Circuit Court for Harford County
Case No. 12-K-16-1181

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2124

September Term, 2017

DAVID THOMAS CLEMENTS

v.

STATE OF MARYLAND

Fader, C.J.
Beachley,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: January 3, 2019

After a trial held on October 18 and 19, 2017, a jury sitting in the Circuit Court for Harford County convicted David Thomas Clements, appellant, of two counts of distribution of a controlled dangerous substance (CDS). The circuit court sentenced appellant to forty years' imprisonment, with all but twenty-five years suspended.[1] On appeal, appellant presents one question for our review: "Did the trial court commit reversible error in denying [his] *Batson*[2] challenge?"

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

BACKGROUND[3]

Appellant was charged with selling cocaine to an undercover detective in Joppa, Harford County, on two occasions: May 9 and May 20, 2016. At trial, Detective Brad Sives of the Harford County Sheriff's Office testified that, in his capacity as an undercover detective, he purchased 3.5 grams of cocaine from appellant on May 9, 2016, and 7 grams of cocaine from appellant on May 20, 2016. Detective Sives used a covert audio and video camera to record the two drug transactions. Detective David Waldsmith testified that he conducted surveillance of Detective Sives's transactions with appellant from a nearby location and video-recorded the transactions. The detective's video

[1] Appellant filed a pre-judgment petition for writ of certiorari, which the Court of Appeals denied on August 31, 2018.

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

[3] Because appellant does not challenge the legal sufficiency of the evidence supporting his convictions, we briefly recite the facts relevant to our discussion.

recordings were played for the jury at trial. Appellant was ultimately convicted on both counts of cocaine distribution.

DISCUSSION

Appellant argues that the trial court committed reversible error by denying his *Batson* challenge to the State's use of two peremptory strikes against African American jurors. The State counters that by accepting the jury without qualification, appellant waived his *Batson* challenge, and therefore failed to preserve his argument for review.

During jury selection, after the State indicated that it was using a peremptory strike for juror number 28, the following exchange occurred:

> [DEFENSE COUNSEL]: Your Honor, I would object. I believe we have had two African-American jurors who didn't answer any questions struck from the jury panel that has a limited amount of African-Americans.
>
> THE COURT: That would be juror number 4 and juror number 28. Is that correct?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Mr. [Prosecutor]?
>
> [PROSECUTOR]: I'm exercising my strikes. There is no pattern. I have had four strikes, two of them have been Caucasians and two of them have been African-Americans.
>
> THE COURT: I don't think it is appropriate for you to give a non-discriminatory reason that you struck them.[4]

[4] From the context of this exchange, there appears to be a transcription error in the court's statement that it is "not" appropriate for the prosecutor to give a non-discriminatory reason for the strikes because the prosecutor proceeds to provide an explanation for the strikes.

[PROSECUTOR]: Number 4 didn't answer any questions. I don't know anything about him. He heard about the events that occurred in Edgewood. I simply don't want him on the jury.

Then the other juror, number 28, I struck her because I would like to seat juror number 34 who I believe is an African-American female. So, she would be the next one up. I would like to have her seated rather than the other juror.

[DEFENSE COUNSEL]: There are no African-Americans on the panel and those are two people that answered the questions. The reasons are generic.

THE COURT: They are generic but non-discriminatory. The concern that I have is with regard to juror number 4. The statement that was made by the State is that the relationship is more to the Edgewood area as opposed to a racially biased concern. Then on juror number 28, as [the prosecutor] has pointed out, the next juror up to be seated is juror number 34 who is also an African-American female.

So, I think his interest in seating another juror, if he is seeking a juror of the same race, I haven't heard what would be a discriminatory reason for seating one African-American female over another African-American female. I don't find that the State has been employing discriminatory intent or motivation in making the strikes that he has made so far.

Again, we have kept the jurors that have been stricken in the gallery in the event that there [are] any other motions . . . if we need them.

[DEFENSE COUNSEL]: Thank you.

After the jury was selected, the court asked the defense if "the jury panel as comprised" was acceptable, and defense counsel responded that the jury was acceptable. Defense counsel also accepted two alternate jurors without qualification. After the alternate jurors were selected, and before excusing the remainder of the venire, the court asked counsel: "Is there any reason to approach?" Counsel for both parties responded in the negative.

Appellant argues that the trial court's acceptance of the prosecutor's race-based and gender-based explanation for striking juror number 28 violated *Batson.* Appellant also argues that the trial court violated *Batson* by accepting the prosecutor's "nonsensical" explanation for striking juror number 4 as "generic but non-discriminatory." The State argues, and appellant acknowledges, that under *Gilchrist v. State*, 340 Md. 606 (1995), appellant's *Batson* challenge was waived when he accepted the ultimate composition of the jury without exception. Because we conclude that appellant's *Batson* challenge is waived, we do not reach the merits of his claim.

The Court of Appeals has explained that "[w]hen a party complains about the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury." *Id*. at 618; *see also Thomas v. State*, 301 Md. 294, 310 (1984) ("[A]ny objection to the composition of the jury or the panel of talesmen was waived when [appellant] unequivocally indicated that the jury was acceptable to him."); *Tetso v. State*, 205 Md. App. 334, 370 (2012) ("[I]f a party knows a cause of challenge and does not take it at the proper time, —that is, while the jury is being impanelled, —he cannot avail himself of the defect afterwards.") (citations and internal quotation marks omitted). Applying this fundamental principle in the present case, once the jury had been selected, appellant

waived his earlier *Batson* challenge by stating without qualification that the jury was acceptable.[5]

Appellant contends that his *Batson* challenge should not be deemed waived "merely because defense counsel said the jury was acceptable." Appellant argues that defense counsel's response that the jury was acceptable was merely an indication that he did not wish to use any more peremptory strikes, and not that he was abandoning his prior objection. We note that during jury selection, the court consistently asked whether *individual* jurors were acceptable to the State and the defense. Once twelve jurors were seated in the box, however, the court asked whether "*the jury panel as comprised*" was acceptable to the parties. The court's transition from inquiring about the acceptability of individual jurors to inquiring about the "panel as comprised," signaled that the jury had been selected. When defense counsel asked that juror number 31 be struck from the jury, leaving eleven jurors in the box, the court resumed asking counsel whether individual jurors were acceptable. Once a twelfth juror was again selected, the court inquired:

> THE COURT: Is the jury as comprised acceptable to the State?
>
> [PROSECUTOR]: Acceptable, Your Honor.
>
> THE COURT: Defense?
>
> [DEFENSE COUNSEL]: The Court's indulgence. Acceptable, Your Honor.

[5] Acknowledging *Gilchrist* and its progeny, appellant explicitly recognizes that this Court "is not able to overrule holdings of the Court of Appeals."

After the alternate jurors were selected, the court invited the parties to approach the bench for "any reason." Defense counsel declined the court's invitation to approach the bench, effectively abandoning his final opportunity to challenge the composition of the jury. We find support in the *Maryland Evidence Handbook* for our conclusion that defense counsel's unqualified acceptance of the jury precludes appellate review of the *Batson* claim:

> Make sure the record shows that you are not abandoning whatever objections you have made. You will not be stuck just because you ultimately say "acceptable," as long as before doing so, out of the hearing of the jury, you state for the record that your affirmative response to the "Is the jury acceptable?" question does not constitute a waiver of your previous objections to the selection process. *Lawrence v. State*, 296 Md. 557, 571, 457 A.2d 1127, 1134 (1983). An otherwise unqualified affirmative response will indeed preclude appellate review. *Kennedy v. Mobay*, 84 Md. App. 397, 429, 579 A.2d 1191, 1207 (1990).

Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 112, at 55 (4th ed. 2010). Here, the court provided appellant with multiple opportunities to preserve his *Batson* challenge by reasserting his earlier objection, but he failed to do so. Appellant's affirmative acceptance of the final jury panel without qualification resulted in a waiver of appellant's *Batson* challenge.

Appellant asks us to exercise our discretion under Md. Rule 8-131 to review his *Batson* claim for plain error. Pursuant to Rule 8-131(a), we ordinarily will not decide issues that do not plainly appear to have been "raised in or decided by the trial court." In this case, review of appellant's claim for plain error is not appropriate because he did not merely fail to preserve his objection; he affirmatively waived it. "Waiver is the

intentional relinquishment or abandonment of a known right." *State v. Rich*, 415 Md. 567, 580 (2010) (citation and internal quotation marks omitted). While "forfeited rights are reviewable for plain error, waived rights are not." *Id*. (citation omitted).

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