Circuit Court for Howard County
Case No. 13-K-16-057265

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1072

September Term, 2017

RENEE NICOL

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: April 12, 2018

After a trial held on June 27 and 28, 2017, a jury sitting in the Circuit Court for Howard County convicted Renee Nicol, appellant, of possession of cocaine with intent to distribute, conspiracy to distribute cocaine, and conspiracy to possess cocaine with intent to distribute. The circuit court sentenced appellant to ten years' imprisonment, with all but six years suspended, for conspiracy to distribute cocaine, and to a concurrent ten-year sentence, with all but six years suspended, for possession of cocaine with intent to distribute. The court merged, for sentencing purposes, appellant's conviction for the second conspiracy. On appeal, appellant argues that the circuit court erred in denying her challenge to the State's striking of two African American prospective jurors during the jury selection stage of the trial.

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

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was arrested on October 12, 2016 at a hotel room in Laurel after Howard County police officers, executing a search warrant, entered the hotel room where they located appellant and two other individuals. Inside the room, police found 53 individually wrapped bags of a "white rock-like substance" which was later determined to be 12.15 grams of cocaine. Police found an additional four baggies of white powder, also determined to be cocaine, weighing .339 grams, .41 grams, and .436 grams, and 3.122 grams, respectively, as well as a folded dollar bill containing a white substance determined to be cocaine, a digital scale, a handwritten ledger, and approximately $823.00 in cash. The case was eventually set for a jury trial in circuit court.

During jury selection, appellant, who is a female Caucasian, exercised all ten of her peremptory strikes to remove Caucasian jurors. The State used two of its five peremptory strikes against Juror Number 11 and Juror Number 31, both of whom were African American venirepersons. Appellant, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), challenged the State's use of its peremptory strikes against those jurors, and the following colloquy ensued:

> THE COURT: Your basis for striking [Juror Number] 31?
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> [PROSECUTOR]: Permission, Your Honor. I have struck a number of jurors. That previous juror I struck was also a pretty young age. Life experience and the type of evidence I'm going to present I think that's important. The juror I struck earlier I struck him because he answered – he was mistaken about whether he was [Juror Number] 10 or 11. Now, you expect jurors to do that. Difficulty paying attention. Frankly, he had trouble getting around, too. But I would also note as far as *Batson* goes, counsel has only struck white jurors and that challenge wasn't raised.
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> [DEFENSE COUNSEL]: Well, that's –
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> [PROSECUTOR]: I'm sorry, counsel. Beyond that there are three African-American jurors on the panel. On top of that [appellant] is not African-American. The issue isn't *Batson*. So I am trying to create a jury that's sympathetic or not sympathetic to a particular person is not even an issue in this. It's not been an issue in this case. So that's my response, Your Honor.
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> THE COURT: Anything else?
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> [DEFENSE COUNSEL]: Well, your Honor, yes. I think that with respect to counsel's point about who I struck I would just say at this time relevant at this stage is counsel never raised a *Batson* challenge. I could provide a race-neutral answer for each and every one of my strikes. And quite frankly, 95 percent of the jurors are not African-American or seemingly of one race.

THE COURT: Let me ask you this. In a case where the Defendant is not African-American tell me about the [applicability] of *Batson*.

[DEFENSE COUNSEL]: Sure. I think that counsel said it perfectly with respect to creating certain – there's an assumption that certain types of people would be sympathetic to certain types of Defendants, but I think that goes to jurors being – the race of the jurors being sympathetic to certain types of crimes such as, a crime like this involving drug distribution, alleged drug distribution and drug possession, so that would be the basis for the challenge and how it's relevant to my particular client.

[PROSECUTOR]: Your Honor, I don't know anything in the law that suggests that jurors of certain backgrounds are more susceptible to certain types of –

THE COURT: Is it your position that the *Batson* case does not apply where the Defendant is not –

[PROSECUTOR]: Yes, Your Honor. That was the issue in *Batson* and counsel's argument about certain types of jurors might be less informed on certain types of crimes [is] not legally founded. That's not what *Batson* is about.

THE COURT: I do note that Juror Number 31 is only 19 years of age. I accept that as a racially neutral criteria being applied by the State. And I do believe that Juror Number 11 didn't remember his own number when he came in for the jury roll call. And given the fact that [appellant] is not African-American I'm not even – I'm not convinced that *Batson* has applicability.

[DEFENSE COUNSEL]: Okay. Thank you, Your Honor.

THE COURT: So I – Just so –

[DEFENSE COUNSEL]: I'm sorry.

THE COURT: So I would be inclined to deny your motion.

[DEFENSE COUNSEL]: Okay. Thank you for considering our objection for the record.

THE COURT: Thank you.

[DEFENSE COUNSEL]: Thank you.

As indicated, appellant was convicted of multiple narcotics-related offenses, sentenced, and thereafter noted a timely appeal.

DISCUSSION

Appellant challenges the court's denial of her *Batson* challenge on the grounds that the court misapplied the holding in *Batson*, and improperly denied her challenge with respect to Juror 11 because it failed to make a determination as to whether the prosecutor's proffered reason for the strike was pretextual.[1] The State responds that appellant's *Batson* challenge is unpreserved because, after raising her *Batson* challenge, she failed to "preserve" her challenge by failing to object to the jury that was ultimately selected. The State also contends that appellant's *Batson* challenge is unpreserved because at trial, appellant did not cite to the holding in *Powers v. Ohio*, 499 U.S. 400 (1991), which, the State claims, is the basis of her appellate claim. Alternatively, on the merits, the State contends that the trial court properly executed the *Batson* analysis. The State asserts that the trial court is permitted to implicitly rule on the State's proffered

[1] Appellant states in her brief that she "acknowledges that it appears [from the court's colloquy with counsel] that the court accepted the State's assertion that it struck Juror Number 11 because that juror was young and age has been recognized as a valid racially neutral criteria in Maryland. *Bridges v. State*, 116 Md. 113, 133 (1997)." Appellant's reference to "Juror Number 11" appears to be a typographical error, as the court stated that it accepted the State's assertion that it struck *Juror Number 31*, who was 19 years old, due to her age. In her brief, appellant limits her argument to the court's ruling on her *Batson* challenge as it relates to Juror Number 11. Accordingly, we limit our review to the court's ruling as it relates to Juror Number 11.

race-neutral reasons, and that its determination that the State's proffered reasons were nondiscriminatory was not clearly erroneous.

As a preliminary matter, we do not agree with the State regarding preservation. Waiver of a *Batson* challenge may occur where a party objects to the inclusion or exclusion of a someone in a particular venire, and "thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable[.]" *Gilchrist v. State*, 340 Md. 606, 618 (1995). *Accord Ray-Simmons v. State*, 446 Md. 429, 449 (2016) (statement that one is satisfied with the jury that was selected will ordinarily waive any issue concerning jury selection). Here, the court did not inquire as to whether the jury, as impaneled, was satisfactory to appellant, and appellant made no statement to the court indicating that the final jury panel was acceptable to her. Accordingly, appellant's *Batson* challenge was preserved when the trial court expressly ruled on her challenge and denied it.

We are also unpersuaded by the State's argument that appellant's *Batson* challenge is unpreserved because defense counsel failed to argue at trial that her challenge was based on the holding in *Powers*, as she now argues on appeal. At trial, defense counsel stated that he was challenging the State's striking of Jurors Number 11 and 31 "[b]oth of whom are African-American neither of whom answered any questions." Defense counsel's failure to cite to *Powers* in response to the court's inquiry as to the applicability of *Batson*, is not fatal to appellant's claim. Appellant's argument

on appeal is consistent with her position below that the State's peremptory strikes of Jurors Number 11 and 31 were discriminatory, and we shall review her claim.

Based on our review of the record, we have no difficulty concluding that although the trial court and counsel questioned *Batson*'s applicability in this case, the court applied the *Batson* analysis in evaluating appellant's challenge. The holding of *Batson* applies equally to protect jurors from being excluded solely on the basis of their race or on the assumption that their race affects their ability to be impartial, regardless of which party exercises the race-based peremptory challenges. *Gilchrist*, 340 Md. at 622-24 (citation omitted). "The underlying purpose of *Batson* and its progeny is to protect the defendant's right to a fair trial, to protect the venireperson's right not to be excluded on an impermissible discriminatory basis, and to preserve public confidence in the judicial system." *Edmonds v. State*, 372 Md. 314, 329 (2002) (citing *Powers*, 499 U.S. at 404-10, *Batson*, 476 U.S. at 85-88, *Jones v. State*, 343 Md. 584, 592-94 (1996), *Gilchrist*, 340 Md. at 620-21). The court's concerns about whether *Batson* applied in this case, although unfounded, did not affect the court's application of the law, as the court proceeded to evaluate appellant's challenge using the *Batson* analysis.

Appellant argues that even if the trial court did not misapply the *Batson* holding, the court failed to make an ultimate finding that the State's proffered race-neutral reason for striking Juror Number 11 was not pretextual or discriminatory. In *Batson*, 476 U.S. at 89, the Supreme Court held that exercising a peremptory challenge to exclude a potential juror solely on the basis of his or her race, gender, or ethnicity violates the Equal

Protection Clause of the Fourteenth Amendment to the United States' Constitution. *Batson* set forth a three-part test for evaluation of whether the Equal Protection Clause had been violated. 476 U.S. at 96-98. The Court of Appeals, in *Ray-Simmons v. State*, 446 Md. 429, 435 (2016), discussed the "three-step process" a court undertakes in evaluating a claim of purposeful discrimination under *Batson*. At step one of the process, the party challenging the strike must make out a *prima facie* case of discrimination by showing that the peremptory strike of a potential juror "was exercised on one or more of the constitutionally prohibited bases." *Id.* at 436.

Once the objecting party makes the requisite showing, "'the burden of production shifts to the proponent of the strike to come forward with' an explanation for the strike that is neutral as to race, gender, and ethnicity." *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995)). "'Any reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation.'" *Id.* (quoting *Edmunds*, 372 Md. at 330). "If the defending party offers a race-neutral reason, the challenging party must demonstrate that the offered explanation merely is a pretext for a discriminatory intent or purpose." *Edmonds*, 372 Md. at 330.

The trial court then proceeds to step three to determine "whether the opponent of the strike has proved purposeful racial discrimination." *Ray-Simmons*, 446 Md. at 437 (quoting *Purkett*, 514 U.S. at 767)). "'At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'" *Parker v. State*, 365 Md. 299, 309 (2001) (quoting *Purkett*, 514 U.S. at 768). Because the trial

court's determinations regarding the ultimate question of discriminatory intent are essentially factual, they are to be accorded great deference and will only be overturned when they are clearly erroneous. *Id.* (citation omitted). *See also Elliot v. State*, 185 Md. App. 692, 714 (2009) (citations omitted). Step three of the analysis is one of credibility, which is measured by many factors: the demeanor of counsel, the reasonableness or improbability of the explanations, and whether the proffered rationale has some basis in accepted trial strategy. *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003).

As the Court of Appeals has observed, "Sometimes the record is adequate for a reviewing court to find that the trial judge implicitly ruled on the pretextuality of a proffered race-neutral reason. An implicit finding may be acceptable if it is apparent from the record that the court found the reason to be nondiscriminatory." *Edmonds*, 372 Md. at 337, n.13 (collecting cases). Based on the record, we conclude that this is such a case. The trial court, in considering the prosecutor's tendered reason for striking Juror Number 11, stated that Juror Number 11 "didn't remember his own number when he came in for the jury roll call." The court's statement indicated that it had accepted the prosecutor's given reason that Juror Number 11's inability to remember his juror number reflected a lack of attention, and that it found that reason to be nondiscriminatory.

The trial court was in a superior position to assess the prosecutor's stated race-neutral reason and evaluate his demeanor and credibility. *See Harley v. State*, 341 Md. 395, 402-04 (1996). Moreover, we conclude that the court's analysis was not incomplete, even though the court did not address the prosecutor's comment that "[f]rankly, Juror

Number 11] had trouble getting around too." A court is not required to "make detailed findings addressing all the evidence before it." *Miller-El*, 537 U.S. at 347. *See also Whittlesley v. State*, 340 Md. 30, 48 (1995) ("Although it would have been preferable for the trial judge to state the reasons for his [*Batson*] ruling expressly, we presume that the trial judge properly applied the law."). Although the court did not place on the record detailed reasons for finding that the prosecutor's proffered explanation for striking Juror Number 11 was non-pretextual and race-neutral, we are satisfied that it did make such a finding, and that its finding was not clearly erroneous.

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