Circuit Court for Baltimore County
Case No. 03K15005122

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1759

September Term, 2016

DEIDRA GRIFFIN

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: April 23, 2018

This appeal arises from the conviction of appellant Deidra Griffin for the shooting death of her child's father, Lonnie Paye, Jr. At the conclusion of a four-day jury trial, on June 10, 2016, Griffin was found guilty of first-degree murder and the use of a handgun in the commission of a crime of violence. On September 22, 2016, the Circuit Court for Baltimore County sentenced Griffin to life with all but 60 years suspended, plus ten years to be served concurrently, and five years of supervised probation upon her release. Griffin asks that we review four issues, which we have reworded as follows:

1. Whether the trial court erred in admitting evidence that Griffin owned a 9 millimeter ("9 mm") pistol, even though the State conceded it was not the firearm that was used in the shooting of Paye.

2. Whether the trial court abused its discretion in the manner in which it responded to a juror's question about whether Griffin could receive the death penalty if convicted.

3. Whether the trial court impermissibly shifted the burden of determining bias to the jurors by its phrasing of two *voir dire* questions.

4. Whether the trial court abused its discretion in denying Griffin's *Batson* claim.

## BACKGROUND

On July 1, 2015, around 8:00 P.M., Wanda Gresham called the police from her cell phone while standing outside of the house of her boyfriend, Paye, on Travancore Road in Randallstown, Maryland in Baltimore County. When officers from the Baltimore County Police Department arrived, Gresham said that she had not heard from Paye since June 19,

2015 and believed something might be wrong. Gresham pointed out that the grass was overgrown and told the officers that Paye was meticulous about his lawn. The officers checked the mailbox and discovered that it had not been cleared since June 19, 2016. Unable to find a way into the house, the officers called the fire department to open the front door. While waiting for the fire department, however, one of the officers checked what appeared to be Paye's work van in the driveway, found that it was unlocked, and pressed a garage door opener that he located inside. One of the doors on the attached garage opened, and the officers immediately observed the odor of a deceased body. Once inside, officers found Paye's body lying on the garage floor between two of his vehicles. Ultimately, the officers entered the home and observed no signs of forced entry or evidence of a struggle inside, but noticed a surveillance camera pointed outside of the front entrance of the house. At some point, the officers located four bullet casings in the garage between a wall and one of Paye's vehicles and determined the likely cause of death to be homicide. Detectives Massey and Janowitz were assigned the case and they arrived on the scene around 11:30 P.M.

Gresham told investigators that she and Paye met on a dating website two or three months earlier. She said that she did not live with Paye and did not have a key to his house, but she had stayed the night with him on June 18, 2015 and left for work sometime around 6:30 AM on June 19, 2016. She stated that she and Paye had plans to make dinner together later on the evening of June 19, and that she left that morning on good terms with him. She explained, further, that Paye was involved in a custody dispute with Griffin, Paye's ex-

girlfriend, who was currently living in Michigan with Paye and Griffin's nearly one-year-old son, Preston. Gresham told the officers that Paye was recently awarded visitation, he was scheduled to have his first visitation from June 25 to June 30, 2015, and that he had planned to drive to Michigan to pick him up. In addition, Gresham said that she had agreed to go with Paye to shop for a crib and other items prior to the visitation, because Paye, at age 51, was a first-time father and needed to set up a room for Preston.

When Paye did not respond to Gresham's calls or texts or answer the door on June 19, Gresham thought that perhaps she had done something wrong and Paye was choosing not to answer. Gresham went back to her own home that night, which was a five-minute drive from Paye's house, but she continued to call and text Paye. Gresham told the officers that she returned to the house approximately every other day and never received an answer, but thought that Paye might have left early for Michigan to pick up his son. Receiving no response by July 1, 2015 -- one day after Paye would have returned from bringing Preston back to Michigan -- Gresham finally called the police.

In the days following July 1, 2015, detectives began reviewing the video surveillance recovered from the front entrance of Paye's home. The video showed that, on the morning of June 19, Gresham left the home around 7:00 A.M., and Paye left the house a few minutes later. Around 2:00 P.M. that afternoon, an unknown person -- who appeared to detectives to be an African American woman with a size and stature similar to Griffin -- entered the front door with a key. The person was wearing a tan or brown outfit and a hat with a brim. A few hours later, the video showed Paye returning home in his work van

and eventually entering the house. A few minutes later, the unknown individual exited the front door carrying a bag of items, wearing a black glove on one hand.

In part, because detectives learned that Paye was involved in a custody dispute with Griffin, on July 4, 2015, Detective Massey and his partner flew to Ann Arbor, Michigan and traveled with officers from the local police department to Griffin's house in Bay City. Griffin -- who was hosting a BBQ for the holiday with her family -- was cooperative and agreed to go with the detectives to the local station to answer questions. Griffin informed the detectives that she had flown to Baltimore and rented a car on June 16, 2015 for an interview at Johns Hopkins University, but that she flew back to Michigan on June 17, 2015 and had not returned to the Baltimore area. Detective Massey testified that, at some point during his trip to Michigan, he learned that Griffin owned a 9 mm handgun, which she purchased in 2014.[1]

Detective Massey testified that upon returning to Maryland, the detectives confirmed that Griffin attended an interview at Johns Hopkins University on June 16, 2015. They also obtained a copy of Griffin's rental car agreement with Payless Rental Cars, which corroborated Griffin's account -- Griffin picked up a Jeep Cherokee at the BWI rental car complex on June 16, 2015 and returned it on June 17, 2015. The detectives observed, however, that Griffin had reported to Payless that the license plate was stolen from the vehicle. Further, Detective Massey explained that they were able to obtain

[1] The shell casings found on the floor of Paye's garage were later determined to be 9 mm ammunition.

Griffin's cell phone records for the relevant time period and saw that she called a Baltimore area phone number days before the shooting. They later learned the number belonged to an EZ Storage facility in Randallstown, and that Griffin leased a storage unit there. The access logs and video surveillance footage at EZ Storage showed that someone had accessed Griffin's unit on June 18, 2015 -- a day after Griffin told investigators that she had already returned to Michigan. Further, the video showed that the person who entered Griffin's access code drove a Chevy Malibu or similar vehicle onto the premises. The person appeared to kneel down and stand up multiple times in front of the vehicle in a way that led detectives to believe that the driver was changing the license plate.

Detective Massey explained to the jury that certain police vehicles in Baltimore City are outfitted with a "license plate reader," which takes many high-speed photographs of license plates throughout the day, embedding each photograph with a time and location stamp. Police are able to enter individual license plate numbers into the system to look for a match, and the detectives did so for both Paye's work van and the license plate that Griffin claimed was stolen from her rented Jeep Cherokee. They found that the license plate on Paye's work van was captured by a police vehicle near the intersection of Liberty and Marriotsville Road, not far from Paye's house, a few minutes after Paye's surveillance camera showed him leaving home. The detectives found that the plate reader also captured the stolen license plate at the same location within seconds of capturing Paye's work van. Detective Massey testified that investigators obtained surveillance footage from the morning of June 19, 2015 from a Dunkin' Donuts that had a camera pointed at the area

where the license plate reader captured Paye's work van and the stolen plate number. The Dunkin' Donuts footage showed Paye in his work van at a traffic light and, only seconds later, what appeared to be a Malibu following closely behind.

The detectives returned to Michigan on July 20, 2015, arrested Griffin for the murder of Paye, and executed a search warrant on her home. During the search, police recovered a 9 mm PX 4 Storm semiautomatic pistol, empty boxes of 9 mm Federal brand ammunition, and paper targets with the name of a nearby shooting range printed on them. The detectives went to the range and talked to an employee who remembered Griffin -- he said that she came to the shooting range the previous October and told him that, although she had some familiarity with long guns, she needed instruction on how to shoot a 9 mm pistol that she had recently purchased. The employee provided Griffin with some training on how to shoot a 9 mm handgun. During the week leading up to the murder, however, Griffin had returned to the shooting range two times and practiced with a 9 mm pistol. Later, the detectives had Griffin's 9 mm pistol tested to determine whether it was the firearm that shot the two bullets recovered from Paye's body or produced the four casings found on Paye's garage floor. The firearms examiner found, however, that the firearm recovered from Griffin's home was not the same gun that shot the bullets or produced the casings.[2]

[2] The firearms examiner testified that the shell casings were stamped as Federal brand ammunition.

While the detectives were in Michigan to arrest Griffin, they spoke with a man named Martin Hodder, who said that he was Griffin's older brother's best friend of many years. Hodder testified at trial that, around June 13, 2015, Griffin contacted him and asked him for a favor. He said that Griffin claimed that she had a job interview in Chicago, Illinois, but that her credit cards were maxed out, and she needed a rental car to drive to the interview. She asked Hodder to put the vehicle in his name and told him that she would reimburse him for the expense, and Hodder agreed to help. Hodder testified that he gave detectives screenshots of his text conversations with Griffin, and he read the following text from Griffin aloud for the jury:

> Martin, thanks for your help. I need a mid sized car from Wednesday 6-17 until Sunday 6-21. Let me know the cost and . . . I can deposit the funds in a bank account or drop you a check in the mail later. Touch base after you get more details. Tell Sharon I said, hey.

Hodder testified that on June 16, 2015, he went to Enterprise Rental Cars in Ann Arbor, Michigan and rented a car for Griffin. Because Griffin told him that she would not be able to pick up the car until later, Hodder drove the car out of the rental facility, parked in a nearby lot, and left the keys under a rear floor mat. He took a photograph of the car on his phone and sent it to Griffin, letting her know where the car would be when she arrived. Hodder later shared the photograph of the car, which was still on his phone, with the detectives. At trial, he identified a car in the photo as the light tan Chevy Malibu that he rented for Griffin. The rental records from Enterprise indicated that the Malibu was

returned in the early morning hours of June 22, 2015. We discuss other facts related to the proceedings below.

## DISCUSSION

### I. The Circuit Court Did Not Abuse Its Discretion by Admitting Evidence of Griffin's Ownership of a 9 mm Handgun, Empty Ammunition Boxes, or Paper Shooting Targets.

Griffin argues that the trial court erred by admitting evidence of Griffin's ownership of a 9 mm handgun, empty ammunition boxes, and paper shooting targets recovered from Griffin's home. The trial court held a hearing on Griffin's motion *in limine*, during which she argued that her ownership of the gun was not relevant because it was not used in the shooting. The State argued that the three gun-related items recovered from Griffin's Michigan home were probative of Griffin's preparation and training with a similar firearm in the weeks preceding the shooting. After hearing argument from both sides, the circuit court ruled as follows:

> When I take into account in this particular case that the state seeks to make a connection between the defendant's training, the fact that the same size shell casing as that found with the empty boxes in the residence, and evidence of the same size gun, I'm going to allow the evidence except I will not allow the admission of the actual gun into evidence. There is absolutely no reason to do that. It is not the gun that was involved in this particular shooting and I will not allow that. The paper targets, the boxes can come in.

We review a trial court's decision whether to admit or exclude relevant evidence under an abuse of discretion standard. *See State v. Simms*, 420 Md. 705, 724 (2011). We generally afford the trial court wide discretion in making this determination. *Id.* To be

admissible at trial, however, evidence must be relevant. Md. Rule 5-401; *see also Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013) (explaining that the trial court has no discretion to admit irrelevant evidence). Whether certain evidence is relevant is a legal determination, which we review *de novo*. *See Simms*, 420 Md. at 724 (Citations omitted).

To be "relevant," the evidence must be probative of a material fact. *See Williams v. State*, 342 Md. 724, 737 (1996). Relevant evidence "makes the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401; *see also Snyder v. State*, 361 Md. 580, 591 (2000) (explaining that the trial court must be satisfied that the admission of "the proffered item . . . increases or decreases the probability of the existence of a material fact"). Moreover, the trial court's determination of relevance is "not made in isolation"; "[i]nstead, the test . . . is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable." *Id.* at 592 (Emphasis added) (Citation omitted). "It is not necessary," however, "that evidence of this nature conclusively establish guilt." *Simms*, 420 Md. at 727 (quoting *Thomas v. State*, 397 Md. 557, 577 (2007)). Instead, "[t]he proper inquiry is whether the evidence *could* support an inference" that is probative of a material fact. *Id.*

Even if the trial court finds that the evidence is relevant, however, it must determine whether "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Md. Rule 5-403. We explained the following in *Smith v. State*:

> "Evidence is prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Hannah v. State*, 420 Md. 339, 347, 23 A.3d 192 (2011) (quoting *King v. State*, 407 Md. 682, 704, 967 A.2d 790 (2009)). We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case. In order to admit evidence of a "highly incendiary nature," the evidence must greatly aid the "jury's understanding of why the defendant was the person who committed the particular crime charged." *Gutierrez v. State*, 423 Md. 476, 495, 499, 32 A.3d 2 (2011).

218 Md. App. 689, 705 (2014).

Griffin argues that her ownership of a 9 mm handgun, the empty ammunition boxes, and the paper targets were irrelevant and that the admission of this evidence was unfairly prejudicial.[3] As support for her argument, Griffin points to our opinion in *Smith*, 218 Md. App. 689. There, the defendant was tried and convicted of involuntary manslaughter in the shooting death of his roommate. On the night in question, Smith called police to his apartment, claiming to have found his roommate with a bullet wound to his right temple, but the police could not find a gun in the apartment. While being questioned by police,

[3] Griffin argues in her brief that her ownership of a 9 mm handgun lacked relevance, in part, because "[t]he [S]tate's expert testified that the bullets removed from Mr. Paye were either .38 or []9 mm caliber; whereas, the ammunition and handgun taken from Ms. Griffin were []9 mm." The firearms examiner testified that the bullets (the projectiles) he examined were consistent with being shot from a 9 mm, .38, or .357 caliber firearm, because the bullet diameter of ammunitions used in these various caliber firearms is approximately the same. Regarding the cartridge casings found in the garage, however, the firearms examiner concluded that the markings on all four were consistent with being shot from the same firearm and that the type of firearm used was a "9 mm Luger," also referred to as a "9 mm Parabellum" or "9 by 19 millimeter."

Smith told three versions of what caused his roommate's death. We described Smith's account of events in the following way:

> After the interrogating officers pressed Mr. Smith regarding inconsistencies in his stories, Mr. Smith offered a third version. This time, Mr. Smith said that he had put the .38 inside [a] laundry basket at his mother's house, then went back to his apartment. Mr. McQueen was watching television, and Mr. Smith then took the gun out of the laundry basket and placed it on the floor, warning him that the gun was loaded. Mr. Smith proceeded to use the back bathroom in the rear of the apartment; as he was exiting the bathroom, he heard a gunshot and came out to see blood coming out of Mr. McQueen's head. Upon seeing the body, Mr. Smith grabbed the gun and threw it away in the nearby lake, then returned to the apartment and called the police.

*Id.* at 697.

Critically, Smith admitted to being the owner of the gun that killed his roommate and the only other person present in the apartment when his roommate was shot. *Id.* at 696. Smith informed police that he had retrieved the gun from his mother's house, where he kept several other guns of various types that he lawfully owned. He told police, however, that the .38 caliber revolver that caused his roommate's death was at the bottom of a lake and he later assisted police in recovering it. In both of his last two versions of events, however, Smith theorized that his roommate had committed suicide. *Id.* at 696-97. Hence, at trial, the jury was tasked with deciding whether Smith shot his roommate or his roommate shot himself, regardless of either person's intent. The jury ultimately found Smith guilty of manslaughter. *See id.* at 697.

Smith argued on appeal that evidence of his possession of multiple guns at his mother's house "was irrelevant and unfairly prejudicial because the weapons and ammunition were unrelated to the shooting in question." *Id.* at 703. We reversed and remanded Smith's case for a new trial. We explained:

> Although there was nothing illegal about Mr. Smith owning guns and ammunition, the evidence the court admitted regarding Mr. Smith's ownership of unrelated firearms and ammunition was minimally relevant, at best, and highly prejudicial, and should have been excluded from the trial of these charges. Neither the State nor the trial judge articulated how this evidence was relevant to whether Mr. Smith committed the alleged crimes . . . . [W]e cannot see from this record how the inclusion of this evidence would help prove the offense charged.

*Id.* at 705-06.

In contrast to *Smith*, however, here, the State articulated its purpose in introducing evidence of Griffin's ownership of a 9 mm handgun. The State argued that evidence of Griffin's ownership of and practice with the same type of firearm and ammunition as the State contended had been used by the shooter was probative of Griffin's premeditation of the murder. A shooting-range employee testified that Griffin went to the shooting range and practiced with a 9 mm handgun days before Paye's murder. The introduction of empty ammunition boxes and paper shooting targets, as well as her ownership of a 9 mm handgun, all of which were recovered from Griffin's home in July, provided some corroboration of the employee's testimony. Additionally, Griffin's possession of Federal brand 9 mm ammunition was consistent with the brand used by the shooter and was clearly relevant. Griffin was free to argue before the jury that the particular brand was especially common,

as her counsel did, but it was the jury's task to decide how much weight to give the evidence.

At first glance, *Smith* appears to help Griffin primarily because both cases involved the admission of evidence of the defendant's ownership of a gun that was not used to kill the victim, and therefore, the relevance of those firearms to the homicide needed to be explained. Unlike in *Smith*, however, the State and the trial court articulated the relevance of Griffin's ownership of a 9 mm handgun.[4] The other gun-related items taken from Griffin's home corroborated testimony that was probative of Griffin's preparation for the murder. Griffin's premeditation was a material fact in the jury's analysis of Griffin's culpability for first-degree murder. The trial court properly considered the relevance of Griffin's ownership of the 9 mm handgun and other items "in conjunction with all other relevant evidence." *See Snyder*, 361 Md. at 592. Accordingly, we hold that the circuit court did not err in its determination that Griffin's ownership of a 9 mm handgun, empty ammunition boxes, and paper shooting targets were relevant.

Having concluded that the evidence was relevant, our final inquiry is whether the trial court abused its discretion in determining that the probative value of the evidence was not "substantially outweighed by the danger of unfair prejudice." *See* Md. Rule 5-403. We emphasize, first, that there was little risk of confusing the jury about whether the 9 mm

[4] Compare the trial judge's explanation in this case to the lack thereof in *Smith*, 218 Md. App. at 705 ("Neither the State nor the trial judge articulated how this evidence was relevant to whether Mr. Smith committed the alleged crimes.").

handgun that police recovered from Griffin's home was used to kill Paye. On direct examination of the firearms examiner, the State emphasized the fact that the gun recovered from Griffin's home was not the gun that shot Paye. The State connected the evidence of Griffin's gun ownership, empty ammunition boxes, and paper targets to the training and practice she obtained at the shooting range in Michigan. Additionally, during both its opening statement and closing argument, the State emphasized that the gun recovered from Griffin's home was not the gun used to shoot Paye.[5]

Griffin provides no support for her argument that the trial court abused its discretion in weighing the probative value of the evidence against the risk of unfair prejudice. She adds only that the 9 mm handgun evidence from her home was "highly prejudicial," and reminds us that in *Smith*, we held that the trial court's introduction of other firearms "failed the probativity/prejudice balancing test." *See Smith*, 218 Md. App. at 706. It is true that mere ownership of a firearm may be controversial within certain contexts. *See id.* at 705; *see also U.S. v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992) ("Rightly or wrongly, many people view weapons, especially guns, with fear and distrust."). Our question, however, is whether the admission of evidence of Griffin's ownership of a 9 mm handgun in this instance was *unfairly* prejudicial given its probative value.

[5] For instance, the State conceded the following to the jury during its opening statement: "Now, let me tell you right [a]way, we retrieved and recovered that gun. We brought it back to Baltimore County. It is scientifically proven not to be the gun. I will tell you that."

Unlike in *Smith*, the evidence at issue was highly probative of a material fact -- namely, Griffin's premeditation of the murder. Both the trial court and the State articulated the relationship of the evidence to a material fact, the truth of which would make it more probable that Griffin planned to kill Paye ahead of time. The evidence corroborated other probative evidence, such as the shooting range employee's testimony that Griffin returned to the range and practiced with a 9 mm handgun shortly before Paye's murder. As we explained above, for the trial court to find that evidence is probative of a material fact, "it is not necessary that evidence of this nature conclusively establish guilt." *Simms*, 420 Md. at 727. The jury was entitled to attribute whatever weight it deemed appropriate to these items along with all other evidence it received. We therefore conclude that the trial court was within its discretion to admit evidence of Griffin's ownership of a 9 mm handgun and other related evidence.

## II. We Decline to Review the Trial Court's Phrasing of Two *Voir Dire* Questions, to Which Griffin's Counsel Never Objected.

Among other questions, the trial judge asked the members of the venire the following during *voir dire*:

> Is there any member of the panel that holds such strong feelings about murder or the use of a handgun that you would be unable to sit calmly and deliberate fairly as a juror in this case?
>
> Has any member of the panel or your immediate family ever had a child custody or visitation experience or dispute that would prevent you from sitting fairly and deliberating fairly as a juror in this case?

Griffin argues for the first time on appeal that the trial court's manner of phrasing these two questions impermissibly shifted the burden of determining bias from the trial court to the jurors. The Court of Appeals in *Moore v. State* explained:

> The purpose of *voir dire* is to ensure and secure a defendant's right to a fair and impartial trial by permitting the selection of a jury comprised of venirepersons who do not hold preconceived notions or biases that would affect the outcome of the trial. As we have said, in pursuit of this goal, a trial court must question the venire and consider whether any of the answers reveals such a bias. [*Curtin v. State*, 393 Md. 593, 605 (2006)]. Any question likely to elicit disqualifying information must be asked. Failure to do so taints the objectivity and thus impartiality of the jury, with negative implications for the defendant's right to a fair trial.

412 Md. 635, 664 (2010).

The Court of Appeals, in *Pearson v. State*, 437 Md. 350 (2014), abrogated *State v. Shim*, 418 Md. 37 (2011) -- a decision that had previously guided trial courts on the "strong feelings" question in the following way:

> When requested by a defendant, and regardless of the crime, the court should ask the general question, Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts.

*Shim*, 418 Md. at 54. In 2014, however, the *Pearson* Court provided the following correction to its previous guidance:

> [W]e conclude that, here, the "strong feelings" *voir dire* question . . . was phrased improperly. [ . . . ] In retrospect, . . . it is apparent that the phrasing of the "strong feelings" *voir dire* question in *Shim* [418 Md. at 54] clashed with existing precedent. [ . . . ]

> [T]he phrasing of the "strong feelings" *voir dire* question in *Shim* "shifts from the trial [court] to the [prospective jurors] responsibility to decide [prospective] juror bias." [*Dingle v. State*, 361 Md. 1, 21 (2000)]. [ . . . ]
>
> Thus, we hold that, on request, a trial court must ask during *voir dire*: "Do any of you have strong feelings about [the crime with which the defendant is charged]?" We abrogate language in *Shim*, 418 Md. at 54, 12 A.3d at 681, to the extent that this Court required a trial court to phrase the "strong feelings" *voir dire* question in a way that shifted responsibility to decide a prospective juror's bias from the trial court to the prospective juror . . . .

*Pearson*, 437 Md. at 363-64 (Footnote omitted).

Based on *Pearson*, Griffin argues the trial court erred by asking (1) whether any potential juror had such strong feelings about the crime of murder that he or she would be "unable to sit calmly and deliberate fairly as a juror," and (2) whether any potential jurors, or one of his or her family member's, involvement in a child custody dispute "would prevent you from sitting fairly and deliberating fairly as a juror." A fundamental difference between the proceedings in *Pearson*[6] and this case, however, is that Griffin did not object to either of the two *voir dire* questions she challenges on appeal.

[6] In *Pearson*, the defendant's co-defendant submitted prior to trial the proposed *voir dire* question, "Have you, any member of your family, [a] friend, or [an] acquaintance been the victim of a crime?" *Id.* at 354-55. The trial judge declined to ask this question, along with two others, and Pearson objected to the judge's refusal to ask. *Id.* at 355. The Court in *Pearson* held that the trial court was not required to ask the broad, potentially time-consuming question of whether any member of the venire, or his or her family member had been the victim of *any* crime. *Id.* at 359. Instead, the Court held that the trial court must ask, upon the request of a party, about potential jurors' strong feelings related to the particular crime charged. *Id.* at 363.

### A. Griffin Failed to Preserve the Issue for Appeal.

Generally, our appellate courts "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a); *Collins v. State*, 164 Md. App. 582, 602 (2005) (quoting *Richmond v. State*, 330 Md. 223, 235 (1993)). "[T]he purpose of the preservation rule is to ensure that the trial court and the opposing party have fair warning of an issue such that the trial court has an opportunity to correct any error." *Ray-Simmons v. State*, 446 Md. 429, 450 (2016) (Citation omitted). We reiterated the reason we do not routinely make a determination on an unpreserved issue in *Abeokuto v. State*:

> The rules for preservation of issues have a salutary purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court, . . . including [in] capital cases. The 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.

391 Md. 289, 327 (2006).

As we explained in *Smith*, "Maryland Rule 4–323(c) governs the 'manner of objections during jury selection,' including objections made during *voir dire*." 218 Md. App. at 700 (quoting *Marquardt v. State*, 164 Md. App. 95, 142 (2005)). An appellant will be said to have preserved an issue for appeal where he or she, "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." Md. Rule 4-323. This Rule is not

complex -- "the objector simply needs to make 'known to the circuit court what [is] wanted done.'" *See id.* (quoting *Marquardt*, 164 Md. App. at 143) (Internal quotation marks omitted).

Specific to the trial court's *voir dire* questions, a defendant may preserve an error for appellate review by responding affirmatively to a trial judge's question whether the parties have any objections to the questions asked, and, if requested by the trial judge, stating the grounds for the objection. *See id.* at 700; *Marquardt*, 164 Md. App. 95; *see, e.g., Wimbish v. State*, 201 Md. App. 239, 266 (2011) (holding that the defendant waived objections to *voir dire* questions by failing to object in the trial court).

Griffin concedes that her defense counsel never objected to the two questions she now challenges. The issue, therefore, it is not properly before us on appeal. Had her trial counsel objected when the trial judge asked the parties if they had any objections, the trial judge might have rephrased its language before concluding *voir dire*.[7]

### B. We Decline to Review Griffin's Ineffective Assistance of Counsel Claim in a Direct Appeal.

To remedy her waiver of the issue, Griffin argues that her counsel's failure to object to the trial judge's phrasing of the questions constitutes ineffective assistance of counsel. The Supreme Court, in *Strickland v. Washington*, 466 U.S. 668 (1984) provided the two components of a convicted defendant's claim that his or her counsel was so defective as to require reversal of the conviction:

[7] We do not imply in our holding that the trial judge erred in his phrasing of the two *voir dire* questions.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

*Id.* at 687. On review of an ineffective assistance of counsel claim, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Generally, our appellate courts will not review a defendant's challenge to a criminal conviction based on a claim of ineffective assistance of counsel on direct review; rather, the preferred forum for this claim is within a post-conviction proceeding. *See Tetso v. State*, 205 Md. App. 334, 377 (2012). The Court of Appeals explained in *Harris v. State* the purpose of limiting most ineffective assistance claims to collateral proceedings:

> In essence, it is because the trial record does not ordinarily illuminate the basis for the challenged acts or omissions of counsel, that a claim of ineffective assistance is more appropriately made in a post conviction proceeding . . . . Moreover, under the settled rules of appellate procedure, a claim of ineffective assistance of counsel not presented to the trial court generally is not an issue which will be reviewed initially on direct appeal . . . . [In a post-conviction proceeding], there is presented an opportunity for taking testimony, receiving evidence, and making factual findings concerning the allegations of counsel's incompetence. By having counsel testify and describe his or her reasons for acting or failing to act in the manner complained of, the post conviction court is better able to determine intelligently whether the attorney's actions met the applicable standard of competence.

295 Md. 329, 338-39 (1983).

"Rare instances" exist in which direct review of an ineffective assistance of counsel claim may be appropriate. *See Tetso*, 207 Md. App. at 378; *see also Harris*, 299 Md. at 518 ("In this case . . . , we are presented with a unique set of facts which justifies resolution of the ineffective assistance of counsel claims in a proceeding other than one under the post conviction procedure statute."). These instances arise, however, "only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel." *Tetso*, 207 Md. App. at 378. Otherwise, in trying to determine "why counsel acted as [he or she] did, direct review by this Court would primarily involve the perilous process of second-guessing, perhaps resulting in an unnecessary reversal in a case where sound but unapparent reasons existed for counsel's actions." *Id.* at 379 (quoting *Addison v. State*, 191 Md. App. 159, 175 (2010)).

For example, in *Whitney v. State*, the shortcomings of the appellant's trial counsel, and the potential for prejudice, were apparent on the surface of the trial record. 158 Md. App. 519, 528 (2004) ("Trial counsel's refreshing candor has simplified our inquiry."). There, the attorney, herself, admitted that, during *voir dire*, she did not have sufficient knowledge of the law to correct the trial judge's erroneous belief that each side was entitled to only four peremptory strikes, rather than ten. *See id.* The record made clear, therefore, that the trial attorney failed to advocate for a procedural right of her client due to her lack of knowledge. *See id.* at 526 ("Appellant's appeal on this issue is grounded on trial counsel's concession of her neglect in failing to apprehend that the defense was entitled to ten peremptory strikes.").

Griffin argues that the record is sufficiently developed here, because "[f]ailure to know the law is clearly grounds for ineffective assistance of counsel." Quoting the United States Supreme Court in *Hinton v. Alabama*, Griffin notes that "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." 134 S. Ct. 1081, 1089 (2014). In this case, however, we do not know what Griffin's attorney knew, whether he was familiar with the *Pearson* holding, or whether he would have objected had he studied the relevant law before the trial judge asked the questions at issue.

In both *Hinton* and *Whitney*, it was clear from the record that the attorneys *would* have exercised their clients' rights had they known the law. *See, e.g.*, *Hinton*, 134 S. Ct. at 1088 ("The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance.").

Here, there is no indication in the record that Griffin's defense attorney was ignorant of the law with respect to the *Pearson* Court's abrogation of *Shim*. Unlike in *Whitney*, the record does not reveal whether Griffin's counsel's silence on the trial judge's wording of these two questions was a calculated decision, rather than an indication of his lack of competence. Thus, the material facts relevant to the first prong of the test laid out in *Strickland*, 466 U.S. at 687, are not sufficiently developed here. Accordingly, we hold that Griffin waived her right to challenge the form of the two questions when her attorney failed

to object during *voir dire*, and an ineffective assistance of counsel claim on this issue is not appropriate for direct review.

### III. The Circuit Court Did Not Abuse Its Discretion in Its Response to the Juror's Death Penalty Question.

On the third day of trial, a juror sent a note to the trial judge with the following question: "Will a guilty verdict lead to a death sentence? If so, I cannot give a guilty verdict as I[] cannot put anyone to death." The trial judge discussed the issue with the parties. Griffin's counsel suggested that "the response to the juror should be that sentencing is not up -- is not for your consideration, and end it at that." Griffin's counsel continued,

> [S]aying to them we're not, you know, we are not seeking this part of the punishment, then you are appeasing them and telling them about sentencing. Let's tell the jurors they're not seeking the death penalty but they want life without parole against my client. They don't ever want her to get out of jail. Tell them, you know, Your Honor is not going to tell them that because that's improper. So by telling them that not to worry about the death penalty, that's also a problem.

The court concluded its discussion with the parties, explaining its reasoning:

> [B]oth counsel make good arguments but by not telling him, by not telling him that the death penalty is not a possibility in Maryland, he's going to continue to think . . . [the] death penalty is a possibility in which case I think he would be more likely than not [to reach a verdict] not based upon the facts . . . . [T]o presume that he would find the Defendant guilty, I don't find that persuasive.

After the court announced its intended course of action, Griffin's counsel asked that the juror be struck, and the trial court declined. Griffin's counsel then requested that, if the trial judge informed the juror that Maryland does not impose the death penalty, he would

also "tell [him] . . . . the [S]tate wants life without parole. So weigh that as you would." Once again, the trial judge declined and then called the juror into the court room:

> THE COURT: My response to you is as follows: That it is a two pronged response -- one, sentencing and punishment -- sentencing is not within the province nor should it be the concern of the jury.
>
> THE JUROR: Yes.
>
> THE COURT: The second part of the response is that Maryland does not have a death penalty.
>
> THE JUROR: Thank you, sir.

The trial judge instructed the juror not to discuss his response with the other jurors and the juror returned to the jury room. Griffin's counsel asked a second time that the juror be stricken, and the trial judge denied the request. Griffin's counsel then moved for a mistrial, and the trial judge denied the motion.

On appeal, Griffin contends that the trial court abused its discretion because "[t]he court's response to the juror's question, disabusing him of any notion that the death penalty was possible, should have been tempered, as requested by defense counsel, with the response that the [S]tate was seeking life without parole." Next, Griffin argues, "To the extent that the juror made it clear he could not convict Ms. Griffin unless he knew that a death sentence could not be imposed, the juror was unable to perform jury service."[8]

[8] Griffin provided no support for this argument in the context of a jurisdiction that no longer has the death penalty. She notes only that Md. Rule 4-312(g)(3) permits the trial judge to "replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service."

Finally, in the absence of granting either of these requests, Griffin argues that a mistrial should have been granted.

Pursuant to Md. Rule 4-325(a), "[t]he court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. In its discretion the court may also give opening and interim instructions." As we explained recently, based on Rule 4-325(a), "[t]he decision of whether to supplement the instructions, including an instruction given in response to a jury question, is within the discretion of the trial court and will not be disturbed except on a clear showing of an abuse of discretion." *Lindsey v. State*, 235 Md. App. 299, 314 (2018) (citing *Appraicio v. State*, 431 Md. 42, 51 (2013)). We therefore review the trial court's answer to the juror's death penalty question for abuse of discretion.

In 2013, Maryland's death penalty statute was repealed and life imprisonment without the possibility of parole became the highest possible sentence for the crime of first-degree murder. *See* Maryland Laws, Ch. 156 (S.B. 276) (2013). Griffin's challenge raises the question of how a trial court should respond to a juror's unfounded concern that the death penalty may be imposed as a result of his or her decision, now that Maryland no longer has the death penalty, and *voir dire* questions on jurors' views of capital punishment are therefore no longer perceived as necessary.

Prior to 2013, in first-degree murder cases that could result in capital punishment, a trial judge dealt with the potential for jurors' "strong feelings" about the death penalty

during the *voir dire* phase of trial. *See Curtin*, 393 Md. at 609–10 n. 8. The Court of Appeals explained in *Corens v. State*:

> It is unquestioned . . . that a person who has conscientious scruples against capital punishment cannot properly examine the evidence in a prosecution for a crime for which capital punishment may be imposed . . . .

185 Md. 561, 564 (1946) (Citations omitted). Indeed, questions regarding potential jurors' "scruples against capital punishment" were considered mandatory during *voir dire* in applicable cases. *See Washington v. State*, 425 Md. 306, 315 (2012) (discussing "certain areas where . . . inquiry is mandated during *voir dire*," including, "in capital cases, the ability of a juror to convict based upon circumstantial evidence"); *see also Wagner v. State*, 213 Md. App. 419, 450 (2013) (Citations omitted) (providing that "it is mandatory for the court to inquire into" certain areas, including the "unwillingness to convict in capital cases"). Questions surrounding jurors' feelings about the death penalty were required because, if a juror objected to capital punishment regardless of the facts, then "[the juror] d[id] not stand impartial between the prisoner and the State." *Corens*, 185 Md. at 564. Thus, the Court in *Corens* explained, "If it develops on the voir dire examination . . . [that] a prospective juror . . . has such conscientious scruples, the State may challenge [the juror] for cause."[9] *Id.* at 564 (Citations omitted).

[9] The same was true regarding a defendant's right to challenge potential jurors with "pro-death penalty" attitudes. *See Evans v. State*, 333 Md. 660, 672-73 (1994).

In support of her argument that the trial judge should not have told the juror that Maryland no longer has the death penalty, Griffin quotes the following passage from the United States Supreme Court's decision in *Shannon v. United States*:

> It is well established that when a jury has no sentencing function, it should be admonished to "reach its verdict without regard to what sentence might be imposed." *Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed. 2d 1 (1975). The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.

512 U.S. 573, 579 (1994) (Citations omitted) (Footnote omitted).

Indeed, Maryland's Court of Appeals has explained that, "[a]s a general rule, a jury should not be told about the consequences of its verdict -- the jury should be focused on the issue before it, the guilt or innocence of the defendant, and not with what happens as a result of its decision on that issue." *Mitchell v. State*, 338 Md. 536, 540 (1995) (Citations omitted). The "general rule," however, is not absolute. Certain circumstances may justify a response to a jury question that provides more than a simple instruction not to consider sentencing, particularly where an accurate answer to the question would reveal only an "automatic" outcome as part of a "statutory scheme in Maryland." *See Sidbury v. State*,

414 Md. 180, 187–88 (2010). For instance, in *Sidbury*, reviewing its decision in *Erdman v. State*, 315 Md. 46 (1989), the Court of Appeals explained:

> In *Erdman*, we considered whether a defendant was entitled to an instruction that if the jury found him "not criminally responsible," he would be committed to the Department of Health and Mental Hygiene. [ . . . ]
>
> We determined that although, generally, "the jury has no concern with the consequences of a verdict," the Circuit Court erred in refusing to give the instruction, because, by virtue of a comprehensive statutory scheme in Maryland, commitment of a defendant found not criminally responsible is practically "automatic." [*Erdman*, 315 Md. at 52-53]. We further noted that a reasonable interpretation of the verdict sheet, containing spaces for the jury to designate "Criminally Responsible" or "Not Criminally Responsible," might lead the jury to conclude that a defendant found to be not responsible for his criminal conduct would "walk out of the court room, not only unpunished but free of any restraint." *Id.* at 57 . . . . To alleviate such concerns, we reasoned that the instruction was warranted.

414 Md. at 187-88.[10]

Our courts have recognized that "a person who has conscientious scruples against capital punishment cannot properly examine the evidence in a prosecution for a crime for which capital punishment may be imposed . . . ." *Corens*, 185 Md. at 564. When we made these observations, however, the state of the law was such that a juror's guilty verdict could lead to a death sentence to which he or she was conscientiously opposed.[11]

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[10] See *id.* at 192-93, discussing when a trial court does not abuse its discretion in refusing to answer a jury question about the consequences of a hung jury.

[11] We recognize that, in many cases, the obstacle that a potential juror's conscientious objection to capital punishment posed was, in part, that it impaired his or her ability to

Although Maryland no longer imposes the death penalty, this case demonstrates that not every layperson in Maryland is aware of it. Our prior policy of requiring inquiry into juror's beliefs surrounding capital punishment during *voir dire* was based, in part, on an acknowledgment that some jurors' concerns about the possibility of the death penalty could prevent them from fairly and impartially evaluating the evidence. When capital punishment was possible, the State was entitled to have such a juror removed for cause before the trial began. Although the death penalty is no longer a possible outcome, it nonetheless remains true that a juror's belief that the death penalty could be imposed entails the same potential for substantially "impair[ing] their performance as jurors." *See Evans*, 333 Md. at 672. Lingering questions about the existence of capital punishment in Maryland may persist among jurors, but, under the circumstances of this case, the juror's belief did not have to remain a disqualifying distraction from his duty to decide the facts based on the evidence.

Griffin argues that because the trial judge told the juror that Maryland does not have a death penalty, it should have elaborated on the likelihood of a life sentence as a result of

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make a sentencing determination in a sentencing proceeding. *See* Md. Code (1957, 1992 Repl. Vol., 1993 Cum. Supp.), Art. 27, § 413 (providing that juries may have statutory power over punishment in some cases); *see, e.g.*, *Evans*, 333 Md. at 668 ("[T]he case before us . . . focuses on jurors who may be predisposed [to vote] in favor of the death penalty."). Nevertheless, a potential juror also could be removed for cause because his or her conscientious objection to capital punishment substantially impaired his or her ability to reach a determination of guilt or innocence, *see Henry v. State*, 324 Md. 204, 219 (1991), or to convict based only on circumstantial evidence. *Corens*, 185 Md. at 564. In *Corens*, the Court of Appeals explained that such a conscientious objection could impair a juror's ability to "examine the evidence" where the death penalty was a possible outcome. *Id.*

a guilty verdict. Doing so, however, would have injected the consideration of sentencing back into the juror's deliberations, rather than removing an unnecessary impairment. By informing the juror that a death penalty sentence was not within the realm of possible outcomes for *any* criminal defendant in Maryland, the trial judge prevented the juror from "ponder[ing] matters that [were] not within [the] province" of the jury, eliminating an unnecessary "distract[ion] from [the juror's] factfinding responsibilities." *See Shannon*, *supra*, 512 U.S. at 579. The trial judge's response gave the juror no information regarding any sentence that could be imposed upon Griffin's conviction of first-degree murder or any other crime with which she was charged.

Additionally, the trial court properly refused to provided the juror with a speculative outcome, as it remained within the State's discretion whether to seek a sentence of life without the possibility of parole and the court's discretion to impose it. In *Mitchell*, where the jury had asked the trial judge what would happen as a result of a hung jury, the Court of Appeals held that the trial court properly exercised its discretion not to answer the question. *Mitchell*, 338 Md. at 542–43. The Court explained:

> Even if the jury's question were proper, the trial judge still properly exercised his discretion in refusing to answer it. As it is up to the State's Attorney to decide whether to retry a defendant after a mistrial, the trial judge could not have *known* what would happen in the case of a "hung" jury. Any definitive answer that the court would have given to the jury's question, therefore, would necessarily have been speculative.

*Id.* In this case, as in *Mitchell*, the trial court avoided providing the juror with speculative information that would likely invite the juror to consider collateral issues not relevant to his deliberations.

The trial judge's decision in this case was consistent with his responsibility to ensure that the juror focused on the facts and the evidence, rather than on sentencing and punishment. Accordingly, we hold that the trial judge did not abuse his discretion by informing the juror that Maryland no longer imposes the death penalty, nor by refusing to add Griffin's requested instruction regarding the State's intention to seek a sentence of life without parole.[12]

## IV. The Trial Court Did Not Err in Denying Griffin's *Batson* Claim and Refusing to Reseat Juror No. 7.

The United States Supreme Court, in *Batson v. Kentucky*, 476 U.S. 79 (1986), and subsequent decisions, "instruct that the exercise of peremptory challenges on the basis of race, gender or ethnicity violates the Equal Protection Clause of the Fourteenth Amendment." *See Ray-Simmons*, 446 Md. at 435 (explaining the basis of a *Batson* claim). During *voir dire*, the State exercised a peremptory strike to exclude Juror No. 7, an African American female who had not answered a *voir dire* question. Griffin's counsel asked to approach, and the following exchange occurred at the bench:

[12] Because we hold that the trial court did not abuse its discretion in answering the juror's question, we need not address in any depth the trial court's decision not to strike the juror or to deny Griffin's motion for a mistrial.

> [DEFENSE COUNSEL]: Your Honor, make a motion, the *Batson* challenge against the State. I believe that the -- that basis would be race, Your Honor, and/or gender.
>
> Juror 7, Your Honor, answered no questions. She was struck. She was a black female. Juror 73, Your Honor, said he could be fair. Did answer some questions that he went both ways. He was a black male. And then (inaudible), Your Honor, answered no questions. She's a black female. She was also struck.
>
> Based off of the number or the I guess small number of minorities on the panel as a whole, I would . . . ask Your Honor for a *Batson* challenge.
>
> [STATE'S ATTORNEY]: Happily give race neutral reasons for all three.
>
> THE COURT: Just speak up a little bit so . . . can hear you.
>
> [STATE'S ATTORNEY]: Sure. The first juror, number 7, I don't know Your Honor's take on who (inaudible) as the foreman. Every juror -- you know, most jurors leave juror number one as the foreman. She's relatively young. I prefer not to have a young foreman. At the time that I struck her I had a lot of strikes left.

In justifying his strike of two other African American jurors, the prosecutor explained that he had observed the juror sleeping and added, "This is an involved case. I need jurors who are paying attention."[13] After the prosecutor provided a list of justifications for all three jurors, the trial judge turned back to Griffin's counsel:

> THE COURT: Anything else?

[13] On appeal, Griffin challenges only the court's denial of her objection with respect to the State's use of a peremptory challenge for Juror No. 7.

> [DEFENSE COUNSEL]: I didn't see the sleeping part but I will certainly not claim that she wasn't. I don't know.
>
> THE COURT: I don't know either. Um, at this point I have no alternative but to deny the motion.
>
> [STATE'S ATTORNEY]: Okay.
>
> THE COURT: Let's continue.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

Soon after Griffin's *Batson* motion, the clerk asked, "Is the jury panel as presently constituted acceptable to the State?" The State accepted the jury, and the clerk asked the defense the same question. Griffin's counsel asked for the court's indulgence, paused, and then replied, "Acceptable."

The Supreme Court, in *Batson*, provided a "three-step process to be utilized by trial courts in assessing claims that peremptory challenges were being exercised in an impermissibly discriminatory manner." *State v. Stringfellow*, 425 Md. 461, 469-70 (2012). The Court of Appeals in *Gilchrist v. State* elaborated on these three steps:

> First, the complaining party has the burden of making a *prima facie* showing that the other party has exercised its peremptory challenges on an impermissibly discriminatory basis, such as race or gender. [ . . . ]
>
> Second, once the trial court has determined that the party complaining about the use of the peremptory challenges has established a *prima facie* case, the burden shifts to the party exercising the peremptory challenges to rebut the *prima facie* case by offering race-neutral explanations for challenging the excluded jurors. The "explanation must be neutral, related to the case to be tried, clear and reasonably specific, and legitimate." *Stanley v. State*, 313 Md. 50, 78, 542 A.2d 1267, 1280 (1988). [ . . . ] "At this step of the inquiry, the

> issue is the facial validity of the . . . explanation." *Hernandez v. New York,* 500 U.S. 352, 360 . . . (1991). [ . . . ]
>
> Finally, the trial court "determine[] whether the opponent of the strike has carried his [or her] burden of proving purposeful discrimination." *Purkett v. Elem*, *supra*, 115 S.Ct. at 1771, 131 L.Ed.2d at 839 . . . . This includes allowing the complaining party an opportunity to demonstrate that the reasons given for the peremptory challenges are pretextual or have a discriminatory impact. *Stanley v. State*, *supra*, 313 Md. at 61--62, 542 A.2d at 1272–1273. It is at this stage "that the persuasiveness of the justification becomes relevant . . . ." *Purkett v. Elem*, *supra*, 115 S.Ct. at 1771, 131 L.Ed.2d at 839. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." [*Id.* at 1771].

340 Md. 606, 625–26 (1995).

**A. Griffin Failed to Preserve Her *Batson* Claim for Appellate Review.**

Based on our review of Maryland caselaw, we conclude that Griffin's counsel waived Griffin's *Batson* claim by accepting the jury as empaneled at the end of *voir dire*. The Court of Appeals, in *Stringfellow* explained:

> Generally, a party waives his or her voir dire objection going to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire if the objecting party accepts unqualifiedly the jury panel (thus seated) as satisfactory at the conclusion of the jury-selection process. [*Gilchrist*, 340 Md. at 617]. [ . . . ]
>
> Objections related to the inclusion/exclusion of prospective jurors are treated [as waived] for preservation purposes because accepting the empaneled jury, without qualification or reservation, "is directly inconsistent with [the] earlier complaint [about the jury]," which "the party is clearly waiving or abandoning." [*Id.* at 618].

425 Md. 461, 469-70 (2012).

In *Ray-Simmons*, where the Court held that a defendant's *Batson* objection was preserved even though her counsel had unqualifiedly accepted the jury as empaneled at the end of *voir dire*, the Court stated explicitly that its holding was based on its conclusion that her co-defendant's renewal of objections to the jury as empaneled automatically preserved the objection for her. 446 Md. at 442. Without such a renewal, however, the objection would have been waived. *See id.* ("Taken together, Ms. Ray-Simmons's objection and Ms. McGouldrick's preservation of that objection . . . , we hold that both Petitioners preserved for appellate review their challenge to the State's peremptory challenges.").

In this case, Griffin's counsel raised an objection under *Batson* based on racial discrimination, the trial court denied Griffin's challenge, and soon thereafter, the clerk asked whether the defense accepted the jury as empaneled. Griffin's counsel paused before answering, without qualification, "Acceptable." Clearly, an objection to the exclusion of a juror based on race is a challenge relating to the compostion or make-up of the panel. Pursuant to *Stringfellow*, therefore, her unqualified acceptance of the jury at the conclusion of jury selection was "directly inconsistent with" Griffin's *Batson* claim. 425 Md. at 470. Griffin's appeal of the trial court's decision overruling Griffin's objection to the prosecutor's use of peremptory strikes is therefore not properly before us.

### B. Even if Griffin Had Preserved her *Batson* Claim, the Trial Court Did Not Err in Denying Her Motion to Reseat Juror No. 7.

Alternatively, even assuming Griffin's *Batson* claim was preserved by her counsel's objection, despite accepting the jury as empaneled, we hold that the trial court did not abuse its discretion by overruling Griffin's counsel's objection and permitting the State to use its

peremptory challenge to exclude Juror No. 7. Griffin's primary argument on appeal is that the State's explanation for striking Juror No. 7 was not legitimate and race-neutral. Additionally, Griffin contends that, even if the State's justification was legitimate and race-neutral, the trial court abused its discretion because it failed to properly evaluate the State's justifications for the strike.

In support of her argument that the prosecutor's explanation was "akin to no explanation at all," Griffin argues that "the prosecutor's claim that he did not want juror 7 because he did not want her to serve as the foreperson is not legitimate because if it were, *any* juror could be stricken for that reason because any juror could serve as the foreperson." Griffin's argument is unpersuasive, however, as she ignores the more critical part of the prosecutor's justification for using the strike -- the juror's age. A venire member's age is a valid basis for using a peremptory strike. *See, e.g.*, *Harley v. State*, 341 Md. 395, 401 (1996) (holding the circuit court's findings -- that the State provided race-neutral reasons for its strikes of certain African American jurors -- were not erroneous, where the State proffered age as one of its justifications).[14]

[14] Griffin's argument, that a party's explanation cannot be legitimate and race-neutral where it could apply to any juror, is both unclear and misapprehends the State's explanation. In *Harley*, the Court of Appeals held that the prosecutor's explanation for striking two African American jurors was race-neutral and legitimate where she explained that she struck the jurors to get to another juror -- a police officer -- whom she believed would be more favorable to the State. *See Harley*, 341 Md. at 403. Following Griffin's reasoning, however, would mean the prosecutor's justification in *Harley* could not have been "legitimate because if it were, *any* juror could be stricken for that reason because any juror could" be excluded in favor of another venire member.

Additionally, Griffin emphasizes that "[t]here is no law, statute or rule that requires appointing the juror in seat one to be the foreperson." Assuming Griffin's contention on this point is that the prosecutor's explanation was not "legitimate," we disagree. The Court of Appeals explained in *Gilchrist*, 340 Md. at 627 that it is only at the third stage of the *Batson* analysis that the court may reject a party's justification for being implausible. Similar to the prosecutor's decision in this case, there was no guarantee for the prosecutor in *Harley* that striking the jurors would ensure that the more desirable venire member would be seated on the jury. As the trial judge articulated and we repeated in *Harley*, "lawyers traditionally . . . gamble on who they are going to get on [the] jury [and if they] will best serve that particular party. And that's part of their duty as a lawyer, whether . . . State's Attorney or defense counsel." 341 Md. at 401. In contrast, the Court of Appeals in *Ray-Simmons* explained that the prosecutor's basis for a peremptory strike -- that she intended to replace the juror "with another black male" -- was not "clear and reasonably specific," and the justification, itself, was both race and gender-based. 446 Md. at 444. There, the Court of Appeals said:

> A desire to replace a juror with another unspecified member of the panel does not explain in any way, race-neutral or otherwise, the prosecutor's reasons for striking that particular juror. *See State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209, 212 (1998) (concluding that the defendant failed to comply with *Batson* by explaining that he wanted "to reach some jurors further down the list" because he did not explain "which jurors he was attempting to seat or why other jurors were more desirable" and therefore "[t]he effect was the same as if no reason was given") (internal quotation marks omitted).

*Id.* at 444–45.

Unlike in *Ray-Simmons*, however, the State's justification in this case was "clear and reasonably specific" -- the juror was seated in a position that the prosecutor believed might lead to being assigned as the foreperson and she was relatively young. Thus, the reason proffered for "why other jurors were more desirable" than Juror No. 7, *see id.* at 445, was the prosecutor's belief that striking the juror would increase the likelihood that an older juror would be assigned to serve as the foreperson.

Griffin's argument misconstrues the most critical aspect of a party's explanation when that party justifies their use of a peremptory strike as a way to reach a subsequent, more desirable venire member.[15] The State was entitled to gamble on whether an older juror might end up as the jury foreperson, as long as its reason for doing so was not based on Juror No. 7's membership in a protected class. Based on our review of the record, therefore, we cannot conclude that the trial court erred in finding that the State provided a legitimate, race-neutral reason for striking Juror No. 7.

[15] The Court of Appeals has emphasized that, even where a prosecutor explains that he or she applied a routine policy, "[e]xcluding a juror on the basis of a uniform policy is inherently discriminatory and impermissible *if the reason proffered is a surrogate for race*." *Edmonds v. State*, 372 Md. 314, 336 (2002) (Emphasis added). The prosecutor's stated policy of disfavoring young forepersons, however, does not fall within that realm of ostensibly race-neutral, but inherently discriminatory jury selection policies. In contrast to the justification of age in this case, see *United States v. Bishop*, in which that the prosecutor justified a peremptory strike of an African American woman based on her residence in a high-crime and impoverished neighborhood, asserting that it made her more likely to "believe[] that police . . . in South Central L.A. pick on black people," among other things. 959 F.2d 820, 822 (9th Cir. 1992). The Ninth Circuit Court of Appeals held that the prosecutor's "invocation of residence both reflected and conveyed deeply ingrained and pernicious [racial] stereotypes" and was inherently discriminatory. *Id.* at 825.

Next, Griffin argues the trial court abused its discretion in the third stage of its analysis. In analyzing a *Batson* challenge, the third step is the point at which the trial judge "must decide whether the opponent of the strike has proved purposeful racial discrimination." *See Ray-Simmons*, 446 Md. at 437 (quoting *Purkett*, 514 U.S. at 767) (Internal quotation marks omitted). It is at this stage that the court decides the persuasiveness of the justification. *See id.* (Citation omitted). Quoting from *Ray-Simmons*, Griffin places the focus of the third step on the trial court's explanation of how it "evaluate[d] not only whether the [striking party's] demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the [striking party]." *See id.* at 448. Here, however, the State's race-neutral reason for striking the juror was her age and position in seat one. Assuming the trial court could ascertain Juror No. 7's age, whether "the juror's demeanor" was consistent with the State's justification was not a significant issue.

To the extent Griffin argues that the trial judge was required to articulate a full explanation on the record of its decision to deny Griffin's *Batson* claim, including its evaluation of "whether the [prosecutor's] demeanor belies a discriminatory intent," we disagree. To be sure, the Court of Appeals has provided that, "before ruling on a *Batson* motion, a trial court has an obligation under *Batson*'s step three to evaluate the credibility of the race-neutral reasons offered by the lawyer and rule on purposeful discrimination for each challenged juror." *Edmonds*, 372 Md. at 339. The Court noted in *Edmonds*, however, that its "holding should not be read as requiring specific words to satisfy *Batson*." *Id.* at

339, n. 14. What matters upon appellate review is that we can discern from the record the trial court's "ultimate finding of whether [the challenging party] has established purposeful discrimination" and "final ruling on the *Batson* motion." *Id.*

In this case, when the parties reached the bench, the prosecutor immediately offered to provide race-neutral justifications, not only for Juror No. 7, but all three jurors. The trial judge permitted the prosecutor to explain, and the prosecutor provided race-neutral justifications, none of which Griffin's counsel challenged. The trial judge asked Griffin's counsel if he wanted to add anything else, but Griffin's counsel responded only that he did not know whether one of the jurors had fallen asleep. In the absence of any additional argument from Griffin's counsel that the State's justifications were merely pretexts for discrimination, the trial judge denied Griffin's motion.

We assume the trial court knew and applied the law applicable to its analysis of Griffin's *Batson* challenge. *See Thornton v. State*, 397 Md. 704, 736 (2007) ("Ordinarily, we will presume that the trial judge knows the law and applies it properly."). Particularly under these circumstances, where the court did not make inconsistent statements regarding the credibility of the State's explanation, and Griffin's counsel provided no argument in response to the State's justification for Juror No. 7, the court's concise statement that it had "no alternative but to deny the motion" indicates its finding that Griffin's counsel failed to prove purposeful discrimination. The State provided a legitimate, race-neutral reason for exercising its strike on Juror No. 7, and there is no indication in the record that the trial court -- which was in the best position to evaluate the factual nuances of the entire *voir dire*

process -- doubted the prosecutor's sincerity. "If the trial court finds the prosecutor's explanation credible, there is little left to review." *Acquah v. State*, 113 Md. App. 29, 58 (1996).

At the third step of the analysis, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Gilchrist*, 340 Md. at 628. The exchange at the bench was relatively brief, and Griffin's counsel added nothing in response to the prosecutor's justification to show that it was a pretext for discrimination. We cannot find that the trial court abused its discretion in denying Griffin's *Batson* claim with respect to Juror No. 7, and we therefore decline to grant Griffin's request for a new trial on this basis.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**