VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 8th day of April, 2021.

Present: All the Justices.

James Laimont Bryant, Appellant,

against Record No. 200897
Circuit Court No. CR17-334-01

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Bedford County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no reversible error in the judgment of the circuit court.

James Laimont Bryant ("Bryant") was charged with unreasonable refusal to take a breath test and opted for a jury trial. During juror selection, after the parties had exercised all of their peremptory strikes, the trial court instructed that the clerk would call the names of the individuals who had been selected as jurors and those individuals should stand; the individuals who were not called were to remain seated. After the clerk called the names of the jurors, Bryant noticed that the only African American on the venire had been struck by the Commonwealth. Bryant, who is also African American, immediately informed the trial court that he had a motion to make outside of the presence of the jury. The trial court inquired if this was a matter that needed to be addressed before the jury was sworn; Bryant responded that it was. The trial court then sent the jury to the jury room and sent the remaining members of the venire to the empty jury waiting area.

Bryant then made a *Batson* challenge to the Commonwealth's decision to exercise a peremptory strike to remove the only African American from the jury. After hearing from both

sides, the trial court ruled that the Commonwealth's "peremptory strike. . . is not permitted and will be disallowed." While discussing the possible remedies, the trial court noted that it doubted if there were enough jurors present to start the juror selection process over. The Commonwealth objected to reseating the struck juror, asserting that that juror had already been dismissed from the jury and was aware of that fact. The Commonwealth expressed its concern that this would result in the juror being prejudiced against it. Bryant responded that the only remedy he was seeking was to have the juror reseated on the jury; he explicitly stated that he was "not asking for a new jury."

The trial court acknowledged that it had made a mistake in the manner that it had conducted the voir dire by not giving the parties the opportunity to object before the court clerk announced the jurors. However, it agreed with the Commonwealth's concern that the struck juror would be prejudiced against the Commonwealth. Rather than reseat the juror, the trial court decided to call two new jurors[1] and give each party one more peremptory strike. After voir dire was conducted on the new jurors and each party made its additional strike, Bryant again argued that the struck juror should have been reseated. The trial court noted Bryant's objections and proceeded to conduct the trial.

After the trial was completed, Bryant moved to set aside the verdict. In his motion, Bryant again argued that the trial court erred by refusing to reseat the struck juror. He also insisted, for the first time, that the only legitimate alternative to reseating the struck juror was to empanel a new jury. However, during oral argument on the hearing, Bryant only argued that the struck juror should have been reseated.

[1] Initially, the trial court stated it was going to call three new jurors, but it subsequently realized that it only needed to call two.

On appeal, Bryant argues that the trial court erred in failing to reseat the improperly struck juror or empanel a new jury after his successful *Batson* challenge. In deciding what remedy to impose for a successful *Batson* challenge, "courts are to be accorded significant latitude." *Koo v. McBride*, 124 F.3d 869, 873 (7th Cir.1997). Accordingly, the Court reviews the lower court's decision in this case for an abuse of discretion. *Coleman v. Hogan*, 254 Va. 64, 68 (1997).

This Court has recognized two possible remedies for the unconstitutional exercise of peremptory strikes: "reseating persons improperly struck from the jury panel and discharging the venire and selecting a new jury from a new panel." *Id.* at 67. The Court notes, however, that when the trial court questioned whether there were enough jurors available from which to select a new jury, Bryant stated that he was "not asking for a new jury." Thus, Bryant cannot subsequently assign error to the trial court's failure to implement a remedy that he explicitly rejected. *See Palmyra Associates, LLC v. Comm'r of Highways*, ___ Va. ___, ___ (2020) (holding that the invited error doctrine precludes a litigant from attempting to take advantage of a situation created by his own actions).[2] Accordingly, the Court's review is limited to whether the trial court abused its discretion in refusing to reseat the improperly struck juror.

In *Coleman*, this Court noted that there were a number of factors to be considered before a juror could be reseated. 254 Va. at 67-68. One of these factors, "the knowledge of the jurors regarding the improper strike," is of particular import in the present case. The record establishes that, at the time when Bryant raised his *Batson* challenge, everyone in the courtroom knew who had

[2] Although Bryant subsequently raised the trial court's failure to seat a new jury in his motion to set aside the verdict, that motion was untimely and is therefore waived. *See* Code § 8.01-352(A) (requiring that objections to irregularities in the impaneling of jurors be raised before the jury is sworn unless leave of court is granted); *see also Bethea v. Commonwealth*, 297 Va. 730, 743 (2019) ("Untimely objections are generally waived").

been struck and who had not. Although the struck juror may not have specifically known why she was struck, it would not be difficult for her to surmise that race may have played a part in the decision. Similarly, it would not be difficult for her to surmise that it was the Commonwealth that struck her. Under such circumstances, placing her back on the jury was not a viable option. Therefore, the trial court did not abuse its discretion in refusing to reseat the struck juror.

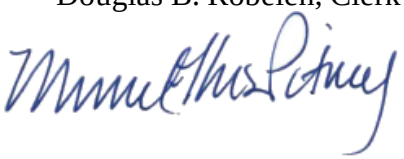
Accordingly, under the specific facts of this case, the trial court was left with no alternative other than to fashion a new remedy in response to Bryant's successful *Batson* challenge.[3] Therefore, the judgment is affirmed.

This order shall be certified to the Circuit Court of Bedford County.

A Copy,

Teste:

Douglas B. Robelen, Clerk



By:

Deputy Clerk

[3] It is important to note that Bryant did not raise any objection to the remedy fashioned by the trial court, nor did he assign error to the remedy on appeal. Accordingly, the propriety of the remedy is not before the Court, nor is any opinion offered with regard to its efficacy. Suffice it to say that, in those rare instances where a new *Batson* remedy must be fashioned, that remedy must address the ills that *Batson* was designed to address. Specifically, a *Batson* remedy must ensure that no person is tried by a jury that is tainted by the exclusion of individuals based on a prohibited discriminatory basis. *See Batson*, 476 U.S. at 85 (holding that a defendant is denied "equal protection of the laws when [he is] put[] on trial before a jury from which members of his race have been purposefully excluded"); *Drain v. Woods*, 595 Fed. Appx. 558, 567–68 (6th Cir. 2014) ("Once a *Batson* violation has been found, the trial court must implement an adequate remedy to cure the jury of the taint of selection by impermissible racial discrimination"); *Coleman*, 254 Va. at 69 (holding that, where a discriminatory strike taints the jury, "[t]he remedy provided by the trial court must cure that taint").