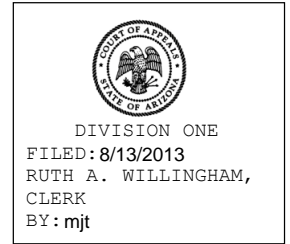


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**



STATE OF ARIZONA, ) 1 CA-CR 12-0461  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DAMIEN CHARLES BODDY, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Yuma County

Cause No. S1400CR201100807

The Honorable Lawrence C. Kenworthy, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
by Joseph T. Maziarz, Section Chief Counsel  
Criminal Appeals  
and Andrew Reilly, Assistant Attorney General  
Attorneys for Appellee

Yuma County Public Defender's Office Yuma  
by Edward F. McGee, Deputy Public Defender  
Attorneys for Appellant

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**H O W E**, Judge

¶1 Damien Charles Boddy appeals his conviction and sentence for sexual assault, arguing the court erred in

upholding the State's peremptory strikes against his *Batson*<sup>1</sup> challenge and in considering his refusal to accept responsibility for his crime as an aggravating circumstance. For the following reasons, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 On June 21, 2011, a Yuma County Grand Jury indicted Boddy on kidnapping<sup>2</sup> and sexual assault, class two felonies; and aggravated assault, a class six felony. During jury selection, Boddy's counsel argued that the State had violated *Batson* by using its peremptory challenges to strike an African-American and three Hispanics from the venire based on their race. Although the trial court questioned whether counsel had made a prima facie case of discrimination when four Hispanics remained on the jury, the prosecutor voluntarily explained the reasons for the strikes: one juror was a teacher; the second had sat as a grand juror, loved criminal science dramas, and had served as a Marine; the third was a friend of a victim/witness advocate and a teacher; the fourth wore a t-shirt to court, sat "hunched over in his chair and slouched down," had not listened to the voir dire questions, and was a student. The trial court ruled that counsel had not shown by a preponderance of the evidence that the strikes were racially based. Boddy's counsel attempted

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<sup>1</sup> *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

<sup>2</sup> The trial court subsequently dismissed the kidnapping charge.

to list the jurors who remained on the jury and had the same characteristics as the struck jurors, but the trial court stopped counsel from doing so stating, "there's already a record about that." The trial then proceeded, and the jury found Boddy guilty of sexual assault but not guilty of aggravated assault.

¶13 Before sentencing, the Yuma County Adult Probation Department prepared a presentence report and recommended that the trial court impose the presumptive term of seven years imprisonment. The Probation Department considered several factors in its recommendation: (1) the offense caused the victim bodily injury; (2) the offense had a "long-lasting emotional impact" on the victim; (3) Boddy had no prior felony convictions; (4) the victim had taken anti-convulsion medication before the offense and was "in an altered state of mind" at the time of the offense; (5) Boddy's offense made him ineligible to receive a suspended sentence; and (6) Boddy "still strongly suggests the sexual contact with the victim was mutual and he does not take responsibility for the offense."

¶14 At sentencing, the State agreed with the recommendation, but Boddy requested a mitigated sentence. Boddy objected to any consideration of the factors that the victim suffered bodily and emotional injury and was in an altered state of mind at the time of the offense, contending that no evidence supported them. He also objected to consideration of his refusal

to take responsibility for the offense, arguing that he was merely exercising his constitutional right to maintain that he was not guilty. The court ruled, however, that it could consider Boddy's refusal to take responsibility for the offense in determining the sentence.

¶15 The trial court then heard Boddy's allocution, and he requested a mitigated sentence because the case took "a toll" on his family and because he had merely engaged in consensual sex. The trial court found that a mitigated sentence was inappropriate because the sex was not consensual and Boddy had injured the victim and caused her "significant emotional harm." The court then sentenced Boddy to seven years imprisonment, with credit for 402 days of presentence incarceration.

¶16 Boddy timely appeals. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033(A) (West 2013).<sup>3</sup>

## DISCUSSION

### I. *Batson* Challenge

¶17 Boddy first argues that the trial court did not follow the requirements of *Purkett v. Elem*, 514 U.S. 765 (1995), in ruling on his *Batson* challenge. On an appeal of a *Batson* ruling,

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<sup>3</sup> We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

we review the trial court's application of the law de novo, but defer to its factual findings unless they are clearly erroneous. *State v. Butler*, 230 Ariz. 465, 474 ¶ 36, 286 P.3d 1074, 1083 (App. 2012). We find no error.

¶18 The Equal Protection Clause prevents the State from peremptorily striking a potential juror based solely on the juror's race. *Batson*, 476 U.S. at 89. A *Batson* challenge proceeds in three steps: (1) the party challenging the strikes attempts to present a prima facie showing of discrimination, and if it does so, (2) the striking party must provide race-neutral reasons for the strikes, and if it does so, (3) the trial court must determine whether the challenging party has carried its burden of proving purposeful discrimination. *Purkett*, 514 U.S. at 767; *State v. Bustamante*, 229 Ariz. 256, 260 ¶ 14, 274 P.3d 526, 530 (2012). The second step is satisfied if the striking party provides reasons for the strikes that are facially based on something other than race. *Hernandez v. New York*, 500 U.S. 352, 359 (1991); *State v. Garcia*, 224 Ariz. 1, 10 ¶ 26, 226 P.3d 370, 379 (2010). The third step is "fact intensive and . . . the trial court's finding at this step is due much deference," *State v. Newell*, 212 Ariz. 389, 401 ¶ 54, 132 P.3d 833, 845 (2006), because the trial court is in a better position than an appellate court to assess the prosecutor's credibility, *State v. Roque*, 213 Ariz. 193, 203 ¶ 12, 141 P.3d 368, 378 (2006).

¶9 The trial court followed these steps. Boddy argued first that he had presented a prima facie case of discrimination because the State struck four minority jurors. The trial court never had the opportunity to rule on the first step, however, because the prosecutor moved directly to the second step by volunteering facially race-neutral reasons for the strikes. This mooted the first step and satisfied the second step.<sup>4</sup> *Hernandez*, 500 U.S. at 359; *Garcia*, 224 Ariz. at 10 ¶¶ 25-26, 226 P.3d at 379. The trial court then applied the third step by considering the prosecutor's reasons and finding that Boddy had not shown by a preponderance of the evidence that the strikes were "race based."

¶10 Boddy argues, however, that the trial court did not properly apply the third step because it did not give him an opportunity to demonstrate that the reasons for the strikes were merely pretext, masking the prosecutor's intent to remove the jurors because of their race. Boddy claims that the trial court stopped him before he completed his explanation. But the third step does not require the trial court to permit argument; it requires the trial court to determine whether the opponent of the strikes has proved purposeful discrimination, *Purkett*, 514

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<sup>4</sup> Boddy concedes that "the prosecutor articulated a facially race-neutral basis for each of his challenged strikes."

U.S. at 767; *Garcia*, 224 Ariz. at 10 ¶ 21, 226 P.3d at 379, and the trial court did so.

¶11 Although Boddy's counsel wanted to highlight that the prosecutor had not removed jurors who had the same characteristics as the jurors he had removed, argument was unnecessary because the trial court had heard the voir dire and was aware of the jurors' characteristics. The trial court so noted when it precluded further argument: "Well, there's already a record about that." Moreover, while a trial court may certainly compare juror characteristics in making its *Batson* ruling, it is not required to do so. *United States v. You*, 382 F.3d 958, 969 (9th Cir. 2004) ("Comparative analysis is one of many tools that a court may employ to determine whether the government exercised its peremptory challenges for a discriminatory purpose. Trial courts, however, are not required to conduct such an analysis.")

¶12 The trial court considered the race-neutral reasons the prosecutor proffered for the peremptory strikes and judged them credible, and we "will not second-guess the trial court's credibility determination." *Garcia*, 224 Ariz. at 10 ¶ 27, 226 P.3d at 379. We also note, as did the trial court, that four minority jurors remained on the jury and the prosecutor used only four of its six peremptory strikes on minority jurors, which weighs against a finding of discriminatory intent. *Roque*,

213 Ariz. at 204 ¶ 15, 141 P.3d at 379 (“Although not dispositive, the fact that the state accepted other [minority] jurors on the venire is indicative of a nondiscriminatory motive.”) (internal quotation marks and citation omitted). The trial court did not err in its *Batson* ruling.

## **II. Denial of Responsibility as an Aggravating Factor**

¶13 Boddy also argues that the court violated his Fifth and Sixth Amendment rights by considering his denial of responsibility as an aggravating factor for sentencing. He acknowledges that he objected at sentencing only on Sixth Amendment grounds—that the trial court was punishing him for exercising his right to trial—and did not object on Fifth Amendment grounds—that the trial court was punishing him for exercising his right against self-incrimination. He argues that because his Fifth and Sixth Amendment rights are intertwined, his objection to the trial court preserved the issue for appeal. The State argues that he has waived his Fifth Amendment objection and that we must review the error only for fundamental error. We need not resolve whether fundamental error review or harmless error review is appropriate, however, because even if Boddy’s objection fully preserved the claim for review, we find no reversible error.

¶14 The Fifth Amendment prevents a person from being “compelled in any criminal case to be a witness against



himself." U.S. Const. amend. V. The Fifth Amendment's protection applies equally at the sentencing phase as it does at the trial phase. *Mitchell v. United States*, 526 U.S. 314, 328-29 (1999). When a sentencing court considers a defendant's refusal to accept responsibility, it deprives the defendant of his Fifth Amendment protection against self-incrimination. *State v. Trujillo*, 227 Ariz. 314, 318 ¶ 15, 257 P.3d 1194, 1198 (App. 2011); *State v. Hardwick*, 183 Ariz. 649, 656, 905 P.2d 1384, 1391 (App. 1995) ("A convicted defendant's decision not to publicly admit guilt is irrelevant to a sentencing determination, and the trial court's use of this decision to aggravate a defendant's sentence offends the Fifth Amendment privilege against self-incrimination.") Thus, the trial court erred in ruling that it could consider Boddy's failure to take responsibility in determining the appropriate sentence.

¶15 That is not the end of the analysis, however. If a court relies on an improper factor in determining a sentence, the sentence will nevertheless be affirmed if the record shows that the court would have imposed the same sentence absent consideration of the improper factor. *State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989); *State v. Ramsey*, 211 Ariz. 529, 543 ¶ 45 n.7, 124 P.3d 756, 770 n.7 (App. 2005). Boddy argues that had the trial court not considered the improper factor, "it might well have departed downward from the

presumptive term and imposed a mitigated sentence." The record does not support such speculation, however. The only mitigating circumstance discussed was Boddy's lack of prior felony conviction, and the trial court expressly found that a mitigated sentence was not appropriate because Boddy caused physical injury and significant emotional harm to the victim. Under these circumstances, the trial court would have imposed the same presumptive sentence if it had not considered the improper factor. See *Ramsey*, 211 Ariz. at 543 ¶ 45 n.7, 124 P.3d at 770 n.7 ("In view of the number of additional aggravating factors the trial court cited and the court's imposition of a presumptive sentence, 'the record clearly shows the trial court would have reached the same result even without consideration of the [arguably] improper factor.'" ) (quoting *Ojeda*, 159 Ariz. at 562, 769 P.2d at 1008). The trial court's error did not prejudice Boddy, and his sentence is affirmed.

**CONCLUSION**

¶16 For the foregoing reasons, we affirm Boddy's conviction and sentence.

\_\_\_\_\_/s/\_\_\_\_\_  
RANDALL M. HOWE, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Judge