Circuit Court for Baltimore City
Case No. 816195006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1902

September Term, 2016

MICHAEL BONNER

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: September 15, 2017

Appellant, Michael Bonner, complains that a judge in the Circuit Court for Baltimore City ruled incorrectly on his *Batson*[1] challenge to the State's use of its peremptory strikes during his October 2016 trial on charges of: (1) wearing, carrying, or transporting a handgun; (2) illegal possession of ammunition; and, (3) removing a firearm's identification mark. The jury convicted Bonner on all counts. The judge granted Bonner's post-verdict motion for judgment of acquittal on the identification removal conviction. Bonner was sentenced to three years incarceration, to be served in home detention, with all but six months suspended and with three years probation, for the handgun offense. He was sentenced to time served on the illegal possession of ammunition conviction.

In this appeal, Bonner poses a bifurcated query:

> Did the trial judge err in overruling Mr. Bonner's *Batson* objection with respect to three jurors struck by the State where:
>
> a. the prosecutor explained that she struck two jurors because they could "sympathize" with Appellant "as fathers," failing to satisfy the requirement under *J.E.B. v. Alabama*, 511 U.S. 127 (1994) that litigants provide a gender-neutral explanation for a challenged strike; and
> b. the prosecutor used all four of her strikes on black jurors and did not strike similarly situated white jurors?

Preliminary to its resistance to Bonner's arguments on the merits, the State contends that Bonner waived for appellate review the disposition of his *Batson* challenge because he failed ultimately to object to the empanelment of the jury. We agree with the State's waiver argument. Our inquiry shall end there. We explain why.

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

The Selection Process and Empanelment of the Jury

On 4 October 2016, the first day of trial, twenty-four venirepersons were in the jury pool. Each side was entitled to four peremptory strikes, and the State one additional strike, and the defense two additional strikes as to selection of an alternate juror. Bonner, a black man, was 31 years old at the time of trial.

The State used its initial two strikes to excuse Jurors Nos. 2134 and 2172, both 19-year old black males. After twelve of the venire persons were in the jury box, the defense struck from the box two prospective jurors.[2] Juror No. 2243, a 40-year old black man, who had been seated in place of Juror No. 2194, was struck subsequently from the box by the State. With the last of its initial four peremptory strikes, the State struck Juror no. 2145, a 58-year old black man.

At this point, defense counsel approached the bench and posed a *Batson* challenge. The judge, noting expressly that the State's four peremptories had been exercised to strike four black men, asked the prosecutor for an "explanation." As to the first two strikes, the prosecutor responded that "someone between the age of 19 and 30 isn't someone I [was] really looking for." As to the latter two strikes, the prosecutor explained "those two were more like older age, father-figure[s] for the defendant."

The defense, testing the State's first response, pointed-out that a potential juror left in the box was a 26-year old white person. The judge found credible nonetheless the prosecutor's explanation as to the exercise of the first two of the State's peremptory strikes:

[2] The record is silent regarding the age, race, or gender of the jurors struck by the defense.

"These two guys are okay. She's [the prosecutor] got a reason that is not pretextual. They're both 19. The juror that you're pointing to is 26. There's a significant difference in age."

With respect to the latter two of the State's initial peremptory strikes, the defense noted that Juror No. 2243 was "only in his 40's," and argued "there are white jurors who are significantly older that she [the prosecutor] could have struck if it's an age thing." Noted examples were Juror No. 2197, who was a 53-year old white female and Juror No. 2222, a 68-year old white female. The following colloquy ensued:

> THE COURT: Yea. Those are both women.
> [DEFENSE COUNSEL]: But I'm just saying for race.
> THE COURT: No I understand exactly what you're saying. I'm bringing up a different point. You said that they were fatherly?
> [PROSECUTOR]: Yeah. Father-age. I feel like they could sympathize with him based off his age as fathers.
> [DEFENSE COUNSEL]: Well then the foreperson, Juror number 1. He's 55 and he's white. I mean, Judge, I think it's pretext.
> THE COURT: Okay. Okay. I think I'm going to reseat 2243.
> [PROSECUTOR]: Okay.
> THE COURT: 2145 I think is somewhat different, but 2243 I'm going to reseat.
>
> * * *
>
> CLERK: 2243, please come forward and have a seat in number 3.
> THE COURT: Okay.
> CLERK: Is the jury panel acceptable to the State?
> [PROSECUTOR]: Acceptable.
> CLERK: Acceptable to the defense?
> [DEFENSE]: Brief indulgence. The defense would respectfully thank and excuse Juror no. 2222,[3] seated in seat number 11.
> CLERK: Seat number 11, 2222, please step down. Have a seat in the courtroom. Defense strike number 3. 2246,[4] please come forward. Acceptable to the defense?
> [DEFENSE]: Acceptable.

[3] Juror No. 2222 was a 68-year old white female.

[4] The record does not reflect the age, race, or gender of this juror.

CLERK: Acceptable to the State?
[PROSECUTOR]: Acceptable.
CLERK: Seat number 11. Is the jury panel acceptable to the defense?
[DEFENSE]: The defense would respectfully thank and excuse, Juror No. 2126, seated in seat number 1.
CLERK: Seat number 1, 2126,[5] please step down. Have a seat in the courtroom. Defense strike number 4. Juror No. 2251,[6] please step forward. Acceptable to the State?
[PROSECUTOR]: Acceptable.
CLERK: Seat number 1
THE COURT: You've got to ask about the defense.
CLERK: He's out of strikes.
THE COURT: Pardon.
CLERK: He's out of strikes.
THE COURT: That's correct.
CLERK: is the jury panel acceptable to the state.
[PROSECUTOR]: Yes it is.

The selection of Juror No. 2255 as the alternate was uneventful. The trial transcript reveals that the following colloquy collapsed the seating of the alternate with acceptance by both counsel of the jury in the box:

CLERK: How many alternates would you like, your Honor?
THE COURT: Just one.
CLERK: Juror No. 2255 please step forward. Is alternate number 1, acceptable to the State?
[PROSECUTOR]: Acceptable.
CLERK: Acceptable to the defense?
[DEFENSE]: Acceptable.
CLERK: You can have a seat right there in the first chair, ma'am. Alternate 1, acceptable to the State?
[PROSECUTOR]: Acceptable.
CLERK: Acceptable to the defense?
[DEFENSE COUNSEL]: Yes. Thank you.
CLERK: The jury panel and alternate are acceptable to the State and the defense, Your Honor.
THE COURT: Thank you very much[.]

[5] Juror No. 2126 was a 55-year old white male.
[6] The record does not reflect the age, race, or gender of this juror.

The defense made no further comment or objection as to selection of the jury to decide Bonner's fate.

ANALYSIS

I. Appellant waived affirmatively his *Batson* challenge.

A. The State's Waiver / Non-Preservation Argument

The State points-out that, from the time of the ruling on Appellant's *Batson* challenge to the Clerk's announcement that the jury as seated was acceptable to the State and the defense, defense counsel gave no indication of disagreement or dissatisfaction with the jury ultimately in the box. Therefore, as the argument goes, the defense acquiesced in the trial court's decision to reseat only one of the challenged jurors (notably declining to pursue any substantive argument at the bench specifically relating to Juror No. 2145), and stood silent in the face of the Clerk's pronouncement that the jury panel and alternate were "acceptable to the State and the defense."

If the jury as empaneled was not acceptable to the defense, that was the time to say so, sayeth the State. The stricken jurors (i.e., Jurors No. 2134, 2172, 2145) had not departed the courtroom. Defense counsel had the opportunity to alert the trial court to any lingering concerns regarding the composition of the jury and, if necessary, the court could have fashioned an additional remedy. By declining to take any exception to the jury as empaneled ultimately, Bonner gave the court a "green light" to proceed with the trial and thereby failed to preserve, if not waived affirmatively, for appellate consideration the issue of how the jury was selected.

B. Bonner's Response

Bonner, on the other hand, finds no legal support for the waiver of an otherwise timely *Batson* challenge through subsequent silence as to the empanelment of the actual jury. He contends that he was not obliged to reiterate his timely *Batson* challenge at the empanelment of the jury. Moreover, at no time did the defense suggest that re-seating Juror No. 2243 resolved its *Batson* challenge.

More pointedly, Bonner deems that he was not asked literally by the Clerk whether he accepted the jury, only whether he accepted the alternate juror. It was the Clerk who announced that the jury was acceptable, without the benefit of asking directly whether Bonner (or the State) accepted the jury. Thus, as his argument goes, he neither waived his Batson challenge, nor failed to preserve it for appellate consideration.

C. Standard of Review

Batson challenges, when ripe for appellate consideration, are reviewed for their adherence to a three step process: (1) the party invoking *Batson* must present a *prima facie* case of intentional discrimination; (2) if the challenger fulfills the step one requirement to the trial judge's satisfaction, the judge transfers the burden to the non-moving party to present any race- and/or gender-neutral reasons for its strikes; and, (3) the trial court determines whether intentional discrimination was proven. *Foster v. Chatman*, 136 S. Ct. 1737, 195 L. Ed. 2d 1 (2016); *Ray Simmons v. State*, 446 Md. 429, 132 A.3d 275 (2016).

In 2016, the Maryland Court of Appeals explained fully each of these three steps:

> 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 black jurors in the particular venire . . . might give rise to or support or refute the requisite showing."
>
> 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."
>
> 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 436–37, 132 A.3d at 279–80 (citations omitted).

D. Timeliness of the *Batson* Challenge

In Maryland, a *Batson* challenge must be raised before the jury is sworn. *Richardson v. McGriff*, 361 Md. 437, 466, 762 A.2d 48, 63 (2000). Moreover, the Court of Appeals opined, "[a] *Batson* objection is timely if the [asserting party] makes it no later

than when the last juror has been seated and before the jury has been sworn." *Stanley v. State*, 313 Md. 50, 69, 542 A.2d 1257, 1276 (1988). Here, Appellant made a *Batson* challenge before the jury was sworn by stating he would like to object, based on *Batson*, to the State's striking of Jurors numbered 2134, 2172, 2243 and 2145. Thus, the initial timing is not at issue. Nonetheless, *Stanley* noted that an "objection made just before the jury is sworn [would] ordinarily be sufficient to preserve a *Batson* issue for appellate review[; however,] under some circumstances prudence may suggest some action at an earlier time." *Stanley*, 313 Md. at 69-70, 542 A.2d at 1276. Although Appellant made his initial objection known before the jury was sworn, *Stanley's* cautionary observation, considered in either direction at trial, is pertinent because of Appellant's subsequent lethargy during the colloquies regarding the jury venire, failing to make any objection to the final jury panel known to the Court after the seating of alternate Juror No. 2255.

E. Waiver of Appellant's *Batson* challenge

We shall not reach the merits of Appellant's *Batson* challenge because it was waived.[7] The Court of Appeals in *Gilchrist v. State*, 340 Md. 606, 618, 667 A.2d 876, 881-82 (1995), held:

> When a party complains about the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury. The party's final position is directly inconsistent with his or her earlier complaint.

Further, the Court of Appeals has long taken the position that "the defendant's claim of error in the inclusion or exclusion of a prospective juror or jurors 'is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of

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[7] The State contends that Appellant failed to preserve for appeal, if not waived affirmatively, the issue of jury composition. We agree that Appellant has waived affirmatively his *Batson* challenge, but we disagree that Appellant failed to preserve his *Batson* challenge. Our finding as to timeliness is immaterial to our ultimate holding, but it is worth noting the principal difference between the concepts of non-preservation and waiver. We find *Williams v. State*, 131 Md. App. 1, 748 A.2d 1 (2000), instructive on this matter. In *Williams*, this Court explained that a failure to object to a court's instruction or never bringing the objection "to the Judges' attention in any way" results in non-preservation of the issue for appellate review. *Williams*, 131 Md. App. at 11-12, 748 A.2d at 6. *See also Collins v. State*, 318 Md. 269, 284, 568 A.2d 1, 8 (1990) ("Counsel's failure to except to the reinstruction is indicative of an acceptance and approval of the amended form used[,]" thus, signifying a failure to preserve this issue for appellate review.); *Young v. State*, 14 Md. App. 538, 565, 288 A.2d 198, 213–14 (1972) (party failed to object to the court's supplementary instruction to the jury eliminating the capacity of appellate review). Conversely, *Williams* opined that a properly asserted objection reasserted inadequately after the satisfactory remedial measures taken to rectify the grounds for the objection results in a waiver of the objection. *Cf. Williams*, 131 Md. App. at 17, 748 A.2d at 9. (asserting that the party did not object to the "introduction of the written statement on either of the particularized grounds he now argues. However, had the objecting party properly noted his initial objection, it had been waived when the evidence came in on other occasions, both earlier and later, without objection.").

the jury selection process.'" *Gilchrist*, 340 Md. at 617, 667 A.2d at 881 (quoting *Mills v. State*, 310 Md. 33, 40, 527 A.2d 3, 6 (1987), *vacated on other grounds*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed.2d 384 (1988)). *See Foster v. State*, 304 Md. 439, 450-51, 499 A.2d 1236, 1241-42 (1985), *reconsideration denied*, 305 Md. 306, 503 A.2d 1326, *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3310, 92 L. Ed.2d 723 (1986). Therefore, Appellant relinquished voluntarily his known right to reassert his challenge to the composition of the jury when he accepted affirmatively the jury composition at the conclusion of the selection of the jury. *See Gutloff v. State*, 207 Md. App. 176, 197, 51 A.3d 775, 788 (2012) (explaining that a waiver "is an intentional and voluntary relinquishment of a known right").

The colloquies that followed the lodging of his *Batson* challenge evince Appellant's acquiescence to the ultimate composition of the jury, most notably after Appellant exhausted his peremptory strikes, except for the remaining alternative juror strike reserved to both Appellant and the State (which Appellant did not utilize). The court took the initiative to ask the parties' counsels on multiple occasions if the jury panel was acceptable to them. It was not until Appellant exhausted the remainder of his strikes that the Clerk asked the State whether the jury panel was acceptable. It is here that Appellant, left with no alternative to exercise any power to remove a juror, remained silent, raising no objection to the jury composition as it existed then. Such silence indicated that Appellant accepted by default the jury as seated, giving the Clerk justification to ask the State, which possessed one remaining strike, whether the panel was acceptable to it.

Contrary to Appellant's argument that the Court needed to ask him directly (after he exhausted his strikes) whether the jury was acceptable, the Clerk asked Appellant twice

in the following exchange if the jury panel was acceptable. These two[8] direct questions posed by the Clerk occurred after the reseating of Juror No. 2243. The transcript states in relevant part:

> CLERK: 2243, please come forward and have a seat in number 3.
> THE COURT: Okay.
> CLERK: ***Is the jury panel acceptable to the State?***
> [PROSECUTOR]: Acceptable.
> CLERK: ***Acceptable to the defense?***
> [DEFENSE]: Brief indulgence. The defense would respectfully thank and excuse Juror no. 2222, seated in seat number 11.
> CLERK: Seat number 11, 2222, please step down. Have a seat in the courtroom. Defense strike number 3. 2246, please come forward. Acceptable to the defense?
> [DEFENSE]: Acceptable.
> CLERK: ***Acceptable to the State?***
> [PROSECUTOR]: Acceptable.
> CLERK: Seat number 11. ***Is the jury panel acceptable to the defense?***
> [DEFENSE]: The defense would respectfully thank and excuse, Juror No. 2126, seated in seat number 1.
> CLERK: Seat number 1, 2126, please step down. Have a seat in the courtroom. Defense strike number 4. Juror No. 2251, please step forward. ***Acceptable to the State?***
> [PROSECUTOR]: Acceptable.

(Emphasis added).

Upon the exhaustion of Appellant's strikes, the Clerk asked Appellee whether the jury was acceptable, but neglected to ask again Appellant. The Court took notice of

[8] Appellant argued in his brief that "the trial judge rejected the [*Batson*] challenge with respect to three of the stricken jurors, but reseated one juror []. Defense counsel *did not* indicate that this was an acceptable resolution." This assertion is not persuasive given that, in place of a negative response showing his dissatisfaction with Juror No. 2243, Appellant chose to exercise one of his remaining peremptory strikes to remove Juror No. 2222. Appellant misstates the record, however; the Clerk not only asked Appellant directly whether the jury panel was acceptable, but Appellant took measures to alter the jury panel further, apt to his desires, rather than indicate his displeasure with Juror 2243.

this and notified the Clerk that they needed to ask Appellant if the jury panel was acceptable to him. The Clerk responded that Appellant was out of strikes, and the Court agreed because Appellant must now take the panel as it is. At any point following the exhaustion of Appellant's strikes he could have reasserted his objection to the jury composition; instead, he remained "intentionally" silent. We cannot agree with Appellant's contention that he was never asked whether the jury was acceptable. The Clerk asked Appellant several times whether the panel was acceptable. Appellant had many opportunities to challenge the jury composition after his *Batson* challenge, but accepted ultimately the panel without noting to the Court any reservations or exceptions.

Appellant argues also that he was not required to restate the *Batson* challenge to preserve it for appellate review under Maryland Rule 4-323(c), which states "it is sufficient that a party, 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. R. 4-323(c). Appellant fails to note, however, a significant portion of that rule indicating that, "[i]f a party has *no opportunity to object to a ruling or order at the time it is made*, the absence of an objection at that time does not constitute a waiver of the objection." *Id.* (emphasis added). Appellant had ample opportunity to object to a ruling at a variety of points during the process of jury empanelment. Ultimately, after exercising the last of his strikes and the uncontested seating of alternative Juror No. 2255, the Clerk asked—in a generalized

manner—"[a]cceptable to the defense[]" referring to the alternate juror and the jury panel as a whole. The transcript reflects, in relevant part:

> CLERK: You can have a seat right there in the first chair, ma'am. Alternate 1, acceptable to the State?
> [PROSECUTOR]: Acceptable.
> CLERK: ***Acceptable to the defense?***
> [DEFENSE COUNSEL]: ***Yes. Thank you.***
> CLERK: The jury panel and alternate are acceptable to the State and the defense, Your Honor.
> THE COURT: Thank you very much[.]

(Emphasis added).

At no point after Appellant's initial challenge did he make known to the court his now claimed lingering dissatisfaction with the panel. At the same time, Appellant stated, consistent with *Gilchrist*, that the "same jury as ultimately chosen is . . . acceptable." *Gilchrist*, 340 Md. at 618, 667 A.2d at 881. This Court has not taken the position that there are sacred words that must be uttered for a waiver to occur. Considering the entirety of the exchanges noted *supra*, it is indisputable that Appellant's subsequent affirmative assent to the Clerk's "[a]cceptable to the defense[]" question was meant to indicate Appellant's satisfaction with the panel.

Furthermore, Appellant's actions, or lack thereof, do not rise to the level of affirmative action to signify an intent to maintain or retain his *Batson* challenge. *See Edmonds v. State*, 372 Md. 314, 328, 812 A.2d 1034, 1042 (2002) ("Petitioner objected repeatedly to the State's exercise of peremptory challenges to exclude African-American venirepersons. Petitioner also asked the court to reseat Smith,

but the court did not comply. Furthermore, petitioner excepted to the final composition of the jury and sufficiently pursued the *Batson* challenges.").

Appellant misplaces his reliance on *Elliott v. State,*185 Md. App. 692, 972 A.2d 354 (2009). In *Elliot*, the exchanges between the Court and defense are different markedly from those made here. In *Elliot*, not only did defense counsel raise a *Batson* challenge coupled with "I just don't want to waive the issue" and "I just want to preserve the issue of using strikes on men," but also he thanked the court after the denial of his *Batson* challenge. *Elliott*, 185 Md. App. at 707, 972 A.2d at 362. The State in *Elliot* asserted that Elliot waived his *Batson* challenge by saying thank you to the judge and, thereby, acquiescing to the trial court's action, i.e., "has no basis for appealing those actions now." *Elliot*, 185 Md. App. at 708, 972 A.2d at 363. We disagreed, explaining that, "although defense counsel thanked the court after it heard the argument on the State's use of its jury strikes, defense counsel's response 'was merely obedient to the court's ruling and obviously not a withdrawal of the prior [*Batson*] objection[].'" *Elliot*, 185 Md. App. at 711, 972 A.2d at 364 (quoting *Ingoglia v. State*, 102 Md. App. 659, 664, 651 A.2d 409 (1995)).

Unlike in *Elliot*, nowhere did Appellant assert his intent to preserve or avoid a waiver of the *Batson* issue, nor was the dialogue between the court, Clerk, prosecutor, and defense analogous to the exchanges between the court and the defense attorney in *Elliot* (except for the use of a courtly "thank you"). Appellant had an overabundance of opportunities to express his dissatisfaction with the jury

panel, but continued to strike jurors in response to the Clerk's questions regarding acceptability of the jury panel and, ultimately, upon the exhaustion of his strikes, accepted the jury as empaneled.

Thus, we disagree with Appellant's assertion that he did not "affirmatively represent" that the jury was acceptable. We hold that his affirmative "[y]es. Thank you[]" acknowledgement to the Clerk's "[a]cceptable to the defense[]" question, and totality of exchanges following his *Batson* challenge (followed by the Clerk's conclusory "[t]he jury panel and alternate are acceptable to the [s]tate and the defense, [y]our [h]onor[]"), manifests an indication of satisfaction with the jury panel. We decline Appellant's invitation to exercise our discretion to reach the merits of his *Batson* challenge on appeal.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.