Circuit Court for Baltimore City
Case No. 118116015

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3434

September Term, 2018

BRANDON BURTON

v.

STATE OF MARYLAND

Fader, C.J.,
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 14, 2020

Brandon Burton was convicted in the Circuit Court for Baltimore City of home invasion, burglary, kidnapping, robbery, possession of a handgun, and conspiracy. On appeal, Mr. Burton argues that the court erred in not finding the State's use of peremptory strikes against four out of five jurors racially motivated and that the court abused its discretion by admitting video testimony taken during a pre-trial photographic array procedure. Neither of Mr. Burton's arguments are preserved, though, and we affirm his convictions.

I. BACKGROUND

A. The Incident.

On the evening of October 28, 2017, Marvin McCrey and his daughter went out for dinner to celebrate her thirteenth birthday. Mr. McCrey testified that after arriving home, and while getting out of the car, he and his daughter were accosted by six men with masks and guns. The men placed guns to their heads, marched them to their front door, and forced Mr. McCrey's wife to open it. The men entered the home, tied up the wife and daughter, and dragged them into the basement. They bound Mr. McCrey's hands behind his back and pushed him around his home to search for money and his daughter's cell phone (a birthday gift), and they took both. Next, the men forced Mr. McCrey outside and into the back of a van and drove some distance before parking in a dark alley.

As it turns out, Mr. McCrey had another cell phone and was able to call the police from inside the van. The police eventually found the van, freed Mr. McCrey, and took him to the station. Mr. McCrey told the officers that based on seeing Mr. Burton around his sister's neighborhood and hearing Mr. Burton's voice, he was able to identify Mr. Burton

as one of the men who attacked the family. Mr. McCrey later confirmed his identification of Mr. Burton using a pre-trial photographic array. The police recorded the statement and the process of showing him the photo array; as we discuss later, the State sought to introduce this recording at trial.

B. Jury Selection.

During jury selection, the State used four out of five peremptory strikes to strike jurors who were "very similarly raced," *i.e.*, people of color. Counsel for Mr. Burton's co-defendant, Mr. Holland, objected to the fifth strike and approached the bench. Mr. Burton's counsel did not object. While at the bench, counsel for Mr. Holland argued that the State's strikes were motivated by race in violation of *Batson v. Kentucky*.[1] The court overruled the objection without making any findings about the racial nature of the strikes, counsel returned to their tables, and jury selection continued. Before the fifth strike, the State had deemed sixteen potential jurors acceptable.

The jury found Mr. Burton guilty of home invasion, burglary, kidnapping, robbery, possession of a handgun, and conspiracy. He was sentenced to a total of sixty years, with all but forty-five years suspended.

Mr. Burton filed a timely appeal. We supply additional facts as necessary below.

II. DISCUSSION

Mr. Burton seeks to raise two issues on appeal.[2] *First*, he argues that the trial court

[1] 476 U.S. 79 (1986).

[2] Mr. Burton phrased his Questions Presented as follows:

> 1. Did the lower court err in failing to make a prima facie

erred in failing to find the State's peremptory challenges were racially motivated and to determine whether the strikes violated *Batson*. *Second*, Mr. Burton argues that the court abused its discretion when it admitted video evidence that, he contends, was hearsay. The State disputes both contentions and argues that neither was preserved for appellate review. The State is right.

A. Mr. Burton Didn't Preserve His *Batson* Challenge.

As jury selection wound down, counsel for Mr. Holland objected to the State's fifth peremptory strike:

> [MR. HOLLAND'S COUNSEL]: Your Honor, I'm going to do a Batson challenge, mainly because 2286, I don't even think came up. The only person that – the only person that wasn't a person of color that the State struck was a public defender employee, other than that everybody is very similarly raced.

> finding that the State utilized its peremptory jury strikes for racially motivated reasons where four of five peremptory strikes were used to remove "a person of color"?
>
> 2. Did the lower court err in admitting, over objection, a video of the victim's extra-judicial identification procedure containing an extended and consistent description of the assault at issue in this case given after the victim made an identification?

The State phrased its Questions Presented as follows:

> 1. Did Burton fail to preserve any objection to the prosecution's use of peremptory strikes by failing to join his co-defendant's *Batson* claim, and did he affirmatively waive that claim in any event by accepting the jury as empaneled?
>
> 2. If preserved, did the circuit court correctly admit the redacted video tape of McCrey's identification pertaining to Burton?

[THE COURT]: I'm going to deny your request, counsel.

Before the objection, the State had already deemed sixteen potential jurors acceptable. The record is silent as to the racial makeup of the potential jurors.

Mr. Burton contends that the trial court erred by failing to find the State's exercise of peremptory challenges was motivated by race. Parties violate the Equal Protection Clause of the Fourteenth Amendment when they ground their peremptory challenges on race, gender, or ethnicity. *See generally Batson*, 476 U.S. 79 (holding that peremptory challenges based on race, gender, or ethnicity violate the Equal Protection Clause of the Foruthteenth Amendment). When reviewing *Batson* challenges, "[t]he determination of whether that threshold has been crossed is entrusted to the trial judge," and we do not disturb the ruling unless it is clearly erroneous. *Bailey v. State*, 84 Md. App. 323, 328–29 (1990).

Before we can address the merits of the *Batson* issue, though, we must determine whether Mr. Burton preserved it for appellate review. To be clear, the issue was raised, but by Mr. Holland, not by Mr. Burton. The question is whether Mr. Burton succeeded in joining the objection of his co-defendant, which he must do expressly:

> [I]n cases involving multiple defendants each defendant must lodge his own objection in order to preserve it for appellate review and may not rely . . . on the mere fact that a co-defendant objected. One defendant [] may expressly join in an objection made by a co-defendant but he must expressly do so. It is not implicit.

Williams v. State, 216 Md. App. 235, 254 (2014). When a trial court rules "at the outset of trial proceedings that 'an objection made by one defendant would be deemed made by the

others,'" objections made by one party are automatically joined by the other. *Ray-Simmons v. State*, 446 Md. 429, 440 (2016). But without an express joinder, Mr. Burton wasn't covered by his co-defendant's objection—he had to object on his own.

And in this case, he wasn't joined, and he didn't join. The record reveals no motion or request or agreement or ruling—at the outset of the trial or at any time before these peremptory strikes—for the defendants to join each other's objections. Without an objection of his own or an overt request to join the other party's objection, we are constrained to find that Mr. Burton failed to preserve a *Batson* challenge.

Even if Mr. Burton had preserved his *Batson* argument, he has another problem: at the close of jury selection, his counsel accepted the jury without qualification. This acceptance waived any objections he had articulated during the selection process. *See State v. Stringfellow*, 425 Md. 461, 469–70 (2012). *Compare Elliott v. State*, 185 Md. App. 692, 710–11 (2009) (thanking the court did not constitute acceptance of the panel). And Mr. Burton did so unequivocally—he now asks us to find that he achieved substantial compliance with the preservation requirement, but we can't read his unqualified "yes" answer to the question of whether the jury was acceptable as anything other than an acceptance.

From there, Mr. Burton asks us to address on direct appeal his claim that his counsel was ineffective for failing to preserve his *Batson* claim. Claims of ineffective assistance of counsel are rarely appropriate on direct appeal. *Murdock v. State*, 175 Md. App. 267, 295 (2007). They generally are addressed in post-conviction proceedings because "the trial

record rarely reveals why counsel acted or omitted to act, and [such post-conviction] proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). This record offers no way to evaluate the rationale or reasonableness behind his counsel's decision not to join his co-defendant's *Batson* contention, nor whether or to what extent Mr. Burton was prejudiced by that decision. Those questions should be addressed in a post-conviction proceeding and assessed against a record developed for that purpose.

B. Mr. Burton Didn't Preserve His Hearsay Objections To Mr. McCrey's Video Statements.

Mr. Burton argues that the circuit court abused its discretion when it admitted hearsay statements by a witness embedded within a video recording of a pre-trial identification procedure. Evidentiary rulings are typically reviewed for abuse of discretion, but "[w]hether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005). We then take the following approach when reviewing these contentions:

> Maryland courts . . . take a two-part approach in reviewing hearsay rulings. "[T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review."

Traynham v. State, 243 Md. App. 717, 725–26 (2019) (*quoting Gordon v. State*, 431 Md. 527, 538 (2013)). In this instance, the trial court never made a finding about whether Mr. McCrey's statements on the video were or were not hearsay because Mr. Burton never objected on that basis. The court decided to admit the video after finding that it was

appropriate for the jury and could be authenticated by Mr. McCrey on the stand, and that opposing counsel could cross-examine him.

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). As a general matter, "[t]he grounds for [an] objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." Md. Rule 4-323(a). If, however, grounds are asked for or volunteered, that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated. *See Von Lusch v. State*, 279 Md. 261 (1977).

At trial, Mr. Burton objected to the admission of the video evidence on four different grounds: (1) that *the detective's* statements in the recording were hearsay, (2) that the recording was "duplicative" of Mr. McCrey's trial testimony, (3) that Mr. McCrey's statements impermissibly "bolster[ed]" his trial testimony, and (4) that the State had failed to "lay a foundation" for the recording. None of those were tied to hearsay statements *made by Mr. McCrey*, the theory Mr. Burton argues here. Although sometimes, we can glean a hearsay objection from objections based on unreliability, lack of corroboration, or inability to cross-examine a witness, *see Pitt v. State*, 152 Md. App. 442, 464 (2003), *aff'd*, 390 Md. 697 (2006) (finding that although counsel did not use the word "'hearsay'" in his objection, the substance of his objection, referring to an inability to cross-examine a witness, was sufficient to preserve the issue for appellate review); *see also Carter v. Aramark Sports & Ent. Servs., Inc.*, 153 Md. App. 210, 229–31 (2003) (holding that a hearsay objection was

present, although, "just barely," where counsel articulated "that the evidence in question was 'uncorroborated' and 'unreliable,'" given the fact that "'[l]ack of reliability and corroboration go to the heart of the hearsay objection'") (*quoting United States v. Spiller*, 261 F.3d 683, 689–90 (7th Cir. 2001))), Mr. Burton's objections do not suggest any inability to corroborate Mr. McCrey's statements in the video or any possibility that Mr. McCrey's statements were unreliable. And as the State notes, Mr. Burton also didn't seek to redact the portions he now challenges from the video before it was played for the jury. *Belton v. State*, 152 Md. App. 623, 634 (2003).

These arguments walk a couple of fine lines. On the one hand, Mr. Burton's hearsay objections related only to the statements on the video by the detective, not Mr. McCrey. At the same time, he argues that Mr. McCrey's descriptions of the assault during the photo array video were prior consistent statements and not admissible as such. Had he objected to them as hearsay, we likely would agree. But he didn't, so we don't reach the question of the statements' consistency, *see* Md. Rule 5-802.1, or any other argument. The conscious distinction between objecting to hearsay statements from the detective and not to those by Mr. McCrey renders any objection to the latter unpreserved, and therefore not before us.

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