IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1996 Term

No. 23329

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

DOMINIQUE RAHMAN
Defendant Below, Appellant

Appeal from the Circuit Court of Kanawha County
Honorable Lyne Ranson, Circuit Judge
Criminal Action No. 95-F-159

REMANDED WITH DIRECTIONS

Submitted: September 24, 1996
Filed: December 20, 1996

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JUSTICE WORKMAN delivered the Opinion of the Court.
JUDGE RECHT sitting by temporary assignment.
JUSTICE CLECKLEY concurs and reserves the right to file a concurring Opinion.

SYLLABUS BY THE COURT

1. "Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered. U.S. Const. amend. IV. W.Va. Const. art. III, § 6." Syl. Pt. 3, State v. Choat, 178 W.Va. 607, 363 S.E.2d 493 (1987).

2. "'"Probable cause to make an arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed." Point 1 Syllabus, State v. Plantz, [155] W.Va. [24] [180 S.E.2d 614].' Syllabus Point 3, State v. Duvernoy, 156 W.Va. 578, 195 S.E.2d 631 (1973)." Syl. Pt. 7, State v. Craft, 165 W. Va. 741, 272 S.E.2d 46 (1980).

3. "A warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest." Syl. Pt. 6, State v.

Moore, 165 W.Va. 837, 272 S.E.2d 804 (1980), overruled on other grounds by State v. Julius, 185 W.Va. 837, 408 S.E.2d 1 (1991)

4. "Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury." Syl. Pt. 2, State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55 (1979), cert. denied, 445 U.S. 904 (1980).

5. "A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment." Syl. Pt. 7, State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992).

6. "In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should

analyze the statutes under the test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses." Syl. Pt. 8, State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992).

7. "Rule 609(a)(2) of the West Virginia Rules of Evidence divides the criminal convictions which can be used to impeach a witness other than a criminal defendant into two categories: (A) crimes 'punishable by imprisonment in excess of one year,' and (B) crimes 'involving dishonesty or false statements regardless of the punishment.'" Syl. Pt. 2, CGM Contractors, Inc. v. Contractors Environmental Services, Inc., 181 W.Va. 679, 383 S.E.2d 861 (1989).

8. "Evidence that a witness other than the accused in a criminal case has been convicted of a crime is admissible for the purpose of impeachment under West Virginia Rule of Evidence 609(a)(2)(B) when the underlying facts show that the crime involved dishonesty or false statement." Syl. Pt. 5, Wilkinson v. Bowser, No. 23295, ___ W.Va. ___, ___ S.E.2d ___ (filed Dec. 19, 1996).

9. "It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution for a member of a cognizable racial group to be tried on criminal

charges by a jury from which members of his race have been purposely excluded." Syl. Pt. 1, State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989).

10. "To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, 'the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.' [citations omitted.] Batson v. Kentucky, 476 U.S. 79 at 96, 106 S.Ct. 1712 at 1722, 90 L.Ed.2d 69 (1986)." Syl. Pt. 2, State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989).

11. "The State may defeat a defendant's prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing non-racial, credible reasons for using its peremptory challenges to strike members of the defendant's race from the jury." Syl. Pt. 3, State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989).

12. Striking even a single black juror for racial reasons violates equal protection, even though other black jurors remain on the panel. The focus of the trial court's analysis should be on whether the State's reason for a challenged strike is pretextual, and not on the overall composition of the jury.

13. In assessing a Batson challenge, the trial court must consider a party's assertion that a similarly situated prospective juror was not challenged, both in determining whether the defendant has stated a prima facie case of discrimination, and in deciding whether the explanation given by the prosecution was a pretext for racial discrimination. In order for the trial court to make the latter determination, the State must articulate a credible reason for the different treatment of similarly situated black and white jurors.

Workman, Justice:

Dominique Rahman appeals his conviction on four felony counts of possession of heroin with intent to deliver. He asserts six errors: (1) the trial court erred by denying a motion to exclude heroin found inside the Appellant's jacket pocket; (2) the trial court should have declared a mistrial after the prosecutor asked the Appellant during cross-examination whether he had ever sold heroin before; (3) separation of the charges into four counts violated the Double Jeopardy Clause; (4) there was insufficient evidence to support the conviction on count two; (5) defense counsel should have been allowed to impeach a co-defendant with prior misdemeanor convictions; and (6) the court erred by denying the Appellant's Batson challenge to the State's peremptory strike of a black juror. See Batson v. Kentucky, 476 U.S.79 (1986). For the reasons set out below, we affirm the judgment of the circuit court, but remand the case for a hearing on the validity of the peremptory strike.

[1]The Honorable Arthur M. Recht resigned as Justice of the West Virginia Supreme Court of Appeals effective October 15, 1996. The Honorable Gaston Caperton, Governor of the State of West Virginia, appointed him Judge of the First Judicial Circuit on that same date. Pursuant to an administrative order entered by this Court on October 15, 1996, Judge Recht was assigned to sit as a member of the West Virginia Supreme Court of Appeals commencing October 15, 1996 and continuing until further order of this Court.

On April 7, 1995, the Charleston drug unit outfitted a confidential informant ("CI") with a body wire, gave him $180 in recorded bills, and directed him to attempt to purchase heroin. Officers dropped the CI off near the residence of Albert Parker, and kept him under both visual surveillance and audio surveillance via the body wire. The CI gave the money to Albert Parker, who said he would return shortly with the heroin. Officer William Hart continued to watch the CI, while officers Steven Neddo and Randy Mayhew followed Parker as he drove to the Day's Inn near St. Albans. At the Day's Inn, the officers watched Parker enter room 269, and exit a few minutes later. Officer Neddo remained watching room 269, as did Captain Larry Dodson, who had been watching the Days' Inn all day. Detective Mayhew followed Parker back to Charleston, and waited for word from Officer Hart. After being advised by Hart that Parker had delivered two packets of heroin to the CI, Detective Mayhew stopped Parker while he was walking home, and Parker agreed to cooperate with the police. Parker went to the drug unit office, where he told police he had purchased heroin from someone named "Turbo," in room 269 of the Day's Inn, and described Turbo as a tall black male with a ponytail. During this time, Officers Neddo and Dodson continued to watch room 269 at the Days' Inn. They observed two black males repeatedly come out of room 269 onto the landing and return to the room. Soon thereafter, they saw the two men, one of whom matched Turbo's description, leave room 269 and start to drive away. The officers pulled the car over.

Captain Dodson informed the Appellant, who matched Parker's description of Turbo, that he was the subject of a heroin investigation, and that Dodson was going to search him for any weapons, needles or heroin. Dodson did a pat-down, and felt a bulge in one of the Appellant's jacket pockets. He thought the bulge felt like heroin packets. He reached into the pocket and found eight packages or bundles of heroin marked "the bomb." After he found the heroin, Dodson conducted a full search incident to an arrest, including all pockets and shoes and socks.

Officer Neddo and another officer then went to room 269. Sandra Wright was in the room. The officers asked if anyone else was there. She said no, and gave them permission to look around. The officers saw two packets of ten bundles each of heroin lying beside the sink in an area that was part of the main room. This heroin was also marked "the bomb." The Appellant and the other male, Keith Ellison, were brought back to the room. The Appellant said that the room was his, and signed a written consent to search. A search produced $2,410 in small bills from the nightstand, including $120 of the recorded currency that had been given to the CI that morning.

Ten days later, on April 17, 1995, an employee of Massey Vending Company was servicing a vending machine at the Day's Inn. He dropped his keys, and when he bent to pick them up he noticed a bag tucked inside the machine where the cooling unit sits. He turned the bag over to the police. It contained a digital scale, some ammunition, and

about seventy bundles of heroin. The bundles were marked "the bomb," as was the heroin found on the Appellant and in his hotel room, as well as the heroin Parker sold to the CI.

The Appellant was charged with four counts of possession of heroin with intent to distribute, based on: (1) the transaction with Parker and the CI; (2) the heroin found in the Appellant's jacket pocket; (3) the heroin in plain view next to the sink in the hotel room; and (4) the heroin found in the vending machine ten days later. The case was tried on July 14-18, 1995. The jury convicted the Appellant on all four counts. The court sentenced him to four consecutive sentences of one-to-fifteen years.

We address first the admissibility of the heroin found by police in the Appellant's jacket pocket. The Appellant does not contest the validity of the stop, but asserts that police exceeded the scope of a valid "stop and frisk" by reaching inside his jacket pocket to recover the heroin. With regard to the "stop and frisk" exception to the Fourth Amendment's prohibition of unreasonable search and seizure, this Court has held:

> Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered. U.S. Const. amend. IV. W.Va. Const. art. III, § 6.

Syl. Pt. 3, State v. Choat, 178 W.Va. 607, 363 S.E.2d 493 (1987). This exception gives officers the authority to conduct a limited patdown for weapons. Id. at 613, 363 S.E.2d at 499. The Appellant asserts that the warrantless search of the inside of his jacket pocket was not reasonably related in scope to the circumstances which justified the initial stop. He cites State v. Hlavacek, 185 W.Va. 371, 407 S.E.2d 375, 380 (1991), in which this Court concluded that a search was unconstitutional when a police officer required a suspect to empty his pockets incident to a frisk. The Appellant asserts that in his case, as in Hlavacek, the scope of a reasonable frisk for weapons was exceeded.

It is not necessary, however, to rely on the stop and frisk exception in this case. It appears from the record that the police had probable cause to arrest the Appellant prior to the stop, and thereby had the authority to make a full search incident to the arrest. ""Probable cause to make an arrest without a warrant exists when the facts and

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[2]Although our decision does not rely on this basis, we note that where the stop and frisk is justified, the feel of an object other than a weapon, together with other suspicious circumstances, may amount to probable cause for a further search. In United States v. Salazar, 945 F.2d 47 (2d Cir. 1991), cert. denied, 504 U.S. 923 (1992), for example, the court held that when in a pat-down of a suspected drug dealer officers "feel something that their experience tells them is narcotics, the pat-down gives them probable cause to search the suspect for drugs." 945 F.2d at 51; see also 4 W. LaFave, Search and Seizure § 9.5(c) at 280 n.189. Captain Dodson testified that while patting the Appellant down for weapons he felt something that he thought was packets of heroin, and that he had years of experience with heroin and how bundles of heroin looked and felt.

circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed." Point 1 Syllabus, State v. Plantz, [155] W.Va. [24] [180 S.E.2d 614].' Syllabus Point 3, State v. Duvernoy, 156 W.Va. 578, 195 S.E.2d 631 (1973)." Syl. Pt. 7, State v. Craft, 165 W. Va. 741, 272 S.E.2d 46 (1980). When Officers Dodson and Neddo stopped the Appellant's car, they had reliable information that Parker had purchased heroin in room 269 of the Day's Inn, they had seen the Appellant emerge from room 269, and they had a description of "Turbo," which matched the Appellant. This constituted probable cause to make an arrest. Once it is established that there was sufficient probable cause to sustain the arrest, this Court has recognized that "[a] warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest." Syl. Pt. 6, State v. Moore, 165 W.Va. 837, 272 S.E.2d 804 (1980), overruled on other grounds by State v. Julius, 185 W.Va. 837, 408 S.E.2d 1 (1991). We therefore conclude that the seizure of heroin from the Appellant's jacket pocket was within the scope of a valid search incident to his arrest, and the circuit court did not err by refusing to exclude it from evidence.

The Appellant next asserts that the trial court should have granted a mistrial after the State asked the Appellant on cross-examination, "Have you ever sold heroin before?" The defense attorney immediately objected, and the line of questioning was dropped

after a bench conference. The Appellant asserts that this question regarding another crime was prohibited under syllabus point eleven of State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974). This rule is now codified in Rule 404(b) of the West Virginia Rules of Evidence:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial.

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[3]The prosecutor apparently believed that the Appellant would have to answer in the affirmative, because police records reflected a four-year prison term for a drug-related offense. In truth, however, the Appellant had been convicted of possession of cocaine, marijuana and hashish, but not distribution, and not heroin.

[4]The State explains in its brief that it was attempting to impeach the Appellant with the evidence of prior convictions. We note that West Virginia Rule of Evidence 609(a)(1) ordinarily would not permit such a use: "For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted *but only if the crime involved perjury or false swearing*." (emphasis added).

Assuming that the State's question was improper, the State asserts that it was harmless error, and we agree. This Court articulated the standards for nonconstitutional harmless error in syllabus point two of State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55 (1979), cert. denied, 445 U.S. 904 (1980):

> Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

In addition, the Court in Atkins set out factors to be considered in evaluating the prejudicial impact of the error, including whether the error was repeated or singled out for special emphasis in the State's argument; whether the error became the subject of a special instruction to the jury, or produced a question from the jury; the overall quality of the State's proof; whether the error was related to critical testimony of the defendant; and the cumulative effect of the error in the context of the entire trial. 163 W. Va. at 514-15, 261 S.E.2d at 62-63. The Court in Atkins concluded, based on that analysis, that the erroneous admission into evidence of the defendant's two prior criminal convictions in that case was harmless error. Id. at 516, 261 S.E.2d at 63.

Applying these factors to the case before us, we reach the same conclusion. Evidence of the Appellant's prior conviction was never actually introduced, so its

removal from the State's case does not affect the sufficiency of the evidence. Our analysis must focus, therefore, on whether the question itself had a prejudicial effect on the jury. In the present case, we do not find any of the Atkins factors. The State asked the question once, it went unanswered, and it was not repeated or mentioned again in the course of the trial. Defense counsel did not request an instruction regarding this issue, and none was given. The record does not reflect that the jury asked about it. The overall quality of the State's proof was strong, and the error did not relate to critical testimony of the defendant. Based on these factors, and in the context of the entire trial, we find this error to have been harmless.

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[5]When the State finished its cross-examination of the Appellant, defense counsel moved for a mistrial based on the question, "Have you ever sold heroin before?" The court denied the motion, saying that she would tell the jury in the final charge that they should consider the testimony of witnesses only, and not the comments, arguments, or questions of counsel. She indicated a desire not to emphasize the question by focusing on it.

[6]Although the question followed immediately after Appellant's denial that he had sold heroin to Albert Parker, this denial on cross-examination was less critical than his direct testimony about the events in question. In addition, other evidence, including police observation of the Days' Inn, police testimony about the marked bills, Parker's testimony, and the fact that the heroin purchased by Parker was marked "the bomb," made it unlikely that the State's question altered the jury's perception of the Appellant's testimony.

The Appellant also asserts that charging him with four counts of possession with intent to deliver, and the imposition of consecutive sentences, violates the Double Jeopardy Clause of the United States and West Virginia Constitutions. See U.S.Const. amend. V; W.Va. Const. art. 3, § 5. Counts two through five of the indictment were based on (1) the transaction with Parker and the CI; (2) the heroin found in the Appellant's jacket pocket; (3) the heroin in plain view next to the sink in the hotel room; and (4) the heroin found in the vending machine ten days later. The Appellant asserts that his possession of one drug, heroin, in four places in and around his hotel room should be viewed as a single offense. The State responds that separate counts are justified, because each count required proof of different facts.

The Double Jeopardy Clause protects against both a second prosecution for the same offense and the imposition of multiple punishments for the same offense. Syl. Pt. 1, State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); Syl. Pt. 1, Conner v. Griffith, 160 W.Va. 680, 238 S.E.2d 529 (1977). The Appellant's claim must be analyzed within the framework set out by this Court in syllabus points seven and eight of Gill:

> 7. A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.
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> 8. In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the

> statutes under the test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.

187 W.Va. at 138, 416 S.E.2d at 255. In State v. Broughton, 196 W.Va. 281, ___, 470 S.E.2d 413, 422-23 (1996), this Court, using the Gill analysis, held that separate convictions for delivery of cocaine and marijuana in the same transaction did not violate the double jeopardy clause. In so holding, the Court described the applicable standard as a "same evidence" test: "Under this analysis, multiple punishments are permissible 'as long as each charge meriting punishment requires at least one piece of evidence that is not needed to prove other charges.'" Id. at ___, 470 S.E.2d at 422 (quoting State v. Myers, 171 W.Va. 277, 281, 298 S.E.2d 813, 817 (1982)); see also State v. Zaccagnini, 172 W.Va. 491, 308 S.E.2d 131 (1983) (holding that possession of LSD and cocaine with intent to deliver did not constitute the same offense).

The Appellant asserts that, unlike the defendants in Zaccagnini and Broughton, he possessed only one kind of drug, heroin. He points to this Court's decision in State v. Barnett, 168 W.Va. 361, 284 S.E.2d 622 (1981), which held that delivery of two controlled substances in the same statutory category at the same time and place to the same person was one offense. Id. at 365, 284 S.E.2d at 624. We agree with the State, however, that Barnett does not control this case, because the charges against the

Appellant are not based on delivery "at the same time and place to the same person." See id.

Our conclusion is supported by the decisions of numerous federal courts. In United States v. Privett, 443 F.2d 528 (9th Cir. 1971), for example, the Ninth Circuit upheld a conviction on three separate counts relating to the defendant's possession of heroin in a shirt pocket, under the front seat of his vehicle, and in the trunk of his vehicle. 443 F.2d at 531. The Appellant contends that Privett is not analogous to his case because the heroin in the three locations was of different purities, and the sentences in Privett were concurrent, not consecutive. The Ninth Circuit's holding, however, was based on the conclusion that "different proof was required as to each of the three counts." Id. Moreover, the Eighth Circuit, in United States v. Rich, 795 F.2d 680 (8th Cir. 1986), upheld separate convictions for possession of drugs in the defendant's home, on his person, and in his luggage. The defendant in Rich contended that he could only be charged once for each type of drug he possessed, regardless of how many locations it was kept in. 795 F.2d at 682. There, the court upheld the conviction on all counts, and the consecutive sentences imposed, saying that "[a]n activity creates multiple offenses when each count requires proof of an additional fact which the other does not." Id.

The Appellant would have us look to United States v. Williams, 480 F.2d 1204 (6th Cir. 1973), which held that four packets of heroin found on the defendant's premises

would not support four separate charges of possession of heroin. The heroin in Williams, however, was all found in one safe. That is not the situation before us. As in Rich, each count in this case required proof of separate facts, and we therefore conclude that the Appellant's conviction and consecutive sentencing on four counts of possession with intent to deliver did not violate the Double Jeopardy Clause.

Closely related to the Double Jeopardy issue is the Appellant's assertion that there was insufficient evidence to support his conviction on count two, possession with intent to deliver the heroin sold to Albert Parker. The Appellant contends that the State offered no proof that the heroin sold to Parker had been possessed in a place separate from the heroin in the Appellant's jacket pocket or the heroin found beside the bathroom sink. Based on our discussion of Double Jeopardy above, we find no error, because the State was required to prove all the elements of possession with intent to deliver with respect to the heroin sold to Parker, and doing so required proof of additional facts not required to prove the other counts.

Next we address the Appellant's assertion that he should have been allowed to impeach Albert Parker with a prior conviction for shoplifting. After Albert Parker

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[7]Williams was cited with approval by this Court in Zaccagnini. See 172 W.Va. at 501, 308 S.E.2d at 141.

[8]The Appellant also contends that he should have been allowed to impeach Parker with a prior conviction for uttering a forged prescription. In a

testified about his purchase of heroin from the Appellant, defense counsel asked, "You were convicted of shoplifting in 1991, right?" The State moved to strike, and the court in a bench conference ruled that the Parker's conviction for shoplifting was inadmissible, because it is not an offense involving dishonesty or false statement under West Virginia Rule of Evidence 609(a)(2)(B). As set out in syllabus point two of CGM Contractors, Inc. V. Contractors Environmental Services, Inc., 181 W. Va. at 679, 383 S.E.2d (1989).

> Rule 609(a)(2) of the West Virginia Rules of Evidence divides the criminal convictions which can be used to impeach a witness other than a criminal defendant into two categories: (A) crimes "punishable by imprisonment in excess of one year," and (B) crimes "involving dishonesty or false statements regardless of the punishment."

Shoplifting is not punishable by imprisonment in excess of one year, so this conviction was not admissible unless it involved dishonesty or false statement. Although shoplifting involves an element of dishonesty, crimes that typically may be used for impeachment under Rule 609(a)(2)(B) are "in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other

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bench conference following defense counsel's question regarding the shoplifting conviction, Appellant's counsel indicated that he also wanted to impeach Parker with a prior conviction for uttering. The trial court indicated that the conviction would be allowed if the offense was a felony and instructed Appellant's counsel to find out whether the uttering conviction was a felony or a misdemeanor. See W. Va. R. Evid. 609(a)(1). The record does not reflect, and the Appellant does not represent, that the Appellant ever proceeded to offer it. Because the uttering conviction was never offered at trial, no ruling was made on it, and we will not address it on appeal. See Syl. Pt. 1, State Rd. Comm'n v. Ferguson, 148 W.Va. 742,

offense which involves some element of deceitfulness, untruthfulness, or falsification bearing on a witness' propensity to testify truthfully." CGM Contractors, 181 W.Va. at 682 n.1, 383 S.E.2d at 864 n.1 (quoting Black's Law Dictionary).

In State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994), the Court upheld the exclusion of a prior conviction for larceny, saying:

> Although there has been some disagreement, "federal courts and most state courts are unwilling to conclude that offenses such as petty larceny, shoplifting, robbery, possession of a weapon, and narcotics violations are per se crimes of 'dishonesty and false statement.'"

Id. at 91, 443 S.E.2d at 248 (quoting John W. Strong et al., McCormick on Evidence § 42 at 146 (4th ed. 1992)). This Court addressed only recently the issue of whether a misdemeanor conviction should be admitted under Rule 609(a)(2)(B). Syllabus point five of Wilkinson v. Bowser, No. 23295, ___ W.Va. ___, ___ S.E.2d ___ (filed Dec. 19, 1996), states: "Evidence that a witness other than the accused in a criminal case has been convicted of a crime is admissible for the purpose of impeachment under West Virginia Rule of Evidence 609(a)(2)(B) when the underlying facts show that the crime involved dishonesty or false statement." In the case before us the Appellant offered no evidence that Parker's shoplifting conviction was based on facts showing dishonesty or false statement, and the conviction was therefore properly excluded by the trial court.

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137 S.E.2d 206 (1964).

The Appellant's final charge is that his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution were violated by the prosecutor's peremptory strike of a black juror. The Appellant, who is black, maintains that the State's failure to strike a similarly situated white juror shows that the strike was racially motivated. The State responds, first, that the Appellant may not have made a prima facie case of discrimination because the State left one black male on the panel, second, that even if the Appellant established a prima facie case, the prosecution articulated a credible, non-racial reason for striking Mr. Foxworth from the jury, and third, that it was under no obligation to give a credible, neutral reason for its failure to strike the similarly situated white juror. The facts surrounding the peremptory strike are as follows.

During voir dire, two prospective jurors indicated that they had experience working with patients who had substance abuse problems. Darrell Foxworth, a black male, said he had worked as a counselor at the West Virginia Rehabilitation Center, and Claudia Bator, a white female, said that she managed a psychiatric unit, which included alcohol and drug patients. During additional voir dire, the prosecutor asked to further question Mr. Foxworth, who explained that he had done a six-month college internship in which about twenty percent of his job involved talking to substance abuse patients. He explained that he wasn't a licensed counselor, and that his role had been primarily to observe. At the time of trial, he was employed at Shawnee Hills as a case manager, and

no longer worked with substance abuse patients. Mr. Foxworth was one of two black veniremen and the State did not challenge the other one, Mr. Black. The State did not ask any further questions of Ms. Bator, and did not strike her from the panel.

Counsel for the defendant challenged the State's peremptory strike of Mr. Foxworth, citing Batson, which is discussed below. The trial court asked the State to provide a reason for its strike. The prosecutor stated that it had been a regular part of Mr. Foxworth's job during the six-month internship to listen to explanations of how people became addicted to or had problems with drugs. This, he explained, raised a concern that the cumulative effect of listening to these one-sided explanations for drug use might affect the prospective juror's ability to be impartial in a trial for possession and distribution of drugs. Defense counsel then raised the issue of Ms. Bator, saying that the State's failure to question her further, even though her job also involved working with drug and alcohol patients, gave the impression that the State was singling out the black venireman. The prosecution responded that it had provided a legitimate, objective reason with respect to juror Foxworth, and thus had satisfied its burden. The court asked whether Mr. Black was still on the jury. The parties responded that he was, and stated on the record that Mr. Black was a black male. The court then said, "All right. You made your motion. I think that there's been some legitimate basis shown."

In State v. Marrs, 180 W.Va. 693, 379 S.E.2d 497 (1989), this Court examined whether a prosecutor's use of a peremptory challenge to strike the only remaining

prospective black juror violated the defendant's right to equal protection. There, we held: "It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded." Id., Syl. Pt. 1. In Marrs, we adopted the standard established by the United States Supreme Court in Batson for proving that use of a peremptory challenge constitutes a violation of equal protection:

> To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, "the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." [Citations omitted.] Batson v. Kentucky, 476 U.S. 79 at 96, 106 S. Ct. 1712 at 1722, 90 L. Ed.2d 69 (1986).

Syl. Pt. 2, Marrs, 180 W.Va. at 693-94, 379 S.E.2d at 497-98. If the defendant establishes a prima facie case under Batson (step 1), the burden of production shifts to the prosecution to articulate a race-neutral explanation (step 2). If the State tenders such an explanation, the trial court must decide (step 3) whether the defendant has proved purposeful racial discrimination, i.e., whether the stated reason was a pretext. Purkett v. Elem, ___ U.S. ___, ___, 115 S.Ct. 1769, ___ 131 L.Ed.2d 834, 839(1995); Hernandez v. New York, 500 U.S. 352, 358-59 (1991); Batson, 476 U.S. at 96-98; State v. Kirkland,

191 W.Va. 586, 595, 447 S.E.2d 278, ___, (1994). The last two steps were summarized in syllabus point three of Marrs: "The State may defeat a defendant's prima facie case of a violation of equal protection due to non-racial discrimination in selection of a jury by providing nonracial, credible reasons for using its peremptory challenges to strike members of the defendant's race from the jury." 180 W. Va. at 694, 379 S.E.2d at 498.

We address first the State's position that the Appellant may not have a valid claim under Batson because one of the remaining jurors was black. We concur with the majority of courts that have considered this issue and have concluded rightly that striking even a single black juror for racial reasons violates equal protection, even though other black jurors remain on the panel. See, e.g., Coulter v. Gramley, 93 F.3d 394, 396 (7th Cir. 1996); United States v. Clemons, 843 F.2d 741, 747 (3d Cir.), cert. denied, 488 U. S. 835 (1988); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987); but cf. United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) (fact that jury included two blacks when prosecution could have struck them shows lack of intent to exclude blacks from jury). The focus of the trial court's analysis should be on whether the State's reason for a challenged strike is pretextual, and not on the overall composition of the jury.

[9]In State ex rel. Azeez v. Mangum, 195 W.Va. 163, 465 S.E.2d 163 (1995), for example, this Court determined that a prospective juror's prior acquaintance with the chief investigating officer was a valid, non-racial

We turn now to the effect of the State's disparate treatment of Mr. Foxworth and Ms. Bator. We are not the first Court to address a defendant's allegations that a prosecutor's peremptory strike of minority venirepersons and failure to strike similarly situated white venirepersons revealed a racially motivated strike. In Jones v. Ryan, 987 F.2d 960 (3d Cir. 1993), for example, the State used a peremptory strike to remove a black prospective juror named Idonia Young. The prosecutor's explanation for striking Ms. Young was that she had a twenty-year-old son, and it was the prosecutor's policy to avoid putting anyone on the jury who had a child of approximately the same age as the defendant. 987 F.2d at 983. The Third Circuit found that the presence of two white jurors who possessed the same characteristic indicated that the State's explanation was pretextual. Id. The court concluded that the reasons proffered by the prosecutor to strike three black jurors, including Ms. Young, were not "'neutral explanations] related to the particular case to be tried[,]'" and granted the petitioner's writ of habeas corpus on that basis. Id. at 975 (quoting Batson, 476 U.S. at 98). The opposite conclusion was reached by the Fifth Circuit in United States v. Mason, 977 F.2d 921 (Th Cir. 1992), in which the government used five of its six peremptory challenges against blacks. The

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reason for a peremptory strike. Id. at 172, 465 S.E.2d at 172.

[10]The State in Jones struck three black venirepersons, and left others on the jury. 987 F.2d at 972-73. The facts with respect to prospective juror Young are the most similar to those in the case before us.

government explained the strikes as due to low levels of education and non-supervisory positions at work, noting that the case was based on circumstantial evidence and the jurors would need to grasp the nuances. There, the court deferred to the circuit court's determination that the reasons given for the strikes were credible and race-neutral. Id. at 923; accord, United States v. Lance, 853 F.2d 1177 (5th Cir. 1988).

Our review of the relevant case law leads us to adopt the following standard. In assessing a Batson challenge, the trial court must consider a party's assertion that a similarly situated prospective juror was not challenged, both in determining whether the defendant has stated a prima facie case of discrimination, and in deciding whether the explanation given by the prosecution was a pretext for racial discrimination. In order for the trial court to make the latter determination, the State must articulate a credible reason for the different treatment of similarly situated black and white jurors.

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In State v. Kirkland, 191 W.Va. 586, 447 S.E.2d 278 (1994), we noted that this Court affords great weight to the findings of the trial court on the issue of whether purposeful discrimination has been established. Quoting the United States Supreme Court, we stated:

> [T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal . . . .

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will 'largely turn on evaluation of credibility.'

191 W. Va. at 596, 447 S.E.2d at 288 (quoting Hernandez, 500 U.S. at 364).

If the circuit court determines that the reason given by the State was pretextual, then a new trial should be awarded. If the trial court determines that the explanation constitutes a credible, nonracial reason for the strike, then the conviction shall stand, and the defendant may appeal that determination.

Remanded with Directions.