

STATEMENT OF THE CASE

Joey Addison appeals from his conviction, after a jury trial, for murder,¹ a felony.

We affirm.

ISSUES

1. Whether the trial court erred in denying Addison's *Batson*² challenges.
2. Whether the trial court erred in excluding evidence.

FACTS

Addison is African-American. At the time of the incident below, he resided at 202 N. Hendricks Place in Indianapolis. In approximately July of 2008, his neighbors noted his transformation from a courteous neighbor into a reclusive, paranoid, and troubled person. He had shed over one hundred pounds, shaved his characteristically long braided hair, and voluntarily ceased his employment.

On December 19, 2008, Addison emerged from his house, wearing a tuxedo and carrying two handguns. He fired multiple gunshots at Gerrod Scott Scales, who he suspected was a trained assassin intent on killing him. Scales was mortally wounded. Afterwards, Addison surrendered peacefully to responding police. A search of his house, pursuant to a search warrant, yielded two nine-millimeter pistols. Ballistic testing positively linked bullets recovered from Scales' body and casings recovered from the crime scene to one of Addison's guns.

¹ Ind. Code § 35-42-1-1.

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

On December 22, 2008, the State charged Addison with Count I, murder, a felony; and Count II, carrying a handgun without a license, as a class A misdemeanor.³ On January 27, 2009, Addison filed a notice of insanity defense pursuant to Indiana Code section 35-36-2-1. The trial court appointed two psychiatrists to evaluate Addison's competency to stand trial.⁴ On May 21, 2009, the trial court convened a competency hearing. Dr. Ned Masbaum and Dr. George Parker testified that Addison lacked the ability to communicate pertinent facts to his counsel or to otherwise assist in his legal defense; and, further, that Addison was of unsound mind and unable to appreciate the wrongfulness of his actions at the time of the shooting. The trial court deemed Addison incompetent to stand trial and committed him to the Division of Mental Health and Addiction to be confined in an appropriate psychiatric institution.

In September of 2009, after a hearing, Addison was deemed competent to stand trial. The trial court set a jury trial setting of April 19, 2010. On April 7, 2010, he filed a notice of deposition with the trial court, wherein he advised the State of his intention to depose his sister, Lola Hall ("Lola"), an Atlanta, Georgia resident. That day, the State filed a motion in limine to bar Addison from calling Lola to testify regarding his background and mental health history. On April 9, 2010, counsel for Addison conducted

³ Count II (I.C. § 35-47-2-1) was dismissed on April 19, 2010, upon Addison's proffer of a valid gun permit.

⁴ Dr. George Parker examined Addison on February 20, 2009 and February 27, 2009; and Dr. Ned Masbaum examined him on March 20, 2009.

a telephonic deposition of Lola. The State had received prior notice, attended the deposition, and took advantage of its opportunity to cross-examine Lola.

On April 19 and 20, 2010, the trial court conducted Addison's jury trial. During round one of voir dire, the State used peremptory challenges to strike potential jurors Henderson, Pettigrew, and Turner -- three of the four African-American potential jurors - - from the venire. Addison raised a *Batson* challenge, alleging that the State had used its peremptory challenges for a racially discriminatory purpose, and also moved for mistrial.

After the State offered its race-neutral rationale for striking Henderson, Pettigrew and Turner, Addison conceded⁵ that the peremptory challenges regarding Henderson and Pettigrew were appropriate; however, as to Turner, he continued his *Batson* objection. The trial court heard and accepted the State's race-neutral rationale for striking Turner, overruled Addison's *Batson* challenge, and denied his request for a mistrial. Subsequently, during round two of voir dire, the State used a peremptory challenge to remove Swanigan -- the sole remaining African American potential juror -- from the venire. Counsel for Addison made another *Batson* challenge and renewed his motion for mistrial. The trial court accepted the State's race-neutral rationale for striking Swanigan, overruled the *Batson* challenge, and denied the motion for mistrial.

⁵ Counsel for the State, Mr. Schafer, explained the State's bases for striking potential jurors Pettigrew and Henderson as follows:

. . . Ms. Pettigrew we struck because she had relative [sic] with a pending robbery case with a pretrial conference - - or perhaps even a trial tomorrow, but I think the reason is pretty obvious. Mr. Henderson acknowledged that some previous involvement of his family members gave him a bias, which he said he would struggle against. But he acknowledged that a bias against the State existed. That's our basis for striking him.

(Tr. 91).

During the trial, the State renewed its motion in limine, seeking to bar Addison from introducing Lola's deposition testimony. The trial court granted the State's motion, concluding that Addison had neither demonstrated that Lola's testimony was relevant nor that she was legally unavailable. The jury thereafter found Addison guilty, but mentally ill of murder, and on May 14, 2010, the trial court imposed a forty-five year sentence. Addison now appeals.

Additional facts will be provided as necessary.

DECISION

1. Batson

Addison first argues that the trial court erred in overruling his *Batson* challenge. A trial court's decision concerning whether a peremptory challenge is racially discriminatory is afforded great deference, and we will set aside the decision only if it is clearly erroneous. *Williams v. State*, 830 N.E.2d 107, 110 (Ind. Ct. App. 2005), *trans. denied*. This deference is not absolute, however; courts need not accept "any facially neutral reason" for striking a juror and should consider "all relevant circumstances" in assessing *Batson*-challenged peremptory strikes. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

In *Batson v. Kentucky*, the United States Supreme Court determined that the prosecutor's use of a peremptory challenge to strike a potential juror solely on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. *Jeter v. State*, 888 N.E.2d 1257, 1262-63 (Ind. 2008). The *Batson* Court set forth the following

three-step test for determining whether a peremptory strike has been improperly used 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.

Id. at 1263.

Our Supreme Court has held that the State's use of a peremptory challenge to remove the only African American venire person on the panel establishes a prima facie case of discrimination. *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004); *see also Graham v. State*, 738 N.E.2d 1096, 1100 (Ind. Ct. App. 2000) (defendant established a prima facie case of discrimination where State used its peremptory challenges to remove the only two African Americans from the venire). Here, the State used its peremptory strikes to remove Pettigrew, Henderson, Turner, and Swanigan -- the only African American venire persons; thus, the trial court properly found that Addison made a prima facie showing of racial discrimination in the jury selection process.

Next, pursuant to *Batson*, the State was required to present race-neutral explanations for removing potential jurors Turner and Swanigan. A "race-neutral explanation" is "an explanation based on something other than the race of the juror." *McCormick*, 803 N.E.2d at 1111.

The record reveals that the State expressed concern that Turner would be overly deferential to the medical experts' opinions regarding whether Addison was legally insane at the time of the offense. As to Swanigan, the State explained that it had misgivings about him because he had previously served as a juror in a homicide/feticide trial that resulted in a not guilty verdict.

Inasmuch as Addison claims that the State's explanations were unsupported and applied as well to non-African American jurors who were permitted to serve, we cannot agree. He invites us to employ a more stringent legal test than has been prescribed by the United States Supreme Court, which has "declared that the race neutral explanation must be more than a mere denial of improper motive, but [] need not be 'persuasive, or even plausible.'" *McCormick*, 803 N.E.2d at 1110 (quoting *Purkett v. Elem*, 514 U.S. 765 768 (1995)). The United States Supreme Court has noted further that "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." *McCormick*, 803 N.E.2d at 1110 (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)).

Based upon the foregoing, we find that the State's proffered explanations were facially valid and that no racially discriminatory intent was inherent therein; thus, the State had offered permissible race-neutral bases for striking potential jurors Turner and Swanigan. The trial court's rejection of Addison's *Batson* challenges was not clearly erroneous.

2. Evidence

Next, Addison argues that the trial court erred “in not finding defense witness Lola Hall unavailable and admitting her sworn deposition testimony regarding [his] history of mental illness which was relevant to the issue of insanity.” Addison’s Br. at 11. He maintains that in light of Lola’s refusal to travel from Georgia to testify at his trial, the trial court should have admitted her prior deposition testimony into evidence.

The trial court has broad discretion in ruling on the admission or exclusion of evidence. *Barnett v. State*, 916 N.E.2d 280, 285 (Ind. Ct. App. 2009) (internal citations omitted). A trial court’s ruling on the admissibility of evidence will be disturbed on review only upon a showing of an abuse of discretion, which occurs when the court’s ruling is clearly against the logic, facts, and circumstances presented. *Id.*

a. *Unavailability*

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evid. R. 801(c). “Generally, deposition testimony of an absent witness offered in court to prove the truth of the matter asserted constitutes classic hearsay.” *Garner v. State*, 777 N.E.2d 721, 724 (Ind. 2002) (internal citations omitted). “Possible exceptions to the hearsay rule lie under both Indiana Trial Rule 32 and Indiana Evidence Rule 804, which allow the use of prior recorded testimony in lieu of live testimony in certain circumstances.” *Id.*

Here, in finding that Addison had not established that Lola was legally unavailable, the trial court remarked, “I don’t find [Lola] to be necessarily unavailable. I

find her to be voluntarily unavailable, which I think is a little different.” (Tr. 444). The court also noted that because Addison failed to utilize the Uniform Act to Secure the Attendance of Witnesses in his efforts to procure Lola’s appearance, he had not made a reasonable good faith effort to obtain her presence for trial. This was error.

Indiana Evidence Rule 804(a) provides, in part, that “[u]navailability as a witness includes situations in which the declarant . . . is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance by process or other reasonable means.” Ind. Evid. R. 804(a)(5) (emphasis added). Indiana Evidence Rule 804(b) establishes exceptions to the traditional hearsay rule by admitting certain out-of-court statements when the declarant is unavailable to testify at trial. These exceptions provide, in pertinent part,

- (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the courts of the same or another proceedings, if the party against whom the testimony is now offered, . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The record reveals that Lola was deposed ten days before trial; that the State had prior notice of the deposition, attended the deposition, and took advantage of its opportunity to cross-examine her. It is undisputed that during the course of the deposition, Lola explained that due to financial difficulties that she was experiencing at the time, she would not appear at trial. The record further reveals that in order to secure

Lola's attendance at his trial, Addison delivered a subpoena to her in addition to purchasing an airline ticket for her to travel to Indianapolis.

Lola's insistence, notwithstanding Addison's efforts, that she would not attend the trial rendered her legally unavailable as a witness, for purposes of Indiana Evidence Rule 804(a)(5). Based on the facts and circumstances surrounding this case -- where Addison delivered a subpoena to Lola and purchased her airline ticket -- we find that he made a reasonable effort to obtain Lola's attendance at his trial, and was unable to do so by process or other reasonable means. We are unaware of any caselaw that requires a party to employ each and every conceivable means of procuring a witness' attendance in order to benefit from the Rule 804 hearsay exception for unavailability of a witness. Thus, it was error for the trial court to decline to find Lola to be legally unavailable pursuant to Indiana Evidence Rule 804(a)(5).⁶ *See Diggs v. State*, 531 N.E.2d 461, 464 (Ind. 1988) ("A witness is deemed 'unavailable' if he persists in refusing to testify concerning the subject matter of his [out-of-court] statement, despite a court order to do so.").

b. *Relevance*

Addison argues that his history of mental illness "was relevant to the issue of insanity," and that the trial court abused its discretion in excluding Lola's deposition testimony as irrelevant. Addison's Br. at 11.

We initially note that Indiana Evidence Rule 103 provides that

⁶ We reject the State's claim that Addison did not reasonably exhaust its available alternatives to obtain Lola's presence at trial. The good faith/reasonableness analysis relied upon by the State in this regard applies to determinations of witness unavailability where the Confrontation Clause is implicated -- such is not the case here.

[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.

In its offer of proof, Addison argued that Lola's testimony was probative to the issues of his sanity, intent, and history of mental illness. Further, he argued that Lola's testimony corroborated the psychiatrists' findings that he was of unsound mind and unable to appreciate the wrongfulness of these actions at the time of the shooting. The State countered, and the trial court agreed, that because Lola had not seen Addison in approximately three years, her testimony had no bearing upon his state of mind at the time of the offense. This was error.

“[R]elevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ind. Evid. R. 401.

At the deposition, Lola testified that their mother and sister had long grappled with crippling mental health issues; that they each had been hospitalized and treated numerous times for their schizophrenia; and that their mother “heard voices” and occasionally lost touch with reality. (Lola Depo. p. 12).

Lola's deposition testimony would tend to lend some support to Addison's claims that he did not feign his mental health problems; that he did not remember killing Scales; and that he was of unsound mind and unable to appreciate the wrongfulness of his conduct at the time of the offense, which matters were facts for the jury to consider. We

conclude that Lola's deposition was relevant because her testimony could have made Addison's claim of insanity and/or having lost touch with reality at the time of the offense more or less probable than it would have been without it. Accordingly, we find that Lola's testimony created an issue of fact that the jury could have taken into consideration in arriving at its verdict. It was, therefore, error for the trial court to exclude the deposition as irrelevant.

c. Harmless Error

Although, for the foregoing reasons, it was error to exclude Lola's deposition, such error was harmless under the circumstances. Error is harmless if it does not affect the defendant's substantial rights. *Little v. State*, 871 N.E.2d 276, 278 (Ind. 2007). Harmlessness is ultimately a question regarding the likely impact of the evidence on the jury. *Id.*

The record reveals that the jury heard the expert opinions of psychiatrists Masbaum and Parker, who testified extensively and were cross-examined about Addison's account of the underlying incident, some limited family history of mental illness, and Addison's own symptoms and diagnoses of delusional disorder, paranoid schizophrenia, and psychosis. In addition, Addison's ex-girlfriend and neighbors testified regarding the drastic decline in his mental state beginning in approximately July of 2008 -- noting his uncharacteristically anti-social and "bizarre" behavior, extreme weight loss, paranoia, and delusions of being monitored by the F.B.I. and targeted by killers. (Tr. 246). Lastly, the record reveals that the State did not deny that Addison

suffered from schizophrenia. (*See* Tr. 649) (“He has a real diagnosis and th[e] State [is] not disputing that.”).

It is well-settled that where improperly excluded testimony is merely cumulative of other evidence presented, its exclusion is harmless error. *See Johnson v. State*, 845 N.E.2d 147, 150 (Ind. Ct. App. 2006) (“The admission of evidence that is merely cumulative of other, properly admitted evidence generally does not warrant reversal of a conviction.”). As evidenced by the verdict of guilty but mentally ill, the jury heard considerable evidence that Addison had significant mental health issues that may have contributed to or influenced his actions in the instant killing. We cannot say that he suffered prejudice to his substantial rights from the trial court’s improper exclusion of Lola’s deposition testimony at trial. Thus, we find no reversible error.

Affirmed.

NAJAM, J., and BAILEY, J., concur.