UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1912

September Term, 2014

JOSEPH HERSHEY

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: July 9, 2015

In the Circuit Court for Baltimore City, Joseph Hershey was tried for assault in the second degree. During the selection of alternate jurors, the State exercised a peremptory challenge, which prompted Hershey to raise a general objection to the composition of the regular jury. The court overruled the objection, and the jury ultimately convicted Hershey of second degree assault.

Hershey now appeals from the resulting judgment and asks this Court to remand the case for a hearing on whether the State exercised its peremptory challenges on an impermissibly discriminatory basis. For the reasons explained below, we affirm the circuit court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Assault

On May 26, 2014, Joseph Hershey and his fiancée Kristen Schwartzman spent the Memorial Day holiday drinking alcohol at their residence in Baltimore City. Hershey and Schwartzman are the parents of a child who was one year old at that time. Around 10:00 p.m., Schwartzman went upstairs to take their child to bed, but she left her cell phone downstairs. Hershey examined Schwartzman's phone and noticed that she had received a text message from a male friend.

Hershey became angry and went upstairs to confront Schwartzman. He began yelling at her, punching her in the face and neck, and slamming her head against a window in the child's bedroom. Hershey also kicked Schwartzman in the ankle as she attempted to escape from the room.

An officer arrived minutes after receiving a report of assault from neighbors. The officer observed that Schwartzman was crying, that she was bleeding from her ear, and that she had bruises on her face, neck, and ankle.

B. Jury Selection and Trial

Hershey was charged with the crime of assault in the second degree. The jury selection phase of his trial occurred on September 23, 2014. After the State and the defense each used four peremptory challenges against potential jurors,[1] a panel of 12 jurors was seated. Both Hershey and the State indicated satisfaction with each of the 12 members of that panel.

The parties then proceeded to the selection of two alternate jurors. After the first alternate juror was seated, the State exercised an additional peremptory challenge against the next potential alternate juror.[2] At that point, defense counsel asked to approach the bench. The following exchange ensued:

> [DEFENSE:] Your Honor, respectfully, the five peremptory challenges that have so far been used –
>
> THE COURT: She's only had four peremptory challenges and you didn't challenge her on that. This is alternate. This is on a very separate scale.

[1] In criminal cases in which the defendant is not subject to a potential sentence of more than 20 years on any single count, each party is permitted four peremptory challenges. *See* Md. Rule 4-313(a)(1).

[2] *See* Md. Rule 4-313(a)(4) ("For each alternate juror to be selected, the State is permitted one additional peremptory challenge for each defendant").

[DEFENSE:] And, Your Honor, I would in that case object to the 12, to the regular jury.

THE COURT: That ship has passed, ma'am. That ship has passed. Stand back.

Moments later, a second alternate juror was seated. The prosecutor announced that both alternate jurors were acceptable to the State. Jury selection then concluded with this exchange:

THE CLERK: Is Alternate Number 1 acceptable to the Defense?

[DEFENSE:] Court's indulgence. Yes, acceptable to the Defense.

THE CLERK: Is Alternate Number 2 acceptable to the Defense?

[DEFENSE:] Yes.

THE CLERK: You have a panel.

THE COURT: We have a panel. Thank you.

The jury was then sworn, and the trial proceeded.

The case against Hershey relied primarily upon testimony from Schwartzman, photographs of her injuries, and testimony from the officer who had responded to the complaint. After the two alternate jurors were excused at the end of the trial, the jury found Hershey guilty of second degree assault.

On September 25, 2014, the court sentenced Hershey to the maximum period of 10 years of imprisonment. *See* Md. Code (2002, 2012 Repl. Vol.), § 3-203(b) of the Criminal Law Article. Hershey then filed this timely appeal.

QUESTION PRESENTED

Hershey presents a single question for our review, which we quote: "Was it error for the court to refuse to hear any objections to the State's five peremptory strikes, after the first of two alternates was selected?" For the reasons discussed in this opinion, we conclude that there is no basis to disturb the judgment.

DISCUSSION

A. The *Batson* Framework for Assessing Discrimination in Jury Selection

Although the issue plainly does not appear to have been addressed anywhere in the record, Hershey now seeks an opportunity to show that the State excluded persons from the jury on the basis of race or gender. Hershey contends that his general objection to the composition of the jury should have triggered the three-step process articulated by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), for evaluating a claim that peremptory challenges have been exercised on an impermissibly discriminatory basis.

Under both federal and Maryland constitutional law, the State may not use peremptory challenges to exclude prospective jurors on account of their race or gender. *See Batson*, 476 U.S. at 89 (Equal Protection Clause of the Fourteenth Amendment forbids prosecutor from challenging potential jurors solely on account of their race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (Equal Protection Clause prohibits discrimination in jury selection on the basis of gender); *Gilchrist v. State*, 340 Md. 606, 624-25 (1995) (under Article 24 of Maryland Declaration of Rights, peremptory challenges may not be exercised on the basis

of race); *Tyler v. State*, 330 Md. 261, 266 (1993) (Articles 24 and 46 of Maryland Declaration of Rights prohibit State from using peremptory challenges to exclude potential jurors because of their gender).

"When a criminal defendant raises a *Batson* claim, the trial judge must follow a three-step process." *Whittlesey v. State*, 340 Md. 30, 46 (1995). First, the defendant has the burden of making a prima facie showing that the State has exercised its challenges on a discriminatory basis; second, if the court determines that the requisite showing has been made, the State must have the opportunity to rebut the inference of discrimination by offering a neutral, non-discriminatory explanation for challenging the prospective jurors; and finally, the trial court must determine whether the defendant has carried the burden of proving purposeful discrimination. *See, e.g.*, *Gilchrist*, 340 Md. at 625-26.

Under this framework, the burden for initiating the inquiry rests squarely with the objecting party. *See Bailey v. State*, 84 Md. App. 323, 326-27 (1990), *cert. denied*, 321 Md. 225 (1990). A defendant objecting to a prosecutor's use of peremptory challenges must satisfy the initial burden of showing facts and other relevant circumstances that create a rebuttable presumption of purposeful discrimination. *See Mejia v. State*, 328 Md. 522, 532-33 (1992); *State v. Gorman*, 315 Md. 402, 410 (1989). "Unless it is established by a preponderance of the evidence, no response by the other party is necessary." *Mejia*, 328 Md. at 532; *see Edmonds v. State*, 372 Md. 314, 335 (2002).

In other words, "a defendant may trigger an equal protection inquiry into a prosecutor's motive" not simply by stating an objection but "by establishing a prima facie case of purposeful discrimination." *Parker v. State*, 72 Md. App. 610, 616 (1987); *see Adams v. State*, 86 Md. App. 377, 384 (1991) (rejecting proposition that "a mere statement of challenge is sufficient to meet the burden"); *Bailey*, 84 Md. App. at 326-27 (explaining that the "elaborate responses of *Batson* are not intended to be a knee-jerk reaction every time a charge of discrimination is laid"). Consequently, "[t]he objection to the prosecutor's exercise of peremptories, *as well as the prima facie case*, must occur . . . in a timely manner." *Parker*, 72 Md. App. at 616 (emphasis added).

The Court of Appeals has explained that even though "an objection made just before the jury is sworn will ordinarily be sufficient to preserve a *Batson* issue for appellate review, under some circumstances prudence may suggest some action at an earlier time." *Stanley & Trice v. State*, 313 Md. 50, 69-70 (1988). In particular, the Court has emphasized that counsel should take action to ensure that the record includes the necessary information about the pertinent characteristics of the venire as a whole and of the persons excluded and retained. *Id.* at 70 & nn.10-11. Consequently, this Court has held that a defendant who seeks reversal of a conviction on *Batson* grounds also bears the burden of "making an adequate record" for the appellate court to evaluate whether the defendant made the required prima facie showing to the trial court. *See Bailey*, 84 Md. App. at 333-34 & n.6 (holding that appellate court had no basis to conclude that trial judge clearly erred or abused its discretion

in determining that appellant failed to make a prima facie showing of racial discrimination, where record did not include adequate information about racial composition of venire panel).

Relying on *Bailey*, the State contends that Hershey "forfeited appellate review of his claim by failing to create an adequate record upon which the trial court's decision can be reviewed." The transcript includes no information about the race of any of the prospective jurors, and only a few persons in the venire were identified as male or female on the record.[3] Of the five prospective jurors who were targeted by the State's peremptory challenges during voir dire, only one gave an affirmative response, indicating that he had a prior drug conviction. As the State correctly observes here, the record fails to contain sufficient "information that would allow a reviewing court to conduct even a cursory analysis as to whether the State exercised its peremptory strikes in violation of *Batson*."

Despite the inadequate record, Hershey suggests that this Court should remand the case for a limited hearing into the circumstances of the exercise of the State's peremptory challenges. He relies upon a line of cases in which a criminal defendant established a prima facie showing of discrimination in connection with a *Batson* objection, but the court then erred while conducting the remainder of the inquiry. *See Mejia*, 328 Md. at 539; *Gorman*, 324 Md. at 129; *Stanley & Trice*, 313 Md. at 92-93; *see also Chew v. State*, 71 Md. App. 681, 697-98 (1987), *vacated after remand*, 317 Md. 233 (1989). Under circumstances where the

[3] Hershey states that, even though the current record includes no information about the membership of jurors in cognizable groups, the jury list provided to defense counsel includes the gender of each potential juror. *See* Md. Rule 4-312(c).

trial court's actions deprive the State of an opportunity to respond to a defendant's prima facie showing, fairness dictates that the State on remand be "afforded a chance to explain its challenges, if it can." *Stanley & Trice*, 313 Md. at 76; *see Mejia*, 328 Md. at 540-41; *Gorman*, 324 Md. at 131.[4]

By the terms of his argument, Hershey concedes that, unlike the defendants in those cases, he made no prima facie showing of purposeful discrimination in the trial court. Hershey only suggests here that he *might* satisfy his burden to make a prima facie showing of discrimination if he were given another opportunity to do so. He argues that the blame for his failure to satisfy his initial burden should be attributed to the trial court. As discussed below, however, we conclude that the trial court cannot be faulted for the failure to conduct a *Batson* inquiry that Hershey never sufficiently requested.[5]

[4] This type of limited *Batson* hearing is appropriate where a reasonable possibility exists that the parties can reconstruct events with sufficient clarity to permit a fair determination of the issue. The trial judge is required to order a new trial if "the passage of time precludes fair consideration of the relevant issues[.]" *Chew v. State*, 317 Md. 233, 239 (1989).

[5] The State also contends that Hershey later waived his objections to the jury selection process when he expressed that the two alternate jurors were acceptable to the defense. We disagree. After he objected to the 12 members of the jury panel, Hershey never affirmatively or unequivocally expressed his satisfaction with the jury as a whole. Defense counsel's statement that Alternate Jurors Number 1 and 2 were acceptable is not inconsistent with the position that the other 12 members of the panel were objectionable. *See Gilchrist*, 340 Md. at 618 (holding that defense counsel did not waive objection to selection of first group of jurors by stating that second group of jurors was acceptable).

B. Insufficiency of Hershey's *Batson* Objection

Hershey argues that the court's actions unfairly deprived him of an opportunity to articulate his *Batson* challenge. He focuses upon a single fact in the record: the trial judge interrupted one of defense counsel's statements about the prosecution's use of peremptory challenges. When defense counsel stated: "Your Honor, respectfully, the five peremptory challenges that have so far been used[,]" the judge interrupted and stated that the prosecutor "only had four peremptory challenges and [the defense] didn't challenge her on that. This is alternate. This is on a very separate scale."

Hershey interprets the court's comment as a ruling that any objection to the State's exercise of peremptory challenges could no longer be made. The State argues here that the court "found it necessary to intervene and clarify" that the State had not exceeded the permitted number of strikes because the statement from defense inaccurately suggested that the State had exhausted its challenges. We find it unnecessary to endorse either party's interpretation. Under any fair reading of the transcript, the court's comment implicitly invited the defense to clarify the basis of its objection.

Rather than request a *Batson* ruling, defense counsel simply made a general objection to the composition of the jury ("I would in that case object to the 12, to the regular jury"), which the court overruled as untimely ("That ship has passed").

Hershey submits that the "orderly, three-step procedure" established by *Batson* and its progeny "could have commenced, here, had the trial court not: (1) interrupted defense

counsel's challenge to the State's peremptory challenges, in mid-sentence; (2) failed to ask the defense for specific grounds of objection to the State's peremptories; and (3) erroneously ruled that the objection was untimely." Hershey contends that he made a general objection to the composition of the jury, which preserved a *Batson* challenge for this appeal. In support, he relies upon the general principle that grounds for an objection need not be stated unless required by rule or requested by the court.[6]

In response, the State argues that the court's mere interruption to one of defense counsel's sentences did not deprive the defense of the opportunity to continue speaking and to develop that objection. The State further argues that it was not the court's responsibility to ask for specific grounds for Hershey's objection, but it was incumbent on defense counsel to clarify any need for a *Batson* ruling. The State also points out that Hershey had an additional opportunity to voice objections before the jury was sworn, but instead he indicated his satisfaction with the remaining alternate jurors. In sum, the State contends that Hershey failed to raise any *Batson* issue so that it could be decided by the trial court, despite sufficient opportunity to do so.

We agree that Hershey's statements were insufficient to bring any *Batson* issue to the trial court's attention. Maryland Rule 4-323(c) provides the basic standard for the method of making objections to non-evidentiary rulings, including objections made during jury

[6] Hershey cites no cases that concern the manner of making an objection to a party's use of peremptory challenges. He relies only on cases involving objections to the admission of evidence.

selection. *See Elliott v. State*, 185 Md. App. 692, 710 (2009) (applying Rule to *Batson* objection); *Marquadt v. State*, 164 Md. App. 95, 142 (2005). The rule states:

> **(c) Objections to Other Rulings or Orders.** For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Md. Rule 4-323(c).

This objection requirement operates in conjunction with the cardinal rule governing the preservation of issues for appellate review: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). These rules "have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court, and these rules must be followed in all cases[.]" *Conyers v. State*, 354 Md. 132, 150 (1999); *see also Handy v. State*, 201 Md. App. 521, 544-45 (2011) ("the purposes of Rule 8-131 are '(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion'") (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)).

Even though the grounds for an objection generally need not be stated, Hershey's statements here were by no means sufficient to make known to the court that he desired a *Batson* ruling. We cannot fault a trial court for its failure to conduct the three-step analysis unless the party adequately alerts the court of the need to employ that procedure. *See Malarkey v. State*, 188 Md. App. 126, 156-57 (2009) (stating that the "trial court cannot correct errors of which it is not informed" and holding that defendant waived claim of error because he failed to make known to the court that he was entitled to a ruling on outstanding motion).

Under our precedent, no particular form of words is necessary to make known to the trial court the party's desire for a ruling on whether the State used its peremptory challenges in a discriminatory manner. A party can properly introduce the issue simply by stating, "I would like to make a Batson challenge." *E.g. Adams v. State*, 86 Md. App. 377, 383 (1991); *see also Mejia*, 328 Md. at 528 (defense counsel stated "'I am going to object . . . on the grounds of the *Batson* case'"). Of course, the objecting party need not refer to the *Batson* case by its name, but also may ask the court to examine whether the other party has excluded potential jurors on an impermissibly discriminatory basis. *E.g. Harley v. State*, 341 Md. 395, 397 (1996) (defense counsel stated that "the State [was] inappropriately challenging [] two black jurors without any basis for doing so other than the racial basis"); *Tolbert v. State*, 315 Md. 13, 17 (1989) (defense counsel objected "to the way that the State is striking only black potential jurors" and asked the court to "inquire or ask the State to articulate a reason");

Elliott, 185 Md. App. at 706-07 (defense counsel stated "[t]he issue I'm raising is whether [the State] used a disproportionate number of [] strikes on men").[7]

Hershey points us to no case, and we have found none, in which it was sufficient for a party to make a *Batson* motion simply by expressing general dissatisfaction with the other party's use of challenges or to the overall composition of the jury panel.

In fact, in *Ball v. Martin*, 108 Md. App. 435, 456-58, *cert. denied*, 342 Md. 472 (1996), this Court reasoned that even an explicit reference to a pattern of peremptory strikes against members of a cognizable group, without more, is not necessarily sufficient to direct the court's attention to the need for a ruling on the issue of purposeful discrimination. In *Ball*, 108 Md. App. at 439, a party objected to the other party's striking of the only African-American juror, which triggered a *Batson* hearing. "[A]fter the trial court overruled the objection, [the objecting party] stated: 'I'm going to put one more thing on the record, . . . all of [the other party's] strikes were of women.'" *Id.* at 457. On appeal, Ball attempted to raise the issue of whether the court erred "'in failing to provide Appellant a proper hearing regarding her *Batson* challenge which challenged Appellee's gender discriminatory peremptory strike[s] of three women[.]'" *Id.* at 439.

[7] Because the mere statement of a challenge is not enough to satisfy the objecting party's initial burden, the party should also come forward at that time to make the prima facie case of purposeful discrimination. *See Adams*, 86 Md. App. at 383-84 (holding that even though defendant stated a *Batson* objection, defendant failed to make prima facie case of discrimination by failing to supply any reasons to support the challenge).

Among the many reasons for rejecting that challenge, we explained that, under the circumstances, a mere statement that the other party had used all of his strikes against women "is not, without more, elevated to a *Batson* objection." *Id.* at 457. Furthermore, we reasoned: "[E]ven if [the issue] were sufficiently raised, the trial court held no hearing and made no ruling for us to review. More important, because appellant did not direct the trial court's attention to the need, if any, for a hearing or a ruling, the issue is thus waived." *Id.* at 457-58. The proffer that we deemed inadequate in *Ball* was substantially more informative than the statements made by Hershey's counsel, which did nothing to indicate to the trial court that it should rule on whether the State had exercised its peremptory strikes on a discriminatory basis.

As this Court has explained: "Considerations of fairness and judicial efficiency generally require that all challenges that a party wishes to make to a trial court's action or conduct 'be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.'" *Malarkey*, 188 Md. App. at 157 (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)). Hershey did not make an adequate factual record of the foundation for a *Batson* challenge, did not make a prima facie showing of purposeful discrimination, and did not ask the trial court to evaluate whether he had made such a showing. The trial judge's interruption of one sentence from the defense counsel did not relieve her of her obligation to "make[] known to the court the action that the party

desires the court to take or the objection to the action of the court." Md. Rule 4-323(c). Under the circumstances of this case, Hershey is not entitled to a hearing on a *Batson* challenge after he failed to request any ruling on the issue at his trial.

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