Circuit Court for Prince George's County
Case No. CT181167X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 557

September Term, 2019

ARNOLD NDUNGU GESICHO

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 11, 2021

Arnold Ndungu Gesicho was found guilty by a jury in the Circuit Court for Prince George's County of ten counts of possession of a counterfeit credit card[1] in violation of Maryland Code, (2002, 2012 Repl. Vol.) Criminal Law Article (CL), § 8-205(b).[2] In his timely appeal, appellant presents three issues for our review, which we have recast and reorganized for clarity. He asserts: first, that the trial court erred in denying his *Batson*[3] challenge; second, that the court erred in permitting the State's lay witnesses to offer expert testimony; and third, that the evidence was not sufficient to sustain the convictions.[4]

Finding neither error nor abuse of discretion, we shall affirm.

BACKGROUND

The Charges

It is not disputed that, on June 12, 2018, at Largo Liquors, in Prince George's County, appellant presented a credit card in payment for a purchase. The attending clerk, Jay Kim, testified that he swiped the card through the credit card reader, but the "machine wouldn't let [him] process the card because it knows it has a chip and this card doesn't

[1] Under Criminal Law Article § 8-201(c)(2) a "Credit card", as defined, also includes "a debit card."

[2] Appellant was sentenced to ten years' incarceration on each count, to run concurrently, with all suspended but 18 months, followed by five years' probation.

[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[4] The questions presented by appellant are:

1. Did the trial court err in denying a *Batson* challenge raised by the defense?
2. Is the evidence sufficient to sustain Mr. Gesicho's convictions?
3. Did the trial court err in permitting the State's witnesses to testify as a lay witness where expert testimony was required?

have a chip embedded in [the] front of the card." Mr. Kim explained that he again swiped the card, this time through a second card reader to "verify the card" and learned that the numbers embossed on the face of the card did not comport with the numbers encoded on the magnetic strip on the back of the card. He testified that, from the "countless" times he had processed credit cards, the fact that the last four numbers were "totally different" told him, from his experience, that it was "a fraudulent card." Mr. Kim testified that, as a result, he called his regular contact in the Prince George's County Police Department, Detective Michael Meta, a financial crimes investigator, who responded to the store.[5]

After having been advised of the circumstances by Mr. Kim, Det. Meta ran the card through his "county-issued credit card analyzer[,]" which is a "magnetic strip reader."[6] The results of that test indicated to him that the last four numbers embossed on the card did not match the last four numbers encoded on the card's magnetic strip. Det. Meta then arrested appellant, and a search of appellant's person incident to his arrest revealed several additional credit cards.[7] Det. Meta testified that he likewise "ran" the additional cards through his "credit card analyzer," revealing that 11 of the additional cards bore embossed numbers that did not match the numbers encoded in their respective magnetic strips.

[5] For some inexplicable reason, appellant chose to remain at the store and await Det. Meta's arrival.

[6] During the course of Detective Meta's testimony, he refers to the machine used to authenticate the cards as both a "credit card analyzer" and a "magnetic strip reader," interchangeably.

[7] Appellant does not challenge either his arrest or the search of his person.

The State charged appellant with one count of theft under $1,500 and with 12 counts of possession of a counterfeit credit card. The jury returned guilty verdicts as to ten counts of possession of a counterfeit card.[8]

The State's case consisted of the testimony of the store clerk, Jay Kim, and Det. Meta, and the admission of the 12 counterfeit credit cards. Appellant offered no evidence in his defense.

DISCUSSION

Standards of Review

Each of appellant's three challenges require consideration under different standards of review. As such, in our review, we apply the appropriate standard to each issue.

With respect to *Batson* challenges,"'[t]hese determinations made by the trial court are essentially factual, and therefore are accorded great deference on appeal[.] An appellate court will not reverse a trial judge's determination as to the sufficiency of the reasons offered unless it is clearly erroneous.'" *Spencer v. State*, 450 Md. 530, 548 (2016) (internal citations omitted) (quoting *Gilchrist v. State*, 340 Md. 606, 627 (1995)).

Whether to require a witness to be qualified as an expert on a particular subject is left to the discretion of the trial court; hence, we review such rulings under an abuse of discretion standard. *Ragland v. State*, 385 Md. 706, 726 (2005).

As to appellant's various evidentiary challenges:

[8] The court granted appellant's motion for judgment of acquittal as to the theft count and the parties stipulated to acquittal of two counts of possession where the card numbers provided on the indictment did not match the cards in evidence.

> We review the trial court's rulings on the admissibility of evidence under an abuse of discretion standard. *Bernadyn v. State*, 390 Md. 1, 7 (2005).… We review *de novo* the issue of whether the evidence is sufficient to sustain [appellant's] convictions. *Hudson v. State*, 152 Md. App. 488, 523, *cert. denied*, 378 Md. 618 (2003). In reviewing for sufficiency, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

Wilder v. State, 191 Md. App. 319, 335 (2010).

The *Batson* Challenge

The Supreme Court has held that "the Equal Protection Clause (of the Fourteenth Amendment) 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." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).[9] The *Batson* Court outlined a three-step analysis that trial courts must engage in when a challenge based on discriminatory jury selection—a *Batson* challenge—is made. *Batson*, 476 U.S. at 96–98; *Spencer*, 450 Md. at 552 (quoting *Gilchrist*, 340 Md. at 625–27). First, the party raising the challenge must demonstrate a *prima facie* case of intentional discrimination. *Spencer*, 450 Md. at 552 (quoting *Gilchrist*, 340 Md. at 625). If that step is satisfied, the non-moving party bears the burden of offering neutral grounds for its strike(s). *Id*. (quoting *Gilchrist*, 340 Md. at 625–26). Finally, the court must determine whether the moving party has met its burden of showing that the opposing party engaged in intentional discrimination in its strike(s). *Id*. (quoting *Gilchrist*, 340 Md. at 626).

[9] The prohibition has been extended to also include challenges on the basis of gender and ethnicity. *See Ray-Simmons v. State*, 446 Md. 429, 435 n. 1 (2016) (collecting cases).

With respect to whether a *prima facia* case of intentional discrimination has been presented, we have explained that:

> The determination of whether that threshold has been crossed is entrusted to the trial judge. 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. It is the trial judge who enjoys the immeasurably superior vantage point to sense the mood and to catch the tone of the entire proceeding.

Bailey v. State, 84 Md. App. 323, 328 (1990).

On the record before us, we are concerned only with the first step because the trial court effectively ruled that the defense failed to establish a *prima facie* case of intentional discrimination. It is that ruling that appellant now asserts was erroneous and compels reversal. We recount from the transcript:

> [DEFENSE COUNSEL]: Your Honor, I'm raising a Batson challenge.
>
> THE COURT: As to what?
>
> [DEFENSE COUNSEL]: As to striking number 22 as well as --
>
> THE COURT: Which one?
>
> [DEFENSE COUNSEL]: Number 22.
>
> THE COURT: Twenty-two.
>
> What would be the basis? Give me a basis.
>
> [DEFENSE COUNSEL]: There is no reason the State struck the person other than -- I would raise it as to race.
>
> [DEFENSE CO-COUNSEL]: Not to race but to youth. Everyone has been a young black person that [the State] struck.
>
> THE COURT: Anyone has been a what?

[DEFENSE CO-COUNSEL]: A young black person.

THE COURT: They don't like youth.

[DEFENSE COUNSEL]: I would raise it as to race as well.

THE COURT: Is there a bias that is recognizable when it comes to age?

[DEFENSE COUNSEL]: I'm raising it as to race.

THE COURT: No. Step back.

The prosecutor stood silent during that brief exchange, and the court did not elaborate on the basis of its ruling.

Appellant argues that the court erred by rejecting his *Batson* challenge without requiring that the State explain its reason for the strikes, thereby implicitly ruling that the defense had not established a *prima facie* basis for the challenge.

The State denies, on this record, that appellant's "challenge" rose to the level of a *prima facie* challenge. The State points out the lack of information in the record, including the trial transcript, about the racial composition of the venire or of jurors already seated and accepted by the parties, without objection, at the time of the State's objection to Juror No. 22, who would have been one of two prospective alternate jurors.[10] The trial court, of course, was able to make those observations as the *voir dire* proceeded and as it ruled. Moreover, appellant offered no evidence of purposeful racial discrimination in the selection process. Even appellant's counsel and co-counsel were in disagreement as to the appropriate grounds for the *Batson* challenge, with co-counsel contradicting the initial

[10] Indeed, appellant's brief does not identify appellant's race.

assertion by counsel on the grounds of race, stating: "Not to race but to youth. Everyone has been a young black person that [the State] struck."

Because we are reviewing largely fact-based determinations, "[w]e afford great deference to a trial court's *Batson* rulings and findings of fact on the question of discriminatory intent." *Berry v. State*, 155 Md. App. 144, 160 (2004) (citation omitted). Such determinations are "afforded great deference" by reviewing courts, and "will only be reversed if [a finding] is clearly erroneous." *Ray-Simmons*, 446 Md. at 437 (citing *Edmonds v. State*, 372 Md. 314, 331 (2002)).

"Whether the requisite *prima facie* showing has been made is the trial judge's call, which must be made in light of all of the relevant circumstances." *Mejia v. State*, 328 Md. 522, 533 (1992) (internal citations omitted). Those circumstances "include 'a pattern of strikes against … jurors [of the cognizable group] in the particular venire, or the prosecutor's questions and statements during the voir dire examination and the exercise of peremptory challenges….'" *Id*. (quoting *Stanley v. State*, 313 Md. 50, 60 (1988)). No such information has been provided in the record before us.

Significantly, in *Bailey v. State*, *supra*, writing for this Court, Judge Moylan said:

> 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.

Appellant offered nothing to the trial court that would address the *Bailey* considerations. Appellant did no more than assert a "*Batson* challenge" which, without more, does not amount to a *prima facie* case of purposeful discrimination. We find no error in the trial court's determination that appellant failed to satisfy the first level requirement of *Batson*.

Expert testimony by lay witnesses

Appellant argues that the court abused its discretion in permitting the testimony of both Mr. Kim and Det. Meta about their respective attempts at authentication of the card presented by appellant at Largo Liquors. That, appellant contends, was expert testimony offered by the State through lay witnesses, contrary to Md. Rules 5-701 and 5-702.

Appellant asserts:

> Mr. Kim testified that the credit card was fraudulent because the numbers on the front did not match … the numbers on the back. Detective Meta gave the jury a lesson on the components of a credit card and how they can be modified. Defense counsel objected to the testimony of both witnesses on the grounds that they were offering expert testimony as lay witnesses….

(Internal citations and footnote omitted).

The State, of course, finds no abuse of discretion in the court's ruling. The State further responds that appellant did not preserve his objection to Det. Meta's testimony.

Here, we are dealing primarily with Rule 5-701, governing the admissibility of testimony of lay witnesses, which provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences

> which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

On the other hand, the testimony of expert witnesses is governed by Rule 5-702, which provides that:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Both Mr. Kim and Det. Meta described only what they did in dealing with the card offered by appellant as payment for his purchase. Both relied solely on the use of credit card machines: Mr. Kim used one machine to attempt to process the card for the transaction and another machine to "verify" the card after the first machine had declined it; and Det. Meta used a machine to verify that the numbers programed on the card matched those embossed on the front of the card.

Mr. Kim reported that the card was declined by his store's credit card system and explained, without objection, that: "The machine wouldn't let me process the card because [the machine] knows it has a chip and this card doesn't have a chip embedded in front of the card." After which, he "swiped" the card through a second machine to verify the card. Mr. Kim merely announced that the embossed numbers did not match the embedded numbers, a conclusion that could be reached by any experienced store clerk or checker. From his experience, he explained, the nonmatching numbers told him it was "a fraudulent

card", so he contacted Det. Meta for assistance. It was that statement that is the basis of appellant's argument with respect to Mr. Kim's testimony.

On cross examination, Mr. Kim explained that he had Det. Meta's phone number and had notified him on previous occasions when he has encountered suspected counterfeit cards. Appellant also elicited from Mr. Kim that his experience is based only on his present employment and not from any other employment or training. His suspicion that the card was fraudulent was based on his perception that the numbers on the front of the card did not match those that the second machine reflected were programed onto the card.

Preservation

With respect to appellant's challenges to Det. Meta's testimony, we first take up the State's preservation argument. Det. Meta began his discussion about the magnetic strip reader he used by providing a brief explanation of the anatomy of credit cards. It was at this point that appellant objected to Det. Meta not having been qualified as an expert witness and not having received notice of the State's intent to offer expert testimony. The court overruled the objection, explaining that: "He can testify as to that machine. You get to question him too about the accuracy…."

After Det. Meta continued in his description of the function of the magnetic strip reader, the following ensued:

[THE STATE]: Did you run State's Exhibit 1 through your --

[DET. META]: I did.

[THE STATE]: -- machine. [sic] What, if anything, did it show you?

[DET. META]: So the first six numbers on the card --

[DEFENSE COUNSEL]: Objection. Withdrawn.

Det. Meta then continued to explain the function of the 16 numbers embossed on the front of the card, the first six of which are bank identification numbers and the last four of which are the account numbers. Then, at the State's request, Det. Meta demonstrated the magnetic strip reader for the benefit of the court and jury.[11] At that point, appellant again objected on the grounds of hearsay and relevance but did not specifically reassert an objection based on lay witness/expert witness grounds.

We shall hold, however, that the objection of the latter ground has been sufficiently preserved for our review. First, appellant made clear that his essential objection to the testimony of Det. Meta was on Rule 5-701 and Rule 5-702 grounds, and then, by using the same language when noting a subsequent objection on similar grounds, he adequately renewed the objection. Apart from that, we are unable to discern the meaning of defense counsel's two-word comment: "Objection. Withdrawn.", which was made without any accompanying explanation. The objection was adequately renewed and has been sufficiently preserved for our review.

Turning to appellant's substantive issue, we note that whether to require a witness to be qualified as an expert on a particular subject is left to the discretion of the trial court;

[11] At trial, appellant raised a number of objections to the State's use of demonstrative evidence and in having Det. Meta read what numbers appeared on the magnetic strip reader when he swiped State's Exhibit No. 1, the card appellant used when trying to make his purchase at the liquor store. He does not pursue any of those evidentiary challenges in this appeal.

hence, we review such rulings under an abuse of discretion standard. *Ragland v. State*, *supra*.

In his testimony, Det. Meta confirmed that, by use of his magnetic strip reader, the numbers on the front of the card and the numbers programed in the card did not match. He explained that he "had enough to detain and take [appellant] into custody for the possession of a reprogrammed credit card, which is essentially a counterfeit charge." A search incident to the arrest yielded several additional cards, all of which he ran through the card reader, which revealed that 11 additional cards from appellant's person were also found to have numbers programed that did not match those embossed.

Appellant calls our attention to *Ragland v State*, *supra*, wherein the Court of Appeals addressed whether the testimony of two police officers that, in their opinion, they observed a suspected drug transaction was admissible as lay opinion testimony. We believe *Ragland* to be inapposite to the circumstances underlying the instant appeal. In *Ragland*, the officers' testimony included their professional opinions that were based largely on their specialized knowledge, training, and experience that what they observed was in fact a drug transaction. 385 Md. at 725. In the instant appeal, however, there was no room for speculation on Det. Meta's conclusions. He was called to investigate a suspected fraudulent card and when he arrived, he ran the card in his magnetic strip reader, which revealed that the numbers did not match. Det. Meta, as well as Mr. Kim, did no more than determine that the embossed and embedded numbers did not match, a conclusion based on their observations, not opinion.

The State has called to our attention *Johnson v. State*, 457 Md. 513 (2018), wherein the Court of Appeals addressed the admissibility of testimony by the State's witness who read a GPS (Global Positioning System) generated report. In ruling that the reading of a GPS-generated report to the jury by a witness does not require that the witness be qualified as an expert, the Court observed:

> In our view, the times and locations reflected in GPS data in a business record do not necessarily require expert testimony to be admissible. Courts regularly admit business records through witnesses who are not experts in the technology that produced those records. In many instances, such records indicate, like the GPS report here, a person's (or device's) location at a given time, are produced or processed by computers, and are admitted without expert testimony—*e.g.*, computer generated reports from electronic ankle monitoring devices, electronic records of employee card access, computer reports generated from electronic hotel key cards, and computer reports from electronic toll transponders. Expert testimony about how a clock works is not necessary every time an employee's timesheet is offered into evidence. The same is true for GPS entries.

Johnson, 457 Md. at 532 (internal footnotes omitted).

As *Johnson* dealt with the reading of a GPS report, we are satisfied likewise that neither Mr. Kim nor Det. Meta used technical language in their testimony and that their testimony was decipherable by jurors without specialized knowledge. An overwhelming majority of noncash payments made in this country are consummated by the use of either a credit or debit card.[12] Because of the broad use of such cards, we can reasonably infer

[12] As the State notes, approximately 75 percent of all noncash payments made in 2018 were card payments, which included credit and debit cards, as estimated by the Federal Reserve Board. Federal Reserve Board, *The 2019 Federal Reserve Payments Study*, at 3 (Dec. 2019), available at: https://www.federalreserve.gov/newsevents/pressreleases/files/2019-payments-study-20191219.pdf. Of the 75 percent of noncash payments, 34 percent were made by credit card payments and 55 percent were made by non-prepaid debit card payments in 2018. *Id*. at 3–4.

that those who possess and legitimately use credit cards are aware that the information contained on and in the cards relates to their individual accounts. We can also reasonably conclude, as did the *Johnson* Court in its discussion of GPS, that testimony about the anatomy of credit cards is not so particularly related to some science or profession that is beyond the ken of the average layman. The testimony of Mr. Kim and Det. Meta was rationally based on their perception of the results of the "swiping" of the card and, in our view, was helpful to a clear understanding by jurors and the determination of the facts at issue.

We find no abuse of discretion in the rulings by the trial court on appellant's objections to the testimony of either Mr. Kim or Det. Meta.

Sufficiency of the Evidence

Section 8-205(b) of the Criminal Law Article, under which appellant was charged, provides:

> (b) A person may not, with the intent to defraud another:
> (1) falsely make a purported credit card;
> (2) falsely emboss a credit card; or
> (3) transfer or possess:
> (i) a falsely made instrument or device that purports to be a credit card, with knowledge that the instrument or device was falsely made; or
> (ii) a falsely embossed credit card with knowledge that the credit card was falsely made or falsely embossed.

The statute defines "falsely make" as meaning: "(i) to make or draw, wholly or partly, a device or instrument that purports to be a credit card but that is not a credit card because an issuer did not authorize the making or drawing; or (ii) to alter a credit card that was validly issued." CL § 8-205(a)(3).

Appellant contends that the State "failed to prove that [he] possessed credit cards that were falsely altered[,]" and that "[t]he State also failed to prove that [he] had the requisite intent." We find no merit in either of appellant's contentions.

The court carefully instructed the jury as to the elements of CL § 8-205(b) in accord with Maryland Criminal Pattern Jury Instruction MPJI-Cr 4:14.2(c):

> The Defendant is charged with the crime of counterfeiting a credit card. The crime of counterfeiting a credit card includes knowingly possessing a falsely made credit card and/or debit card. In order to convict the Defendant the State must prove: One, that the Defendant possessed a falsely made credit card and/or debit card; two, that the Defendant knew that the credit card and/or debit card was falsely made; and three, that the Defendant did so with the intent to defraud another.
>
> A falsely made credit card is one that was made to appear to be a credit card but is not genuine because an issuer did not authorize the making or a validly issued credit card that has been altered. An issuer is a business organization or financial institution or its agent that issues a credit card.
>
> Intent to defraud means [the] intent to deceive for the purpose of causing some financial or property loss to another.

The focus of the jury instructions was clearly on sub-section (b)(3)(i), which proscribes possession of "a falsely made instrument or device that purports to be a credit card, with knowledge that the instrument or device was falsely made[.]"

Appellant asserts that the State was required to prove specifically that the cards found in his possession were validly issued, and thereafter altered, as a predicate to proof of possession. We find no such burden in the statute. Each of the cards in evidence bore, on its face, evidence that it had been issued to appellant by an appropriate institution, as the trial court found in responding to appellant's motion for judgment. Det. Meta's testimony confirmed that appellant's name was embossed on all of the cards collected from

him and that numbers embossed on the face of each card did not match the numbers programed on the cards. Indeed, it is entirely possible that such cards were counterfeited on blank cards stolen before ever reaching an authorized issuer. The evidence was sufficient for the jury to infer that the 12 cards were illegally reprogramed or altered.

We recall the established standard of sufficiency—that the evidence before the trier of fact is sufficient to sustain a conviction when, viewed in a light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Wilder*, 191 Md. App. at 335. Moreover, our concern, as an appellate court,

> "is not whether the verdict below was in accord with the weight of the evidence, but rather, whether there was sufficient evidence at trial 'that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'"

Burlas v. State, 185 Md. App. 559, 568–69 (2009) (quoting *State v. Stanley*, 351 Md. 733, 750 (1998)).

We make short work of appellant's argument that the State failed to prove his intent to possess the counterfeit cards to defraud another. The State directs us to this Court's decisions in *Turner v. State*, 6 Md. App. 337, 339 (1969), in which we opined that "[i]n the absence of a satisfactory explanation the forgery could be inferred from the possession and uttering of the forged instrument[,]" (internal citation omitted), and in *Smith v. State*, 7 Md. App. 457, 461 (1969), wherein we explained that counterfeiting of an instrument indicates, "the making of a copy without authority or right and with a view to deceive or defraud by passing the copy as original or genuine." (Internal citation omitted). In other words, intent

to defraud may be inferred from possession of a forged or counterfeit instrument when it is presented as a valid instrument in order to pay for item, as was the case in the instant appeal.

That the State offered proof that appellant attempted to purchase goods with an altered credit card and was, at that time, in possession of 11 additional similarly altered cards, was sufficient for the jury to reasonably infer intent to defraud. Possession of one altered card might raise a reasonable doubt in the mind of a juror, but evidence of a defendant's possession of 11 additional altered cards provides considerably to the State's proof.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.