UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1913

September Term, 2014

ON REMAND

MARK O'NEIL

v.

STATE OF MARYLAND

Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 11, 2016

This case comes before this Court for a second time pursuant to the Court of Appeals's per curiam order, *O'Neil v. State*, 446 Md. 610 (2016), remanding the case for further consideration in light of *Ray-Simmons & McGouldrick v. State*, 446 Md. 429 (2016).

Following a jury trial in the Circuit Court for Baltimore City, Mark O'Neil, appellant, was convicted of first-degree assault and the use of a handgun in a crime of violence against Glancy Edwards. In his direct appeal, appellant asked this Court to consider, *inter alia*, whether the circuit court erred in denying appellant's *Batson* challenge after the prosecutor used peremptory strikes to remove three African-American female jurors.[1]

In an unreported opinion filed on October 26, 2015, this Court affirmed the circuit court's judgments of conviction. *See Mark O'Neil v. State of Maryland*, No. 1913, September Term, 2014 (filed October 26, 2015). With respect to one of the prosecutor's strikes, we noted that the trial court had interrupted the prosecutor while she was explaining her strike of juror #532, and, as a consequence, the State "had no opportunity to offer a race- and gender-neutral explanation for striking juror #532" before the trial judge announced that defense counsel had not "yet" established a *prima facie* case of discrimination.

Appellant then filed a petition for a writ of certiorari, noting that a similar case, *Ray-Simmons*, was then pending before the Court of Appeals. On February 22, 2016, the

[1] *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986), where the Supreme Court of the United States held that a party may not use peremptory strikes to remove jurors based on racial grounds.

Court of Appeals filed its opinion in *Ray-Simmons*, sustaining the defendant's *Batson* argument and remanding the case for a new trial. On March 25, 2016, the Court of Appeals summarily vacated our judgment in O'Neil's case and remanded the case to us "for further consideration in light of *Simmons & McGouldrick v. State*."

In supplemental briefing on remand, appellant focuses exclusively on the strike of juror #532, and asks that his convictions be reversed and the case be remanded for a new trial. The State argues that the circuit court's ruling should again be upheld, or, in the alternative, that a limited remand be ordered to determine whether the State had a race- and gender- neutral reason for its peremptory strike of juror #532. For the reasons set forth below, we shall remand the case to the circuit court for further proceedings.

DISCUSSION

In *Ray-Simmons*, 446 Md. at 435, the Court of Appeals explained the process that must be followed when one party raises a *Batson* challenge:

> *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. Excusing a juror on any of those bases violates both the defendant's right to a fair trial and the potential juror's "right not to be excluded on an impermissible discriminatory basis." *Edmonds v. State*, 372 Md. 314, 329, 812 A.2d 1034 (2002). . . .
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> The Supreme Court announced in *Batson* a three-step process to assist the trial court in deciding a claim that a party to the case exercised a peremptory challenge to eliminate a prospective juror based on his or her race, gender, or ethnicity. . . .

(Footnote omitted.)

The Court of Appeals further noted in *Ray-Simmons* that, "[a]t 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. Then:

> If the objecting party satisfies that preliminary burden, 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. *Purkett* [*v. Elem*], 514 U.S. [765] at 767, 115 S.Ct. 1769 [(1995)]. 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." *Edmonds*, 372 Md. at 330, 812 A.2d 1034 (citation omitted). "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). The proponent of the strike cannot succeed at step two "by merely denying that he had a discriminatory motive or by merely affirming his good faith." *Purkett*, 514 U.S. at 769, 115 S.Ct. 1769. Rather, "[a]lthough there may be any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause," the striking party "must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge." *Miller–El* [*v. Dretke*], 545 U.S. [231] at 239, 125 S.Ct. 2317 [(2005)] (alterations omitted); *Stanley* [*v. State*], 313 Md. [50] at 61, 542 A.2d 1267 [(1988)] (quoting *Batson*, 476 U.S. at 98 n. 20, 106 S.Ct. 1712).
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> If a neutral explanation is tendered by the proponent of the strike, the trial court proceeds to step three, at which the court must decide "whether the opponent of the strike has proved purposeful racial discrimination." *Purkett*, 514 U.S. at 767, 115 S.Ct. 1769. "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." *Johnson* [*v. California*], 545 U.S. [162] at 171, 125 S.Ct. 2410 [(2005)] (quoting *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769) (emphasis omitted); *see also Edmonds*, 372 Md. at 330, 812 A.2d 1034. At this step, "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]." *Snyder* [*v.*

> *Louisiana*], 552 U.S. [472] at 477, 128 S.Ct. 1203 [(2008)]. 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. *Edmonds*, 372 Md. at 331, 812 A.2d 1034.

Id. at 436-37.

In *Ray-Simmons*, the Court of Appeals considered whether a prosecutor's explanation for a peremptory strike fulfilled *Batson's* step two requirement of providing a race- and gender-neutral explanation. The prosecutor in *Ray-Simmons* stated in response to a *Batson* challenge: "As to [juror number] 4583, I intended to replace him with another black male." *Id*. at 439. The Court of Appeals concluded that this explanation "violated *Batson* because on its face the explanation was neither race- nor gender-neutral." *Id*. at 446. Because the Court concluded that "it would be impossible to reconstruct a jury that tried and convicted Petitioners almost four years ago," the Court ordered a new trial. *Id*. at 447.

We noted in our previous opinion in O'Neil's case "that there is no information in the record regarding the racial and gender composition of either the pool of potential jurors or the jury as it was finally composed. We are left, therefore, with little basis upon which we might detect any clear error in the circuit court's findings regarding whether there was a pattern of [purposeful] discrimination in the prosecutor's use of peremptory strikes." Slip op. at 13. But the *Ray-Simmons* Court observed that "the question of whether the challenger has made a prima facie case under step one becomes moot if the striking party offers an explanation for the challenged strike." 446 Md. at 437.

The State argues that, because the prosecutor never actually offered any explanation for the strike of juror #532, "the trial court never moved beyond step one of the *Batson* analysis with respect to that juror." In our view, however, the prosecutor was in the process of offering step two explanations for all three of the challenged strikes, and the trial court did move beyond step one with respect to all of the challenges, including the strike of juror #532. Under the circumstances, we conclude, as the *Ray-Simmons* Court did, "'whether petitioner has made a prima facie showing that the State's challenges were racially [or gender] motivated . . . is moot because the State offered explanations for its peremptory challenges and the court ruled, in part, on the ultimate question of intentional discrimination.'" *Id*. (quoting *Hernandez, supra*, 500 U.S. at 359). *See also Ray-Simmons*, 446 Md. at 444 ("The State, by proffering an explanation for each of its strikes, moved the *Batson* inquiry to step two. At that step, the State, as the party exercising the challenged peremptory strike, carries the burden of coming forward with a clear and reasonably specific explanation of its legitimate reasons for exercising the challenge.") (internal citations and quotation marks omitted).

Here, as in *Ray-Simmons*, appellant contends that the prosecutor failed to provide a race- and gender-neutral step-two explanation sufficient to satisfy *Batson*. In this case, however, the prosecutor never proffered *any* reason why she used a peremptory strike for juror #532. The prosecutor stated only: "[W]ith regards to juror number 532 she was replaced with another black female, Your Honor. That would be number 12 seated in seat 12 and—." The court then interrupted and asked the prosecutor about her reasons for a different strike.

Both here and in *Ray-Simmons*, the prosecutors mentioned the race and gender of a replacement juror. What distinguishes the exchanges in the two cases, however, is that, in *Ray-Simmons*, the prosecutor, in proffering an explanation for the challenged peremptory strike, acknowledged using race and gender as a reason for the strike, stating: "I intended to replace him with another black male." In O'Neil's case, the prosecutor only stated that the juror she struck had been replaced by a venireperson of the same race and gender. Unlike the prosecutor in the *Ray-Simmons* case, the prosecutor in this case did not say it was her intent to replace one African American female with another. Indeed, she did not provide any rationale for striking juror #532. She was interrupted by the court before she was able to tender any explanation as to why the strike in question was made. The prosecutor's reason for striking juror #532 is therefore not discernable from the record.

Because the prosecutor was interrupted by the trial judge and was not given an opportunity to offer an explanation for striking juror #532 before the trial judge proceeded to step three, the proper remedy is a limited remand to provide the trial court with an opportunity to conduct a proper *Batson* analysis of the strike of juror #532.

With respect to the remedy for an error in a trial court's consideration of a *Batson* challenge, the *Ray-Simmons* Court stated:

> A limited remand may be appropriate, for example, where the State was not given an opportunity at trial to explain its reasons for exercising the contested peremptory challenges. *See Mejia v. State*, 328 Md. 522, 540, 616 A.2d 356 (1992) (ordering a limited remand because less than two years had passed since the trial began and "the State was not given the opportunity to explain its striking of [the challenged juror]"); *Stanley*, 313 Md. at 75–76, 542 A.2d 1267 (ordering a limited remand "to permit the State to provide, if it can, racially neutral reasons for its use of peremptories"). We also have recognized, however, that "certain difficulties

> are inherent in attempting to reconstruct events that occurred a year or more earlier." *Chew* [*v. State*], 317 Md. [233] at 239, 562 A.2d 1270 [(1989)].

Id. at 447.

In *Edmonds v. State*, 372 Md. 314, 339 (2002), the Court of Appeals explained that a limited remand is "the appropriate remedy" unless "it is impossible to reconstruct the circumstances surrounding the peremptory challenges." The *Edmonds* Court explained:

> A trial court *Batson* error does not *ipso facto* entitle a party to a new trial. Under the circumstances presented in the instant case, remand to the trial court is the appropriate remedy. This Court has determined previously that unless it is impossible to reconstruct the circumstances surrounding the peremptory challenges, due perhaps to the passage of time or the unavailability of the trial judge, the proper remedy where the trial court does not satisfy *Batson's* requirements is a new *Batson* hearing in which the trial court must satisfy the three-step process mandated by that case and its progeny. A limited remand was the procedure followed in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *Mejia v. State*, 328 Md. 522, 616 A.2d 356 (1992), *State v. Gorman*, 324 Md. 124, 596 A.2d 629 (1991), and *Stanley v. State*, 313 Md. 50, 542 A.2d 1267 (1988). Although a limited remand may not always be practical, in this case neither the passage of time nor any other factor appears to limit the ability of the trial judge to conduct the *Batson* analysis.
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> A limited remand ordinarily is the remedy applied by appellate courts throughout this country when a trial court fails to conduct a proper *Batson* analysis.

Id. at 339-341.

The Court in *Ray-Simmons* found that it would be "impossible" to conduct a proper *Batson* analysis of a jury selection process that occurred "almost four years ago." 446 Md. at 447. Here, however, trial began just over two years ago. This case is therefore

more similar to *Mejia v. State*, 328 Md. 522, 540-41 (1992), where the Court of Appeals ordered a limited remand for a case that had been tried nearly two years prior.

We recognize, however, that, due to the passage of time, it might not be possible for the trial court to conduct a proper *Batson* analysis, and we therefore paraphrase the concluding comments that the *Edmonds* Court provided when it ordered a limited remand for the trial court to conduct a proper *Batson* analysis:

> [P]ursuant to Rule 8-604, we remand this case to the Circuit Court for Baltimore [City] to make a determination whether [the prosecutor can offer race- and gender-neutral reasons for striking juror #532, and, if so, whether] the prosecutor's race-neutral [and gender-neutral] reasons were pretextual and therefore whether petitioner has met his burden of proving purposeful discrimination as to [juror #532]. If the court cannot effectively do so, or finds purposeful discrimination, it shall order a new trial.

372 Md. at 341-42 (footnote omitted).

PURSUANT TO MARYLAND RULE 8-604(d), CASE IS REMANDED, WITHOUT AFFIRMANCE OR REVERSAL, TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.