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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-18-0551

Natasha Lashay Cunningham

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-18-888; CC-18-889)

WINDOM, Presiding Judge.

Natasha Lashay Cunningham appeals her convictions for unlawful possession of a controlled substance, a violation of § 13A-12-212, Ala. Code 1975, and second-degree possession of

marijuana, a violation of § 13A-12-214, Ala. Code 1975.[1] The Houston Circuit Court sentenced Cunningham to 48 months in prison for her possession-of-a-controlled-substance conviction and to 12 months in jail for her possession-of-marijuana conviction, and ordered that the sentences were to be served concurrently. Cunningham filed a motion for new trial, which was denied.

On December 8, 2016, Sergeant Robert Cole with the Dothan Police Department, along with another officer, conducted a traffic stop after the driver failed to use the proper turn signal and made an improper lane change. Sgt. Cole approached the driver's side of the vehicle while the other officer approached the passenger side. Cunningham, the driver, rolled down her window. Sgt. Cole informed Cunningham why he stopped her and asked for her driver's license. Cunningham told Sgt. Cole that her driver's license had been suspended. Sgt. Cole asked Cunningham to step outside the vehicle, and she complied. Meanwhile, the other officer made contact with the passenger, Eugene Neal. When the officer determined that

[1]Cunningham was indicted for distributing a controlled substance, a violation of § 13A-12-211(a), Ala. Code 1975, and for second-degree possession of marijuana.

there was a warrant for Neal's arrest, he informed Neal that he would be taken into custody. Cunningham then became aggressive and angry. She "darted" from behind the vehicle and went to the driver's side door, which she opened. Cunningham had her upper body inside the vehicle. Concerned for his safety, Sgt. Cole pulled her out of the vehicle. Cunningham had her purse in her hands. Because of safety concerns and Cunningham's behavior, Sgt. Cole placed Cunningham in handcuffs until the traffic stop could be completed. While Cunningham was being handcuffed, her purse fell to the ground and various items fell out. Sgt. Cole picked up the items to put them back inside the purse. As he did so, he smelled marijuana. Sgt. Cole searched the purse and found a pill bottle in one of the side pockets along with a clear bag in the main portion of the purse. Both the bottle and the bag contained marijuana. Sgt. Cole also found a white box that contained several bags of methamphetamine and a glass pipe. A digital scale was found during a subsequent search of the vehicle.

On appeal, Cunningham argues that the circuit court erred: 1) by considering the offense of possession of a

controlled substance to be a lesser-included offense of distribution and submitting that charge to the jury for consideration; 2) by denying her motion for mistrial after a witness stated that Cunningham had prior drug offenses; 3) by denying her motion for a judgment of acquittal; 4) by denying her motion to suppress the evidence seized from her purse; and 5) by denying her Batson motion.[2]

I.

Cunningham argues that the circuit court erred when, after granting her motion for a judgment of acquittal to the charge of distributing a controlled substance, it submitted the charge of unlawful possession of a controlled substance as a lesser-included charge to the jury.[3]

This Court has never directly decided the question of whether simple possession of a controlled substance is a lesser-included offense of distribution of a controlled

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

[3]During trial, defense counsel stated that, after viewing the officer's report and speaking with Sgt. Cole, defense counsel determined that it was Sgt. Cole's intent that Cunningham would be indicted for possession of a controlled substance with intent to distribute pursuant to § 13A-12-211(c) and not actual distribution under § 13A-12-211(a). According to defense counsel, Cunningham was "indicted under the incorrect charge of distribution." (R. 69.)

substance.[4] However, in Harris v. State, 274 So. 3d 304 (Ala. Crim. App. 2018), this Court held that possession of a controlled substance was a lesser-included offense of an attempt to commit distribution. Because Harris had been convicted of attempting to commit distribution of a controlled substance and of marijuana, double-jeopardy precluded his

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[4]State and federal courts that have ruled upon this issue are decidedly split. Some courts have held that possession is a lesser-included offense of distribution. Anderson v. State, 385 Md. 123, 867 A.2d 1040, 1045 (2005) (holding that because a distributor has either actual or constructive possession of the substance by dominion or control of the substance, possession of the substance distributed is necessarily an element of the distribution); State v. Johnson, 261 Neb. 1001, 627 N.W.2d 753, 760-61 (2001) (holding that possession is a lesser-included offense of distribution); Austin v. Commontwealth, 33 Va. App. 124, 531 S.E.2d 637, 639 (2000) (same).

Other courts have held that possession cannot be considered a lesser-included offense of distribution. In reaching that conclusion, those courts have stated that, because distribution may involve acts perpetrated in furtherance of a transfer or sale other than possession, possession cannot be considered a lesser-included offense of unlawful distribution. See United States v. Colon, 268 F.3d 367 (6th Cir. 2001); United States v. Jackson, 213 F. 3d 1269 (10th Cir. 2000), vacated on other grounds, 531 U.S. 1033 (2000); United States v. Gore, 154 F.3d 34 (2d Cir. 1998); United States v. Sepulveda, 102 F.3d 1313 (1st Cir. 1996); State v. Goodroad, 455 N.W.2d 591 (S.D. 1990); People v. Bloom, 195 Colo. 246, 577 P.2d 288 (1978).

convictions for possession of a controlled substance and possession of marijuana.[5]

"Section 13A-1-9(a), Ala. Code 1975, provides:

> "'(a) A defendant may be convicted of an offense included in an offense charged. An offense is an included one if:
>
> > "'(1) It is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged; or
> >
> > "'(2) It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense; or
> >
> > "'(3) It is specifically designated by statute as a lesser degree of the offense charged; or
> >
> > "'(4) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interests, or a lesser kind of

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[5]Without specifically addressing the issue, this Court has also implied that the unlawful possession of a controlled substance can be a lesser-included offense of distribution by finding that evidence did not support a lesser-included-offense charge on possession in a trial for unlawful distribution of a controlled substance. See Garrick v. State, 589 So. 2d 760 (Ala. Crim. App. 1991); Powell v. State, 608 So. 2d 411 (Ala. Crim. App. 1992); Davis v. State, 673 So. 2d 845 (Ala. Crim. 1995).

culpability suffices to establish its commission.'

"In Williams v. State, 104 So. 3d 254 (Ala. Crim. App. 2012), this Court explained that,

"'"'"to be a lesser included offense of one charged in an indictment, the lesser offense must be one that is necessarily included, in all of its essential elements, in the greater offense charged[,]" Payne v. State, 391 So. 2d 140, 143 (Ala. Cr. App.), writ denied, 391 So. 2d 146 (Ala. 1980), ... unless it is so declared by statute.'

"'"James v. State, 549 So. 2d 562, 564 (Ala. Cr. App. 1989). 'Whether a crime constitutes a lesser-included offense is to be determined on a case-by-case basis.' Aucoin v. State, 548 So. 2d 1053, 1057 (Ala. Cr. App. 1989). 'In determining whether one offense is a lesser included offense of the charged offense, the potential relationship of the two offenses must be considered not only in the abstract terms of the defining statutes but must also ... in light of the particular facts of each case.' Ingram v. State, 570 So. 2d 835, 837 (Ala. Cr. App. 1990) (citing Ex parte Jordan, 486 So. 2d 485,

> > 488 (Ala. 1986); emphasis in original). See also Farmer v. State, 565 So. 2d 1238 (Ala. Cr. App. 1990)."
>
> "'[Ford v. State,] 612 So. 2d [1317,] 1318 [(Ala. Crim. App. 1992)]. The "particular facts" of each case are those facts alleged in the indictment. Thus, "the statutory elements of the offenses and facts alleged in an indictment--not the evidence presented at trial or the factual basis provided at the guilty-plea colloquy--are the factors that determine whether one offense is included in another." Johnson v. State, 922 So. 2d 137, 143 (Ala. Crim. App. 2005).'
>
> "Williams, 104 So. 3d at 264."

Harris v. State, 274 So. 3d at 308.

Section 13A-12-211, Ala. Code 1975, provides that "[a] person commits the crime of unlawful distribution of controlled substances if, except as otherwise authorized, he or she sells, furnishes, gives away, delivers, or distributes a controlled substance enumerated in Schedules I through V." Section 13A-12-212(a)(1), Ala. Code 1975, provides that "[a] person commits the crime on unlawful possession of a controlled substance if[,] ...[e]xcept as otherwise authorized, he or she possesses a controlled substance enumerated in Schedules I through V."

> "Based on the statutory elements of the offenses and facts as alleged in the indictments, possession of [methamphetamine] ... [is a] lesser-included offens[e] of [distribution of methamphetamine]. Specifically, the commission of the [distribution offense] as alleged in the indictment necessarily included all the elements of the possession offens[e] as alleged in the indictment."

Harris, 274 So. 3d at 308.[6]

This Court recognizes, as have other courts, that there may be circumstances in which a substance may be distributed without the defendant's having any actual or constructive possession. However, in this case, Cunningham did have possession of the controlled substance; therefore, under these circumstances, the circuit court properly found possession to be a lesser-included offense of distribution. Thus, the circuit court did not err in instructing the jury on the offense of unlawful possession of a controlled substance.

II.

Cunningham contends that the circuit court erred by failing to declare a mistrial after a witness testified that Cunningham had prior drug offenses.

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[6]Methamphetamine is a Schedule III substance. See § 20-2-26(a)(1)(c), Ala. Code 1975. The indictment charging Cunningham with distribution tracked the language of § 13A-12-211, Ala. Code 1975.

During the cross-examination of Sgt. Cole, the following transpired:

> "[Defense counsel:] You asked her for her license, and she told you [it was] suspended?
>
> "[Sgt. Cole:] That's correct. She said [it was] suspended for prior drug offenses.
>
> "[Defense counsel]: Judge, I am going to object to that.
>
> "THE COURT: I'll sustain the objection to that.
>
> "[Defense counsel]: I would ask that it be struck from the record.
>
> "THE COURT: Ladies and gentlemen, disregard that last response from Sergeant Cole.
>
> "Defense counsel:] Judge, may we approach on that?
>
> "THE COURT: Yes, sir.
>
> "[Defense counsel]: Judge, for the record, I would ask for a mistrial, based upon that. We are here on a drug case. There's been -- it's kind of -- you can't unring the bell. They have heard that she has a prior drug charge, and we are here on a drug charge. So I would ask for a mistrial.
>
> "....
>
> "THE COURT: I will deny the motion for a mistrial, but I will instruct the jury again that they will need to disregard that. And I will ask the jury if there's anyone on the jury who feels they could not disregard that.

> "[Defense counsel:] Okay. That's our objection, Judge.
>
> "THE COURT: Yes, sir. I'll note that.
>
> "THE COURT: Ladies and gentlemen, again, I'll instruct you to disregard the last answer to the last question presented to Sergeant Cole as to the status of her license. And there's some reference made in Sergeant Cole's answer to some other proceeding. That has nothing to do with this case.
>
> "Let me ask each member of the jury, is there any member of the jury who feels that they could not disregard the response that Sergeant Cole made to that question from [defense counsel]?
>
> "THE COURT: I'll let the record reflect that no juror has responded to that.
>
> "Again, ladies and gentlemen, just disregard the response that Sergeant Cole made to that."

(R. 103-05.)

The circuit court has the discretion to grant or deny a motion for a mistrial, and such a ruling will be disturbed only upon a showing of manifest abuse. Evans v. State, 794 So. 2d 415 (Ala. Crim. App. 2000). "'The trial judge is in the best position to determine whether the prejudicial effects of an improper remark can be eradicated by instructions to the jury, and his determination should be accorded great deference.'" Simmons v. State, 797 So. 2d 1134, 1164 (Ala. Crim. App. 1999) (quoting Hannah v. State, 518 So. 2d 182, 185

(Ala. Crim. App. 1987)). "[A] mistrial is a drastic remedy, to be used only sparingly and only to prevent manifest injustice." Ex parte Thomas, 625 So. 2d 1156, 1157 (Ala. 1993). "A mistrial is an extreme measure that should be taken only when the prejudice cannot be eradicated by instructions or other curative actions of the trial court." Ex parte Lawrence, 776 So. 2d 50, 55 (Ala. 2000). A mistrial is properly denied if an error can be cured by an instruction. Id.

Sgt. Cole's reference to Cunningham's having prior drug offenses was brief and in response to a question asked by defense counsel, not the prosecutor. The circuit court sustained Cunningham's objection and immediately instructed the jury to disregard the testimony, and then gave the jury another round of instructions following Cunningham's motion for a mistrial. The circuit court's instructions cured any prejudice Cunningham may have suffered from Sgt. Cole's answer. Jurors are presumed to follow the trial court's oral instructions. Taylor v. State, 666 So. 2d 36, 70 (Ala. Crim. App. 1994). See also Smith v. State, 795 So. 2d 788, 822-23 (Ala. Crim. App. 2000) ("'[R]eferences to the appellant's

having been in prison, which were clearly unresponsive to the questions posed are comparable to remarks that we have held can be eradicated by curative instructions. See, e.g., Bowers v. State, 629 So. 2d 793, 794 (Ala. Cr. App. 1993) (noting that, where "trial court, of its own volition, instructed the jurors to disregard [police detective's unresponsive answer that he 'understood the defendant was facing charged in Milwaukee'] and questioned jurors to ensure that they could disregard the statement," the trial court's actions "cured any possible error"); Garnett v. State, 555 So. 2d [1153] at 1155 [(Ala. Crim. App. 1989)]("[A]ny prejudice arising from [prosecutor's] question [indicating that murder defendant had been arrested for beating his wife] ... was both capable of eradication and was eradicated by the trial court's prompt action."); Floyd v. State, 412 So. 2d 826, 830 (Ala. Cr. App. 1981) ("[T]he trial court's action in immediately instructing the jury to disregard the prosecution's vague reference to another unspecified crime cured any potential error prejudicing the appellant's case"). See also Reams v. United States, 895 A.2d 914, 924 n.5 (D.C. 2006) (holding that testimony that witness and defendant "sold drugs together" was

not so prejudicial as to require a mistrial where trial judge immediately struck the testimony and told jury to disregard it). Compare Ex parte Sparks, 730 So. 2d 113 (Ala. 1998) (noting that improper questioning about a previous conviction for the same offense is difficult for the jury to disregard and finding that prejudice could not be eradicated in that case by a curative instruction). This Court finds no abuse of discretion in the circuit court's denial of Cunningham's motion for mistrial. Therefore, this issue does not entitle her to relief.

III.

Cunningham argues that the evidence was insufficient to sustain her convictions for possession of a controlled substance and for possession of marijuana. Specifically, she contends that the State failed to prove that she had knowledge of the drugs in her purse.

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). '"The test used in determining the

sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).

> "'The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala. Cr. App. 1983).'"

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004)(quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992)).

The evidence presented at trial, when viewed in a light most favorable to the State, indicated that Cunningham was in actual possession of methamphetamine. During the search of Cunningham's purse, Sgt. Cole found methamphetamine and marijuana. Although Cunningham argues that Neal had access to her purse while she was outside the vehicle and that he could have hidden the contraband inside her purse without her knowledge, such a theory raises questions about the weight of the evidence, not the sufficiency of the evidence. It is not the role of this Court to reweigh the evidence on appeal. Living v. State, 796 So. 2d 1121 (Ala. Crim. App. 2000). The fact that the drugs were found in Cunningham's purse was sufficient to allow the jury to conclude reasonably that Cunningham knew the drugs were in her purse. Nation v. State, 627 So. 2d 1156, 1158 (Ala. Crim. App. 1993) (noting that whether a defendant had knowledge that an item contained an illegal substance is for the jury to decide). Accordingly, this Court concludes that the State presented sufficient

evidence to support Cunningham's convictions for unlawful possession of a controlled substance and unlawful possession of marijuana.

IV.

Cunningham argues that the circuit court erred in denying her motion to suppress the drug evidence obtained through what she says was an unconstitutional search of her purse. Cunningham claims that the search was unconstitutional because "the only testimony the State presented at all to justify why the purse was searched was that the officer 'smelled raw marijuana.'" (Cunningham's brief, at 33.)

In State v. Landrum, 18 So. 3d 424, 426 (Ala. Crim. App. 2009), this Court explained:

> "'This Court reviews de novo a circuit court's decision on a motion to suppress evidence when the facts are not in dispute. See State v. Hill, 690 So. 2d 1201, 1203 (Ala. 1996); State v. Otwell, 733 So. 2d 950, 952 (Ala. Crim. App. 1999).' State v. Skaggs, 903 So. 2d 180, 181 (Ala. Crim. App. 2004). In State v. Hill, 690 So. 2d 1201 (Ala. 1996), the trial court granted a motion to suppress following a hearing at which it heard only the testimony of one police officer. Regarding the applicable standard of review, the Alabama Supreme Court stated, in pertinent part, as follows:
>
> > "'"Where the evidence before the trial court was undisputed the ore tenus rule is inapplicable, and the Supreme Court will

> sit in judgment on the evidence de novo, indulging no presumption in favor of the trial court's application of the law to those facts." Stiles v. Brown, 380 So. 2d 792, 794 (Ala. 1980) (citations omitted). The trial judge's ruling in this case was based upon his interpretation of the term "reasonable suspicion" as applied to an undisputed set of facts; the proper interpretation is a question of law.'

"State v. Hill, 690 So. 2d at 1203-04."

Because the evidence presented at the suppression hearing was not in dispute, this Court affords no presumption in favor of the circuit court's ruling.

Further,

> "[t]his court has recognized that, in appropriate circumstances, an officer's detection of the odor of marijuana may provide probable cause to search or to arrest. In State v. Mathews, 597 So. 2d 235 (Ala. Cr. App. 1992), we stated:
>
> > "'"It appears to be generally accepted that the smell of marijuana in its raw form or when burning is sufficiently distinctive to come within the rule of ... Johnson [v. United States, 333 U.S. 10, [68 S. Ct. 367, 92 L. Ed. 436] (1948), that probable cause to believe that an illegal substance is present may be established by smell]. Consequently, the courts have found probable cause to search when the distinctive odor of

> > marijuana is found emanating from a particular place and have likewise found probable cause to arrest when the odor was detected coming from a particular person."
>
> "'[W. LaFave, 2 Search and Seizure] § 3.6(b) [(2d ed. 1987)] (footnotes omitted). See, e.g., State v. Betterton, 527 So. 2d 743 (Ala. Cr. App. 1986), aff'd, 527 So. 2d 747 (Ala. 1988). "The odor of fresh marijuana or marijuana smoke, standing alone, has ... been held or recognized as providing probable cause to conduct warrantless searches of ... persons and their clothing." Donald M. Zupanec, Annotation, Odor of Narcotics as Providing Probable Cause for Warrantless Search, 5 A.L.R.4th 681, 686 (1981) (footnotes omitted). See also State v. Compton, 13 Wash. App. 863, 538 P.2d 861, 861-62 (1975) (wherein the court held that, because the officer was qualified to identify the smell of raw or burning marijuana, his detection of the smell of such contraband provided "him sufficient information to form a reasonable belief that the crime of unlawful possession of a controlled substance was being committed in his presence").'
>
> "597 So. 2d 237."

Blake v. State, 772 So. 2d 1200, 1205 (Ala. Crim. App. 2000).

During a legal traffic stop, Sgt. Cole, who was familiar with the smell of marijuana, smelled marijuana emanating from Cunningham's purse. Because Sgt. Cole smelled marijuana emanating from the purse, he had probable cause to search the

purse. Accordingly, the circuit court did not err by refusing to suppress the evidence of the marijuana and the methamphetamine found in the purse.

V.

Cunningham argues that the circuit court erred in denying her Batson motion. Cunningham contends that her motion should have been granted because, she says, the State used several of its peremptory strikes to remove black jurors from the jury venire and the State's reasons for those strikes were pretextual and illogical.

The record reflects that, following jury selection, Cunningham made a Batson motion, alleging that the State had violated Batson by using 5 of its 11 strikes to remove black veniremembers from the venire. The circuit court then requested that the State provide its reasons for the strikes. After the State explained its strikes, the circuit court asked defense counsel if he had a response. Defense counsel stated:

> "Judge, I just have my objection on the record. But specifically on Juror Number 41, about Ms. [C.], the fact that there's a relative convicted of rape, there was no evidence whatsoever that she would hold that against the State. I do have an objection. But in all fairness, I can give some understanding to the other strikes that the State gave, but on juror -- on that juror, the fact that a relative was

> convicted of a rape -- I don't know where it was. This is not a rape case. There was no indication she couldn't be fair on the jury. She was a member of the minority. I would ask that she be placed back on the jury in that the State did not give a race-neutral reason for striking her."

(R. 41.) The circuit court found the reasons give by the State to be race-neutral and denied the Batson motion.

This Court will reverse the circuit court's ruling on a Batson motion if the ruling is clearly erroneous. Cooper v. State, 611 So. 2d 460, 463 (Ala. Crim. App. 1992), citing Jackson v. State, 549 So. 2d 616 (Ala. Crim. App. 1989). The trial court's Batson ruling is entitled to great deference. Talley v. State, 687 So. 2d 1261, 1267 (Ala. Crim. App. 1996).

> "'The party alleging racially discriminatory use of peremptory challenges bears the burden of establishing a prima facie case of discrimination. Ex parte Branch, 526 So. 2d 609, 622 (Ala. 1987). Once a prima facie case has been established, a presumption is created that the peremptory challenges were used to discriminate against black jurors. Id. at 623. Where the prosecutor is required to explain his peremptory strikes, he or she must offer "'a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory. However, this showing need not rise to the level of a challenge for cause.'" McLeod v. State, 581 So. 2d 1144, 1155 (Ala. Crim. App. 1990), quoting Ex parte Branch, 526 So. 2d

> at 623. (Emphasis in Branch; citation omitted.) Once the responding party has articulated a race-neutral reason or explanation for eliminating the challenged jurors, the moving party can offer evidence showing that the reason or explanation is merely a sham or pretext. Ex parte Branch, 526 So. 2d at 624. When the trial court has followed this procedure, its determination will be overturned only if that determination is "clearly erroneous." Id. at 625.'

"Burgess v. State, 811 So. 2d 557, 572-73 (Ala. Crim. App. 1998), aff'd in pertinent part, rev'd on other grounds, 811 So. 2d 617 (Ala. 2000).

> "'Within the context of Batson, a "race-neutral" explanation "means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral .... In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law .... [E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judges's province."'

"Allen v. State, 659 So. 2d 135, 147 (Ala. Crim. App. 1994) (emphasis added; citations omitted)."

Rogers v. State, 819 So. 2d 643, 648-49 (Ala. Crim. App. 2001).

When a defendant does not challenge the prosecutor's articulated, race-neutral reason for a strike at trial, he or she has not preserved the argument for appellate review. Parris v. State, 885 So. 2d 813, 838 (Ala. 2001). See also Brown v. State, 705 So. 2d 871 (Ala. Crim. App. 1997); Covington v. State, 620 So. 2d 122, 127 (Ala. Crim. App. 1993) ("'An objection, of course, should fairly and specifically point out the particular grounds on which an alleged error occurred in order to inform the trial judge of the legal basis of the objection, thereby affording the trial judge an opportunity to reevaluate his or her initial ruling in light of the grounds alleged and to change it, if deemed necessary.' Ex parte Webb, 586 So. 2d 954, 957 (Ala. 1991)."). Cunningham challenged only the reason offered by the State during trial for prospective juror no. 41. Thus, this Court will not review the reasons given by the prosecutor for the other peremptory strikes of black prospective jurors.

Upon reviewing the record, it is apparent that the prosecutor was able to articulate a valid race-neutral reason

for the questioned peremptory strike. The prosecutor indicated that he struck prospective juror no. 41 because she had a family member who had been convicted of rape. This Court has repeatedly held that this is a valid race-neutral reason for striking prospective jurors. See Jackson v. State, 791 So. 2d 979, 1007 (Ala. Crim. App. 2000) (citing Thomas v. State, 611 So. 2d 416, 418 (Ala. Crim. App.), cert. denied, 611 So. 2d 420 (Ala. 1992))(finding previous criminal charges, prosecutions, or convictions of potential jurors or their relatives to be a race-neutral reason for striking potential jurors). See also Powell v. State, 548 So. 2d 590 (Ala. Crim. App. 1988), aff'd, 548 So. 2d 605 (Ala. 1989) (holding following to be race-neutral reasons: veniremember's uncle had been falsely prosecuted; veniremember's nephew was a defendant in a burglary case; veniremember had a family member who had been charged with a crime; veniremember had been charged with DUI; veniremember had been prosecuted for various offenses). Following the prosecutor's articulation of a race-neutral reason, Cunningham failed to carry her burden of offering evidence that the reason offered was a sham or pretextual.

An appellate court may "'reverse the trial judge's determination that the prosecution's peremptory challenges were not motivated by intentional discrimination if that determination is clearly erroneous.'" Ex parte Branch, 526 So. 2d at 625 (quoting Branch v. State, 526 So. 2d 605, 608 (Ala. Crim. App. 1986)). Based upon the record before us, this Court cannot say that the trial court's denial of Cunningham's Batson challenge was clearly erroneous.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Kellum, McCool, Cole, and Minor, JJ., concur.