

Monte Murphy appeals his convictions for three counts of Receiving a Ballot,¹ entered as class A misdemeanors. He presents the following consolidated and restated issues for review:

1. Did the trial court err in denying Murphy's motion for discharge pursuant to Indiana Criminal Rule 4(C)?
2. Did the trial court abuse its discretion when it allowed the State to strike an African-American juror over Murphy's objection?
3. Did the State present sufficient evidence to support his convictions?

We affirm.

The facts favorable to the convictions are that in 2007, Murphy was a firefighter and Muncie City Councilman who was standing unopposed for reelection in the November election. Prior to the election, Murphy provided Kathy and Sylvester Turner² with applications for absentee ballots. He took their completed applications with him, and the Turners later received their ballots in the mail. Thereafter, Murphy returned to the Turners' home and assisted them while they filled out their absentee ballots. Specifically, he informed them how to vote a straight democratic ticket and then took their completed ballots and placed each in its respective envelope. Murphy then left the home with the sealed ballots and mailed them. At some point after the election, Murphy returned to the Turners' home to have them each sign a document entitled power of attorney, which was undated and purportedly granted Murphy the limited power to "deposit in the United States mail my completed and

¹ Ind. Code Ann. § 3-14-2-6(4) (West, Westlaw through end of 2011 1st Regular Sess.).

² Kathy and Sylvester were married at the time, but they divorced at some point after the election and prior to the instant trial. At trial, Kathy had the surname Patton.

signed absentee ballot in the Nov 2007 Muncie Municipal Election.” *Exhibits* at 23 and 27.

Murphy also visited Henrietta Williams prior to the election. At that time, Williams had already completed her absentee ballot and sealed it in the envelope. Murphy took the prepared ballot when he left Williams’s home and placed it in her mailbox. Like the Turners, Williams signed an undated document entitled power of attorney after the election.

On May 27, 2009, following a grand jury hearing, Murphy was indicted for nine counts of class D felony receiving a ballot. The cause was set for jury trial on October 27, 2009. Upon motion by the State, the cause was continued and trial was eventually rescheduled for May 25, 2010. Thereafter, Murphy filed a motion to dismiss on April 21 (based on insufficient indictments), followed by a motion to continue on April 29. The State responded to the latter motion, indicating that it had no objection to a continuance of trial “so long as the delay is chargeable to the defense and not the State of Indiana.” *Appendix* at 210. The trial court granted the continuance and held a pre-trial hearing on the formerly scheduled trial date. The motion to dismiss was addressed at the hearing, and the court allowed the State to amend the indictments to cure deficiencies. Further, at the beginning of the May 25 hearing and with agreement of the parties, the court rescheduled the jury trial for June 22, 2010.

On June 9, 2010, Murphy filed a motion for discharge pursuant to Indiana Criminal Rule 4, claiming that he should have been brought to trial by May 29, 2010. The trial court denied the motion for discharge and found that the delay between April 29 and June 22 should be charged against the defense.

Several days prior to trial, the State dismissed four of the nine counts filed against

Murphy. The jury trial on the remaining five counts commenced on June 22, 2010. At the conclusion of the State's case in chief, Murphy made a motion for the court to enter judgment on the evidence, which the court denied. The case was then submitted to the jury. The jury found Murphy guilty of three counts of class D felony receiving a ballot (the counts involving the Turners and Williams) and acquitted him of two counts (involving two other absentee voters). The trial court later reduced each conviction to a class A misdemeanor and sentenced Murphy to consecutive one-year terms, suspended to probation. Murphy now appeals. Additional facts will be provided below as needed.

1.

Murphy initially challenges the denial of his motion for discharge under Ind. Criminal Rule 4(C). He claims that the delay between April 29 and June 22 should have been charged to the State. We need not reach this question, however, because Murphy has waived this issue for review.

The objective of Rule 4(C) is to “move cases along and to provide the defendant with a timely trial, not to create a mechanism to avoid trial.” *Brown v. State*, 725 N.E.2d 823, 825 (Ind. 2000). Accordingly, “[a] defendant waives the right to be brought to trial within one year by failing to raise a timely objection if the trial court, acting during the one-year period, schedules the trial beyond the limit.” *Gibson v. State*, 910 N.E.2d 263, 267 (Ind. Ct. App. 2009). *See also Dean v. State*, 901 N.E.2d 648 (Ind. Ct. App. 2009), *trans. denied*.

At the beginning of the hearing on May 25, 2010, the matter of rescheduling the trial was addressed as follows:

THE COURT:The Court anticipates setting this for trial on June 22nd,

2010, commencing at 9:00 a.m. Mr. Brooke, on behalf of the Defendant, do you know of any legal reason why trial should not take place on that date or do you want to reserve time to comment or object?

[DEFENSE]: I have, I have no legal reason as to why the trial shouldn't take place on that date, Your Honor.

THE COURT: All right. [State], do you know of any reason why the trial should not take place on that date?

[STATE]: No, Your Honor. June 22nd is fine with the State.

THE COURT: All right. Accordingly then, by the Court's standard pre-trial jury Order the Final Pre-trial Conference will be scheduled for the Friday before the Tuesday Jury Trial.... Mr. Murphy, you are advised of the trial date at this time, the trial date of June 22nd, 2010 at 9:00 a.m.

Transcript at 15.

As set out above, Murphy expressly acquiesced to the new trial date and did not assert an objection until more than two weeks later on June 9, 2010, which was after the alleged running of the Rule 4(C) period. Because Murphy did not timely object to the setting of the trial date, his claim of a violation of Rule 4(C) is waived. *See Dean v. State*, 901 N.E.2d 648.

2.

Murphy argues that the State's peremptory challenge of a prospective African-American juror violated *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court permitted the peremptory challenge over Murphy's objection, concluding that the State had offered legitimate, race-neutral reasons for the challenge.

It is well established that the use of a peremptory challenge to strike a potential juror solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Jeter v. State*, 888 N.E.2d 1262 (Ind. 2008), *cert. denied*.

The *Batson* Court developed a three-step test to determine whether a peremptory challenge has been used improperly to disqualify a potential juror on the basis of race. First, the party contesting the peremptory challenge must make a prima facie showing of discrimination on the basis of race. Second, after the contesting party makes a prima facie showing of discrimination, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. Third, if a race-neutral explanation is proffered, the trial court must then decide whether the challenger has carried its burden of proving purposeful discrimination.

Jeter v. State, 888 N.E.2d at 1263 (citations omitted).³

At trial, the State offered the following reasons for striking the juror in question:

The State peremptorily challenged [the juror] because, several reasons. One (1), she testified that she's known Mr. Murphy and that her family has known Mr. Murphy; she's done so since Elementary School.^[4] And, so therefore, she's fifty (50), she knows, therefore has known him for at least forty (40) years. So, she is a financial secretary of Local 123 of the Security Police Firefighters Professional Association. I don't take that to be a racially exclusionary Organization. I, I take it to be the Security Police Firefighter's Professional Association with the Union. She has served in that capacity. She was verbally, or visibly upset when I was asking her questions. She wouldn't look at me, she would look anywhere else. Based on her association with Mr. Murphy, and her reaction to the State as the State was conducting voir dire, we believe that a peremptory challenge was appropriate.

Transcript at 185. Facially, these are legitimate race-neutral reasons for exercising a peremptory strike.

Proffered race-neutral reasons notwithstanding, Murphy correctly observes that a trial court is not bound to accept them. Although the ultimate burden of persuasion regarding purposeful discrimination rests with the party opposing the strike, the third *Batson* step

³ “[O]nce the proponent ‘has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [opponent of the challenge] had made a prima facie showing becomes moot.’” *Id.* at 1264 (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)).

requires evaluation of the persuasiveness of the justifications proffered by the State. *See Jeter v. State*, 888 N.E.2d 1262.

“In the typical peremptory challenge inquiry, the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the [proponent’s] state of mind based on demeanor and credibility lies ‘peculiarly within a trial judge’s province.’”

Id. at 1264-65 (quoting *Hernandez v. New York*, 500 U.S. at 365).

In the instant case, the trial court found the race-neutral explanation offered by the State to be credible. “On appeal, a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.” *Id.* at 1265. The record reveals that the juror had known Murphy since elementary school and lived in his neighborhood for about twenty years. Further, the trial court was able to observe the demeanor of the juror during voir dire, as well as the attorney asserting the challenge. Murphy has failed to establish clear error, and we sustain the trial court’s ruling on this issue.

3.

Finally, Murphy challenges the sufficiency of the evidence supporting his convictions.⁵ With respect to the counts involving the Turners, Murphy observes that their testimony did not support the convictions and was in direct conflict with the information contained in their affiant questionnaires (affidavits). Further, regarding the count involving

⁴ In fact, the juror indicated that she grew up in the same neighborhood as Murphy and did not move until she was twenty years old.

⁵ Murphy also seeks review of the denial of his motion for judgment on the evidence with respect to the counts involving the Turners. We need not separately address this issue because our standard of review with

Williams, Murphy acknowledges that the evidence establishes she handed her sealed and completed ballot to him and that he walked it outside to her mailbox. Despite this evidence, Murphy argues that he did not “receive” the ballot because although he had possession he did not have control over the ballot.

Our standard of review for challenges to the sufficiency of the evidence is well settled.

When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). “We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009).

The crime of receiving a ballot, a class D felony, is defined as “knowingly ...[r]eceiving from a voter a ballot prepared by the voter for voting”. I.C. § 3-14-2-6(4). There are, of course, several categories of people exempted and allowed to receive a completed ballot. Murphy does not argue, however, that he falls within any of these exceptions. Murphy’s argument on appeal is simply that he did not receive a completed ballot from the Turners or Williams.

With respect to the first two challenged counts, the State presented into evidence sworn affidavits from the Turners that were completed about a month after the election. Both affidavits indicated that the Turners completed their absentee ballots in the presence of Murphy and then handed the ballots to Murphy. According to the affidavits, Murphy took

regard to the denial of a motion for judgment on the evidence is the same as that for a challenge to the sufficiency of the evidence. *See Proffit v. State*, 817 N.E.2d 675 (Ind. Ct. App. 2004), *trans. denied*.

the ballots and placed them in their respective envelopes. He then left the Turners' home with the completed ballots. After the election, Murphy returned to the couples' home to have them each sign a document indicating that they approved of his actions (that is, taking the completed ballots and depositing them in the mail). This evidence sufficiently establishes that Turner received completed absentee ballots from the Turners. His request that we consider other evidence that is "in direct conflict" with the affidavits (i.e., the witnesses' trial testimonies) is improper. *Appellant's Brief* at 30. It was the jury's province to judge the credibility of the witnesses. We reject Murphy's invitation to judge their credibility and reweigh the evidence.

Turning to the remaining conviction, Murphy acknowledges that the evidence establishes that Williams handed him her completed and sealed absentee ballot and that he then walked the ballot out to Williams's mailbox. He argues, however, that he did not "receive" the ballot because he never left Williams's property with it and Williams continued to maintain control over it while she watched him place it in the mailbox. We find no merit in this argument, as Murphy clearly received the ballot in contravention of the statute. *Cf. Murphy v. State*, 837 N.E.2d 591 (Ind. Ct. App. 2005) (holding that receipt of a sealed envelope containing an absentee ballot from a voter and delivery to a mailbox amounts to unauthorized receipt of a ballot).

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.