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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/16/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0622
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ALEX BUTLER,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-167705-001

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

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D O W N I E, Judge

¶1 Alex Butler appeals his criminal convictions, contending the trial court erred in resolving his *Batson*¹ challenge. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Butler was charged with theft of a means of transportation and trafficking in stolen property. Fifty potential jurors participated in voir dire. After certain individuals were excused for cause, Jurors 1, 3-13, 15, 17-18, and 20-30 remained subject to peremptory strikes ("jury pool").

¶3 During voir dire, the court posed the following questions and received the following answers from members of the jury pool:

- Have you, a close friend or relative served as a law enforcement officer?

Juror 1: ex-husband in Arizona and California

Juror 7: friend in Phoenix

Juror 8: served in the Coast Guard

Juror 10: two friends in Yuma and one in Phoenix

Juror 11: father- and brother-in-law in other states

Juror 12: father in another state

Juror 20: father and friends

Juror 28: brother-in-law in another state

¹ *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

- Have you, a close friend or relative been arrested, charged, or convicted of a crime?

Juror 1: son convicted of theft

Juror 10: "[A]ll of my uncles, but I don't know what they were for"

Juror 11: three misdemeanor offenses

Juror 15: ex-husband convicted of domestic violence

Juror 20: husband convicted of stealing motorcycles 20 years ago

Jurors 26 and 28: misdemeanor DUI convictions

- Have you, a close relative or friend been a crime victim? Jurors 3-9, 12-13, 17, 21, 23, and 27 responded affirmatively.

¶4 In exercising its peremptory strikes, the State struck Juror 10, the only African American in the jury pool.² Butler raised a *Batson* challenge, and the court asked the State its reason for the strike, prompting the following colloquy:

[STATE]: [Juror 10] said she had various family members who had been convicted of crimes.

THE COURT: I do find that's a race-neutral reason. You can make a record, if you would like.

[DEFENSE]: Hold on a second. I would like to look at the rest of the [potential jurors], then.

(PAUSE)

² Butler is African American, but except as disclosed in the parties' briefing, the racial composition of the jury pool is unknown.

[T]here were two other jurors who were not stricken, number 15. Her ex-husband, domestic violence. And then Number 28, he said he had a misdemeanor DUI, so you got people who are white who have actually -- he actually had a conviction of his own. [Juror 15], a more close associate, her husband -- ex-husband had a conviction. [Juror 10] said she had uncles, various, but she couldn't elaborate, it sounded like it was uncles she didn't even know, so that's my record. I don't think that that's a -- that's good of enough neutral reason, given two other people who are still on the panel.

THE COURT: [Does the State] have any response to that?

[STATE]: Well, your Honor, I just will say that 28 was convicted, however, it was a misdemeanor. He also stated he had family members with law enforcement and had previously been a victim and it might have been an assumption on my part, but I also assumed that when [Juror 15] said her ex was convicted of [domestic violence], I made the assumption that she was the victim.

THE COURT: And that was this Court's assumption, also.

¶15 Juror 10 was excused, and jurors 3, 5, 7, 9, 12, 13, 15, 18, 22, 23, 25, 26, 28, and 30 were seated. The jury found Butler guilty as charged. Butler timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21, 13-4301, and -4033.

DISCUSSION

¶16 Courts employ a three-step process in determining whether a peremptory strike violates *Batson*: (1) the opposing

party must make a prima facie showing of discrimination;³ (2) the proponent must offer a race-neutral basis for the strike; and (3) the opponent must persuade the court that the proffered reason is "pretextual" and the strike was "actually based on race." *State v. Lucas*, 199 Ariz. 366, 368, ¶ 7, 18 P.3d 160, 162 (App. 2001) (citations omitted). When considering a *Batson* challenge, we defer to the trial court's findings of fact unless clearly erroneous, but we review the court's application of the law *de novo*. *Id.* at ¶ 6 (citations omitted).

I. Race-Neutral Basis

¶7 To rebut a prima facie showing of discrimination, the State must give "a clear and reasonably specific explanation" of its "legitimate reasons" for exercising a peremptory strike. *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (internal quotation marks and citations omitted); see also *State v. Newell*, 212 Ariz. 389, 401, ¶ 54, 132 P.3d 833, 845 (citation omitted) (the State meets its burden by offering a "facially valid explanation" for the challenge).

¶8 The State's strike of Juror 10 was based on "various family members" having been arrested, charged, or convicted of a crime. This is a race-neutral reason. See *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987) (citations omitted) (concerns about the "impartiality of a juror due to his habits

³ This prong is not at issue on appeal.

and associations" is a proper basis for peremptory strike), *abrogated on other grounds by Huddleston v. United States*, 485 U.S. 681 (1988); *State v. Hernandez*, 170 Ariz. 301, 305-06, 823 P.2d 1309, 1313-14 (App. 1991) (citations omitted) ("As long as it is not based upon race, perceived sympathy on the part of a prospective juror toward a defendant is a legitimate basis for a peremptory strike."); *cf. State v. Gallardo*, 225 Ariz. 560, 565, ¶ 12, 242 P.3d 159, 164 (2010) ("criminal history" is a race-neutral reason to strike juror).

II. Pre-textual

¶9 The "critical question" in determining whether a defendant has proven discrimination "is the persuasiveness of the prosecutor's justification" and whether the race-neutral explanation is "credible." *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003); *see also Purkett*, 514 U.S. at 768 (there must be a plausible basis for believing a juror's ability to remain impartial will be affected). Credibility is measured by, among other things, the prosecutor's demeanor, how reasonable or improbable the explanations are, and whether the rationale has some basis in accepted trial strategy. *Cockrell*, 537 U.S. at 339; *Newell*, 212 Ariz. at 401, ¶ 54, 132 P.3d at 845. We give "much deference" to the trial court's determination because it

is in a better position to assess credibility.⁴ *Newell*, 212 Ariz. at 401, ¶ 54, 132 P.3d at 845.

¶10 Butler argued below that the State's articulated rationale for striking Juror 10 was not a "good . . . enough neutral reason" because Jurors 15 and 28, both "white," were seated despite a "more close" association to criminality. The State immediately distinguished those two jurors, explaining that a member of Juror 28's family was a law enforcement officer and that Jurors 15 and 28 had both been crime victims. A prosecutor might perceive such factors as being advantageous to the State. *See Cockrell*, 537 U.S. at 339 (court may consider whether explanation has some basis in accepted trial strategy). In addition, Juror 10 disclosed that multiple family members ("all of my uncles") had been charged, arrested, or convicted, further distinguishing her from other members of the jury pool.

¶11 The prosecutor's factual misstatement in describing Juror 28 as a crime victim, and her assumption that Juror 15 had been the victim of her ex-husband's domestic violence, do not show that the stated basis for striking Juror 10 was pretextual.

⁴ Butler correctly notes that the trial court made no specific finding regarding the third *Batson* prong. Such a finding would have assisted us in our review. However, by pursuing a legally-sufficient inquiry into the State's peremptory strike and then directing the clerk to seat jurors from the jury pool, the court determined, albeit implicitly, that Butler had not carried his burden of demonstrating race-based discrimination.

The trial judge shared the same assumption about Juror 15. Additionally, Butler accepted the State's characterizations of these jurors without objection, and nothing in the record suggests that the State purposefully misstated any juror's responses. See *Lamon v. Boatwright*, 467 F.3d 1097, 1101 (7th Cir. 2006) ("It follows that *Batson* and its progeny direct trial judges to assess the *honesty* – not the accuracy – of a proffered race-neutral explanation.").

¶12 *Miller-El v. Dretke*, 545 U.S. 231 (2005), upon which Butler relies, is distinguishable. In *Dretke*, a prosecutor sought to strike an African-American juror he claimed was opposed to the death penalty. *Id.* at 244. When defense counsel noted that the juror had actually "expressed unwavering support" for the death penalty, the prosecutor "suddenly" came up with another reason for the strike -- specifically, a family member's criminal conviction. *Id.* at 242, 246. The trial court struck the juror. *Id.* at 243. On review, the Supreme Court conducted "side-by-side comparisons" of the responses from African-American jurors who were struck and white jurors who were allowed to serve, finding significant differences. *Id.* at 241, 244-45. The court concluded there was "no good reason to doubt" that the prosecutor's newly-stated reason for striking the African-American juror was anything but a pretext. *Id.* at 245-46. In the case at bar, the State's articulated reason for the

peremptory strike was not an after-thought, and, as previously noted, there were meaningful differences between Juror 10 and the jurors that Butler identified.

¶13 Finally, Butler asserts for the first time on appeal that the same rationale used to strike Juror 10 should have disqualified Juror 26, who had been convicted of misdemeanor DUI. Butler, however, concedes that he did not make this argument below. He therefore cannot rely on it on appeal to show that he satisfied his burden of demonstrating the State's strike was racially motivated. *Cf. State v. Bustamante*, 229 Ariz. 256, 261, ¶ 17, 274 P.3d 526, 531 (App. 2012) ("In failing to object to the prosecutor's characterization of this prospective juror's language problems at the time, defendant failed to meet his burden to show that this reason was merely a pretext for racial discrimination."); *see also State v. Garza*, 216 Ariz. 56, 65, ¶ 3, 163 P.3d 1006, 1015 (2007) (noting that the defendant's failure to raise a *Batson* challenge deprived the State of the "opportunity to give neutral explanations" and waived the issue on appeal).

CONCLUSION

¶14 For the reasons stated, we affirm Butler's convictions and sentences.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge