UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2486

September Term, 2015

JOHN ALBERT BARTON, III

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: November 21, 2016

Appellant, John Albert Barton, III, was tried and convicted, in his first trial, involving separate victims, of theft of property with a value of at least $1,000 but less than $10,000 by a jury in the Circuit Court for Cecil County (Sexton, J.). Subsequent to a second trial, which resulted in acquittal of appellant on all counts by the jury, appellant**,** at his third scheduled trial date, December 7, 2015, entered an *Alford*[1] plea to one count of theft of property with a value under $1,000. On December 11, 2015, the court sentenced appellant to the Division of Corrections for a period of ten years for the conviction of theft rendered in the first trial and a concurrent sentence of eighteen months for the theft conviction pursuant to the *Alford* plea. From the aforesaid convictions and sentences, appellant filed the instant appeal, raising the following issues, which we quote, for our review:

1. Did the trial court err in overruling appellant's *Batson*[2] challenge?

2. Was the evidence sufficient to sustain appellant's theft conviction?

3. Did the trial court abuse its discretion in denying appellant's motion for a new trial?

FACTS AND LEGAL PROCEEDINGS

Background

The first witness, who testified for the State in appellant's first trial held September 10 through September 15, 2015, was Tim Cook, who lived at 100 Bethel Springs Drive,

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986). *See infra*.

North East, Maryland. On January 17, 2014, Cook, after his flight home from California, went to bed at approximately 11:00 p.m. His wife and children had already gone to bed. Cook did not turn on the home alarm that night. When he awoke the next morning and discovered that his home had been broken into and that several items had been taken, he called the police. He testified that a window had been pried open and that there was evidence that someone had attempted to gain entry through another window. An inventory of stolen items revealed that video games, a portable DVD player, DVDs, an AR-15 rifle with scope, accessories and a case, a BB gun, a cigar humidor with cigars, handbags and cameras had been taken.

Cook testified as to the "approximate value" of the items taken as follows: (1) an AR-15 valued at $2,000; ammunition valued at $500; a BB gun was valued at $125 to $150; the humidor and cigars were "probably $500"; the "replacement value" of the video camera was $1,200; the value of the [other] camera was probably seven to eight hundred dollars and the lenses that were stolen were probably $1,000 "all together." As for various handbags, the large Coach bag was at least $300, the medium was at least $200, the Vera Bradley was at least $200; the Wii games run 40, 50 apiece and the total value of the fifteen games stolen was $600, with the "replacement value" of the game system itself was around $300. Cook testified that he was compensated "[a]pproximately $12,000" for his losses. The cost of repairing the window was approximately $400.

The State's next witness, Casey Benjamin, was living in a trailer, located at 432 Lakeside Drive, North East, Maryland with her cousin, Christine Benjamin, during the time

period around January 17, 2014. Casey had been living there for approximately one month prior to January 17. The trailer was a "flophouse," with numerous people staying there, including Christine . . . Johnny Barton, [appellant,] Joey Martinelli, Sean Veasey, Sierra [Nobles] . . . another girl named Lee or something . . . Fred Nobles . . . Timmy Hand, Sr., . . . Josh Brewster . . . . " According to Casey, others unnamed "just came along . . . day after day and just kind of stayed." People at the trailer would do drugs, "[h]eroin, smoke crack, smoke weed, stuff like that." At one point in time, Casey was staying with her baby's father, Josh Brewster**,** in the first bedroom of the trailer; after Josh went to jail, Casey "ended up staying in the back [room] with Christine.**"**

Appellant had been staying at 432 Lakeside for approximately one week prior to January 17th. On the night of January 17, someone "conjured up the plan . . . to go rob houses or try to make money." According to Casey, "Johnny and Sean put ski masks on and put foundation like on his tattoos or whatever." Casey further testified that she drove Martinelli's car and that appellant then drove off in Martinelli's girlfriend's car with Casey driving; appellant and Veasey rode in the back seat of the car. They drove around for approximately ten minutes until Casey stopped at a house where there was a wooden fence. She and Martinelli "dropped off " appellant and Veasey and, without knowing to which house they had gone, Casey drove with Martinelli to a place where they waited for a telephone call from appellant or Veasey to come pick them up.

Approximately twenty to twenty-five minutes later, Martinelli received a telephone call and proceeded to where appellant and Veasey were located, in order to provide

transportation to both, who "had stuff piled up next to that wooden fence." Appellant and Veasey put "the stuff in the back seat" and the four of them left. Among the items Casey saw placed in the back seat were a gun case, Wii video games, cameras, cigar humidor and a flat screen TV. At one point, Casey pulled over and the items were moved from the back seat to the trunk of the car. Upon returning to the trailer, Casey, Veasey, Martinelli and appellant took the "stuff into the 'first bedroom' of the house," where appellant and Sierra Nobles were staying. According to Casey, "Once everything was brought in, it was kind of like Johnny and Joey were staying, they were in the bedroom, the door was shut. Sean Veasey was in there, too, I believe."

Casey further testified that there was a discussion of selling the items in order to buy drugs and that appellant gave the Wii system and games to Devon, Christine's son. She maintained that she last saw the Vera Bradley bag in Christine's room and that Fred Nobles sold the cigars and humidor to Carl Sexton. According to Casey, she was told that the gun was sold, although she did not disclose who sold the gun. The proceeds, Casey asserted, were used to buy crack and that, subsequently, appellant "broke out" crack and gave some to Casey, Veasey and Christine.

Casey was eventually interviewed by Detective Chris Lewis regarding the property taken from the Cook house. After initially denying that she drove the car on the night in question, she admitted her involvement, stating that appellant, upon entering the vehicle, admitted that he "busted out the window" at the Bethel Springs property. Casey denied that Detective Lewis made any promises to her in return for her testimony or speaking to him.

On cross-examination, Casey admitted that she was on methadone at the time of trial and that, in January 2014, she was using heroin, injecting at least thirteen packages, *i.e.*, one bundle per day of crack and oxycodone. Regarding the trailer arrangements, Casey explained that she and Brewster were in one bedroom for a time and that Christine and Hand were staying in the back bedroom. Veasey, appellant and others would sleep in the living room on furniture or on the floor. Appellant's girlfriend also stayed at the trailer at times.

Casey further testified that, prior to going out on the night of January 17, she had used thirteen small bags of heroin and that, at the time of the interview with Detective Lewis, she was still using a small amount of heroin. Casey also testified that she entered a guilty plea and received probation before judgment, limiting her exposure to incarceration, to the six days that she was confined during pre-trial detention.

The State's next witness, Christine Benjamin, testified that, in January 2014, she lived at 432 Lakeside Drive, where her fourteen-year-old son, Devon, would stay with her periodically. In January 2014, appellant, Hand, Fred Nobles and Casey also resided at the trailer. Christine stayed in the back room with Hand. According to Christine, whenever appellant got out of jail, he would stay with her in the middle room of the trailer with Devon. Appellant also stayed in Devon's room after Devon went to stay with Anna Duarte and Jermaine "Jay" Gilliam.

Christine further testified that appellant told others to let him know if anyone wanted a Wii and that Devon asked Anna and Jay if they wanted a Wii. According to Christine, a

"bunch" of people, including herself, "Johnny, Devon, Fred . . . Timmy" walked up there to sell the Wii. Christine did not see money exchanged or how it was handle[d] because she stayed down here and they were "up there at the house." On cross-examination, Christine admitted that, in January 2014, she was "using a lot of drugs, including heroin and crack." Carl Sexton testified that, on or about January 18, 2014, he purchased a cigar humidor and cigars from Fred Nobles for $50.

Jermaine Gilliam testified, on behalf of the State, that Anna Duarte is his fiancé and that he lives with Duarte and four kids, including Christine's son, Devon Benjamin. In late January 2014, Devon and a "bunch of other kids" offered to sell him a game system, which he purchased in the presence of Devon, a "bunch of kids" and Timmy Hand. Gilliam further testified that Hand gave him the "controller" and that he gave Devon $43.00. Gilliam explained that he was referring to Hand, whom he also knows as "Jay," in his statement to police. When he described the person with Devon as bald, with tattoos, he was referring to Hand. Gilliam denied that appellant was present during the sale of the game system transaction and he denied that he had told his wife that he was.

Anna Duarte testified that Gilliam told her that he purchased the game system from appellant and Devon, whereupon the court instructed the jury that Gilliam's statement to Duarte was admitted for impeachment purposes only. The State's next witness, Detective Chris Lewis, Cecil County Sheriffs' Office, in response to the report of the burglary, proceeded to the Cook residence. After taking an inventory of the stolen property and identifying the point of entry as a window, the locking mechanism of which had been

broken, Detective Lewis also observed off the porch . . . a split rail fence with metal in between. On that metal, which was bent down, it appeared that someone had crawled across or had accessed that point. On the other side of that fence, an item was located matching the description of the "victim's . . . purse." Although the attempt, by Detective Lewis**,** to obtain fingerprints from the scene was unsuccessful, he did, however, recover the humidor and cigars from Sexton as well as the game system from Gilliam.

As part of his investigation, Detective Lewis participated in the execution of a search warrant at 432 Lakeside Drive on January 29, 2014. Appellant and others were present when the search warrant was executed. Among the items recovered were the Vera Bradley handbag and another handbag taken from the Cook residence. The handbags were found in the back bedroom occupied by Christine and Hand. On cross-examination, Detective Lewis testified that Christine had entered a plea of guilty to conspiracy to commit burglary in this case and that Cook did not report that a television or flat screen television had been stolen from his house and that no fingerprint or DNA evidence was recovered from the Cook residence or from the Vera Bradley bag.

Joseph Martinelli, testifying on behalf of the defense, stated that, while he was in his vehicle on January 17, 2014, the Cook residence was burglarized. He had entered a plea of guilty for his involvement and had received an eight-year sentence. According to Martinelli, Casey drove the vehicle, accompanied by Fred Nobles and Sean Veasey. After Nobles and Veasey alighted from the vehicle when they arrived at the Cook residence, Casey and Martinelli parked the vehicle behind a dumpster and waited for a telephone call

to pick them up. Martinelli testified that appellant was not in the vehicle driven by Casey when the Cook residence was burglarized.

In rebuttal, the State called Fred Nobles, who testified that he did not break into the Cook residence nor did he see others burglarize it. Nobles admitted, however, to selling the cigar case to Carl Sexton. He entered a plea of guilty in the case to theft.

Jury Selection

During jury selection, the State exercised all five of its allotted peremptory strikes. Appellant's trial counsel objected and the following colloquy ensued:

> [APPELLANT'S COUNSEL]: I want to check my notes as to who the State challenged because I'm anticipating a *Batson* challenge or a *Batson* issue regarding who the State challenged on the issue of age and the young men that were challenged, but I need to go look at my notes to see exactly who they challenged.
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> * * *
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> THE COURT: I have No.7, No. 8, Nos. 30, 60 and 90.
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> * * *
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> [APPELLANT'S COUNSEL]: Yeah. There's three jurors here. No. 90 is age 23 years, a male. He didn't answer any questions. There is another young male that was stricken who is No. 30, who answered no questions. And No. 7, who is a male that is 23, and answered no questions. I believe the challenges had to be based on gender or age and I think the challenges were improper, and I think the State is required to give an explanation as to why those individuals were challenged.
>
> THE COURT: Mr. Fockler?
>
> [ASSISTANT STATE'S ATTORNEY]: I will say—and I'm just looking through here. I have two males, younger males on here. I think a [name], who is 27—yeah, I believe so—which wasn't challenged by the State, which was challenged by the defense. Also I believe I have a woman by the name of [], who is age 26, who wasn't challenged by the State. I have a woman by the name of [] - no, she got bumped. I'm trying to think. How far down did we get?

* * *

[ASSISTANT STATE'S ATTORNEY]: Yeah. She's 18. There is another young man that's on there. I think he's like maybe seated in the Juror No. 8 or 9 spot. I'm not sure without turning around. But I'm trying to see what number he is. But he's a younger man as well.

I mean, I don't see that—the State didn't base its opinion based on age or really gender. I mean, there is a younger male on there. Again, I'm not sure what juror number he is but he's seated in the blue shirt up there.

* * *

THE COURT: Anything further, Mr. Fockler, that you want to say with regard to the striking of individuals 30, 60 and 90?

[ASSISTANT STATE'S ATTORNEY]: 30. Let me look at this.

THE COURT: Actually 60 I have as female individual who is 53.

[ASSISTANT STATE'S ATTORNEY]: Sometimes, as Judge Rollins used to say, it's kind of a gut thing, not in regards to any particular effort to be discriminatory. No. 30. I'm just trying to look at No. 30 here. No. 30, I mean, you know, education. I certainly look at education and so forth, which I sometimes prefer. I don't know if that's a discriminatory matter or not. And who was the other one. He's not contesting Mr. [],is he?

THE COURT: Juror Nos. 30 and 90.

[ASSISTANT STATE'S ATTORNEY]: And 90 was [name]. Sorry if I used names. No. 90, I don't know. Like I said, perhaps it's more of an educational aspect compared to the other jurors and perhaps the employment aspect as well. I'll note that Juror No. 90 is in sales, has a high school education. And Juror No. 30 is warehouse and, again, high school GED. But I would say that there are ample jurors on there that are of youthful age that were stricken by the State or are currently on the jury as it sits currently.

THE COURT: Mr. Brown, anything further?

[APPELLANT'S COUNSEL]: I believe we've improperly denied three qualified male jurors resulting in a jury of ten women with two men based on improper striking by the State based on age and gender.

THE COURT: I note for the record that Mr. Fockler struck Juror No. 30, which is a male individual, age 26, based on the information presented. I do also note this was an individual who was not questioned in any way. He answered in the affirmative—did not answer affirmatively in any way in this matter.

Juror No. 7, a male individual, age 23 years of age. The State exercised a strike. Juror No. 8, a male individual, 69 years of age. The State had exercised a strike.

Juror No. 7 was an individual who had not been questioned by counsel in chambers. However, Juror No. 8 had been present and answered questions.

And then Juror No. 90, a male individual, 23 years of age, which was stricken by the State. That individual did not answer any questions and did not make any affirmative responses in connection with this matter.

[ASSISTANT STATE'S ATTORNEY]: If l may interrupt. Is Juror No. 62 on the—

THE COURT: 62 is on the jury seated in Seat No. 12.

[ASSISTANT STATE'S ATTORNEY]: He's a male, age 24.

THE COURT: He is. Well, I note in connection with this matter a jury was selected. There are twelve jurors who have been selected. There are two male individuals, ten female individuals. The two male individuals are ages 24—

[ASSISTANT STATE'S ATTORNEY]: 81. I think it's Juror No. 81.

THE COURT: —and 63 years of age. The remaining individuals are female ranging in age from age 18 to age 51. I'm going to deny your challenge with regard to the jury as chosen.

[APPELLANT'S COUNSEL]: Excuse me?

THE COURT: I'm going to deny your challenge that you have made to the jury as chosen.

Appellant was convicted and the instant appeal followed.

DISCUSSION

A. Peremptory Challenges

Appellant contends that the trial court erred in rejecting his *Batson* challenge. Regarding the striking of the jurors in question, appellant asserts that "[t]he lack of sincerity in the prosecutor's preface to his reasons, coupled with the lack of specificity in the reasons given, compels the conclusion that the reasons about education and employment were not persuasive and were mere pretext."

The State responds that the trial court complied with *Batson* and properly denied appellant's motion. The State notes that appellant initially complained that the potential jurors were struck based on age and gender and, accordingly, this Court should decline review of appellant's challenge, in the instant appeal, based "only on gender." We agree. Appellant's trial counsel initiated the bench colloquy anticipating a *Batson* challenge "on the issue of *age* and the *young men* that were challenged." The five challenged jurors were identified as follows:

Juror No. 7: 23-year-old male

Juror No. 8: 69-year-old male

Juror No. 30: 26-year-old male

Juror No. 60: 53-year-old female

Juror No. 90: 23-year-old male

After the challenged jurors were identified, counsel explicitly stated that he believed the challenges were based on gender and age, specifically bringing to the court's attention

Juror Nos. 7, 30 and 90 and stating: "I think the State is required to give an explanation as to why *those* individuals were challenge." (Emphasis supplied). The trial judge prompted an explanation from the State regarding Jurors "30, 60 and 90," later correcting herself, *i.e.*, "Actually 60 I have as female individual who is 53." The Assistant State's Attorney offered explanations concerning education and employment for Juror Nos. 30 and 90. Significantly, however, after the Assistant State's Attorney offered explanations for two of the strikes, when solicited by the court for response, appellant's counsel responded: "I believe we've improperly denied *three qualified male jurors* resulting in a jury of ten women with two men based on improper striking by the State *based on age and gender,*" despite the fact that *four* male jurors had been stricken. (Emphasis supplied). Appellant's counsel failed to inquire about Juror No. 8, who was also male, but 69 years of age, or Juror No. 60, who was female and 53 years of age. Accordingly, appellant has preserved, for our review, a *Batson* challenge that encompasses *both* age-related and gender-related discrimination.

We review a *Batson* challenge under the clearly erroneous standard. *Khan v. State,* 213 Md. App. 554, 568 (2013). "Nevertheless, if 'the relevant facts are not in dispute,' the appellate court 'may exercise [its] independent constitutional judgment to determine what should be concluded from those facts.'" *Elliott,* 185 Md. App. at 715 (quoting *Mejia v. State,* 328 Md. 522, 539 (1992); citing *Stanley v. State,* 313 Md. 50, 71 (1988)).

> *Batson* 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. Excusing a juror on any of those bases violates both the

> defendant's right to a fair trial and the potential juror's 'right not to be excluded on an impermissible discriminatory basis.'

Ray-Simmons v. State, 446 Md. 429, 435 (2016) (quoting *Edmonds v. State*, 372 Md. 314, 329 (2004)). *See also Tyler v. State*, 330 Md. 261, 270 (1993) (noting that the use of preemptory strikes to discriminate based on gender violates the Md. Decl. of Rts. Arts. 24 and 46).

> The Supreme Court announced in *Batson* a three-step process to assist the trial court in deciding a claim that a party to the case exercised a peremptory challenge to eliminate a prospective juror based on his or her race, gender, or ethnicity. The Supreme Court has hewed to that process ever since *Batson* and has clarified how trial courts are to employ the process and appellate courts are to review trial courts' decisions. The Supreme Court has emphasized that, throughout the process of evaluating such claims, '[t]he trial court has a pivotal role.'

Ray-Simmons, 446 Md. at 435 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)).

> At step one, the party raising the *Batson* challenge must make a *prima facie* showing—produce some evidence—that the opposing party's peremptory challenge to a prospective juror was exercised on one or more of the constitutionally prohibited bases. [T]he *prima facie* showing threshold is not an extremely high one—not an onerous burden to establish. A *prima facie* case is established if the opponent of the peremptory strike(s) can show that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Merely a 'pattern' of strikes against [a protected class of] jurors in the particular venire . . . might give rise to or support or refute the requisite showing.

Id. at 436 (quotations and citations omitted). Furthermore, if the striking party offers an explanation, "the question of whether the challenger has made a *prima facie* case under step one becomes moot . . . ." *Id.* at 437.

In the case *sub judice*, appellant argues that the first prong is not at issue because the Assistant State's Attorney offered an explanation for some of the challenged strikes in response to the trial court's questioning. *Ray-Simmons, supra.* The State does not address

this mootness argument in its brief. We agree with appellant that the State's offering of an explanation renders the question of whether appellant, as the challenger, made a *prima facie* case moot under step one. Accordingly, we move to step two of the *Batson* analysis.

> 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. A step-two explanation must be neutral, but it does not have to be persuasive or plausible. Any reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. The proponent of the strike cannot succeed at step two by merely denying that he had a discriminatory motive or by merely affirming his good faith. Rather, [a]lthough there may be any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause, the striking party must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge.

Ray-Simmons, 446 Md. at 436–37 (quotations and citations omitted).

In the instant case, appellant challenged Juror Nos. 7, 30 and 90, requesting that the State explain its strikes regarding the three jurors. In response to the inquiry by the court, the State responded that there was a young man currently on the jury, as well as a young woman, and that appellant had struck a young male from the *venire* as well. The Assistant State's Attorney denied that he decided to strike the jurors based on their age or gender, stating that "sometimes . . . it's kind of a gut thing, not in regards to any particular effort to be discriminatory." The Assistant State's Attorney further explained that he struck Juror No. 30 based on "education and so forth" and, with respect to Juror No. 90, the prosecutor stated: "I don't know. Like, I said, perhaps it's more of an educational aspect compared to the other jurors and perhaps the employment aspect as well." Accordingly, as to both Juror

Nos. 30 and 90, the Assistant State's Attorney cited the employment and education levels as the basis of the State's challenges.

In its brief, the State acknowledges that it did not offer an explanation to the trial court for striking Juror No. 7, but maintains, before us, that it was 'appropriate' since the trial court did not ask for an explanation regarding Juror No. 7. Furthermore, the State argues that, although the trial court made no specific finding as to Juror No. 7, "it impliedly found," *via* the prosecution's explanations for striking Juror Nos. 30 and 90, that the reason for striking Juror No. 7 was sufficiently gender and age neutral. This Court's analysis of this issue in *Elliot v. State*, 185 Md. App. 692, 714 (2009) is instructive:

> Although 'each strike,' and the reason given for it, must be examined in light of the circumstances under which it was exercised, including an examination of the explanations offered for other strikes, the Fourth Circuit has explained that '*Batson* . . . does not require *individualized* explanations for peremptory strikes . . . . [A] court may . . . find that the prosecutor has complied with *Batson* based on an overall explanation that is found satisfactory as to each of the challenged strikes.'

(Emphasis supplied) (some citations omitted) (quoting *Evans v. Smith*, 220 F.3d 306, 314 (4th Cir.2000)).

A relevant excerpt from *Evans*, *supra* is also instructive:

> It is thus clear that the trial court applied *Batson* in essence. The trial court warned the prosecutor that it would scrutinize the state's exercise of its peremptory challenges for any racial bias. When the defense objected, the court gave the prosecutor an opportunity to explain his actions. The prosecutor provided a race-neutral explanation that the trial court could assess in light of its own observation of jury selection. *Evans provided no further support for his allegation of intentional discrimination and did not seek further explanation from the prosecutor.* Although the trial court did not record explicit findings, its overruling of Evans' objection in the context of the proceedings makes it clear that the trial court accepted the prosecutor's explanation and found that there was no discriminatory intent.

In the instant case, after the Assistant State's Attorney proffered explanations regarding Juror Nos. 30 and 90, appellant was provided an opportunity by the court to respond. Appellant did not provide additional support for his allegations; rather, he reiterated that "three qualified male jurors" were struck. Furthermore, appellant did not request an explanation for striking Juror No. 7. Accordingly, we hold that the State complied with *Batson* in offering neutral explanations for its peremptory strikes of the three jurors.

> 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. It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At this step, the trial court must evaluate 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]. Because a *Batson* challenge is largely a factual question, a trial court's decision in this regard is afforded great deference and will only be reversed if it is clearly erroneous.

Ray-Simmons, 446 Md. at 437 (quotations and citations omitted). "[T]he decisive question will be whether counsel's [] neutral explanation for a peremptory challenge should be believed." *Edmonds v. State*, 372 Md. 314, 330–31 (2002) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). "If a trial court determines that a reason given for a peremptory challenge is a pretext for purposeful discrimination and upholds a *Batson* motion, the court has "the discretion to fashion a remedy for a *Batson* violation that addresses and resolves the specific harm caused by that violation." *Id.* at 331 (quoting *Jones v. State*, 343 Md. 584, 602–03 (1996)).

In the case *sub judice*, at issue is the trial court's denial of appellant's *Batson* challenge. This is a factual determination and trial courts are afforded great deference. Education and employment are facially gender and race neutral explanations for the State's use of its peremptory strikes. Appellant offered no additional support that the strikes were discriminatory. Accordingly, assessing the "demeanor" of Juror Nos. 30 and 90 in exhibiting the "basis for the strike" is fairly straightforward; they were either employed and possessed education levels as the State described, or they did not. In sum, assessing the explanation proffered by the prosecution, including counsel's demeanor and credibility of the reasons offered, the trial court found that the peremptory strikes were not discriminatory and denied the *Batson* challenge. For the foregoing reasons, we affirm.

B. Sufficiency of the Evidence for Theft Conviction

Appellant next contends that the evidence presented was insufficient to convict him of theft of at least $1000 but less than $10,000, based on the theory of possessing stolen property under the Criminal Law Article § 7–104(c). Specifically, appellant promulgates the theory that "one cannot be both the thief and the possessor of the same stolen good," citing *Grant v. State*, 318 Md. 672, 679 (1990). Appellant, however, acknowledges that, at the close of his case at trial, counsel failed to renew his motion for judgment of acquittal and, thereby, failed to preserve the issue of sufficiency of evidence as a denial of such motion. Accordingly, in the alternative, if we decline to review for insufficiency of the evidence, appellant urges us to review for ineffective assistance of counsel, citing *Testerman v. State*, 170 Md. App. 324 (2006).

The State responds that appellant, on appeal, is not attacking the sufficiency of the evidence; rather, appellant is attacking what he perceives is an "inconsistent verdict." The State further asserts that appellant did not preserve the issue for our review and we should decline consideration. If, however, the issue has been preserved, the State argues that the law permits conviction of theft and subsequent possession and that the evidence presented was sufficient to sustain appellant's theft conviction.

Recently, this Court, in *Chisum v. State*, 227 Md. App. 118, 124 (2016), reiterated the procedural requirement, in a jury trial, for appellate review of sufficiency of the evidence:

> In a jury trial, the scope of the legal sufficiency issue is clear. Maryland Rule of Procedure 4–324 requires an appellate court to review the legal sufficiency of the evidence *if, at the close of all of the evidence, a timely motion for a judgment of acquittal has been made by the defendant*. *Absent such a motion, no review of the legal sufficiency of the evidence is even permitted.*

(Emphasis supplied).

In the instant case, appellant was convicted of theft by a jury. His counsel failed to move for judgment of acquittal at the close of the State's case based on the State's failure to establish that value of the goods was or exceeded $1,000 and his counsel further failed to renew the motion for judgment of acquittal at the close of all of the evidence. Accordingly, the issue has not been preserved and review of the sufficiency of the evidence is precluded under Rule 4–324.

In the alternative, appellant asks that we review, on direct appeal, the issue of ineffective assistance provided by his trial counsel in failing to renew the aforementioned

motion for judgment of acquittal, citing *Testerman v. State*, 170 Md. App. 324 (2006) in support. The State's response is that the case *sub judice* presented "factual complexities" that may have factored into defense counsel's trial strategy not to move for judgment of acquittal and, therefore, post-conviction review is the more appropriate forum for review of ineffective assistance of appellant's counsel, *vel non*.

> [G]enerally a post-conviction proceeding is the 'most appropriate' way to raise a claim of ineffective assistance of counsel, because 'ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel.' But, we may nonetheless do so, 'where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable.'

Id. at 335 (quoting *In re Parris W.*, 363 Md. 717, 726 (2001) (citing *Mosley v. State*, 378 Md. 548, 558–59 (2003)).

It is clear from the Statement of Facts that there are a number of "critical facts" in dispute, *e.g.*, appellant's presence, *vel non*, at the scene of the crime. Accordingly, we hold that**,** unlike *Testerman*, a direct appeal is not the appropriate forum to adjudge the issue of ineffective assistance of counsel in the case *sub judice*.

C. Appellant's Motion for a New Trial

Appellant's final contention is that the trial court abused its discretion in denying his motion for a new trial. Appellant initially contends that the evidence presented was insufficient to sustain his theft conviction from the first trial. Alternatively, appellant asserts that the verdict should be set aside "as against the weight of the evidence."

The State's response is that the trial court did not abuse its discretion in denying appellant's motion for a new trial because appellant's argument actually centers on inconsistent verdicts, *i.e.*, that the jury found him guilty of theft by possession of stolen property, but not burglary, and one cannot be the thief as well as the possessor. Accordingly, argues the State, appellant should have made his motion for a new trial *before* the jury was excused so the trial court could remedy any error. Finally, the State contends that appellant put forth no newly discovered evidence; rather, he "simply disputed the evidence put forward by the State, which demonstrated that he possessed stolen goods." Accordingly, the State urges us to affirm the trial court's denial of appellant's motion for a new trial.

The standard for reviewing a trial judge's ruling on a motion for new trial is typically for abuse of discretion. *Mack v. State,* 166 Md. App. 670, 683-84 (2006) (citations omitted). However, "under some circumstances a trial judge's discretion to deny a motion for a new trial is much more limited than under other circumstances . . . [and] there are situations in which there is virtually no discretion to deny a new trial." *Merritt v. State*, 367 Md. 17, 29 (2001).

> [I]t may be said that the breadth of a trial judge's discretion to grant or deny a new trial is not fixed and immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 58–59 (1992). On the more restrictive side of a trial judge's discretion is if there is newly found evidence.

> It would be plainly unjust to permit a verdict to stand, as against an application for a new trial seasonably made, if credible evidence, competent to be considered, and not previously discoverable by due diligence, supported the conclusion that the jury were misled as to the principal part of their award.

Buck, 328 Md. at 58 (quoting *Washington, B. & A. Elec. R. Co. v. Kimmey*, 141 Md. 243, 250 (1922)). Accordingly, "a trial judge has virtually no 'discretion' to refuse to consider newly discovered evidence that bears directly on the question of whether a new trial should be granted." *Id.* In the instant case, appellant does not assert that there is newly discovered evidence to support a motion for a new trial. Therefore, the trial court's discretion is broader in scope and we will review accordingly.

Md. Rule 4–331 governs a motion for a new trial of a criminal proceeding in the circuit court. Subsection (a) provides that "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." Subsection (b)(1)(B) provides that "[t]he court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial in the circuit courts, on motion filed within 90 days after its imposition of sentence. Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity."

In the case *sub judice*, appellant directs our attention to his previous argument under the issue of sufficiency of evidence to support his first contention that the trial court erred in denying his motion for a new trial. This is simply a request to re-litigate his case and one not permitted under law. "[I]nsufficiency of the evidence is today a singularly inappropriate basis for ordering a new trial, because if the evidence was insufficient to go to the jury in the first place, double jeopardy principles preclude a new trial." *In re Petition for Writ of*

Prohibition, 312 Md. 280, 313, 539 A.2d 664, 680 (1988) *disapproved of on other grounds by State v. Manck*, 385 Md. 581, 870 A.2d 196 (2005).

Alternatively, appellant asks our review of the trial court's denial of his motion for a new trial based on the weight of the evidence.

> [R]eviewing weight of the evidence of necessity involves a weighing process, and part of that weighing may implicate consideration of credibility. But a trial judge is not at liberty to set aside a verdict of guilt and to grant a new trial merely because the judge would have reached a result different from that of the jury's. Motions for new trial on the ground of weight of the evidence are not favored and should be granted only in exceptional cases, when the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. And in the area of credibility, a reviewing judge ordinarily should not make a credibility determination if there is nothing more than conflicting testimony; there should usually be at minimum substantial impeachment of a witness before the judge finds that witness's testimony deficient on the basis of credibility.

Petition for Writ of Prohibition, 312 Md. at 326–27.

In the case *sub judice*, appellant argues that, consistent with his argument concerning the insufficiency of the evidence, his "verdict was against the weight of the evidence either because the weight of the evidence precludes a finding that he possessed stolen items or because, even if he possessed them, the State failed to establish their market value of at least $1,000." Essentially, appellants asks that we review his argument for insufficiency of the evidence under the weight of the evidence standard, *i.e.*, examining witness credibility. However, as *Petition for Writ of Prohibition*, *supra*, instructs, there must be more than conflicting witness testimony." There should usually be at minimum substantial impeachment of a witness" which is not present in the instant case. Furthermore, there is nothing from the record to support the idea that a "miscarriage of justice" would

occur if appellant's theft conviction were allowed to stand. Appellant provides no specific support for his argument or instances that his is an "exceptional case" that warrants granting his motion for a new trial. Accordingly, we affirm the circuit court's ruling.

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