Circuit Court for Wicomico County
Case No. 22-K-16-000658

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1223

September Term, 2017

OMARI HORNE JOYNER

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Meredith, J.

Filed: July 9, 2018

*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.

At the conclusion of a jury trial in the Circuit Court for Wicomico County, Omari Horne Joyner, appellant, was convicted of second-degree rape and second-degree assault. After sentencing, Joyner noted a timely appeal and presented us with the following two questions for review:

1. Did the trial court err in failing to properly apply the test enunciated in *Batson v. Kentuck*y, 476 U.S. 79 (1986), regarding the striking of Juror 353?

2. Did trial counsel's waiver of a meritorious *Batson* issue for appeal deny Appellant his constitutional right to effective assistance of counsel under the Sixth & Fourteenth Amendments to the United States Constitution, and Articles 21 & 24 of the Maryland Declaration of Rights?

For the reasons discussed below we affirm.

BACKGROUND

The Offense

Because Joyner does not contend that the evidence was not legally sufficient to support his convictions, we shall only briefly recount the events giving rise to Joyner's convictions.

The victim — I.J. — and her friends met Joyner and his brother-in law (Dexton "Dex" Jackson) on the beach in Ocean City, Maryland, during the summer of 2016. Thereafter, the women invited Joyner and Jackson back to their apartment, and the group consumed alcohol and smoked marijuana to the point of intoxication. At some point, Jackson engaged in sexual intercourse with I.J., and later, Joyner initiated sexual intercourse with I.J. I.J. testified that, during the intercourse, she was intoxicated, and she

told Joyner to stop. At trial, Joyner claimed the sexual intercourse was consensual. The jury found Joyner guilty of second-degree rape and second-degree assault.[1]

The *Batson* Challenge[2]

During jury selection, the following occurred, out of the presence of the jury, after the State indicated it would exercise a peremptory strike as to juror 353:

> DEFENSE: I rarely make this type of challenge; however, I would note for the record that juror 353 presently seated in seat number four is an African-American female aged 62, responded to no questions by my recollection or my notes made on the qualification form. **I don't believe that she's the first African-American juror challenged by the State, I'm just looking for a reason**.
>
> THE COURT: Okay.
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> THE STATE: Your Honor, I'd note for the record that the first strike by the State involved a white female aged 63. The second strike from the State included a young male age 26. Candidly I couldn't recall what the third strike was with respect to, and fourth, Your Honor, what color they were. But clearly the strikes are not being based on color rather than State's preference, Your Honor.
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> THE COURT: Okay. Any specific reason as it relates to this juror?

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[1] The jury found Joyner guilty of the variant of second-degree rape that prohibits sexual intercourse with a person the defendant knows to be a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, in violation of Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 3-304(a)(2). The jury acquitted Joyner of the counts charging first-degree rape, conspiracy to commit first degree rape, and conspiracy to commit second-degree rape. The jury could not agree on a unanimous verdict for the counts charging force-based second-degree rape and false imprisonment.

[2] *See Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that exercising peremptory strikes solely on the basis of race during jury selection violates a defendant's rights under the Equal Protection Clause of the United States Constitution).

> THE STATE: Candidly, Your Honor, because I'm trying to get to more men.
>
> THE COURT: Because what?
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> THE STATE: Because I'm trying to get more men.
>
> DEFENSE: I'm sorry, I couldn't hear.
>
> THE STATE: Trying to get to more men.
>
> DEFENSE: Trying to get to more men.
>
> THE COURT: All right. Anything further?
>
> DEFENSE: Just wanted to make that record.
>
> THE COURT: The record's been made, the motion is denied.

(Emphasis added.)

Thereafter, just prior to the jury being sworn, all parties indicated their acceptance of the jury panel.

The Parties' Contentions

As explained above, at trial, when Joyner raised a *Batson* challenge on the basis of race, after the State peremptorily struck a female African American potential juror, the trial court requested that the State offer an explanation for the strike. The State explained that the strike was not based on race, but rather, the State explained that "[c]andidly, [the State was] trying to get more men [on the jury]."

In this Court, Joyner asserts that the trial court "clearly erred in failing to recognize that gender was an illegitimate basis for a peremptory strike and in failing to complete the *Batson* inquiry and divine whether or not the prosecutor was engaging in purposeful racial

discrimination." Joyner claims that, "[i]n any event, the prosecutor's facially invalid reason (gender) for striking [the female African American juror] patently amounted to a *Batson* violation," which requires reversal of Joyner's convictions.

On appeal, Joyner recognizes that, when he accepted without qualification the jury as empaneled at trial, he failed to preserve his *Batson* challenge for appellate review. *See Gilchrist v. State*, 340 Md. 606, 618 (1995). Nevertheless, Joyner "forcefully suggests" that this Court invoke its discretion under Maryland Rule 8-131(a) to review the *Batson* challenge as plain error because, according to Joyner, this case involves a "blatant" *Batson* violation which "indisputably fundamentally affect[ed] the fairness and integrity of the proceedings." According to Joyner, it is at least "most unlikely," and at most "frankly inconceivable," that failing to preserve the *Batson* challenge was a matter of tactics or strategy.

As an alternative to his entreaty to this Court to exercise its extraordinary power of plain error review, Joyner urges this Court to find that trial counsel's failure to preserve the *Batson* challenge denied Joyner his right to effective assistance of counsel. Joyner argues that "there is simply no plausible tactical reason for trial counsel not to have taken proper exception at the conclusion of the jury selection process in order to preserve the merits of the *Batson* issue for appellate review in this case."

The State contends that this Court should decline to review Joyner's unpreserved claims. While the State agrees with Joyner that gender is an impermissible basis to strike a prospective juror under *Batson's* progeny, and also agrees that, had Joyner asserted and maintained a *Batson* challenge on the basis of gender, the claim may have had merit, the

State nonetheless asserts that this Court should decline appellate review of Joyner's *Batson* claim because Joyner waived the claim when he expressly stated at trial that he was satisfied with the jury as selected.

The State disagrees that this case warrants plain error review, noting that such review is not generally extended to situations where an appellant "affirmatively (as opposed to passively) waived" his objection by expressing satisfaction with the trial court's course of action. Moreover, according to the State, plain error review is also not available "where a defendant fails to object as a matter of trial tactics." [3]

The State claims that Joyner ignores the very real possibility that his trial counsel's failure to object to the State's concession that its peremptory strike was gender-based may very well have been attributable to a calculated trial strategy. The State posits that "defense counsel may have viewed a jury with more men on it as a jury that would be more likely to entertain a reasonable doubt on the disputed issues of consent and capacity to consent [to sexual intercourse] in this case." The State's argument continues:

> If defense counsel indeed waived the *Batson* violation for that strategic reason, and if this Court nevertheless were to review the waived *Batson* challenge for plain error, it would effectively reward Joyner with a "free

[3] On appeal, Joyner admits that his expression of satisfaction with the jury as selected "may be viewed to operate as a waiver of the *Batson* issue." In response, the State directs our attention to authority standing for the proposition that, for purposes of plain error review, there is a dramatic difference between rights that are waived, and those that are forfeited. As the State points out, citing *State v. Rich*, 415 Md. 567 (2010), "[f]orfeited rights are reviewable for plain error, while waived rights are not." *Id.* at 578. Hence, the State argues that, because Joyner waived the *Batson* challenge, the claim is not reviewable as plain error. In his Reply Brief in this Court, Joyner has seemingly shifted tacks and now claims that the *Batson* challenge was forfeited, rather than waived, and the error is, therefore, eligible for plain error review. In light of our resolution of this case, we need not, and do not, decide these potentially interesting legal questions.

> play": having taken a chance at getting an acquittal from jury panel that was selected unconstitutionally but in a way he perceived as favorable, Joyner could get a new trial and another chance at acquittal from a different jury, despite losing his initial gambit.

With respect to Joyner's claim that he was denied his right to effective assistance of counsel, the State contends that this direct appeal is not the best vehicle for Joyner to pursue such a claim; instead, his claim of ineffective assistance of counsel should be litigated "in the usual way" by the filing of a petition for post-conviction relief. The State notes that, although this Court has, on rare occasion, entertained a claim of ineffective assistance of counsel on direct appeal when the record is sufficiently developed and the critical facts are not in dispute, this is not such a claim because, as noted, there is, according to the State, a possibility that trial counsel's actions were attributable to legitimate trial strategy.

DISCUSSION

Batson Generally

In *Ray-Simmons v. State*, 446 Md. 429 (2016), the Court of Appeals reiterated that "*Batson* [*v. Kentucky*, 476 U.S. 79 (1986),] and its progeny instruct that the exercise of peremptory challenges on the basis of race, gender, or ethnicity violates the Equal Protection Clause of the Fourteenth Amendment." *Id*. at 435. Ordinarily trial courts follow the three-step process, delineated in *Batson,* to aid its determination of whether a party had "exercised a peremptory challenge to eliminate a prospective juror based on his or her race, gender, or ethnicity." *Id*.[4]

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[4] At step one, the party raising the *Batson* challenge must make a prima facie showing -- produce some evidence -- that the opposing party's peremptory

But the Court of Appeals explained in *Gilchrist v. State*, 340 Md. 606 (1995), that, when a party "complains about the exclusion of someone from or the inclusion of someone in a particular jury, *and thereafter* states *without qualification* that the same jury as ultimately chosen is satisfactory or acceptable, *the party is clearly waiving or abandoning* the earlier complaint about that jury." *Id.* at 618 (emphasis added). *Accord State v. Stringfellow*, 425 Md. 461, 469 (2012).

Here, both parties agree that neither a race-based, nor a gender-based, *Batson* challenge has been preserved for direct appeal because Joyner accepted, without qualification, the jury as empaneled despite that he had earlier objected during jury selection for race-based *Batson* reasons. While this Court is not bound by the concessions

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> challenge to a prospective juror was exercised on one or more of the constitutionally prohibited bases.
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> * * *
>
> If the objecting party satisfies that preliminary burden, the court proceeds to step two, at which 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.
>
> ***
>
> If a neutral explanation is tendered by the proponent of the strike, the trial court proceeds to step three, at which the court must decide whether the opponent of the strike has proved purposeful racial discrimination.

Id. at 435-36 (citations and internal quotation marks omitted).

However, "the question of whether the challenger has made a prima facie case under step one becomes moot if the striking party offers an explanation for the challenged strike." *Id.* at 437.

of the parties, *Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515, 523 (2004), in this case, we agree that no *Batson* related claims have been preserved for appellate review. *Gilchrist,* 340 Md. at 618.

Plain Error

As noted earlier, Joyner urges us to review the *Batson* challenge(s) in this case as plain error despite his acceptance of the jury as ultimately empaneled. Pursuant to Maryland Rule 8-131(a), we ordinarily will not decide issues that do not plainly appear to have been "raised in or decided by the trial court." However, "[w]e may decide . . . an issue that was not raised or decided by the trial court 'if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.'" *Boulden v. State,* 414 Md. 284, 297 (2010) (quoting Md. Rule 8-131(a)). "The purpose of Md. Rule 8-131(a) is to ensure fairness for all parties in a case and to promote the orderly administration of law." *Robinson v. State*, 410 Md. 91, 103 (2009) (internal citations and quotations marks omitted). "Such prerogative to review an unpreserved claim of error, however, is to be rarely exercised and only when doing so furthers, rather than undermines, the purposes of the rule." *Id.* at 104; *see Conyers v. State*, 354 Md. 132, 150-51 (1999) (discussing the narrow circumstances under which this Court will exercise its discretion to review an unpreserved issue).

The observations made by the Court of Appeals in *Robinson* persuade us that Joyner's case is not one in which we should exercise our discretion to excuse the lack of preservation:

> We have said that the appellate court should exercise the discretion to review an unpreserved claim of error "only when it is clear that it will not work an unfair prejudice to the parties or to the court." *Jones* [*v. State*, 379 Md. 704, 713 (2004).] Unfair prejudice may result, for example, when counsel fails to bring the position of her client to the attention of the trial court so "that court can pass upon and correct any errors in its own proceedings." *Id.* It would be unfair to the trial court and opposing counsel, moreover, if the appellate court were to review on direct appeal an un-objected to claim of error under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent. *See id.*; *Conyers*, 354 Md. at 150 (observing that "[t]he few cases where we have exercised our discretion to review unpreserved issues are cases where prejudicial error was found and the failure to preserve the issue was not a matter of trial tactics"). Moreover, **if the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship**. *See, e.g., State v. Rose*, 345 Md. 238, 250 (1997) (observing that excusing the requirement of a contemporaneous objection by defense counsel "would allow defense attorneys to remain silent in the face of the most egregious and obvious instructional errors at trial").

Robinson, supra, 410 Md. at 104 (emphasis added).

Ineffective Assistance of Counsel

As noted earlier, Joyner also urges us to rule that his trial counsel's failure to have preserved his arguments regarding the alleged *Batson* challenges denied him his right to effective assistance of counsel. He claims that we should review this claim of ineffective assistance of counsel on direct appeal despite the fact that it was an issue that was not considered by the circuit court, and despite the cases that hold that post-conviction proceedings are the preferred forum for review of such claims. *See, e.g., Mosely v. State*, 378 Md. 548, 572-73 (2003); *Washington v. State*, 191 Md. App. 48, 71-72 (2010).

In *Mosley*, the Court of Appeals emphasized that Maryland continues to "adhere to our long-standing view that ineffective assistance of counsel claims are best tested in post-conviction proceedings and that review of such claims on direct appeal is limited to the

rare exception where the record is sufficiently developed and the critical facts are not in dispute." *Id*. at 572-73. Here, trial counsel has not testified about his jury selection strategy, and we decline to evaluate counsel's effectiveness in the absence of a more complete record on that topic.

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