UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2227

September Term, 2014

GERARD DAWSON DENNIS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 12, 2015

Gerard Dawson Dennis ("Dennis") was convicted by a jury sitting in the Circuit Court for Wicomico County of robbery; robbery with a dangerous weapon; burglary in the first, third and fourth degrees; first-degree assault; second-degree assault; wearing, carrying and transporting a handgun; use of a firearm in the commission of a felony or crime of violence; and for felony in possession of a firearm. For purposes of sentencing, the court merged the following convictions: robbery with armed robbery; third-and fourth-degree burglary with first-degree burglary; second-degree assault with armed robbery; and wearing, carrying and transporting a handgun with the conviction for use of a firearm in the commission of a felony. Dennis was sentenced to the following consecutive terms of imprisonment: 20 years for robbery with a dangerous weapon; 20 years for first-degree burglary; 20 years for first-degree assault; and five years for use of a firearm in the commission of a felony. Dennis was also sentenced to five years' imprisonment for the felon in possession conviction, to run concurrent with the sentence imposed for the other firearms violation, but consecutive to the other sentences. In this appeal, Dennis presents two questions for our review:

1. Did the trial judge abuse her discretion in denying the Batson challenge?

2. Did the trial judge impose an illegal sentence by failing to merge the sentence for first-degree assault by firearm into the sentence for robbery with a dangerous weapon?

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

I.

FACTUAL BACKGROUND

As the issues in this case are, for the most part, not fact dependent, only a brief recitation of the facts as presented in the State's case is necessary. On October 4, 2013, at approximately 11 p.m., Seth Nicholson was in his apartment when he heard a light tap at his door. He looked through the peephole in the door, but saw no one. He then asked several times: "Who's there?" When he received no response, Nicholson opened the door a crack and saw Dennis, whom he knew. Dennis was holding a chrome handgun that he pointed at Nicholson's face.

With the gun still pointed at Nicholson's face, Dennis and another man entered the apartment. Dennis said: "Give me everything you got," which Nicholson understood to mean money and drugs. Nicholson gave Dennis about $400 from his wallet. One of the intruders then said: "no, we want the work," which Nicholson interpreted to mean that they wanted his drugs. Dennis then hit Nicholson across the forehead with the stock of the gun. Nicholson reached down underneath his couch and retrieved several bundles of heroin, which he threw to Dennis. Dennis and the other man then walked out the front door with the drugs and money.

Additional facts will be added in the discussion as they become relevant.

II.

DISCUSSION

A. Batson Challenge

Dennis, at trial, claimed that the prosecution violated his constitutional right by striking prospective jurors because they were African-American.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court reaffirmed that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id*. at 89. The Court observed that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community . . ." and "undermine[s] public confidence in the fairness of our system of justice." *Id*. at 87.

When raising a *Batson* challenge to the prosecution's use of peremptory strikes during jury selection, a defendant must first establish a prima facie case of purposeful discrimination. *Batson,* 476 U.S. at 93-94. "Once such a showing is made, the burden shifts to the striking party to produce neutral explanations for the exercise of its strikes. If the striking party proffers a race-neutral explanation, the trial court must then decide whether there has been purposeful racial discrimination." *Berry v. State*, 155 Md. App. 144, 160, *cert. denied*, 381 Md. 674 (2004) (citation omitted).

"[T]he prima facie showing threshold is not an extremely high one - not an onerous burden to establish." *Stanley v. State*, 313 Md. 50, 71 (1988). "It simply requires the defendant to prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State and requires it to respond to the rebuttable presumption of purposeful discrimination that arises under certain circumstances." *Id*. This threshold requirement ensures that "charges of racial discrimination, calling into play the full strictures of *Batson*, are neither carelessly indulged nor promiscuously invoked." *Bailey v. State*, 84 Md. App. 323, 326, *cert. denied*, 321 Md. 225 (1990).

The showing required to establish a prima facie case of intentional discrimination is:

> the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Batson, 476 U.S. at 96 (citations and internal quotation marks omitted).

It is not disputed that Dennis is African-American and that the State exercised peremptory strikes to exclude three African-Americans from the panel. Therefore, the only issue to be decided is whether the court abused its discretion in ruling that no inference of

intentional discrimination could be drawn from the facts and circumstances surrounding the selection process.

At trial, after the State struck three African-American jurors with peremptory challenges during jury selection, defense counsel raised a *Batson* objection. The court deferred ruling on the objection until a jury had been provisionally selected, stating "we will decide that when the jury has been picked and we will go over that."[1]

At the conclusion of jury selection, but before the jury had been sworn, the court revisited the issue:

> THE COURT: Now, [Defense Counsel], you wish to make a Batson challenge?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. It seemed like - -

[1] Dennis appears to suggest that it was inappropriate for the court to defer its ruling until the jury had been chosen. Waiting until jury selection is complete before considering a *Batson* objection is often necessary, as the Court of Appeals has noted:

> [A]n objection premised upon [the] unconstitutional exercise [of peremptory challenges] appropriately may not be raised, or, at the least, is not cognizable, until the factual predicate for it exists. Ordinarily the predicate will not exist until the last member of a cognizable racial group has been stricken or the twelfth juror has been seated, although not sworn. Only then, when all of the facts and circumstances necessary to a ruling on the objection are before it, is the court enabled to assess meaningfully the validity of the objection [footnote omitted].

Stanley v. State, 313 Md. 50, 69 (1988) (quoting *Parker v. State*, 72 Md. App. 610, 617-18 (1987).

THE COURT: I didn't do it at that time because I thought it's fair to wait until the jury is all picked, and then we can get an idea of whether there is any discriminatory basis for the Batson challenge.

[DEFENSE COUNSEL]: I understand, Your Honor, but the discrimination is not on the final as the discrimination is in the actions of the - -

THE COURT: No, but - - I understand that, but you can judge those actions better when you consider it after the full jury is picked.

[DEFENSE COUNSEL]: I understand, Your Honor, and my objection, Your Honor, is the fact that - - the first three people that the State struck were African-American, and it seemed very consistent that she was - - it seemed to me - -

THE COURT: How many African-Americans had been recalled by then - -

[DEFENSE COUNSEL]: I didn't even check, Your Honor.

THE COURT: We have 1, 2, 3, 4 African-Americans on the jury. There were a number of African-Americans on the panel. She struck three African-Americans and one white. How many do you think [of] yours were white?

[DEFENSE COUNSEL]: Your Honor, I think mine were - - of my ten, I think I probably struck six. I'm not exactly sure. I don't use that as a basis.

* * *

THE COURT: I don't think there is evidence that you did. I don't think there is evidence that the State did.

[DEFENSE COUNSEL]: Well, the first three were African-Americans - -

> THE COURT: I understand - -
>
> [DEFENSE COUNSEL]: And that would have been seven jurors on the panel that would have been African-American,which would have been a majority, which I think makes a dramatic difference, Your Honor.
>
> THE COURT: Well, I don't think there's a prima facie case of juror selection based on race in this case with the number of African-American jurors that are present on this panel, which is a large number, and the striking of three plus one, I don't think it's - -
>
> [DEFENSE COUNSEL]: For purposes [sic], I'm going to object also, Your Honor. Thank you.

Dennis argues that the court abused its discretion in ruling that the defense failed to make out a prima facie case of purposeful discrimination. According to Dennis, the court denied the challenge on "untenable grounds" by relying only on the fact that there were African-Americans seated on the jury and that the State had also struck a white person.

The State responds that Dennis's interpretation of the record is incorrect, and that the court did not rely solely on the composition of the seated jury in making its ruling, but properly relied on circumstances, including the number of African-Americans in the pool of prospective jurors.

In evaluating a trial court's determination of whether a prima facie case of purposeful discrimination exists, we review the court's findings of fact for clear error, and its ultimate ruling for abuse of discretion. *Bailey*, 84 Md. App. at 329. Dennis does not challenge the

court's findings of fact, but asserts only that the ultimate ruling that the record did not give rise to an inference of discrimination was an abuse of discretion.

Appellate courts have defined "abuse of discretion" in various ways, as we have summarized:

> "Abuse of discretion" is one of those very general, amorphous terms that appellate courts use and apply with great frequency but which they have defined in many different ways. It has been said to occur "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." It has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the logic and effect of facts and inferences before the court," when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice."

North v. North, 102 Md. App. 1, 13-14 (1994) (citations omitted).

The determination of whether a prima facie case of discrimination exists is entrusted to the trial judge. *Bailey*, 84 Md. App. at 328. "In reviewing the trial judge's 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." *Id*. As we have observed:

> [t]he 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.

Id. at 328-29. *See also*, *Batson*, 476 U.S. at 97 ("We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning [counsel's] use of peremptory challenges creates a prima facie case of discrimination against black jurors.")

Dennis correctly asserts that a court cannot deny that a prima facie case of purposeful discrimination exists based solely on the fact that African-American jurors were seated on the jury panel. "[T]he fact that black jurors were seated is entitled to substantial consideration, [but] it is not dispositive of this issue and does not preclude a finding that defendants established a prima facie violation of Batson." *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991). "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Batson*, 476 U.S. at 96. "By way of illustration, the [*Batson*] Court observed that a 'pattern' of strikes against black jurors in the particular venire, or the prosecutor's questions and statements during the voir dire examination and the exercise of peremptory challenges might give rise to or support or refute the requisite showing." *Stanley*, 313 Md. at 60-61 (citing *Batson*, 476 U.S. at 97).

The court did not base its finding that Dennis has failed to meet his threshold burden of establishing a prima facie case of discrimination solely upon the composition of the seated jury. The court clearly considered not only the fact that there were four African-Americans ultimately seated on the jury, but also considered the racial makeup of the jury in relation to the number of African-Americans that were in the original jury pool, as evidenced by the

court's stated observation that there were four African-Americans on the jury and that there were "a number of African-Americans on the panel." This was an appropriate consideration. "When determining whether a prima facie case of discrimination has been shown, the [trial] court may consider the proportion of black jurors stricken compared with the composition of the venire.") *Joe*, 928 F.2d at 103. (citing *Batson*, 476 U.S. at 97).[2]

Dennis suggests that a prima facie case of discrimination was established based on what he claims was a "pattern of strikes - three in a row" against African-Americans, citing the suggestion in *Batson* that an inference of discrimination might arise from a 'pattern' of strikes against black jurors. 476 U.S. at 97. We are unable to conclude from the record before us that there was a pattern in the State's use of peremptory challenges such that an inference of discrimination could be drawn because the record is devoid of critical information about the pool of prospective jurors from which the jury had been selected.

[2] Dennis points out that the trial court did not specify on the record the number of African-Americans on the panel. This was not the court's responsibility. If Dennis wished to challenge the court's finding on this issue, it was his burden to make an adequate record. *Bailey v. State*, 84 Md. App. at 333.

> We emphasize here the need for the record to contain not only specific findings by the judge, but also information to support those findings; information such as the numbers of blacks and whites on the venire, the numbers of each stricken for various reasons, the reasons underlying strikes for cause, pertinent characteristics of jurors excluded and retained, relevant information about the race of the defendant, the victim, and potential witnesses, and so forth.

Id., n.6 (quoting *Stanley*, 313 Md. 70, n. 11).

In *Bailey*, the defendant claimed that the sole fact that seven out of ten of the prosecution's peremptory challenges were used to strike black jurors established a pattern of discrimination sufficient to meet the threshold showing. 84 Md. App. at 330. In holding that the record was "fatally incomplete," for purposes of appellate review, Judge Moylan, speaking for this Court, observed that:

> [t]here 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.

Bailey, 84 Md. App. at 331 (emphasis in original).

Here, in ruling that a prima facie case of discrimination had not been established, the court observed that there were "a number of African-Americans on the panel." As Dennis failed to make a record of the statistical information regarding the percentage of African-Americans in the pool of prospective jurors, we cannot say that the court abused its discretion in ruling that Dennis failed to meet his burden of showing, by a preponderance of the evidence, that the State's use of peremptory challenges gave rise to an inference of discrimination.

B. Merger

Dennis next contends that his convictions for first-degree assault and robbery with dangerous weapon should have merged for sentencing purposes under the required evidence test, arguing that the two offenses stemmed from the same transaction. The State responds preliminarily that Dennis has waived this argument because defense counsel agreed with the court at sentencing that the two offenses did not merge. Alternatively, the State concedes that the two offenses would merge if they were based on the same act, but argues that Dennis's convictions were based on two separate acts and therefore they do not merge. The State asserts that the conviction for robbery with a dangerous weapon was based on Dennis's act of holding a gun in Nicholson's face, and the first-degree assault conviction was based on the fact that appellant hit Nicholson across the forehead with the gun.

We conclude that the argument was not waived. Nevertheless, Dennis does not benefit because we believe that Dennis's defense counsel was correct when he told the court that the convictions do not merge for sentencing purposes.

With respect to the State's preservation argument, we note that Maryland Rule 4-345(a) provides that the court may correct an illegal sentence at any time. "A failure to merge a sentence is considered to be an 'illegal sentence' within the contemplation of the rule." *Pair v. State*, 202 Md. App. 617, 624 (2011), *cert. denied*, 425 Md. 397 (2012) (citation omitted). "[A] motion to correct an illegal sentence under Rule 4-345(a) is not waived even if no objection was made when the sentence was imposed or the defendant

purported to consent to it." *Johnson v. State*, 427 Md. 356, 371 (2012) (citations and internal quotation marks omitted). Accordingly, Dennis's argument that the court imposed an illegal sentence by failing to merge the two convictions is not waived, and we shall address the merits.

Merger of convictions for sentencing purposes is derived from the protection against double jeopardy afforded by the Fifth Amendment of the United States Constitution and Maryland common law, and protects criminal defendants from multiple punishments for the same offense. *Brooks v. State*, 439 Md. 698, 737 (2014). Our review of a court's failure to merge offenses for sentencing purposes is *de novo*.

"[T]he double jeopardy analysis is a two step process. . . . [W]e must first determine whether the charges arose out of the same act or transaction, and second, whether the crimes charged are the same offense." *Purnell v. State*, 375 Md. 678, 694 (2003) (citations and internal quotation marks omitted). *See also*, *Morris v. State*, 192 Md. App. 1, 39 (2010) ("To evaluate the legality of the imposition of separate sentences for the same act, we look first to whether the charges arose out of the same act or transaction, then to whether the crimes charged are the same offense. . . .") (citation and internal quotation marks omitted). If it is determined that the charges are based on the same act or transaction, we then employ

the required evidence test to determine whether two different offenses are the same for double jeopardy purposes.[3] *Purnell*, 375 Md. at 693.

Maryland courts have consistently held that where convictions for first-degree assault and robbery with a dangerous weapon are based on the same conduct, for sentencing purposes, the assault offense must merge into the offense for armed robbery. *See Morris*, 192 Md. App. at 39-40 ("As this Court has previously held, first-degree assault is 'a lesser included offense of robbery with a dangerous and deadly weapon.'") (quoting *Williams v. State*, 187 Md. App. 470, 476, *cert. denied*, 411 Md. 602 (2009); *Gerald v. State*, 137 Md. App. 295, 312 (2001) (merging conviction for first-degree assault into conviction for armed robbery) *cert. denied*, 364 Md. 462; *Snowden v. State*, 321 Md. 612, 617-19 (1991) (convictions for offenses of assault and robbery required to merge). The "dispositive inquiry" before the offenses are merged is whether the first-degree assault conviction was a distinct act or whether it arose out of the act of armed robbery. *Morris*, 192 Md. App. at 40. We conclude that the assault upon Nicholson was a distinct act from the armed robbery, and therefore, the offenses do not merge.

[3] "The required evidence test focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Snowden v. State*, 321 Md. 612, 617 (1991) (citation and internal quotation marks omitted). "If the offenses merge and are thus deemed to be one crime, separate sentences for each offense are prohibited." *Id*. (citation omitted).

"The 'same act or transaction' inquiry often turns on whether the defendant's conduct was one single and continuous course of conduct, without a break in conduct or time between the acts." *Id*. at 39 (citation and internal quotation marks omitted). "[W]hen the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant." *Id*. We see no ambiguity here, however.

Count One of the indictment charged Dennis with robbing Nicholson with a dangerous weapon and stealing money and a cell phone. The State did not prosecute Dennis for the theft of the heroin from Nicholson. There was no testimony at trial that Dennis took a cell phone from Nicholson. The robbery was therefore complete when Nicholson handed his money over to Dennis. The subsequent act of striking Nicholson on the head with the gun was a separate and distinct act from the armed robbery as charged.

The indictment is ambiguous as to the conduct upon which the first-degree assault charge was based, but the jury instructions clearly focused the jury's attention on the act of

striking Nicholson with the gun.[4] The court first instructed the jury on second-degree assault as follows:

> The defendant is charged with the crime of second[-]degree assault. *Second-degree assault is caused by the offensive physical contact to another person. In order to convict the defendant of second[-]degree assault, the State must prove: one, the defendant caused offensive physical contact or physical harm to the alleged victim*; two, that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and three, that the contact was not consented to by the alleged victim or not legally justified.

The court then instructed the jury that to convict Dennis of first-degree assault, it must find that the State proved all of the elements of second-degree assault, and that a firearm was used to commit the assault. "A jury is presumed to understand and follow the court's instructions." *Whittington v. State*, 147 Md. App. 496, 534 (2002), *cert. denied*, 373 Md. 408 (2003), *cert. denied*, 540 U.S. 851 (2003).

Furthermore, in closing argument, the State urged the jury to convict Dennis of robbery with a dangerous weapon based on the act of pointing a gun at Nicholson and taking

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[4] Count Six of the indictment charged Dennis as follows:

> THAT GERARD DAWSON DENNIS, on or about the 4th day of October, 2013, in Wicomico County, State of Maryland, unlawfully did assault Seth Nicholson in the first degree in violation of Criminal Law Article, Section 3-202 of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such cases made and provided, against the peace, government and dignity of the State.

Count Seven (second-degree assault) was similarly worded in that it did not indicate the conduct upon which the charge was based.

his drugs and money, and then urged them to convict Dennis of first-degree assault based on the separate act of hitting Nicholson in the head with the handgun. The State addressed the jury in closing argument as follows:

> Did Mr. Nicholson consent to being hit in the head with a handgun? No. Who hit him in the heard with the handgun? Mr. Dennis. That's first-degree assault.

Here, although the indictment does not contain the particular act supporting the charge of first-degree assault, it is clear that the jury considered the evidence in accordance with the court's instruction that a conviction of first-degree assault must be based on a finding that Dennis caused "offensive physical contact or physical harm" to Nicholson, as well as the State's closing argument that the act of hitting Nicholson in the head constituted the first-degree assault. This assault occurred after the robbery of the cash was complete, and therefore was a separate offense. Accordingly, the convictions do not merge.[5]

In his brief, Dennis cites *Morris*, *Williams*, and *Gerald*, all *supra*, arguing that these cases compel merger of his conviction for first-degree assault into his conviction for robbery

[5] Dennis submits in a footnote that even if the required evidence test is inapplicable, the sentences would merge pursuant to the rule of lenity or principles of fundamental fairness. They do not. The rule of lenity does not apply here because the convictions were based on separate acts. *See Williams v. State*, 187 Md. App. 470, 480 (offenses did not merge under rule of lenity because the burglary was complete before assaults occurred and was therefore not an overt act of the assaults), *cert. denied*, 411 Md. 602 (2009). The "fundamental fairness" principle is here inapplicable because the assault charges cannot be said to be incidental to the armed robbery charge. *Marlin v. State*, 192 Md. App. 134, 171 (2010).

with a dangerous weapon pursuant to the required evidence test. We disagree. The case law relied on by Dennis is not controlling here because it is clear that the jury convicted Dennis of first-degree assault based on conduct separate from the armed robbery.

In *Gerald*, the victim was hit in the head with a shotgun, robbed of cash, and then shot as he tried to run away. 137 Md. App. at 299. In rejecting the State's argument that the victim was not shot until the robbery was complete, and that therefore the offenses were separate and did not merge, we held that:

> [a]s cogent as the State's theory may be on appeal, it is not at all clear that the jury considered the evidence in accordance with that theory. The court instructed the jury on the elements of each charge, but it did not explain how the assault and robbery charges related to one another, how they differed, and what the jury needed to find to convict under both charges. . . . With an ambiguity in the indictment, and non-curative instructions, the first degree assault conviction must indeed merge into the robbery conviction.

Id. at 312 (citations omitted).

Likewise, in *Williams* and *Morris*, we held that because neither the charging documents nor the jury instructions made it clear that the charges were based on separate acts, the convictions for first-degree assault merged into a conviction for robbery with a dangerous and deadly weapon. *Williams*, 187 Md. App. at 477, *Morris*, 192 Md. App. at 44.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.