UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 547

September Term, 2016

DAVON JONES

v.

STATE OF MARYLAND

Meredith,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: May 19, 2017

After a trial in the Circuit Court for Baltimore City, a jury convicted Davon Jones of attempted first-degree murder, use of a handgun in the commission of a crime of violence, and conspiracy to use a handgun in the commission of a crime of violence. That jury also convicted appellant's co-defendant, Kevin Garner, of attempted second-degree murder, use of a handgun in the commission of a crime of violence, and conspiracy to use a handgun in the commission of a crime of violence. On March 27, 2007, the circuit court sentenced Jones to twenty years in prison for attempted murder, a consecutive ten years for the weapons violation, and a concurrent three year term for conspiracy, all to be served concurrently with any other sentence Jones was then serving. Following a request for post-conviction relief, appellant was granted leave to file a belated appeal on April 27, 2016. The appeal followed, in which Jones presents two questions that we have rephrased as follows:[1]

> 1. Did the trial court abuse its discretion in granting the State's request for a mistrial?

[1] Jones phrased the questions presented as follows:

> 1. Whether a mistrial over defense objection was manifestly necessary due to the unavailability of Detective Williams despite the existence of reasonable alternatives, such as a stipulation to Detective Williams'[s] testimony or the State's presentation of other witnesses whose testimony would have mimicked Detective Williams'[s] testimony?
>
> 2. Whether the trial court erred in refusing to recognize a prima facie case of racial discrimination during jury selection after the prosecutor used at least four of his seven strikes to remove black jurors from the panel?

2. Did the trial court err in finding that Jones and his co-defendant failed to make a prima facie case that the State exercised peremptory strikes in a racially discriminatory manner?

For the reasons stated below, we shall answer both questions in the negative and affirm appellant's convictions.[2]

BACKGROUND

On January 10, 2006, Jerome Smith was shot and injured by two gunmen. Smith was immediately transported to Sinai Hospital in Baltimore City where he was treated for bullet wounds to his right arm and shoulder.

Baltimore City Police Detective Wayne Williams was assigned as the lead investigator of the Smith shooting. Detective Williams spoke briefly with Smith at the hospital, and later recorded a statement from Smith at a police station on January 11, 2006. In this statement, Smith said that two men shot him: that both men were approximately his height, one was lighter skinned, and the other was darker skinned. On February 15, Smith again spoke with Detective Williams and gave two separate taped interviews.

Smith said in the first interview of February 15, 2006 that two people shot him because he owed $70.00 to a drug dealer named Lonnie Jenkins. During that interview, Detective Williams showed Smith seven separate photographic arrays. In four of those arrays, Smith did not identify anyone. Nevertheless, Smith identified appellant in one of the arrays and he identified Kevin Garner, in another array. He told the police that both

[2] Appellant's co-defendant, Kevin Garner, raised the same issues in his appeal as the two raised in the case *sub judice*. We affirmed Garner's convictions. *See Garner v. State*, No. 362, September Term, 2007 (filed December 23, 2008). Slip op. at 8-16.

men shot at him. Also, in another array, Smith identified a man he knew as "Little Lonnie," as a person who witnessed the shooting but did not participate. During one of the February 15 interviews, Smith gave Detective Williams the address of Garner, who he knew as "Baby," and provided another address where Smith believed appellant might be found. As a result of Smith's statements, police arrested appellant and Garner.

During a suppression hearing held on January 18, 2007, Smith recanted his identification of both appellant and Garner. He swore that he had never seen the two men prior to being shown the photo line-ups, accused the police of "snatching [him] up" and "harass[ing]" him until he identified the two men, and claimed that he was under the influence of marijuana at the time he looked at the photographic arrays.

On Friday, January 19, 2007, trial began and a jury was empaneled. The following Monday, however, prior to opening statements, the State moved for a mistrial on the grounds that Detective Williams was unavailable. The prosecutor explained that Detective Williams had been in a car accident the previous Friday night; although he had been released from the hospital, he was taking pain medications and was unable to leave his house. After the parties attempted unsuccessfully to agree upon a stipulation as to Detective Williams's anticipated testimony, the court granted the State's request for a mistrial, finding that manifest necessity justified the mistrial. The trial that resulted in appellant being convicted of attempted second-degree murder and related charges commenced 17 days after the mistrial was declared.

DISCUSSION

Granting of State's Motion for Mistrial

As already noted, on the morning of the second day of the first trial, the court granted the State's request for a mistrial due to the unavailability of Detective Williams. Appellant contends that the court erred in granting the mistrial. He argues that the court did not, but should have, considered other alternatives to a mistrial, such as: 1) requiring the State to proceed without Detective Williams; 2) having the parties stipulate to Detective Williams's testimony, or 3) calling other witnesses who were present with Detective Williams during the interviews in which Smith made statements that incriminated appellant and Garner.

The State contends that the unexpected unavailability of Detective Williams – a key State witness – was a valid ground for granting a mistrial based on manifest necessity. The State stresses that Detective Williams was a necessary witness because it expected that at trial Smith would recant what he said in his prior taped statements, as he had done at the suppression hearing. The State asserts that Detective Williams's testimony was crucial to counter Smith's expected recantation because no other police witness had a memory of the relevant facts surrounding the police interviews of Smith that resulted in the photographic identification of appellant and Garner.

The Fifth Amendment of the United States Constitution and Maryland common law protect a defendant from "'twice being put in jeopardy for the same offense.'" *Simmons v. State*, 436 Md. 202, 213 (2013) (quoting *State v. Woodson*, 338 Md. 322, 328 (1995)). "In a jury trial, the Double Jeopardy Clause generally bars the retrial of a criminal defendant for the same offense once a jury has been empaneled and sworn." *Id.* (citation omitted).

"When a mistrial is granted over the objection of the defendant, double jeopardy principles will not bar a retrial if there exists 'manifest necessity' for the mistrial." *Id.* (footnote omitted).

As the Court of Appeals has noted: "'It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is an abuse of discretion.'" *Id.* at 212 (quoting *Carter v. State*, 366 Md. 574, 589 (2001)).

Discretion is abused when the trial judge's ruling was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Hart*, 449 Md. 246, 264 (2016) (citation and quotation marks omitted). In this appeal the burden rests with Jones to show that the court's decision was "violative of fact and logic" and not merely one with which the reviewing judges disagree. *Kusi v. State*, 438 Md. 362, 386 (2014) (citation and quotation marks omitted).

In assessing manifest necessity, "the trial judge must weigh the unique facts and circumstances of each case, explore reasonable alternatives, and determine that no reasonable alternative exists." *Quinones v. State*, 215 Md. App. 1, 17 (2013) (citing *Hubbard v. State*, 395 Md. 73, 92 (2006)).

In this case, jeopardy had attached with the swearing of the jury on January 19, 2007. In requesting the mistrial on the morning of the second day of trial, the prosecutor told the court that Detective Williams was a key witness because of Smith's expected recantation of what he originally told police investigators. The State asserted that Detective Williams's testimony was crucial to its case because no other police witness had a memory

of the relevant events, Detective Williams was the lead investigator on the case, and he could testify about all of the recorded interviews with Smith.

Police testimony concerning Smith's statements and his actions relating to the recorded interviews were vital to the case because Smith was a classic "turncoat witness." *See Nance v. State*, 331 Md. 549, 552 (1993). In discussing the value of previous inconsistent statements in the face of a recantation at trial, the Court of Appeals quoted Judge Learned Hand on the response of jurors to such testimony: "'Again and again in all sorts of situations we become satisfied, even without earlier contradiction, not only that a denial is false, but that the truth is the opposite.'" *Id.* at 566 (quoting *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 933 (2d Cir. 1957)). The Court of Appeals also recognized that prior statements may be more accurate because of proximity in time to the event. *Id.*

In this case, we reject appellant's argument that Detective Williams was not a necessary witness for the State. What happened in the second trial shows the importance of Detective Williams's testimony. At trial, Smith described the shooting as follows:

> [THE STATE]: What happened?
>
> [SMITH]: Some guys jumped out of their car, started shooting at me, whatever. I got hit in my shoulder.
>
> Q: How many guys?
>
> A: Was about three of them.
>
> Q: And do you know their names as Davon and Baby?
>
> A: No.

Q: Were any of them Lonnie or Little Lonnie?

A: That statement that I gave the –

Q: Mr. Smith, were any of them Lonnie or Little Lonnie?

A: No.

Q: Did you know who these three guys were?

A: No.

Q: Can you describe these three guys?

A: No.

When questioned about the statement he gave to the police, the following occurred.

[THE STATE]: Did you tell Detective Williams that there were three guys who got out of the car and shot you?

[SMITH]: I don't remember. That was a year – it was a year ago. I don't remember exactly what I told him on the tape.

Q: But you mentioned that it was Baby [Garner] who first approached you?

A: I don't remember. It's on tape. Whatever I said is on the tape.

* * *

Q: Mr. Smith, the statement that you gave on tape on January 11, 2006, is that what happened to you? Is that the truth?

A: No.

Appellant's trial counsel cross-examined Smith as follows:

[APPELLANT'S COUNSEL]: Okay. When you say that Lonnie is the one who set you up for this, do you mean Big Lonnie or Little Lonnie?

[SMITH]: All of it was fiction.

Q: All of it was fiction?

A: Names, people, since I was getting harassed by them detectives. It was like they couldn't – they wouldn't take no for a answer. I don't know, they just wouldn't take no for a answer.

* * *

Q: Okay. I can conclude then that he [appellant] was fairly close to you because he wouldn't have been able to hit you unless he was very close; is that correct?

A: Right.

Q: Did you hit him back?

A: None of it is true so, no, I didn't hit him back.

Q: All right. Now you say the person you know as Baby had a gun.

A: Yes.

Q: You didn't see that gun when Baby first started talking with you, did you?

A: Baby is not the guy who shot me. These two guys are not the people who shot me.

Q: Okay.

A: You keep asking me questions about these two guys. They not the ones who shot me.

* * *

Q: Then why did you pick out the pictures of people who are sitting in this courtroom now?

A: Randomly. Just the police thought they was getting me but I was getting them for the food and for the phone calls.

Q: I'm sorry, could you tell me what you mean you were getting them for the food and for the phone calls?

> A: They thought they was getting some information out of me. I was getting th[ei]r food, that KFC food, and phone calls from them.

(Emphasis added.)

As can be seen, all, or almost all, of Smith's testimony was in contradiction of his prior statements and identifications to Detective Williams. Hence, Detective Williams's testimony was important for the State to place in context Smith's prior statements and identifications and to contradict Smith's assertion that he gave the statements because he had been "harassed" by the police.

Because Detective Williams was the lead investigator and the only police officer present for all of the interviews with Smith, Detective Williams was an indispensable witness for the State. If the trial had gone forward without Detective Williams's testimony, Smith's claims of police harassment would have gone unrebutted.

Furthermore, it is undisputed that Detective Williams's unavailability was unexpected and unforeseeable. The Court of Appeals has recognized that the defendant has a "'valued right to have the trial concluded by a particular tribunal[, but that] is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.'" *Simmons*, 436 Md. at 214, (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). Importantly, this was not a situation where the prosecutor started the trial knowing that Detective Williams was unavailable. *Cf. McCorkle v. State*, 95 Md. App. 31, 56 (1993) ("where the prosecution goes forward with a trial (and permits jeopardy to attach) knowing in advance of its key

witness's absence, that, for double jeopardy purposes, is the equivalent of an acquittal" (citations and emphasis omitted)).

In the case at hand, the court suggested that the parties stipulate as to the substance of Detective Williams's testimony. The following colloquy then occurred:

> [Counsel for Jones]: [I am prepared to stipulate that] police officers behaved in an appropriate and constitutional manner and followed the rules and regulations of the department and did nothing improper such as point out the picture of the person they wanted to have arrested.

Counsel for co-defendant Garner said he would agree to the stipulation suggested by Jones's counsel. The following exchange then occurred:

> THE COURT: But . . . one of the things [the proposed stipulation] does not address is the witness's testimony of the nature of the investigation that went beyond just speaking to the victim. That might be at the crime scene, what did he see? What physical evidence did the witness develop at the crime scene?
>
> [Counsel for Garner]: Uh-huh.
>
> THE COURT: I don't know where it goes.
>
> [Prosecutor]: Your Honor, as I had mentioned, I do think it would be - - essentially we'd have to script his testimony. And it would take some time to do that, Your Honor, if that would be acceptable to both defense counsel. I mean we'd have to talk about his initial point when he arrived at the scene to the investigation that he conducted, to the arrest of one of the defendants, as well. But if defense counsels are willing to work with the State, we can develop and script his testimony and stipulate to it. That's certainly possible.
>
> [Counsel for Garner]: Your Honor, I am rather feeling cautious about how far we would have to go with agreeing to everything with this investigation, which I feel like we're kind of being put in a box here with regard to that. So short of fleshing it out at this point, every nuance, that may be the hurdle.

THE COURT: It's not just scripting it for an initial presentation, it's also being prepared to deal with the rebuttal of things that might occur during the trial beyond the initial presentation of the statement of the witness. That's one of the challenges. Do you want to attempt it?

[Counsel for Jones]: Yes, Your Honor. We do.

THE COURT: Why don't you take a few minutes and do that? And what we'll do is have the Clerk advise the jury that we are trying to resolve a particular problem and that we'll be with them as soon as possible.

* * *

After an interlude, the following occurred:

[Prosecutor]: The defense counsel and I have been working to try to develop the stipulation that would cover Detective Williams's testimony pursuant to the Court's suggestion, and we have been unable to develop such a stipulation.

THE COURT: Sir?

[Counsel for Mr. Garner]: Your Honor, I believe we've made a good faith effort, but the language of the stipulation about the completeness and appropriateness of the entire investigation of . . . Detective Williams puts us in such a hole that I think it invites post[-]conviction later.

[Counsel for Jones]: I concur, yeah.

THE COURT: I knew it was going to be difficult, but I thought it would be worth an opportunity to examine the possibilities. You can't compromise your clients, of course. And neither can the government. But we thought at least give it a try to see what the possibilities could be. We would hope to save a trial, frankly. But we, as we said initially, it would be - - and we had a thought that it would be extremely difficult to attempt, or to complete, but we thought it was worth an effort.

As can be seen, the trial judge and trial counsel went to considerable effort in attempting to arrive at a mutually agreeable stipulation. But, based on the position of the parties, a stipulation was not possible. We therefore reject appellant's argument that

instead of granting a mistrial, the detective's testimony could have been covered by a stipulation.

Lastly, appellant suggests that other police witnesses could have testified as to Smith's statements and behavior during the interviews. From the State's point of view, this was not a fair solution to the problem because the other police officer in attendance when the statements were made, had no memory of the events and therefore could not have effectively rebutted the claim of Smith that police harassed him and "won't take no for an answer" prior to his making the photographic identifications. For the above reasons, we hold that the trial judge did not abuse his discretion in declaring a mistrial based on the unexpected unavailability of Detective Williams.

Batson **Challenge**[3]

During jury selection, the prosecutor and both defense counsel "struck from the box" meaning that all three counsel told the judge, initially, that the first twelve jurors whose names were called by the clerk, were acceptable to counsel. Then, when the court asked counsel if they were satisfied with the twelve jurors seated, counsel began exercising their preemptory challenges. After the State had made five strikes "from the box," counsel for appellant approached the bench and complained that the State had engaged in a "pattern and practice of eliminating the non-white prospective jurors and then having them replaced with white prospective jurors." As can be seen, appellant's challenge at that point was

[3] A *Batson* challenge derives its name from the United States Supreme Court case of *Batson v. Kentucky*, 476 U.S. 79 (1986).

race-based and not gender-based. Immediately after the *Batson* challenge was raised, the trial judge noted that one of the struck jurors was a white female, and another (black male) juror made an "audible sign of displeasure" when he was initially selected. The court stated: "So your challenges apply to three and while you're not raising an issue as to them individually, you're raising the question of the process as a pattern. And I do not find a prima facie case presented on that basis." Jury selection continued with defense counsel striking numerous prospective jurors. The State exercised two peremptory strikes of potential alternate jurors, but the record does not show the race or gender of those jurors or of the eight struck by defense counsel. At that point, although jury selection had not been completed, appellant's counsel renewed their *Batson* challenge, this time complaining that there was not a black man on the jury. The court, again, denied the motion.

The Court of Appeals recently commented on *Batson* challenges as follows:

> 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. . . .
>
> 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. "[T]he prima facie showing threshold is not an extremely high one – not an onerous burden to establish." A prima facie case is established if the opponent of the peremptory strike(s) can show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Merely "a 'pattern' of strikes against black jurors in the particular venire . . . might give rise to or support or refute the requisite showing."
>
> 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. . . .
>
> 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."

Ray-Simmons v. State, 446 Md. 429, 435-37 (2016) (internal citations omitted).

This Court has noted that "'[i]n 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.'" *Khan v. State*, 213 Md. App. 554, 568 (2013) (quoting *Bailey v. State*, 84 Md. App. 323, 328 (1990)). Accordingly, we review a trial judge's *Batson* decision under a clearly erroneous standard of review. *See id.* "'If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous[.]'" *Spencer v. State*, 450 Md. 530, 548 (2016) (quoting *Webb v. Nowak*, 433 Md. 666, 678 (2013)).

Appellant presently maintains that the State's use of peremptory strikes to remove black males from the jury demonstrated a prima facie case of discrimination. Appellant notes that the threshold of a prima facie showing under step one of the *Batson* analysis is not a high bar, and, indeed, may be demonstrated by showing a peremptory strike of just one juror. Specifically, appellant contends that the State's use of peremptory strikes to remove three of the four black male jurors who had been seated meets the low threshold of showing a prima facie case of the use of peremptory strikes for a discriminatory purpose. Appellant argues that because the State used its peremptory strikes to remove 75% of the

black men on the jury and 60% of its strikes (prior to the two strikes used on potential alternates) on black men, that demonstrates a prima facie case sufficient to meet step one of the *Batson* analysis.

The State contends that the court's finding that appellant failed to show a prima facie case of discrimination is not clearly erroneous. The State argues that appellant's use of statistics is misleading because the record does not indicate the racial composition of the venire or the race of the eight jurors that appellant's counsel and co-defendant's counsel collectively struck. The State relies primarily on *Bailey*, *supra*, for the proposition that merely noting the number of struck jurors of a particular race is meaningless without other information. Ultimately, the State contends, because the record is missing that information, we should not second-guess the decision of the trial judge.

Appellant is correct that in some situations a prima facie case may be proven by the striking of one juror. The case that appellant cites for that proposition, however, is distinguishable. In *Mejia v. State*, 328 Md. 522, 539 (1992), the Court of Appeals held that Mejia had proven a prima facie showing of discrimination in the use of peremptory strikes where the State struck the only Hispanic in the venire. The *Mejia* Court concluded: "where the record reveals that but one person with an Hispanic background was in the venire and the State struck that person, it may be concluded that a *prima facie* case of purposeful discrimination has been proven." *Id.* In this case, the record does not indicate that the State struck all of the black males in the venire or how many black males were in the venire in the first place. As such, *Mejia* is inapposite.

This Court's decision in *Bailey* is directly on point. In that case, the State exercised seven of its ten peremptory strikes against black jurors. 84 Md. App. at 325. On appeal, Bailey argued that because the State used 70% of its peremptory strikes against black jurors, this satisfied the first step of the *Batson* inquiry. *Id.* at 330-31. We disagreed:

> There is a critical difference between a pattern in the abstract and a pattern of discrimination. To extrapolate a pattern of discrimination solely from a statistical analysis of the peremptory challenges would require not only knowledge of the percentage of strikes used against a given group but also knowledge of the percentage that that group represented of the total venire panel – or, more precisely, of the percentage that that group represented of the prospective jurors actually called forward to be accepted or challenged.

Id. at 331 (emphasis omitted). We concluded that a pattern of discrimination would be revealed if use of peremptory strikes did not comport with the percentage of strikes against a particular group that would be expected by random chance. *Id.* at 331-32. Judge Charles E. Moylan, Jr., writing for the Court in *Bailey*, said:

> If, for instance, a venire panel were 100 percent white, every peremptory would be directed at a member of the white race, but no pattern of racial discrimination would be indicated. Conversely, if an entire venire panel were black, the 100 percent employment of peremptories against blacks would not suggest a pattern of racial discrimination. It would suggest a pattern, to be sure, but self-evidently not a pattern of racial discrimination.
>
> In the intermediate ranges, if 70 percent of the peremptories were directed against members of a group that represented only 20 percent of the total panel, that percentage of peremptory strikes would, standing alone, suggest a pattern of discrimination. If, on the other hand, 70 percent of the peremptory challenges were used against members of a group that represented 90 percent of the total panel, that would be a contraindication of discrimination. Indeed, it would indicate that 30 percent of the challenges had been used against some other racial group that represented only 10 percent of the available targets. If, finally, 70 percent of the peremptories were directed at members of a group that represented 70 percent of the total

> panel, that would, standing alone, indicate nothing other than statistically predictable random selection at work.

84 Md. App. at 332.

Because the record in *Bailey* did not indicate the composition of the entire venire, we could not "assess whether there has been a disproportionate use of peremptories so as to give rise to an inference of discrimination unless we have two numbers or two percentages to work with. Proportionality by definition is the relationship between two quantities, not one in a vacuum." *Id.* at 332 (footnote omitted).

We are met with the same problem in this case. Appellant argues that the State used its peremptory challenges to strike 75% of the black jurors seated and 60% of its strikes against black males, but we have no information about the proportion of black males in the entire venire. Likewise, we have no information as to how many black females were in the venire or how many served as jurors. The latter information is important because appellant's initial *Batson* challenge, at trial, concerned excluding blacks in general – both male and female. Furthermore, unlike in *Mejia*, we do not know that the State struck all the black male jurors because the record is silent as to the race or gender of the eight prospective jurors struck by counsel for defendants. The record is simply devoid of the information necessary to make the conclusion that appellant would have us make.

Because we lack that information, appellant has failed to show that the trial judge abused his discretion in overruling appellant's *Batson* challenge. As we said in *Bailey*:

> It is the trial judge who is in close touch with the racial mood, be it harmonious or be it tense, of the local community, either as a general proposition or with respect to a given trial of high local interest. The trial judge is positioned to observe the racial composition of the venire panel as a

> whole, a vital fact frequently not committed to the record and, therefore, unknowable to the reviewing court. The trial judge is able to get the "feel" of the opposing advocates – to watch their demeanor, to hear their intonations, and to spot their frequently unspoken purposes. It is a total process in which nonverbal communication may often be far more revealing than the formal words on the typewritten page.

84 Md. App. at 328-29. We, therefore, cannot find that the circuit court was clearly erroneous in concluding that appellant had failed to make a prima facie case that the State used its peremptory strikes in a discriminatory manner. Accordingly, we affirm.

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