UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2685

September Term, 2013

TURBO WILLIAMS

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 24, 2015

Following a jury trial in the Circuit Court for Harford County, appellant, Turbo Williams ("Williams"), was convicted of possession of cocaine with the intent to distribute, possession of paraphernalia, fleeing and eluding a police officer, and speeding. The court sentenced Williams to forty years, with all but nineteen years suspended, for possession with the intent to distribute, and one year, consecutive, for fleeing and eluding. The court imposed fines for the remaining counts.

On appeal, Williams presents three issues, which we have reworded, as follows:

1. Did the trial court err in allowing the State to strike certain jurors?

2. Was Williams denied the right to confront the evidence?

3. Was the evidence legally sufficient to sustain the conviction for possession of cocaine with intent to distribute?

For the reasons below, we affirm the judgments of the circuit court.

BACKGROUND

On February 24, 2012, at 11:10 a.m., Officer Adam Laprade of the Maryland Transportation Authority Police observed a vehicle traveling 71 miles per hour in a 65 mile per hour zone on Interstate 95 in Harford County. Officer Laprade activated his lights and sirens, reported the traffic stop to police communications, and then requested backup because the vehicle refused to stop. From this point on, the traffic stop was audio and video recorded by the camera attached to Officer Laprade's windshield. The video was played for the jury and entered into evidence as State's Exhibit Number 1.

While Officer Laprade was following Williams, he saw Williams throw white rock-like substances and clear plastic bags out the driver's side window.[1] Officer Laprade testified that the white rock substance hit his windshield three times. Thereafter, backup officers arrived and assisted Officer Laprade in surrounding Williams's vehicle, which forced Williams to come to a stop at mile marker 83 on Interstate 95.

Officer Laprade placed Williams under arrest and performed a probable cause search of the vehicle, wherein police recovered two clear plastic bags with white residue, small amounts of crack cocaine spread throughout the vehicle, and trace amounts of marijuana.[2] Two plastic bags with white residue were also recovered from Officer Laprade's vehicle, one was stuck in the grill, and the other was stuck beneath a windshield wiper.[3] Several officers searched the roadway and recovered rocks of cocaine and additional plastic bags with white residue. Back at the station, Williams was searched and officers recovered a plastic bag from the waistband of Williams's underwear that contained a small rock of cocaine.

The suspected narcotics recovered from all locations tested positive for cocaine. In total 8.3 grams of cocaine was recovered. After the evidence was confirmed to be crack

[1] Williams was identified in court as the operator of the vehicle and Officer Laprade testified that Williams was the only person inside of the vehicle.

[2] Williams was driving a Ford Edge, which was rented from Hertz by a female, who was unable to be located.

[3] The plastic bag recovered from the windshield was a sandwich sized bag in which there appeared to be several smaller plastic bags, containing a white powdered substance.

cocaine, pursuant to Department policy, the cocaine was destroyed.[4] Accordingly, the actual drugs recovered in this case were not available as evidence at trial.

Corporal Will Reiber was accepted as an expert in CDS terminology and packaging. Corporal Reiber testified that "the packaging, is is [sic] indicative to me of packaging for large amounts of drugs, cocaine[.]" Corporal Reiber ultimately opined, based on the totality of the circumstances in the case, that:

> everything that I see in this case suggests to me, and the mere fact that eight grams was recovered as well, which still has a street value of $800.00, not even minimizing the amount that was recovered, thinking in terms of the packaging and what potential [sic] could have been held within those bags, it is clear to me that this case is a case that would meet the threshold of possession with intent to distribute.

Additional facts will be discussed below, as they pertain to each question presented.

I. The *Batson v. Kentucky* Issue

During jury selection, defense counsel raised a challenge to the prosecutor's use of peremptory strikes and the following colloquy occurred at the bench:

> [DEFENSE COUNSEL]: Your Honor, we only had very few young people on this jury panel and the State has now chosen to use all of its strikes on those that were young. We have a nineteen year old, juror number 14, that was struck by the State. We have a twenty-seven year old again struck by the State.
>
> COURT: The first one struck by the State was forty-five.

[4] This was the stipulation read to the jury. The parties, however, explained to the court that the evidence was destroyed, pursuant to Department policy, because Williams entered a guilty plea.

[DEFENSE COUNSEL]: I understand.

COURT: I'm trying to to [sic] go by the numbers. The second one was twenty-seven. The third is nineteen.

[DEFENSE COUNSEL]: Your Honor, that virtually exhausts all the young people on this jury. I just don't think the State can use a course of conduct to exclude all the young people on the jury panel.

COURT: Well, it would have been nice if you would have objected when he did that on the last one because they are out the door now.

[DEFENSE COUNSEL]: I think the last one was the one that he just struck from the box, number 14.

[STATE]: Your Honor, I can state on the record. Number one, I don't think the particular challenge goes specifically to age. Let me rephrase that. Number 14 I struck because of his appearance. He has earrings in both ears and in my experience with jurors with earrings and wearing clothes like that they have always been a little bit tricky I [sic]. That would be the reason for my striking that particular person, not because of his age.

COURT: And strike number one was forty-five. From my perspective that is a youngster, but I don't think the rest of America views it that way.

* * *

COURT: And then strike number two was twenty-seven.

[STATE]: I'm very flattered by [defense counsel] thinking that forty-five is very young.

COURT: I don't think he is saying that.

[DEFENSE COUNSEL]: I'm not.

COURT: He is going to number two, the second strike.

[STATE]: Number which one?

COURT: Number 25 who was twenty-seven.

[STATE]: If I could get my notes. I have reasons why I struck them. They are not based on age.

COURT: He was the bearded young man in a blue shirt. I don't remember if you remember that or not if that helps.

[STATE]: I do not. If I could get my notes?

COURT: Sure.

[STATE]: The reason why I struck juror number 25, Your Honor, is he stated that he had a DUI conviction six years ago or his half-sister. That's the reason why I struck that particular juror. His answer for me had a little bit of reservation as far as animosity towards the State's Attorney's Office and that is the reason why I struck him was for that.

COURT: Well, there are two aspects to this. Number one, I don't find that it was timely made in the sense that we had moved on to the next juror. The time to object was when [the prosecutor] utilized the strike before that juror was excused and sent out of the courtroom. He is long gone and we have moved on to another juror. That is my first problem. Number two is had it been timely made, having heard the explanation, I find no violation. So, I would deny the motion and the objection.

Jury selection resumed, but after the State struck juror number 8, defense counsel asked to approach the bench, where the following discussion occurred:

[DEFENSE COUNSEL]: Your Honor, just for the record, I'm making a timely objection. The one that was struck was a twenty-eight year old. I believe that is the last anywhere near young person that we had available on this jury today. The State used three of the four strikes on people in their twenties which is all we have.

COURT: Actually I think one was nineteen.

[DEFENSE COUNSEL]: That's true.

> COURT: The rest were in their twenties.
>
> [STATE]: Your Honor, juror number 8 answered that he has two very close friends with two DUI convictions. Again, he referred to them as close friends. With that, I'm just afraid that he has some kind of antimosity [sic] towards the State's Attorney's Office. He specifically said there were two close friends with DUI convictions.
>
> COURT: Anything else by the defense?
>
> [DEFENSE COUNSEL]: His uncle is a police officer. He seemed very proud of that fact. He didn't express any type of antimosity [sic] towards anybody when he talked about his friends. Other than he is young, I don't see any problem with him.
>
> COURT: Well, the objection was timely made. So, we have that. And we were able to catch him before he got away. However, I don't find any violation. The State has indicated a nonviolative basis for its decision. I don't find any basis to grant that. I'll deny the objection.

Williams argues that he made a *prima facie* showing of discrimination on the basis of age and that the "prosecutor failed to provide satisfactorily neutral explanations for the striking of youthful jurors[.]" Williams acknowledges that "the United States Supreme Court has yet to recognize age as a protected class as contemplated by *Batson* and its progeny, [but argues that] a straightforward application of *Batson* principles to age as a class warrants reversal."

The State counters that "young adults are not a protected group for purposes of an Equal Protection challenge to jury selection[, but even] if they were, the record here fails to demonstrate any purposeful discrimination against young adults, and the State gave neutral explanations for striking youthful jurors in any event."

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the striking of a venireperson on the basis of race." *Edmonds v. State,* 372 Md. 314, 328 (2002). The United States Supreme Court, in *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986), outlined a three-step analysis "for determining whether a peremptory challenge has been exercised in violation of the Equal Protection Clause." *Edmonds,* 372 Md. at 329. The Court of Appeals explained the process, as follows:

> When a criminal defendant raises a *Batson* claim, the trial judge must follow a three-step process. The burden is initially upon the defendant to make a *prima facie* showing of purposeful discrimination [step one]. If the requisite showing has been made, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors [step two]. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination [step three].

Id. at 329-30 (quoting *Whittlesey v. State,* 340 Md. 30, 46-47 (1995)) (internal quotation marks omitted).

This Court specifically discussed peremptory challenges based on age in *Bridges v. State*, 116 Md. App. 113, 133 (1997), and held:

> *Batson* does not cover "rational basis" classifications. An age classification is a "rational basis" classification. Therefore, *Batson* does not cover an age classification. Accordingly, the State's peremptory challenges in this case based on the ages of the prospective jurors were truly peremptory and needed no justification. *Batson* does not apply to age-based peremptories.

Williams has not cited, and we have not found, any authority to convince us otherwise. Accordingly, the trial court did not err by allowing the State to strike jurors on the basis of age.

Even if age were recognized as a protected class, reversal would still not be warranted. Step two of the *Batson* analysis requires a prosecutor to provide neutral reasons for striking the juror in question. The Court of Appeals has explained the prosecutor's burden as follows: "[the] explanation must be race-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." *Edmonds*, 372 Md. at 330. "If the defending party offers a race-neutral reason, the challenging party must demonstrate that the offered explanation merely is a pretext for a discriminatory intent or purpose." *Id.*

Here, the prosecutor explained that she struck one of the challenged jurors due to his appearance and the other two jurors because they had friends or family members with DUI convictions, which the prosecutor believed might create a sense of animosity towards the State's Attorney's Office. The court held that the State provided sufficient reasons for striking the jurors and that Williams had not met his burden of establishing that the explanation was merely a pretext for a discriminatory intent. "As a reviewing court, we give the trial court's finding great deference [because] [t]he trial judge is able to get the 'feel'of the opposing advocates—to watch their demeanor, to hear their intonations, and to spot their frequently unspoken purposes." *Khan v. State*, 213 Md. App. 554, 571 (2013) (citation and some quotation marks omitted). As such, even if age were a protected class, the court still did not err in striking the jurors.

II. The Right to Confrontation

During the first day of trial, defense counsel learned that the drugs recovered in connection with the case had been destroyed. Defense counsel informed the court that he wanted to have the drugs to show the jury that the amount of drugs recovered was not a quantity sufficient for distribution. Defense counsel admitted that he did not have any grounds for a mistrial, but expressed to the court that he believed the lack of evidence would hinder his defense.

The court noted that Williams initially entered a guilty plea and later asked the court to rescind his plea. Once the guilty plea was entered, however, the police destroyed the drugs. The court explained that the usual procedure before granting a defendant's request to rescind a guilty plea is to make sure that the evidence is still available, but that was not done in this case because the State did not oppose Williams's motion. Thereafter, the court suggested using baking soda to demonstrate the amount of cocaine recovered. Defense counsel and the State told the court that Corporal Reiber was already putting together 8.5 grams of powdered coffee creamer to use as a demonstration.[5]

The court informed defense counsel that it would be "very liberal" in allowing him to put together a visual aid for the jury. The court suggested that the parties agree to a

[5] It is unclear why 8.5 grams of powdered coffee creamer was used when 8.3 grams of cocaine was recovered.

stipulation to explain to the jurors why the actual drugs were not available as evidence. Thereafter, the colloquy continued, as follows:

> COURT: Other than that suggestion, have you come up with a different stipulation? Are you okay with what [the prosecutor] just indicated?
>
> [DEFENSE COUNSEL]: Your Honor, I think we have to give it a try this way. What else can we do? I'm not wild about this idea at all.
>
> COURT: I doubt that the State is kicking its heels either.
>
> [DEFENSE COUNSEL]: *If it wasn't for my client's request for a new trial that created some of the problem, I would ask for a mistrial.*
>
> COURT: That was a lead domino.
>
> [DEFENSE COUNSEL]: *I would ask for a dismissal but for the fact that my client had a hand in creating the problem.*
>
> COURT: *I understand. If we didn't have that little factor, I would be listening very hard to your motion.*
>
> [DEFENSE COUNSEL]: Thank you, Judge.

(emphasis added).

During the testimony of Officer Laprade, the CDS analysis report was admitted into evidence as State's Exhibit Number 2 without objection from the defense. Thereafter, the State told the jury that "through agreement with counsel the stipulation is that in this particular incident the CDS was submit[ted] to[ ] MSP, it was analyzed and came back as cocaine with regards to the analysis and per office policy that cocaine was destroyed." Defense counsel responded, "Judge, that's fine."

The following day, during the testimony of Corporal Reiber, the State sought to admit the powdered coffee creamer into evidence, and the following colloquy occurred at the bench:

> [DEFENSE COUNSEL]: I'm kind of in between a rock and a hard place.
>
> COURT: No pun intended.
>
> [DEFENSE COUNSEL]: Yes. Obviously I have problems with the exhibit.
>
> COURT: Without your okay it doesn't come in. That is why I wanted your input on it, [defense counsel]. I know on the one hand I thought part of this was to compensate for the other issue that was destroyed.
>
> [DEFENSE COUNSEL]: It is.
>
> COURT: I wanted you to be able to have something in your hand to show in front of the jury in fairness to you and your client. You can still do that even if it is not in evidence.
>
> [DEFENSE COUNSEL]: That is what I'm thinking.
>
> COURT: However you want to deal with it.
>
> [DEFENSE COUNSEL]: *I don't mind using it as a demonstrative piece of evidence.*
>
> COURT: *Typically that is all it would be is marked for I.D. I'll defer to you.*
>
> [DEFENSE COUNSEL]: *I would rather keep it out.*
>
> COURT: *That's fine. That is what it will be. It will stay for I.D.*

(emphasis added).

On appeal, Williams argues that reversal is required because he "was denied his right to confront the 'real evidence' against him." The State responds that Williams waived his right to appellate review by failing to object and that Williams invited the error he now complains of on appeal. The State argues that even if this issue were properly preserved, Williams has no Constitutional right to confront the evidence against him.

"The 'invited error' doctrine is a 'shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit--mistrial or reversal--from that error.'" *State v. Rich*, 415 Md. 567, 575 (2010) (quoting *Klauenberg v. State*, 355 Md. 528, 544 (1999)). In deciding whether Williams invited the error, we "must also consider whether [he] intentionally relinquished or abandoned a known right." *Id.* at 580 "If [Williams] has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable." *Id.*

Here, defense counsel conceded at trial that Williams's actions contributed to the evidence being unavailable. Specifically, defense counsel stated: "I would ask for a dismissal but for the fact that my client had a hand in creating the problem." Understanding that the drugs were no longer available, in part because Williams previously entered a plea of guilty, the court deferred to defense counsel to decide how to present the evidence.

Defense counsel and the State agreed on a stipulation to read to the jury regarding the evidence, they agreed to use 8.5 grams of powdered coffee creamer as a demonstrative exhibit, and the court followed defense counsel's request to keep the demonstrative evidence

marked as for identification only. Further, defense counsel indicated: "I don't mind using it as a demonstrative piece of evidence." Under these circumstances, Williams both invited the error and relinquished a known right, thereby waiving his right to appellate review on this issue.

III. Sufficiency of the Evidence

Finally, Williams argues that the evidence was insufficient to support his conviction for possession of cocaine with intent to distribute. The State responds that Williams's "claim is unpreserved and meritless."

Maryland Rule 4-324(a) requires a defendant to "state with particularity all reasons why the motion [for judgment of acquittal] should be granted." "This means that a defendant must 'argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient.'" *Arthur v. State*, 420 Md. 512, 522 (2011) (quoting *Starr v. State*, 405 Md. 293, 303 (2008)). "Accordingly, arguments not made before the court will not be considered for the first time on appeal.'" *Id.* at 523.

At the close of the State's case, defense counsel made a general motion for judgment of acquittal and, rather than arguing in support of the motion, stated: "I think we can all agree that the issue is one for the jury to decide in this case." The court agreed that there was sufficient evidence to submit the case to the jury and, therefore, denied the motion.

Thereafter, the defense rested without presenting any evidence. Defense counsel renewed his general motion at the close of the case, and that motion was also denied.

Here, defense counsel did not argue the motion for judgment of acquittal with any particularity and even conceded that the evidence was sufficient to present to the jury. Accordingly, this issue is not preserved for our review. Even if, however, this issue were preserved for our review, the evidence was sufficient to support Williams's conviction for possession of cocaine with the intent to distribute.[6]

"In reviewing a question regarding the sufficiency of the evidence presented at trial, the primary question we ask is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Haile v. State*, 431 Md. 448, 465 (2013) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). Williams does not challenge that he possessed the cocaine, but rather, argues that the evidence was insufficient to prove that he possessed the cocaine with an intent to distribute. As to distribution, the court instructed the jury:

> Distribute means to sell, exchange, or transfer possession of the substance, or to give it away. No specific quantity is required for you to find the intent to distribute. There is no specific amount below which the intent to distribute disappears and there is no specific amount above which the intent to distribute appears. You may find the intent to distribute a substance from the possession of such a quantity of it, which, when considered with all the other circumstances in this case, reasonably indicates the intent to distribute.

[6] Williams does not challenge the evidentiary sufficiency for his remaining convictions.

Even though the actual drugs were not available as evidence, if the jury believed Corporal Reiber's expert testimony, there was more than sufficient evidence for a rational trier of fact to find that Williams possessed the cocaine with an intent to distribute. *See Riggins v. State*, 155 Md. App. 181, 235 (2004) ("The ultimate determination of criminal agency and credibility are always issues for the trier of fact.")

Corporal Reiber, who was accepted as an expert in CDS packaging, testified that based upon the facts of this case, the 8.3 grams of cocaine recovered met the threshold for possession with the intent to distribute. Corporal Reiber explained that the packaging of the drugs in multiple bags, along with the quantity, which had a street value of $800.00, indicated an intent to distribute. Further, Corporal Reiber testified that Williams driving a rental car under another person's name on a Friday at 11:00 a.m also indicated an intent to distribute because most recreational drug use occurs on weekends and because many dealers do not use their personal vehicles during drug deals. Finally, Corporal Reiber surmised that Williams originally possessed more than the 8.3 grams of cocaine that was actually recovered because the bags were thrown out of the car window while Williams was traveling at high speeds on the highway.

This evidence was sufficient to support Williams's conviction for possession of cocaine with the intent to distribute.

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