("This Court has held that good cause exists to extend a trial when a witness is unavailable."). Moreover, in failing to object to a continuance beyond the *Hicks* time limit, appellant waived any argument on this issue. *See Jules v. State*, 171 Md. App. 458, 475 (2006) ("The sanction of dismissal is unavailable to a defendant who, either individually or by his attorney, seeks or expressly consents to a trial date in violation of Rule 4-271."), *cert. denied*, 396 Md. 525 (2007). Hence, we conclude that there was no error, and the court's decision on June 8, 2015, denying appellant's motion to dismiss for a *Hicks* violation was, in effect, superfluous, because the case had previously been extended beyond the *Hicks* limit with appellant's consent.

III. The *Batson* Challenge

Following jury selection, the following exchange occurred:

THE COURT:	Gentlemen, are you satisfied with the jury as impaneled?
[PROSECUTOR]:	The State is satisfied, Your Honor.
[DEFENSE COUNSEL]:	No, sir.
THE COURT:	No, sir. Okay. You may come forward.

(Whereupon, Counsel and the Defendant approached the bench and the following occurred out of the hearing of the jury panel:)

THE COURT:	Okay. I'll hear anything you have to say, [defense counsel].

[DEFENSE COUNSEL]:	The Defendant is present with Counsel at the bench. The State's Attorney—my client, who is an African American—**the State's Attorney struck the only African American juror on the petit panel of 12. I believe the *Batson* case would dictate that the State's Attorney make some kind of proffer as to why he elected—**
THE COURT:	Which juror did you strike, which African American?
[DEFENSE COUNSEL]:	It was No. 6, seated No. 6.
THE COURT:	323? I think it was 323, if that's what you're—
THE CLERK:	Yes, it was.
THE COURT:	She was a female. Do you care to—I'll hear anything you have to say, [prosecutor].
[PROSECUTOR]:	Your Honor, [ ], Juror No. 323, is from Pocomoke City. That area is currently going through a tremendous amount of turmoil regarding its firing of its chief of police. There have been allegations thrown about that my office had something to do with the removal of the chief of police from that jurisdiction. And as a result, I elected not to—because the *voir dire* did not cover that. I wasn't sure if there was an appropriate inquiry that could be made that would inquire into—

THE COURT: So you struck her because you figured she didn't like you or she might not like you?

[PROSECUTOR]: That's true. Yes, sir.

THE COURT: His statement is he struck her because she might not like him because of the turmoil that's going on in Pocomoke City, in reference to the chief of police in which there have been racial allegations made and a major article in the *Baltimore Sun* that I read in the last three or four days and there have been protests on the streets and at City Hall in Pocomoke City in reference to the firing of that particular chief of police who was an African American.

The State's Attorney says his reason for striking that particular juror is that she was from Pocomoke, the area where this turmoil is going on, and he says that there have been indications that some people in that area believe that he had something to do with the firing of the chief of police.

The Court will note there remain, as far as I can see, at least two African Americans on this jury panel. One is the alternate, and one is on the original 12-member jury panel. And so, one—

[PROSECUTOR]:	**I didn't strike the only African American.**
[DEFENSE COUNSEL]:	**I stand corrected. That was an error on my part.**
THE COURT:	Yeah.
[PROSECUTOR]:	And that being the case, I don't know that a *Batson*—**I stand for the proposition that a *Batson* challenge is inappropriate.** I allowed Juror No. 11, **I think it was, or counting from the other way, Juror No. 8, as well as the alternate.** So, I mean, there's got to be—I understand I've already answered the question, but there has to be some—some foundation laid that would justify a *Batson* challenge.
THE COURT:	The African American is seated, appears to be, No. 316, who is from Berlin, not from Pocomoke. The *Batson* challenge is denied.

(Emphasis added).

On appeal, appellant contends that the trial court erred in denying the *Batson*[4] challenge. He argues that the struck juror's place of residence is merely a proxy for the true reason that the State struck the juror—her race, which is an impermissible reason for striking a juror. Appellant concedes that there is no guiding appellate decision in this State

[4] *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the jury selection process is subject to the Equal Protection Clause of the Fourteenth Amendment).

on this issue. Accordingly, he cites cases from Pennsylvania and Georgia in support of his argument.

The State responds, primarily, that appellant has failed to preserve his *Batson* challenge because, following the trial court's observation that there were other African-Americans on the jury, appellant's counsel said, "I stand corrected. That was an error on my part." The State argues that such statement effectively withdrew the *Batson* challenge. Furthermore, the State contends that appellant did not advance the argument at trial that he now presents on appeal, rendering that argument unpreserved.

Alternatively, if the issue is preserved, the State argues that appellant failed to establish a *prima facie* case that the State exercised its strikes on an impermissible basis, thereby dooming his *Batson* challenge. Finally, the State contends that the stated reason for striking the juror was race-neutral and permissible.

The Court of Appeals has recognized that "*Batson* and its progeny instruct that the 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) (footnote omitted). Following a *Batson* challenge, courts engage in a three-step inquiry: "At step one, the party raising the *Batson* challenge 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." *Id.* at 436.

If the objecting party meets that burden, then the court proceeds to step two, "at which 'the burden of production shifts to the proponent of the strike to come forward with' an explanation for the strike that is neutral as to race, gender, and ethnicity." *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995)). Notably, "[a] step two explanation must be neutral, 'but it does not have to be persuasive or plausible. Any reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation.'" *Ray-Simmons*, 446 Md. at 436 (quoting *Edmonds v. State*, 372 Md. 314, 330 (2002)).

If the striking party offers a neutral explanation, then "the trial court proceeds to step three, at which the court must decide 'whether the opponent of the strike has proved purposeful racial discrimination.'" *Ray-Simmons*, 446 Md. at 437 (quoting *Purkett*, 514 U.S. at 767). "'It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.'" *Ray-Simmons*, 446 Md. at 437 (quoting *Johnson v. California*, 545 U.S. 162, 171 (2005)). "Because a *Batson* challenge is largely a factual question, a trial court's decision in this regard is afforded great deference and will only be reversed if it is clearly erroneous." *Ray-Simmons*, 446 Md. at 437. Under the clearly erroneous standard of review, we will affirm if "there was any legally sufficient basis for [the court]'s finding that the peremptories were not racially motivated." *Bridges v. State*, 116 Md. App. 113, 135 (1997) (emphasis omitted).

Preliminarily, we do not agree with the State as to preservation. The trial court expressly denied appellant's *Batson* challenge, thereby preserving it. *See* Md. Rule

8-131(a) ("Ordinarily, the appellate court will not decide any other issue [except for jurisdiction] unless it plainly appears by the record to have been raised in *or decided by* the trial court . . . ." (Emphasis added)).

Furthermore, we find no error with appellant's *prima facie* showing as to the State's strike, mainly because the State proceeded to offer a neutral explanation for the strike. If the proponent of the strike proceeds to step two of the inquiry, then the first step of the *Batson* analysis is moot: "'Once a [race- and gender-neutral] explanation is offered, the prima facie case dissipates[.]'" *Ray-Simmons*, 446 Md. at 438 (alterations in original) (quoting *Gilchrist v. State*, 340 Md. 606, 634 (1995) (Chasanow, J., concurring)); *see also Edmonds*, 372 Md. at 332.

Turning to the merits, we are not persuaded that the cases appellant cites from Pennsylvania and Georgia are on point. In *Commonwealth v. Horne*, 635 A.2d 1033 (Pa. 1994), in a *per curiam* opinion, the Supreme Court of Pennsylvania affirmed that state's intermediate appellate court's vacation of a conviction. *Id.* at 1033. Chief Justice Nix concluded that "peremptory challenges based solely on a venireperson's residence are too closely tied to a venireperson's race." *Id.* (opinion in support of affirmance). In that case, the prosecution struck an African-American juror and, when challenged, offered the fact that the juror lived in a "high crime" area and was "desensitized" to violence as a neutral explanation. *Id.* at 1034.

Chief Justice Nix determined that, although the prosecution's reason for the strike was facially neutral, it "will undoubtedly have a disparate racial effect." *Id.* Chief Justice

Nix noted that United States Supreme Court Justice Marshall—in a dissent from a denial of *certiorari*—and the United States Court of Appeals for the Ninth Circuit have recognized that permitting strikes on the basis of residency does not provide a race-neutral explanation. *Id.* at 1034-35 (citing *Lynn v. Alabama*, 493 U.S. 945, 947-48 (1989) (Marshall, J., dissenting from denial of *certiorari*); *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992)). In effect, without a specific reason for striking a particular juror, strikes based on residency served to further generic stereotypes of people residing in certain neighborhoods. *Id.* (citing *Bishop*, 959 F.2d at 825 (noting that juror's residency in the Compton area of Los Angeles was an insufficient reason to support strike, because it was based solely on the stereotype that the predominately poor, African-American residents of that area are more likely to distrust the police)).

The Supreme Court of Georgia arrived at a similar conclusion in *Congdon v. State*, 424 S.E.2d 630 (Ga. 1993). The prosecutor in that case struck all four African-American members of the jury at the request of the county sheriff, who was the key witness for the prosecution. *Id.* at 630. The sheriff noted that these jurors were residents of Ringgold, Georgia, "where the sheriff had been accused by black citizens of unprofessional and illegal conduct in his investigation of the unsolved 1988 murder of a black woman whose family resided in Ringgold." *Id.* at 631. When faced with a *Batson* challenge, the prosecutor

> described the black population of Ringgold as "extremely small and close knit. . . . They all live in an area that is about five or six or seven city blocks in size . . . ." and stated that each of the jurors

> struck lived within a few blocks of the family of the 1988 murder victim.

Id. (alterations in original) (footnote omitted). The Supreme Court of Georgia noted, however, that the jury included several white residents of Ringgold. *Id.*

The Georgia court determined that the jurors were struck as the "result of a stereotypical belief that all black Ringgold residents were biased against the sheriff." *Id.* at 632 (footnote omitted). The court concluded, bluntly, that "the venirepersons were struck for no reason other than that they were black citizens of Ringgold." *Id.* at 631.

In this case, we are persuaded that the trial court's denial of appellant's *Batson* challenge was not clearly erroneous. In offering an explanation, the prosecutor noted that the struck juror was a resident of Pocomoke City. The prosecutor then advised the court that the chief of police of Pocomoke City had been fired recently, and the State's Attorney's Office was implicated. The court noted that it had seen a major newspaper article in the past week to the same effect. Although the prosecutor's reason was based on a generic belief that residents of Pocomoke City distrusted the State's Attorney's Office, we are not persuaded that such belief rests on a racial stereotype or the juror's race. Indeed, the record does not indicate that there were any jurors from Pocomoke City on the jury, marking a significant difference between this case and *Congdon*. *See* 424 S.E.3d at 631 (noting that white jurors from Ringgold remained on jury). Accordingly, we conclude that the

prosecutor's rationale for striking the juror was race-neutral both facially and in its effect, and thus there was no error in the court's denial of appellant's *Batson* challenge.

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED; APPELLANT TO PAY COSTS.