Circuit Court for Frederick County
Case No. C-10-CR-20-000322

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0593

September Term, 2021

EVERETT LEROY BARTON, JR.

v.

STATE OF MARYLAND

Wells, C.J.,
Ripken,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: June 8, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Everett Leroy Barton, Jr. ("Appellant") was charged with first-degree and second-degree assault of his wife. Mr. Barton elected to exercise his right to a trial by jury. During jury selection, defense counsel raised a *Batson*[1] challenge alleging the State used its peremptory strike to strike a potential juror on the basis of race. The State proffered that it was striking the potential juror because he did not answer any questions and because he worked in childcare, and children were witnesses in the case. The circuit court noted the defense's objection and overruled it. At the end of jury selection, the circuit court asked if the State and defense were satisfied. Both the State and defense answered in the affirmative. At the conclusion of the jury trial, Mr. Barton was convicted and later sentenced. This timely appeal followed.

Mr. Barton presents us with one question on appeal:

1. Did the trial court err when it denied defense counsel's *Batson* challenge?

Because we ultimately find that the defense did not preserve its *Batson* challenge, we affirm the conviction and sentence issued below.

FACTS AND PROCEDURAL HISTORY

Mr. Barton was charged with first- and second-degree assault stemming from an alleged incident that took place between Mr. Barton and his wife on April 19, 2020 at their home in Frederick County. Police officers were dispatched to their home and, after collecting statements from the Bartons and observing injuries to Mrs. Barton, Mr. Barton was arrested.

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

Mr. Barton was indicted by grand jury on June 12, 2020 for first- and second-degree assault related to the April 2020 incident. Mr. Barton pled not guilty and elected to be tried by a jury. Mr. Barton's trial for assault began on June 1, 2021. During jury selection, the State utilized one of its peremptory strikes to strike Juror 33—a Black man. The following colloquy took place regarding Juror 33:

> [CLERK]: Juror No. 33. Defense, do you seat or strike this juror?
>
> [DEFENSE]: Please seat the juror.
>
> [CLERK]: State?
>
> [STATE]: Please strike the juror.
>
> [COURT]: Sir, you may have a seat in the courtroom, and we will let you go here shortly.
>
> [DEFENSE]: May we approach?
>
> [COURT]: You may.
>
> (Bench conference follows:)
>
> [DEFENSE]: I'm going to make a *Batson* challenge at this time. The State has no other information about this particular juror other than the fact that he's in graduate school and he's 18 – I mean, sorry, that he's 36. It's clear that the State is seeking to strike him simply because he's African American.
>
> [COURT]: Okay. Your client is not African-American. Is the –
>
> [DEFENSE]: Doesn't matter.
>
> [COURT]: – victim? I know. Is the victim?
>
> [STATE]: No.
>
> [COURT]: Okay. Are you striking the juror for any of those reasons?

> [STATE]: No, Your Honor. He didn't answer any questions, wasn't able to gain a lot of information about him, so we, we struck him.
>
> [COURT]: Okay.
>
> [DEFENSE]: Your Honor, *Batson* says that just the lack of information in and of itself is not enough to strike a juror. There has to be some affirmative reason for striking the juror in a – even in a peremptory challenge, especially when an African-American juror is involved.
>
> [STATE]: Your Honor, he's in childcare. I mean, our children are witnesses in this case. So –
>
> [COURT]: Okay.
>
> [DEFENSE]: The children are 17, Your Honor.
>
> [COURT]: Right, but they're underage. Okay. Your objection is noted for the record, and it's overruled.

At the conclusion of jury selection, the trial judge asked counsel for both parties if they were satisfied with the jury selection.

> [COURT]: State satisfied?
>
> [STATE]: Yes we are, Your Honor.
>
> [COURT]: Defense satisfied?
>
> [DEFENSE]: Yes, Your Honor.
>
> [COURT]: All right. Approach, please.
>
> (Bench conference follows:)
>
> [COURT]: Just to – just to make sure the record is clear on your *Batson* challenge, there is an African-American juror on the jury.
>
> [DEFENSE]: I know. Yes.
>
> [COURT]: Okay. So – okay. Thank you.

After alternate jurors were selected, the jury was seated and the trial began. After a three-day jury trial, Mr. Barton was found guilty of first- and second-degree assault of his wife. Mr. Barton was sentenced to 25 years in prison with all but 15 years suspended and five years of supervised probation upon release.[2] This timely appeal followed.

DISCUSSION

The United States Supreme Court ruled it was unconstitutional to discriminate on the basis of race in jury selection. *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986) ("The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of . . . race."). Striking a juror on the basis of race not only violates the Equal Protection Clause of the Fourteenth Amendment, but also violates Article 24 of the Maryland Declaration of Rights. *Gilchrist v. State*, 340 Md. 606, 625 (1995).

Once a *Batson* challenge is raised, the trial judge must engage in the following three-step process:

> [First,] [t]he burden is initially upon the defendant to make a *prima facie* showing of purposeful discrimination. [Second,] [i]f the requisite showing has been made, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Whittlesey v. State, 340 Md. 30, 46–47 (1995) (cleaned up).

[2] The second-degree assault conviction was merged with the first-degree assault conviction for sentencing purposes.

In this case, Appellant asserts that the State discriminated on the basis of race when striking Juror 33 and that the trial judge erred in denying defense counsel's *Batson* challenge. We do not reach the merits of the *Batson* challenge because, as the State correctly asserts, Appellant did not properly preserve the *Batson* challenge for appeal.

The Court of Appeals has long held that a defendant's challenge to the inclusion or exclusion of a prospective juror "is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process." *E.g.*, *Gilchrist*, 340 Md. at 617 (quoting *Mills v. State*, 310 Md. 33, 40 (1987), *vacated on other grounds*, 486 U.S. 367 (1988)). A challenge to the inclusion or exclusion of a juror is properly preserved when the party raised a *Batson* challenge and excepted to the final composition of the jury. *See Edmonds v. State*, 372 Md. 314, 328 (2002).

At the conclusion of jury selection, defense counsel indicated he was satisfied, without exception. Appellant asks us to ignore defense counsel's affirmative satisfaction and infer exception because the trial judge stated at a bench conference—after he indicated satisfaction and for the *Batson* challenge record—that the jury included one Black juror. We do not infer exception from the trial judge's statements—defendant or defense counsel must affirmatively except to the jury selection. *See, e.g.*, *Ray-Simmons v. State*, 446 Md. 429, 440 (2016) (holding that the *Batson* challenge was preserved when defense counsel stated the jury was acceptable, except for prior objections); *Edmonds*, 372 Md. at 325–26, 328 (holding that defendant did not waive the *Batson* challenge when defense counsel again objected to the composition of the jury before it was impaneled).

Neither Mr. Barton nor his counsel raised an objection at the conclusion of jury selection, and instead defense counsel indicated his satisfaction with the jury. Without expressing any exception or qualification to his expression of satisfaction, Appellant abandoned and waived the *Batson* challenge.

Appellant asks us to (1) overrule *Gilchrist*, or (2) exercise plain error review. We deny both requests. The Court of Special Appeals does not have the authority to overrule decisions of the Court of Appeals. "The rulings of the Court of Appeals remain the law of this State until and unless those decisions are either explained away or overruled by the Court of Appeals itself." *Foster v. State*, 247 Md. App. 642, 651 (2020) (cleaned up) (quoting *Scarborough v. Altstatt*, 228 Md. App. 560, 577 (2016)).

With regard to plain error review, Appellant does not meet the criteria to qualify for such review. In order to obtain plain error review, the following four prongs must be met:

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Rich, 415 Md. 567, 578 (2010) (cleaned up) (quoting *Puckett v. U.S.*, 556 U.S. 129, 135 (2009)).

Meeting all four prongs of the above test is difficult. *See Rich*, 415 Md. at 579 (quoting *Puckett*, 556 U.S. at 135). Prong one requires the Court to determine whether Appellant waived his right to challenge the legal error. As discussed above, Appellant waived the *Batson* challenge when defense counsel affirmatively expressed satisfaction with the jury, without exception. When defense counsel expressed his satisfaction without qualification, he not only abandoned his *Batson* challenge, but also forewent his right to plain error review. *Gilchrist*, 340 Md. at 617 (holding that a defendant's "claim of error" is abandoned and waived when defendant or his counsel expresses satisfaction with the jury at the conclusion of the jury selection, without qualification or exception).

Additionally, Appellant would fail under prong two because the error is subjective and subject to reasonable dispute. The trial judge has discretion to decide whether the State's race-neutral explanation is credible. Whether the State exercised its peremptory strike of Juror 33 with racially discriminatory intent is not clear in this case. Because Appellant abandoned the *Batson* challenge and the error is subject to reasonable dispute, Appellant fails to meet all four prongs required for plain error review.

CONCLUSION

Appellant waived his *Batson* challenge and does not qualify for plain error review. Therefore, we shall affirm his conviction and sentence instituted below.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.