Circuit Court for Baltimore City
Case No.: 117177029

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2878

September Term, 2018

DARNELL WORRELL

v.

STATE OF MARYLAND

Berger,
Wells,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: July 6, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Minutes after 6 p.m. on January 2, 2017, at a bus stop on East Patapsco Avenue in Baltimore, Jamal Washington was fatally shot. Surveillance camera video showed the shooter flee into a waiting car. Appellant Darnell Worrell, the registered owner of that vehicle, was charged in the murder.

A jury in the Circuit Court for Baltimore City acquitted Worrell of first- and second-degree murder on an aiding and abetting theory but failed to reach a verdict on other charges. Three months later, in a second trial, a different jury convicted Worrell of conspiracy to commit murder and conspiracy to use a handgun in a crime of violence.

Appealing those convictions, for which he was sentenced to life, Worrell presents two questions for our review:

1. Did the [trial] court err in denying Mr. Worrell's challenge to the prosecutor's removal of an African American juror from the petit jury?
2. Did the trial court err in admitting the prior testimony of an expert witness from Mr. Worrell's initial trial?

Concluding there was no error, we will affirm.

BACKGROUND

Because Worrell does not challenge the sufficiency of the evidence supporting his convictions, our summary of the record provides context for the issues addressed in this appeal. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

Surveillance camera footage from multiple locations in the area of the shooting showed a gray or silver four-door Acura, with "no front tag" and "possibly a temp tag," "silver around the grill, tinted windows," "a moon roof," and a "lighter-colored rectangular sheet of paper" visible through the windshield, "with a dark spot in the center[.]" As Jamal

Washington stood near a bus stop in the 100 block of East Patapsco Avenue, the Acura circled the block twice, then entered an alley between Annabel Avenue and Patapsco. With headlights off, the Acura turned around near the Patapsco end of the alley and parked facing toward Annabel.

A hooded individual exited the passenger side of the Acura, ran toward the bus stop where Washington was standing, came out of the alley with arms extended, fired multiple times at Washington, ran back into the alley, and retreated into the passenger side of the Acura. The Acura drove away with its headlights off.

The following day, based on characteristics visible in the surveillance videos, Baltimore City police canvassing the area of the shooting matched the Acura to a parked vehicle, then determined that it was registered to Worrell. When Worrell came to the vehicle, detectives questioned him. After initially giving a false name and denying that the Acura belonged to him, Worrell apologized and admitted his identity and ownership. He said that his cousin, "Montrell Dollar," had the car at the time of the murder, while Worrell was with his girlfriend, Crystal Newby, at her residence.

Finding no record of a person named "Montrell Dollar" in Maryland, investigators reviewed cell phone records for two devices in Worrell's possession. This evidence placed Worrell's phones with his Acura in the area of the murder, contradicting his alibi claim that someone else was using his car while he was with Newby.

According to an FBI expert in historical call detail record analysis, there were multiple calls during the thirty minutes before and after the shooting, connecting to numbers listed in Worrell's saved contacts. All of those calls connected to the cell tower

nearest to where the shooting occurred, not to cell towers "all the way on the other side of town" near Ms. Newby's residence in Northwest Baltimore. After connections ceased in the immediate area of the shooting, Worrell's phones began connecting through different cell towers located around the city. Neither phone connected through cell towers in Newby's neighborhood until four hours after the shooting; 90 minutes later, the phones again began connecting through other towers around the city. During the time Worrell claimed he was with Newby, his phone records show about sixty connections to her phone number, including a ten-minute phone call.

Baltimore City Crime Laboratory Technician Randolph Turner responded at 6:49 p.m. to the scene of Washington's shooting, near the intersection of Patapsco and Hanover. Among the items he collected were metal fragments, some lying next to a lens from the victim's eyeglasses near the bus stop on the "even" side of the street, and others lying in the street and across the street. Also recovered was a .380 caliber cartridge casing lying on the sidewalk across Patapsco Avenue from the victim. A weapon that expels a .380 cartridge or casing when fired would not produce metal fragments like those found near Washington. Turner later spoke to Technician Anderson about the .380 casing he found across the street.

Crime Lab Technician Supervisor Jennifer Anderson testified that around noon on January 2, 2017, she responded to the scene of a different shooting involving a .380 caliber weapon, which occurred about a block away from where Mr. Washington was later shot. After parking her vehicle near the intersection of Patapsco and Hanover, she processed that crime scene during a "strong" and soaking rain. Collecting eight spent .380 cartridge cases,

she individually packaged each in a coin envelope made of paper. When Anderson got to her car, she "was trying to put things into dry envelopes." After she "returned to the forensic bay, [her] headquarters, [she] noticed that one of the cartridge cases had fallen out of the envelope" because one coin envelope was empty, with "a hole in the bottom[.]" When she went back to the scene, she did not find the missing cartridge. She subsequently learned that "Tech Turner" had responded to a later shooting in the same area and found such a cartridge. She identified the .380 cartridge collected by Turner as the same caliber of the missing cartridge from her crime scene.

Baltimore City Police Detective Bryan Kershaw concluded, based on that information, the location of the .380 casing, the videos showing the shooting, and evidence recovered at the scene and from Washington's body, that the .380 casing found by Technician Randolph was "an artifact . . . . from a different incident." Whereas the shooting earlier in the day involved a .380 caliber semiautomatic weapon that ejects casings, a single .30 or .32 caliber projectile was recovered from Washington's head during his autopsy. No casings were found in the area where the shooter can be seen on the video, firing at Washington. Because the weapon used to shoot Washington fired ammunition that was "within a .30 or .32 class[,]" it could not have fired .380 ammunition and would not have expelled a cartridge casing.

Over defense objection, the trial court admitted a recording of testimony given at

Worrell's first trial by firearms examiner Christopher Faber.[1] Faber testified that the single bullet recovered from Mr. Washington's body, as well as fragments found at the scene of his shooting, had copper alloy jackets consistent with a caliber range of .30 to .32 class. Based on these projectiles and fragments, Faber concluded that three shots could have been fired. A weapon capable of firing that ammunition could not have fired ammunition that expelled a .380 casing.

We shall add material from the record in our discussion of the issues resolved in this appeal.

DISCUSSION

I. *Batson* Challenge

Invoking *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712 (1986), and *Chew v. State*, 317 Md. 233 (1989), Worrell contends that the trial court "erred in rejecting [his] challenge to the State's removal of Juror 231," who was one of the four prospective jurors, all African-American, struck by the State. In Worrell's view, the court violated his right to Equal Protection under the Fourteenth Amendment because it did not make a required predicate finding of fact that the juror behaved in the manner proffered by the State as grounds for striking him. Nevertheless, Worrell concedes that defense counsel later stated "that the jury panel, as seated, was acceptable." Acknowledging that constitutes waiver, he asks us to "correct" the underlying error by the trial court, either by treating defense

[1] Because the trial transcript indicates that many portions of the recording were inaudible to the court reporter, both parties' briefs refer to the written transcript of Faber's live testimony during the first trial, on January 4, 2018, which is in the supplemented record before us. *See* Rule 8-411(a)(3). We shall do the same.

counsel's initial objection as "substantial compliance" with the objection requirement, by determining that "trial counsel was ineffective in fail[ing] to perfect this issue for appeal[,]" or by addressing the matter as plain error under Rule 8-131(a).

The State responds that Worrell's *Batson* claim is neither preserved nor meritorious. This Court, the State argues, should decline to consider Worrell's ineffective assistance of counsel claim in this direct appeal or to grant plain error relief.

After reviewing the pertinent law and record, we address Worrell's contentions in turn, explaining why they are not supported by the record or the law.

A. Standards Governing *Batson* Challenges

"*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." *Ray-Simmons v. State*, 446 Md. 429, 435 (2016). The harm resulting from such a discriminatory strike encompasses violations of both the accused's "right to a fair trial" and "the potential juror's 'right not to be excluded on an impermissible discriminatory basis.'" *Id*. (citation omitted). "Moreover, when the striking party's 'choice of jurors is tainted with racial bias, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial, invit[ing] cynicism respecting the jury's neutrality and undermin[ing] public confidence in adjudication.'" *Id*. (quoting *Miller-El v. Dretke*, 545 U.S. 231, 238, 125 S. Ct. 2317 (2005) (citations omitted)).

Trial courts play "'a pivotal role'" in protecting these rights by conducting the following three-step *Batson* analysis. *Id*. (quoting *Snyder v. Louisiana,* 552 U.S. 472, 477,

128 S. Ct. 1203 (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. *See Purkett v. Elem,* 514 U.S. 765, 767, 115 S. Ct. 1769 (1995) (per curiam). "[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." *Johnson v. California,* 545 U.S. 162, 168, 125 S. Ct. 2410 (2005) (internal quotation marks omitted). 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. *Purkett,* 514 U.S. at 767, 115 S. Ct. 1769. 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." *Hernandez v. New York,* 500 U.S. 352, 360, 111 S. Ct. 1859 (1991) (plurality opinion). 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." *Purkett,* 514 U.S. at 769, 115 S. Ct. 1769. 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." *Miller–El,* 545 U.S. at 239, 125 S. Ct. 2317 (alterations omitted).
>
> 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." *Purkett,* 514 U.S. at 767, 115 S. Ct. 1769. "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." *Johnson,* 545 U.S. at 171, 125 S. Ct. 2410 (quoting *Purkett,* 514 U.S. at 768, 115 S. Ct. 1769) (emphasis omitted)[.] *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]." Snyder,* 552 U.S. at 477, 128 S. Ct. 1203. 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 435-37 (Maryland case citations omitted) (emphasis added).

B. The Voir Dire Record

Before voir dire began, the trial judge instructed prospective jurors to respond individually with either "Here" or "Present" as each juror number was called. Although every other prospective juror answered with one of those two words, Juror 231 stated, "Right here."

When voir dire was complete, jury selection began. After the prosecutor struck four prospective jurors – Nos. 186, 231, 250, and 259 – defense counsel asked to approach the bench, and the following ensued:

> [DEFENSE COUNSEL]: Your Honor, please, every strike with the jury the State made were [sic] African American.
>
> THE COURT: Uh-huh. Yes. So you're – it's been four African American[s]?
>
> [DEFENSE COUNSEL]: Four. Uh-huh.
>
> THE COURT: Why don't we ask, start with –
>
> [PROSECUTOR]: Okay. The State struck Juror Number 1-8-6 because she is 19 years old and I don't think somebody who is 19 has the life experience and maturity to take on a murder case.
>
> *THE COURT: Okay. And the second one was a black male, 2-3-1?*
>
> *[PROSECUTOR]: He didn't answer any questions, but during roll call when he said "here," I just felt like he had a little bit of an attitude about being here. So I'm reluctant to see somebody who does not want to participate in*

process.

THE COURT: Okay. And then your third was –

[PROSECUTOR]: 250.

THE COURT: -- 250, black male.

[PROSECUTOR]: I think she was an African America[n] female. I struck her because her mother is pending attempting [sic] murder charges, and I feel like that might hit a little bit too close to home. There might be some sympathy for the defendant.

And 2-5-9 was also an African America[n] female. The State struck her because she had a brother who is incarcerated for narcotics trafficking.

I know the defendant's history, and I don't know if there's going to be some sympathy or she can see her brother in the defendant. So I struck her for that reason.

THE COURT: I have that her brother was incarcerated for child support.

THE DEFENDANT: Yeah. That's what she said.

[PROSECUTOR]: Oh. I have narcotics trafficking.

THE DEFENDANT: She said child support.

[PROSECUTOR]: Well, maybe I heard it wrong.

THE COURT: Okay.

[PROSECUTOR]: Either way, I feel like somebody who has a brother who is incarcerated, I feel like may have some sympathy for the defendant.

THE COURT: Okay. Do you wish to say anything?

[DEFENSE COUNSEL]: Your Honor, please, just because someone is 19 years of age doesn't mean they're immature and they can't sit and hear the facts. I heard – I did not hear one disqualifying characteristics [sic] that the State brought out about that person.

She's a black female, and age 19. I mean if that were the case, consider drafting the military and they are sent over to get killed.

[PROSECUTOR]: Generally as a rule [I] don't seat anybody under 22 is my personal preference. Age is not a protected class. It wasn't race based. It wasn't gender based.

She also has family members that have been arrested for handgun violations.

THE CLERK: Everyone please lower your voices, please.

THE COURT: All right. She did – for 1-8-6, the 19 years old that – she did say that she had two arrested relatives, one for which (Inaudible . . .) and (Inaudible . . .) her adopted mother, that was a corrections officer.

But this attitude about the 2 – on 2-3-1 who didn't answer any questions, --

[PROSECUTOR]: The gentleman when he stood up?

THE COURT: Uh-huh.

[PROSECUTOR]: I – I look at people when they take roll. And I usually make notes if there's something about the way that they respond to their attendance. It was just a feeling that I got.

I marked other people for that same reason as well. I just – I pay attention when they stand up to whether or not it feels, you know, like they want to be here.

THE COURT: I didn't really see him in terms of that. Now, I understanding 2-5-0 and 2-5-9 because, yes, 2-5-0, the mother is pending an attempted murder charges. [Sic] But you are borderline, especially the first two.

[PROSECUTOR]: Your Honor, age is not protected class. I – my preference is not [to] seat very young people on a murder case. I feel like it's a lot of responsibility for somebody who doesn't have a lot of life experience.

It is my own personal preference. It has nothing to do with their gender or their age – or I mean or race. So I don't know that that's an issue here.

[DEFENSE COUNSEL]: You're arguing if you're 19 you don't qualify, but you're three years older –

[PROSECUTOR]: No. That's not what I'm saying. I'm saying on a murder charge, I feel like that at 19 it's – it's a very heavy issue. I would put a 19-year old on a drug case. I would put a 19-year old on a burglary case.

On a murder case, I – my personal preference is I like somebody to have a

little bit more life experience.

[DEFENSE COUNSEL]: Well, how can you judge someone that we don't know the first thing about, life experience?

[PROSECUTOR]: Mr. [Defense Counsel], it's a peremptory challenge. I'm allowed to strike a juror for whatever reason I want as long as it's not race or gender motivated.

THE COURT: It's not just for gender (Inaudible . . .)

[DEFENSE COUNSEL]: So what you're saying is that if you had a witness who is 19, you would think twice about putting him on the stand?

[PROSECUTOR]: I don't that one thing has anything to do with the other. [Sic]

THE COURT: Okay. *So at this juncture I'm not going to reseat the juror* (Inaudible . . .)

[PROSECUTOR]: (Inaudible . . .)

THE COURT: *If you strike any further, I'm going to have to look at the decision. I may to reseat. [Sic] Okay?*

[PROSECUTOR]: Okay.

(Emphasis added.)

When jury selection continued, defense counsel struck another juror before a final juror was seated, with no further strikes by the State. At that point, the following occurred:

THE CLERK: Is the jury panel acceptable to the Defendant?

[DEFENSE COUNSEL]: Absolutely.

THE CLERK: Is the jury panel acceptable to the State?

[PROSECUTOR]: Yes. The panel's acceptable to the State.

THE CLERK: Your Honor, we have a panel.

(Emphasis added.)

After two alternates were selected, defense counsel also responded that they were "[a]bsolutely" acceptable to the defense. The panel was sworn, seated, and given preliminary instructions, with defense counsel making no further mention of his prior challenges.[2]

C. Waiver

We agree with the State that defense counsel's unqualified acceptance of the jury amounted to an abandonment of Worrell's *Batson* objections. "Generally, a party waives his or her voir dire objection going to the inclusion or exclusion of a prospective juror (or jurors) . . . if the objecting party accepts unqualifiedly the jury panel (thus seated) as satisfactory at the conclusion of the jury-selection process." *State v. Stringfellow*, 425 Md. 461, 469 (2012). *See Gilchrist v. State*, 340 Md. 606, 618 (1995). In contrast to objections challenging specific voir dire questions and other matters incidental to jury selection, "[o]bjections related to the inclusion/exclusion of prospective jurors are treated differently for preservation purposes because accepting the empaneled jury, without qualification or reservation, 'is directly inconsistent with [the] earlier complaint [about the jury],' which 'the party is clearly waiving or abandoning.'" *Stringfellow*, 425 Md. at 470 (quoting *Gilchrist,* 340 Md. at 618). This Court has consistently applied this principle. *Compare Gantt v. State*, 241 Md. App. 276, 302-07, *cert. denied*, 466 Md. 200 (2019) (holding that *pro se* defendant's acceptance of empaneled jury waived prior *Batson*

[2]As a result of having seen a press report regarding another criminal case involving Worrell, one of the alternates replaced another of the jurors on the second day of the three-day trial.

objection), *with Mills v. State*, 239 Md. App. 258, 271 n.4 (2018) (accepting jury "pursuant to my motions" preserved *Batson* challenge for appellate review).

Here, defense counsel affirmatively abandoned his complaint about Juror 231 when he declared the jury panel "[a]bsolutely" acceptable to the defense. (T1.228) In turn, that response forecloses Worrell's *Batson* challenge in this Court. *See Stringfellow*, 425 Md. at 469; *Gilchrist*, 340 Md. at 618.

We reject Worrell's argument that the combined effect of his objection to the State's use of peremptory challenges, the allegedly "insufficient explanation for removing Juror 231[,]" and the trial court's refusal to grant *Batson* relief amounts to "'substantial compliance' with [the] exception requirement," warranting "review [of] the issue on appeal[.]" To be sure, the Court of Appeals has adopted a narrow doctrine of "substantial compliance" when another objection to a particular jury instruction would be pointless. *See generally* Md. Rule 4-325(e) (Although "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the ground of the objection[,] . . . . [a]n appellate court . . . may . . . take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object."). In such instances, "there must be an objection to the instruction . . . accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and *the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.*" *Gore v. State*, 309 Md. 203, 209 (1987) (emphasis added).

This doctrine is of no help to Worrell. First, it expressly applies to challenges of jury instructions by the trial court, not to *Batson* challenges made by the prosecution during jury selection. Second, even if *Stringfellow* and *Gilchrist* did not prevent us from adapting the substantial compliance concept to this *Batson* context, we are not persuaded that renewal of Worrell's objection to Juror 231 would have been futile. The trial court, indicating that it was closely watching the State's strikes, expressly left open the possibility of revisiting defense counsel's objections and even reseating a stricken juror. These are not circumstances in which renewing a *Batson* objection may presumed to be pointless.

D. Ineffective Assistance of Counsel Claim

Nor are we persuaded that this case presents one of the rare instances of legal representation that is so patently inadequate as to warrant ineffective assistance of counsel relief on direct appeal. "[T]he adversarial process found in a post-conviction proceeding generally is the preferable method in order to evaluate counsel's performance, as it reveals facts, evidence, and testimony that may be unavailable to an appellate court using only the original trial record." *Mosley v. State*, 378 Md. 548, 562 (2003). The Court of Appeals recently summarized the standards governing such relief:

> To succeed on an ineffective assistance of counsel claim, the defendant must show: (1) that his or her counsel's performance was deficient, and (2) that he or she suffered prejudice because of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). To establish the deficient performance, the defendant must show that the attorney's performance was objectively unreasonable under "prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052. "Judicial scrutiny of counsel's performance is highly deferential, and there is a strong (but rebuttable) presumption that counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable professional judgment." *In re Parris W.*, 363 Md. 717, 725 (2001) (citations omitted). In

> order to rise to the level of ineffective assistance, counsel's actions must not be the result of trial strategy. *Coleman v. State*, 434 Md. 320, 338 (2013). To establish prejudice, a defendant "must show either: (1) 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'; or (2) that 'the result of the proceeding was fundamentally unfair or unreliable.'" *Newton v. State*, 455 Md. 341, 355 (2017) (quoting *Coleman*, 434 Md. at 340-341).
>
> We have previously stated that we rarely consider ineffective assistance of counsel claims on direct appeal. However this rule is "not absolute and, 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." *In re Parris W.*, 363 Md. at 726, 770 A.2d 202 (citations omitted).

Bailey v. State, 464 Md. 685, 703 (2019). Direct appellate review of ineffective assistance claims typically occurs only when "the legal representation is so egregiously ineffective that it is obvious from the trial record that a defendant was denied his Sixth Amendment right to counsel." *Mosley,* 378 Md. at 564.

Here, when defense counsel unequivocally accepted the jury as seated, without reserving any *Batson* challenges, he did not assert his reason for doing so. Nor is the answer apparent from the record before us. Indeed, we can conceive of many legitimate strategic reasons for waiving the prior *Batson* objections to this and other jurors, including that defense counsel was satisfied with the juror who was seated in place of Juror 231. *Cf. Gantt*, 241 Md. App. at 313 ("To get rid of any prospective juror for the affirmative purpose of seating a more desirable juror is facially a non-discriminatory purpose.").

Why defense counsel accepted the jury without renewing his *Batson* objection to Juror 231 is essential information that this Court cannot supply. "[W]e will not second-guess counsel's actions on direct appeal when there is an opportunity to introduce

testimony and evidence directly related to this issue." *Bailey*, 464 Md. at 705. *See Mosley*, 378 Md. at 561 (holding that "the trial record clearly must illuminate why counsel's actions were ineffective because, otherwise, the Maryland appellate courts would be entangled in 'the perilous process of second-guessing' without the benefit of potentially essential information.") (citation omitted). Because defense counsel has not had an opportunity to explain why he abandoned his prior *Batson* challenge regarding Juror 231, we decline to address Worrell's ineffective assistance claim on direct appeal.

E. Plain Error Review

Finally, we will not exercise our discretion to grant plain error relief under Rule 8-131(a) in these circumstances. Appellate courts generally limit plain error review to cases in which "a decision would (1) help correct a recurring error, (2) provide guidance when there is likely to be a new trial, or (3) offer assistance if there is a subsequent collateral attack on the conviction." *Ray v. State*, 435 Md. 1, 22 (2013); *see Lewis v. State*, 452 Md. 663, 699 (2017). We discern no error by the trial court in overruling the *Batson* objection or in accepting defense counsel's waiver of his prior *Batson* objection, much less the risk of recurring error; nor is there a likelihood of a new trial or an opportunity to offer guidance in collateral proceedings.

Even if Worrell's *Batson* objection had been preserved, we are not persuaded that the trial court erred in overruling it. We set forth the full colloquy regarding Worrell's *Batson* objections to show that the trial court did consider and credit the prosecutor's proffer that she struck Juror 231 based on his negative "attitude about being here." After stating she did not observe that reaction, the judge accepted the prosecutor's reason, then

determined that was not a discriminatory basis for striking that prospective juror. *Cf. Acquah v. State,* 113 Md. App. 29, 57 (1996) (recognizing that "the State can rely on body language, expressions, and alertness of the jurors"). Although the trial judge did not see the roll call reaction, she conditionally credited the prosecutor's description but warned it was a "close" call and that she was scrutinizing strikes for the remainder of voir dire, lest she discern grounds for reconsidering and reseating that juror. Neither the State's subsequent strikes, nor defense counsel's response to the completed jury panel, triggered such reconsideration.

Nothing in *Chew* mandates a different view of this exchange between court and counsel. In that case, the Court of Appeals vacated convictions based on the trial court's failure to determine preliminarily that a stricken juror was, as a prosecutor claimed, "immobile, 'stone faced,' and unsmiling as she sat in the juror box." *Chew*, 317 Md. at 246-48 ("Before a trial judge can determine that a ground is racially neutral, he must be convinced that it exists in fact. Here, the judge made no such finding."). Here, in contrast, the trial court credited the State's proffered reason for striking Juror 231, then determined that it was a nondiscriminatory basis for striking him.

In any event, the precedential value of *Chew* was undermined by the Supreme Court's ruling in *Purkett*, clarifying the analytical framework for a *Batson* claim. As Judge Chasanow has pointed out, *Chew* does not apply the principle articulated in *Purkett* that a trial court is not required to evaluate the proffered reason for a particular strike until the third step in its *Batson* inquiry. *See Gilchrist*, 340 Md. at 641 (Chasanow, J., concurring) (observing that the analysis in *Chew* "is similar to what the Supreme Court condemned in

Purkett"). This Court, citing Judge Chasanow's concurrence, has recognized that *Purkett* "change[d] drastically the impact of *Batson* by appearing to limit seriously the power of appellate courts to address the findings of trial courts in respect to the second step when that court is confronted with, and accepts, facially neutral reasons for the strikes, at least as far as the federal constitution is concerned." *Ball v. Martin*, 108 Md. App. 435, 450-51 (1996) (footnote omitted).

For these reasons, *Chew* is inapposite on both the facts and the law. Moreover, we conclude the *Batson* requirements articulated in *Purkett* were satisfied because the court elicited, then evaluated that the State's proffered reason for striking Juror 231, finding that it was not discriminatory. Based on this record, the trial court did not err in denying Worrell's *Batson* challenge to the removal of Juror 231 from the jury.

II. Use of Prior Expert Testimony

Worrell next challenges the trial court's decision to admit a recording of testimony by a firearms examiner who was unavailable to testify during the second trial. In support, Worrell argues that the expert's testimony from his first trial was not relevant because it "did nothing to link [him] to the shooting and did nothing to elucidate his participation in a conspiracy." Moreover, "given the differences in the evidence at the two trials, and the absence of certain stipulations at the second trial," he maintains that the recording was not admissible under Rule 5-804(b)(1), the hearsay exception for former testimony by an unavailable witness. Because "the testimony lacked any probity but yet had the potential to confuse the issues, constitute a waste of time, and to unfairly prejudice" him, Worrell maintains that admission of the transcript was "not harmless."

The State counters that the trial court did not err or abuse its discretion in admitting the prior testimony because it was relevant evidence of the conspiracy to murder and admissible under the hearsay exception for former testimony. For reasons explained below, we agree with the State that the evidence was relevant and admissible under Rule 5-804(b)(1).

A. The Relevant Record

Worrell was represented by the same attorney at his first trial in January 2018. When the second trial began on April 16, 2018, the prosecutor advised the court and defense counsel she had just learned that the subpoenaed firearms expert, Christopher Faber, was on a pre-approved vacation and that his co-examiner was now employed in Florida. As an alternative to live testimony from Faber, the prosecutor proposed admitting his recorded testimony from the first trial and pointed out that Faber had been cross-examined by defense counsel. The prosecutor proffered that Faber testified he examined five bullet fragments or projectiles that were recovered from the scene and medical examiner. He was not able to form "any opinion about whether or not they were fired from the same weapon, or whether or not they matched any other incidents."

Defense counsel objected, stating that he had "new questions that I would like to put to that examiner." The court asked, "What new questions would you like to ask Mr. Faber?" After protesting that he was being "ask[ed] to divulge . . . trial strategy," defense counsel replied:

> I'll tell you. They have nothing to compare with anything, as the prosecutor just told you. Okay? So how can they say that want to introduce *his testimony which is not relevant to anything in this case*, number one.

> Number two, a .380 caliber was taken out of the gentleman's skull. [3] And they also said that there was a .30 – a .32 caliber – they tried to compare it to another size bullet. *That bullet can not be . . . fired from a Bersa .380 . . . semiautomatic.*
>
> After the case was over, I did speak to people who are knowledgeable with regard to firearms. And . . . I don't understand the purpose of putting a man on the stand that can't testify to semiautomatic. And the bullet that they recovered from [h]is head, the bullet they recovered at the autopsy is a . . . . .32 caliber bullet.

(Emphasis added.)

The court clarified that defense counsel "want[ed] to get out the point that a .32 caliber bullet is unable to be fired from a .380 . . . . gun[.]" When the judge inquired whether defense counsel already "ask[ed] that in the first trial[,]" he admitted that "we did" and that testimony would be "on the video[.]"

The prosecutor then explained that at the first trial, the State and the defense had stipulated "there would be no testimony concerning the .380 shell casing" found at the scene "because the crime lab tech knew that it had been dropped by a crime scene technician earlier in the day from a prior shooting." The .380 shell casing found by the lab tech assigned to the Washington shooting matched all the other casings recovered from that earlier shooting. Counsel had agreed not to present any evidence about the .380 casing "so that the jury wouldn't be confused by a piece of evidence that was accidentally collected that had nothing to do with our scene." According to the firearms examiner, all of "the projectile fragments and projectile pieces that were recovered from this homicide,

[3] It is unclear whether the "gentleman" refers to the victim of the earlier shooting involving a .380 caliber weapon, or whether it is an inaccurate statement about the bullet recovered from Washington's head, which was a single .30/.32 caliber.

the firearm examiner did testify they were either a .30 or a .32 class, which is significantly smaller." All references to the .380 casing also were redacted from exhibits "because defense counsel and [the prosecutor] agreed that it had nothing to do with this shooting[.]"

The prosecutor advised that if defense counsel "wants to bring up the issue of the .380" in this trial, without Faber's former testimony, the State would request "a postponement because the firearms examiner is not available[.]" In her view, however, that was unnecessary because Faber's videotaped testimony "was thorough" and "[d]efense counsel had the opportunity to cross-examine him about anything they wanted[,]" including asking whether "a .32 caliber . . . projectile could be fired from a .380 firearm."

Citing Rule 5-804(b)(1), the trial court admitted the recording of Faber's testimony. Although there was no agreement at this second trial "about not discussing the .380 shell casing[,]" the court pointed out that Faber's prior testimony was limited to explaining "the four fragments and the .32 caliber casing" at issue in this case, and "there was no testimony that connected these fragments or bullets whatsoever with the defendant." The court concluded that Worrell had an opportunity and similar motive to develop Faber's testimony, and "specifically can a .380 caliber gun shoot a .32 caliber projective[.]" In addition, both defense and prosecution would be permitted to present evidence regarding the .380 casing and "go through that strategy . . . . with whatever testimony you have in terms of witnesses."

Faber's testimony was played for the jury. On cross-examination, defense counsel's brief inquiry consisted primarily of asking the witness: "Can a .380 semiautomatic revolver fire a .30, .32 bullet?" Faber answered: "No, it's – a .30/.32 class is too small."

B. Relevancy Challenges

Worrell argues that Faber's testimony was not relevant or that its probative value was outweighed by its unfair prejudice. We are not persuaded by either contention.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 5-401. "Evidence that is not relevant is not admissible." Rule 5-402. The party seeking admission of evidence bears the burden of establishing its relevance, but that "is generally a low bar." *State v. Simms*, 420 Md. 705, 727 (2011). When a trial court weighs the relevance of challenged evidence in relation to other evidence or factors, our deferential standard of appellate review is abuse of discretion. *See Parker v. State*, 408 Md. 428, 437 (2009).

Even when "relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 5-403. "[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403." *Odum v. State*, 412 Md. 593, 615 (2010). Instead, "[p]robative value is outweighed by the danger of 'unfair' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Id.* (quotations and citations omitted).

We agree with the trial court that Christopher Faber's testimony was relevant because he explained that Washington was shot with a .30 or .32 caliber weapon that was

fired three times and could not have expelled a .380 cartridge. In addition to making it more likely that that the .380 shell casing was "an artifact" from the shooting earlier that day, Faber's testimony made it more likely that Worrell conspired with the shooter to murder Washington.

Although this ballistics evidence did not directly link Worrell to the shooting or the victim, the testimony about the .30/.32 caliber and .380 caliber ammunition ruled out the possibility of a gunman and weapon other than the lone shooter shown on surveillance videos. Moreover, the testimony that there were three shots made it more likely that the shooting was a planned mission to kill, jointly carried out by the passenger who fired the fatal shot and Worrell who served as the getaway driver. Faber's testimony was consistent with other evidence supporting the State's prosecution theory that Worrell circled the block as Washington stood at the bus stop, delivered the killer to the adjacent alley, stood by while the murder occurred, and then drove the getaway vehicle to escape.

We also agree with the State that Worrell did not preserve his Rule 5-403 objection, because defense counsel objected only that the testimony was not relevant and not admissible under the hearsay exception for former testimony. *See, e.g., Klauenberg v. State*, 355 Md. 528, 541 (1999) (reiterating that "when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal"). Given the probative value of Faber's testimony discussed above, and Worrell's failure to identify any unfair prejudice, the trial court did not abuse its discretion in failing to exclude the testimony, *sua sponte*, under Rule 5-403. *See Newman v. State*, 236 Md. App. 533, 549 (2018).

C. Hearsay Challenge

Worrell alternatively contends that Faber's testimony is hearsay that was not admissible under Rule 5-804(b)(1), the exception to the rule against hearsay for former testimony. The Court of Appeals has articulated the standards governing review of a trial court's decision to admit testimony under this rule, as follows:

> Maryland Rule 5-801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Maryland Rule 5-802 prohibits admission of hearsay statements into evidence, unless the hearsay statement falls within a narrow exception provided by rule, statute or constitutional provision.
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> Maryland Rule 5-804(b)(1) provides one such exception to the hearsay prohibition. . . . [T]hat Rule allows for the admission of a prior statement made under oath by an unavailable witness so long as the party against whom the statement is offered had an "opportunity" and "similar motive" to develop the testimony of the witness when the prior statement was made, by direct, cross- or redirect examination. Md. Rule 5-804(b)(1)[.] We have explained that "an opportunity to develop the testimony 'is generally satisfied when the defense [was] given a full and fair opportunity to probe and expose [the] infirmities [of the testimony] through cross-examination.'" Likewise, a motive is "sufficiently similar" when "the party now opposing the testimony would have had, at the time the testimony was given, 'an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue' now before the court."
>
> We review the admissibility of a hearsay statement under a different standard than the admissibility of some other evidence:
>
> > We review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard. Review of the admissibility of evidence which is hearsay is different. Hearsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is permitted by applicable constitutional provisions or statutes. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law

reviewed *de novo.*

Dulyx v. State, 425 Md. 273, 284-85 (2012) (case citations omitted).

In Worrell's view, the trial court erred in admitting Faber's former testimony because the second trial was "vastly different" given the "different theories of prosecution" and the admission of new evidence and argument about the .380 casing. Worrell contends that these factors created differences in motive and opportunity to cross-examine Faber. We again disagree.

"'The way to determine whether or not motives are similar is to look at the issues and the context in which the opportunity for examination previously arose, and compare that to the issues and context in which the testimony is currently proffered.'" *Williams v. State*, 416 Md. 670, 696-97 (2010) (quoting "Professors Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin, the Commentary to Federal Rule of Evidence 804"). A motive is similar when a party had the same need to develop the testimony at the prior hearing that the party has in the current hearing. *See id.*; *Alexis v. State*, 209 Md. App. 630, 667 (2013), *aff'd on other grounds*, 437 Md. 457 (2014).

Here, the defense motive to develop Faber's testimony was the same at both trials. In the first trial, defense counsel elicited the expert's testimony that the weapon that fired three .30 or .32 caliber projectiles at Washington could not have fired ammunition that produced a .380 shell casing. At the second trial, this is the same evidence that defense counsel told the judge he wanted to elicit, before admitting that he had already done so at the first trial. Based on that record, the trial court did not err in ruling that defense counsel "had an opportunity and similar motive to develop [that] testimony" on cross-examination

during the first trial.

We are not persuaded otherwise by the fact that at the second trial, defense counsel declined to stipulate that the .380 casing recovered by the evidence technician who processed the Washington crime scene was not related to his murder. Although this change altered trial strategy, it required defense counsel to develop testimony from witnesses *other* than Faber, i.e., the two evidence technicians and detective who testified at the second trial about the accidental loss of the .380 casing that matched the ballistics evidence from the earlier shooting nearby. As the trial court promised, defense counsel was permitted to "pursue" that "strategy" by presenting such evidence.

Likewise, the fact that the two trials involved different charges does not lead us to a different conclusion. To be sure, as a result of acquittals in the first trial, the second trial was limited to conspiracy charges. But the State's theory of prosecution at both trials rested on the same factual premise that Worrell drove the shooter to and from the murder. At both trials, the prosecutor conceded in opening and closing that the identity of the shooter was still unknown, but argued that, based on video and cell phone evidence placing Worrell's phones and Acura at the murder scene, it was Worrell who conspired with his passenger to kill Jamal Washington.

Based on this record, the trial court did not err in admitting Faber's former testimony.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY THE COSTS.