Circuit Court for Baltimore City
Case No. 113038019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2565

September Term, 2016

MARK O'NEIL

v.

STATE OF MARYLAND

Berger,
Nazarian,
Arthur,

JJ.

Opinion by Nazarian, J.

Filed: January 10, 2018

This case returns to us for the third time, and on a very narrow question: whether the Circuit Court for Baltimore City was able, two years after the fact, to analyze the State's rationale for striking an African-American juror during *voir dire* at Mark O'Neil's trial. When the case was last here, we remanded the case for a *Batson*[1] hearing, but "recognize[d] that, due to the passage of time, it might not be possible for the trial court to conduct a proper *Batson* analysis." We find that it wasn't, and we reverse and remand for a new trial.

I. BACKGROUND

The history of this case has been recounted in two prior opinions of this Court, *see O'Neil v. State*, No. 1913, September Term 2014 (filed Oct. 25, 2015), *vacated by O'Neil v. State*, 446 Md. 640 (Mar. 25, 2016); *O'Neil v. State*, No. 1913, September Term 2014 (on remand, filed Jul. 11, 2016) so we won't repeat it in detail. The portion relevant to this appeal began when Mr. O'Neil was charged by indictment in the Circuit Court for Baltimore City with, among other things, first-degree assault and use of a handgun in the commission of a crime of violence. He pleaded not guilty and proceeded to a trial that began on June 24, 2014.

During *voir dire*, the defense challenged the State's use of peremptory strikes to remove African-American women from the jury panel. After a brief discussion at the bench, the court ruled that the defense had failed to show a pattern of discrimination and denied the *Batson* challenge. At the conclusion of the trial, the jury convicted Mr. O'Neil of first-degree assault and use of a handgun in the commission of a crime of violence.

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

Mr. O'Neil appealed and contended, among other things, that the court erred in denying his *Batson* challenge. In an unreported opinion filed on October 26, 2015, we affirmed the convictions. We noted that the trial court had interrupted the prosecutor while she was explaining her decision to strike juror #532 (the peremptory strike at issue here), and thus that the State had not had an opportunity to offer a race- and/or gender-neutral explanation for the strike before the court ruled that the defense had not established a *prima facie* case of discrimination. *See O'Neil v. State*, No. 1913, September Term, 2014 (filed October 26, 2015). We observed as well "that there [wa]s no information in the record regarding the racial and gender composition of either the pool of potential jurors or the jury as it was finally composed. We are left, therefore, with little basis upon which we might detect any clear error in the circuit court's findings regarding whether there was a pattern of discrimination in the prosecutor's use of peremptory strikes." Slip op. at 13.

Mr. O'Neil filed a petition for writ of *certiorari*, and at the time, a case raising similar *Batson* issues, *Ray-Simmons v. State*, 446 Md. 429 (2016), was pending in the Court of Appeals. The Court held this case until it issued its opinion in *Ray-Simmons*—which held that the question of whether the challenger has made a *prima facie* case demonstrating a pattern of discrimination becomes moot if the striking party offers an explanation for the challenged strike, 446 Md. at 437—then vacated our judgment and remanded for further consideration in light of *Ray-Simmons*.

We ordered supplemental briefing, and then remanded the case back to the circuit court for "a proper *Batson* analysis." Mr. O'Neil asked us to order a new trial, but we

concluded that a limited remand was usually the appropriate remedy under the circumstances. We acknowledged, though, that the passage of time might render a new analysis ineffective:

> [P]ursuant to Rule 8-604, we remand this case to the Circuit Court for Baltimore [City] to make a determination whether [the prosecutor can offer race- and gender-neutral reasons for striking juror #532, and, if so, whether] the prosecutor's race-neutral [and gender-neutral] reasons were pretextual and therefore whether petitioner has met his burden of proving purposeful discrimination as to [juror #532]. If the court cannot effectively do so, or finds purposeful discrimination, it shall order a new trial.

O'Neil v. State, No. 1913, September Term, 2014 (filed July 11, 2016) (alterations in original) (quoting *Edmonds v. State*, 372 Md. 314, 341–42 (2002)).

On remand, the circuit court analyzed Mr. O'Neil's *Batson* argument against the available record and denied his challenge. He appeals that decision. Additional facts will be supplied as necessary below.

II. DISCUSSION

Mr. O'Neil's sole claim on appeal is that the trial court erred in denying his *Batson* challenge and denying his request for a new trial.[2] He contends that his counsel had "no way to determine whether the prosecutor's reasons for striking Prospective Juror 532 were actually race and gender neutral" because "[t]he ages of the jurors in the case are not in the record" and thus "it [wa]s impossible to know whether the prosecutor did not strike other

[2] In his brief, Mr. O'Neil phrased the Question Presented as follows: "Did the trial court err in denying Mr. O'Neil's *Batson* challenge and failing to grant a new trial?"

young jurors who were not African American or women." As such, he argues, the court should have granted a new trial because the trial judge "was not in a position to hold the prosecutor to her burden of providing a race-and-gender-neutral reason for the strike."

The State counters that "[t]he prosecutor's proffered reason for striking Juror 532 — because she was young — is corroborated by the record" and, indeed, by defense counsel's own statement during the *Batson* challenge, when he recounted that three strikes were used to strike "black females under the age of 25." In light of the great deference afforded to fact findings on appeal, the State contends, "the record offers ample support to establish that the circuit court's finding was not clearly erroneous."

The Equal Protection Clause of the Fourteenth Amendment prohibits the exclusion of jurors on the basis of race, gender, or ethnicity. *Ray-Simmons*, 446 Md. at 435 (footnote omitted). Counsel in a criminal case may not use peremptory challenges to exclude jurors based on any of those categories. *Id.* In *Batson*, the Supreme Court set forth a three-step process for evaluating whether counsel has used peremptory strikes in a manner that violates the Equal Protection Clause. The steps are familiar—the challenger makes a *prima facie* case of discrimination, the opponent proffers a neutral explanation, and the court decides whether the strike represents purposeful discrimination:

> 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. . . .
>
> 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. . . .
>
> If a neutral explanation is tendered by the proponent of the strike, the trial court proceeds to step three, at which the court must decide whether the opponent of the strike has proved purposeful racial discrimination. It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.

Ray-Simmons, 446 Md. at 436–37 (cleaned up).

In this case, we are already past Step One: Mr. O'Neil challenged the State's strike of Juror #532, and alleged that the State was using peremptory strikes to eliminate African-Americans from the jury, during the original *voir dire*. The State began to offer an explanation (Step Two), but got cut off. The limited remand, then, was designed to allow the State to explain its strike and for the court to assess whether discrimination occurred.

It's true that in a *Batson* challenge, "determinations made by the trial court are essentially factual, and therefore are 'accorded great deference on appeal.'" *Spencer v. State*, 450 Md. 530, 548 (2016) (cleaned up). We will not, therefore, reverse a trial judge's fact findings unless they are clearly erroneous. *Id.* (citations omitted). If, however, "the relevant facts are not in dispute, the appellate court may exercise [its] independent constitutional judgment to determine what should be concluded from those facts." *Elliot v. State*, 185 Md. App. 692, 715 (2009) (alteration in the original) (cleaned up); *see also Chew v. State*, 317 Md. 233, 245 (1989) ("[A]n appellate court will give great deference to the first level findings of fact made by a trial judge, but having done so, will make an

independent constitutional appraisal concerning the existence of neutral, non-racial reasons for the striking of a juror.") (citations omitted).

On remand, the trial court read from the transcript of the original *voir dire*, where defense counsel initially made the *Batson* challenge:

> [DEFENSE COUNSEL]: I'm going to make a Batson challenge to the last strike. The State has exercised three strikes, all three strikes have been black females.
>
> [THE COURT]: Has exercised four.
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> [DEFENSE COUNSE]: Four, I'm sorry. Of those four, three of them have been black females under the age of 25, and while I do understand there's no right to a specific demographic on your jury, I believe these are the three youngest black females to have the opportunity to be on the jury and the State has struck them all.
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> [THE COURT]: All right.
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> [STATE'S COUNSEL]: Your Honor, for this particular juror, as soon as I looked over, her head was to the side, she was huffing when she got picked, she clearly did not want to be here, that's the reason that I struck her. With regards to Juror 532, she was replaced with another black female, Your Honor, that would be number 12, seated in seat 12 and--
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> [THE COURT]: the first strike was 434.
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> [STATE'S COUNSEL]: Your Honor, her age made me a little nervous, she's 18, I prefer jurors who have a little bit more experience, a little bit more exposure, for that reason I did strike her.
>
> [DEFENSE COUNSEL]: With all due respect, Your Honor, body language is, in and of itself, isn't enough, and my client is a young African American male, he would like the opportunity to have individuals with their same world view and

> the State has systematically struck everybody, every female on the jury that would share his world view.
>
> [THE COURT] Well, body language is not a suspect class. There have been only four strikes exercised by the State thus far, three of those have been black females, one of them was a white male. I don't find a sufficient basis yet to grant the motion. So I will deny the motion at this point.

After reading the pertinent part of the transcript, the court asked the prosecutor if she would like to be heard. The prosecutor emphasized that she was a "type A" person and that she had her whole file with her, including information about the strikes and why she made them. The prosecutor noted that juror #532 had been replaced with a person of the same gender and race and that, according to her notes, she struck the juror because of her age:

> With regards to Juror Number 532, I can tell you that my notation indicates that I struck her because of her age. If memory serves me correctly, we had quite a few young jurors, I believe defense counsel, [] was trying to get as many young people on the jury as he possibly could, I, in the reverse have a policy of trying to seat individuals over the age of 30. I find that people who are more mature are better for the State overall because they tend to be a little bit more vested in the city, older jurors tend to remember a time in the city when there was not as much crime and they also tend to have children so they appear to me, at least, to have a little bit more of a stake in seeing justice be done. Whereas opposed to some younger jurors are not as experienced in the world and at times can often sympathize with the defense.
>
> So I can tell you that that was the [main] reason why I struck Juror Number 532 was because of age. I also made a notation with regard to that particular juror's educational level which generally means they probably did not have a high education level, so I do prefer a more educated jury as well. So college is always nice, post-college is even better for the State,

> and so I can tell you those are the two primary reasons why I struck that particular juror.

Defense counsel could not respond in kind, however, because the complete file no longer was available:

> And, Your Honor, on behalf of Mr. O'Neil, number one, I would just say that the Court of [Special] Appeals remanded the case and asked for a reconstruction of the Batson challenge and I would argue that as the defense, we're a little hamstrung in challenging what the State's contention here [] today because, you know, I don't have the ven[ire] list with the juror's names or ages because that would be provided at the initial hearing.
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> In addition, I believe that the State stated on the record that she said it generally means when she notes education, it generally means they didn't have a high education level, but she didn't articulate exactly that she remembered the education level of this particular juror. And the Court of [Special] Appeals instructed that if the Court cannot effectively do so, as in reconstruct the Batson hearing, then the case should be -- then a new trial should be ordered in the case. And I would argue that it's very difficult for me to argue against any of the State's contentions in that regards for the previously stated reasons.
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> * * *
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> . . . Perhaps there were others that were young that ended up on the jury but I have no way to examine that or know about that because I wasn't there and we don't – and, you know, it's the State's burden to show and it's –
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> * * *
>
> [DEFENSE COUNSEL]: --we're onto step two, whether the proponent of the strike has given race or gender neutral reasons for the strike, and whether we can effectively evaluate this, at this stage. And I would say, you know, we're now two and a half years from the date of the trial and that's a significant

> period and I think that's why perhaps the State doesn't exactly remember the education level of the prospective juror but again, I just would argue that we, you know, we don't have – it's the State's burden here on this particular issue that this case was remanded for. And so they have to show that there – it was a race and gender neutral reason and that this is an effective re-hearing of this particular issue.
>
> And again, I would just argue, it's very difficult for me to say that age is not a pretextual reason when the other black female that was stricken was for age and I don't have access to see what else was happening with the jury pool at that time.

After hearing argument, the court denied the *Batson* challenge, relying primarily on defense counsel's statement, as he[3] initially approached the bench to challenge the strike that the State had struck three black females under the age of twenty-five:

> All right. Looking back at the transcript, it does seem that, um, the State was or the exercise of strikes that the State had, was striking younger jurors, [defense counsel] when he approached and made his Batson challenge, at first he said that the three strikes have been black females and he points out that all three of them have been black females under the age of 25. I do find that the State's explanation of the reasons for the strike convinced me that they were not made on the basis of race and therefore I am denying the Batson challenge.

The trial court faced a difficult task in attempting to reconstruct a scene from nearly two-and-a-half years before, and it and the parties pieced together the facts as best they could. We disagree, though, that this reconstructed record supported a proper analysis, as both the Court of Appeals and we directed, of the race-and gender-neutrality of the prosecutor's proffered reasons for striking juror #532. This isn't anybody's fault—the parties and the court could only work with the record that remained, and none of us could

[3] Mr. O'Neil's original trial counsel was a man, and his counsel on remand a woman.

have known with any certainty what that record would look like until remand. Indeed, the prosecutor, who was the Assistant State's Attorney when the case was tried, expressed specific recollection of the reasons for her striking juror #532. Further, the trial judge did an admirable job in endeavoring to reconstruct the circumstances surrounding the use of the prosecutor's peremptory challenges. Despite their best efforts, the tangible record was entirely one-sided, and the parties were left to interpolate the age and education of this juror from the State's notes and recollection and from what could be inferred from the original *voir dire* transcript. The defense had neither first-hand recollection nor a complete file. This left the defense unable to confront or examine adequately the reasons given by the prosecutor, and left the court to assess this disputed issue from an incomplete record. *See Chew*, 317 Md. at 246 (trial judge's ruling on the acceptability of the prosecutors' reason for the strike were not supported by the record).

The limited remand remedy, when feasible, can obviate the need for a whole new trial. But where, as here, the passage of time diminishes the court's ability to resolve the factual disputes bearing on whether a strike was race- or gender-neutral, the limited remand can't serve as a substitute for a new trial. The underlying Constitutional right is too important, and any doubt about the quality of the record must, in our view, be resolved in favor of a new trial. *See Edmonds*, 372 Md. at 341–42.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AND CASE REMANDED FOR A NEW TRIAL. COSTS ASSESSED TO THE MAYOR AND CITY COUNCIL OF BALTIMORE.