DIVISION ONE
FILED: 12/07/2010
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0753
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
MANUEL JESUS GUZMAN,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-116182-001 DT

The Honorable Steven P. Lynch, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Craig Soland, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellee

B R O W N, Judge

¶1 Manuel Jesus Guzman appeals from his conviction and sentence for aggravated assault. Guzman argues that (1) the

prosecutor engaged in misconduct when he referenced matters not in evidence during closing argument and (2) the trial court erred when it failed to have the State provide a race-neutral explanation for striking a member of the jury panel after Guzman challenged the strike pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). For the reasons that follow, we affirm.

BACKGROUND[1]

¶2 The incident giving rise to the aggravated assault charge against Guzman occurred as the victim walked his girlfriend home one night. As they walked, the victim's girlfriend received a call from her ex-boyfriend. The ex-boyfriend demanded to know where the victim was. The girlfriend gave her ex-boyfriend a false location and warned the victim that her ex-boyfriend and others might be looking for them. She also described the car they might be driving.

¶3 As the victim and his girlfriend continued to walk down the sidewalk, they spotted the car driving in the opposite direction. Guzman was in the front passenger seat and the ex-boyfriend was in the back seat. After the car passed by, the driver made a U-turn and approached the victim and his girlfriend from the rear. As the car passed the victim, Guzman

[1] We construe the evidence presented at trial in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against Guzman. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

leaned out of the front passenger window and struck the victim in the arm with an aluminum baseball bat, which Guzman swung with both hands as the car passed by at twenty to thirty miles per hour. The girlfriend called 9-1-1 and police stopped the car soon thereafter. The victim later identified Guzman as the person who struck him.

¶4 After a three-day jury trial, Guzman was convicted of aggravated assault, a class three dangerous felony. He was sentenced to the minimum sentence of five years' imprisonment and then filed this timely appeal.

DISCUSSION

¶5 Guzman first argues the prosecutor engaged in misconduct when he referenced matters not in evidence during closing argument. Guzman asserts there was no evidence to support the prosecutor's argument that: (1) Officer Morris asked the victim who hit him and the victim said he did not know; (2) the victim told Officer Morris he never met the person who hit him; (3) Officer Morris asked the victim if he could identify his attacker and the victim said yes; (4) Officer Morris took the victim in his patrol car and conducted a one-on-one identification with the victim; (5) the victim looked at the first suspect presented and said that was not his attacker; (6) when shown a second person, the victim told police that was the person who attacked him; and (7) Guzman was the second person

shown to the victim. Regarding the prosecutor's rebuttal argument, Guzman further argues there was no evidence to support the prosecutor's statement that Guzman was aiming at the victim's head when he swung the bat and missed, and it was "dumb luck" the victim was able to duck in time and avoid a blow to the head.

¶6 A prosecutor's closing argument may not reference matters not previously introduced into evidence. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). Guzman did not, however, object to any of the prosecutor's statements. The failure to object to alleged prosecutorial misconduct waives all but fundamental error. *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even if fundamental error has been established, a defendant must still demonstrate the error was prejudicial. *Id*. at ¶ 26. In our determination of whether a prosecutor's conduct amounts to fundamental error, we focus our inquiry on the probability the conduct influenced the jury and whether the conduct denied the defendant a fair trial. *Wood*, 180 Ariz. at 66, 881 P.2d at 1171. "Prosecutorial

misconduct does not require reversal 'unless the defendant has been denied a fair trial as a result of the actions of counsel.'" *State v. Bible*, 175 Ariz. 549, 600, 858 P.2d 1152, 1203 (1993) (citation omitted). "The focus is on the fairness of the trial, not the culpability of the prosecutor." *Id*. at 601, 858 P.2d at 1204.

¶7 We first clarify what the prosecutor actually said in those portions of his closing identified by Guzman. First, the prosecutor did not reference Officer Morris in those portions of his argument. The prosecutor referred only to "the police officer," "the officer," "one of the police officers" or "he."[2] Regarding the remainder of the closing argument identified by Guzman, the prosecutor actually argued that a police officer asked the victim who hit him; the victim said he did not know and he had never met the person. The prosecutor argued the officer then asked the victim if he could identify the person and the victim said he thought he could. The officer then took the victim to where the suspects were located. The prosecutor argued one of the officers showed the victim the first suspect and the victim indicated this first person was not the person who hit him. The prosecutor argued the victim identified the second person shown to him as the person with the bat. Finally,

[2] There was evidence that more than one officer responded to the scene.

the prosecutor argued this second person was Guzman, the same person the victim identified in the courtroom as his attacker.

¶8 Regarding the rebuttal argument, the prosecutor never argued Guzman was actually aiming at the victim's head. The prosecutor argued that the circumstances—swinging a baseball bat at a person from a moving vehicle—made the bat a dangerous instrument and the offense a dangerous offense. The prosecutor argued the jury should not "reward" Guzman by finding the offense was not dangerous simply because the bat did not hit the victim in the head.

¶9 Regardless, we find no error, fundamental or otherwise. All of the above argument was supported by the evidence introduced at trial. The evidence showed that police asked the victim if he could identify who hit him. Even though the victim had never met Guzman before, the victim told police he could identify the person who hit him. An officer then placed the victim in a car and took the victim to view the suspects one at a time. When the victim was shown the first suspect, the victim told the officer that person was not his attacker. When the victim was shown the second suspect, the victim identified that person as his attacker. While the victim did not expressly testify that the second person shown to him was Guzman, the victim had already identified Guzman in court as his attacker. It was only moments after the victim identified

Guzman in court as his attacker that he testified that when he was shown the second suspect, he told police, "that's him." Based on this evidence, it was well within reason to infer that Guzman was the second person police showed to the victim. Counsel may argue reasonable inferences from the evidence during closing argument. *Bible*, 175 Ariz. at 602, 858 P.2d at 1205.

¶10 Regarding the rebuttal argument, again, the prosecutor never argued Guzman was aiming for the victim's head. The prosecutor was emphasizing the dangerous manner in which Guzman wielded the bat—with both hands, while driving by a person at up to thirty miles per hour. Prosecutors have wide latitude in closing arguments. "[E]xcessive and emotional language is the bread and butter weapon of counsel's forensic arsenal[.]" *Jones*, 197 Ariz. at 305, ¶ 37, 4 P.3d at 360. There was nothing improper about this portion of the prosecutor's argument.

¶11 Further, this portion of the prosecutor's rebuttal was permissible in light of Guzman's closing argument. A prosecutor's argument must be viewed in the context of the arguments of the defendant. *State v. Kerekes*, 138 Ariz. 235, 239, 673 P.2d 979, 983 (App. 1983). "[P]rosecutorial comments which are fair rebuttal to comments made initially by the defense are acceptable." *State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App. 1993). In her closing argument,

Guzman's counsel attempted to minimize, if not trivialize, the seriousness of his actions and any injury he inflicted:

> [O]ne guy ended up with a bruise on his arm and that's the reason we're here today, not hitting him on the head, not in breaking any bones; a bruise on his arm. We're here today because of this red mark on [the victim's] arm.
>
> We're talking about a red mark, a bruise, nothing broken, not knocked off balance, not falling down, a bruise.

Defense counsel further argued that an aluminum baseball bat is not always a dangerous instrument and will not always cause serious physical injury. She continued:

> It was a hit to the arm; not the heart, not the head, not to the stomach, not the chest, not even the legs. It was a hit to the arm. There are no organs in your arm. There is not – he didn't even break any bones. He has a bruise. There is no blood loss, there is no imminent risk of death. That's not a serious physical injury. An injury perhaps, but serious physical injury, that doesn't even come close.
>
> What happened is [the victim] somehow got a bruise on his arm.
>
> Look at this picture. Look at his arm. We're not here because [the victim] got beat up. We're not here because [the victim] broke bones. We're here because [the victim] has a bruise on his arm, one bruise. [The victim] didn't fall down, he did not lose his balance, none of those things. He has a bruise on his arm.

In response to this argument, the prosecutor could properly emphasize the dangerousness of Guzman's actions and argue the

victim was fortunate he was not struck in the head rather than his upper arm given the circumstances.

¶12 Finally, Guzman is correct that there was no evidence to support the prosecutor's rebuttal argument that "[i]t was just dumb luck that [the victim] was able to duck in time." There was no evidence the victim ducked. Even so, we find no fundamental error, as there is little or no probability this statement influenced the jury. It did not go to the foundation of Guzman's case or take away a right essential to his defense, nor was it of such magnitude that Guzman could not have received a fair trial. Further, the jury was properly instructed that its duty is to determine the facts only from the evidence produced in court and that the lawyers' comments are not evidence.

¶13 Guzman next argues the trial court erred when it failed to have the State provide a race-neutral explanation for striking a member of the jury panel after Guzman challenged the strike. While Guzman challenged the State's strike pursuant to *Batson*, Guzman did not object to the court's failure to require the State to provide a race-neutral explanation. Therefore, we review for fundamental error. *See State v. Trostle*, 191 Ariz. 4, 12, 951 P.2d 869, 877 (1997) (the failure to object to the adequacy of the jury selection process constitutes waiver of that issue).

¶14 The State exercised a peremptory strike to remove juror 34. During voir dire, the trial court asked the members of the jury panel if they, their friends or relatives, had ever been arrested for, charged with, or convicted of any crime. Juror 34 indicated she had a cousin who was convicted of murder in Connecticut "for being in the wrong place at the wrong time[.]" She stated it would not have any impact on her in this case. In response to follow-up questions, juror 34 indicated her cousin was prosecuted sometime in the 1980s or early 1990s and she "vaguely" knew the circumstances surrounding the case, but anything she knew about the case was based on hearsay. When asked if she had an opinion regarding whether her cousin was treated fairly by the criminal justice system, juror 34 answered she had no opinion. Other than general background information, juror 34 gave no other material information about herself.

¶15 As soon as the selected jurors were announced, Guzman asked to approach the bench. A bench conference was held but not recorded. Immediately afterwards, the jury was dismissed for the day. The trial court then noted that Guzman had challenged the State's peremptory strike of juror 34 pursuant to *Batson*. Guzman argued that juror 34 was the only African American member of that portion of the panel from which the jury would be selected and that the State struck her based on her race. Rather than have the State provide a race-neutral

explanation for its strike of juror 34 on the record, the court immediately stated:

> Yeah. But the Court believes there was a perfectly viable race control [sic] reason.[3] She indicated that her cousin had been murdered in Connecticut and that he, her cousin had been convicted of murder in Connecticut. And she indicated he was at the wrong place at the wrong time. Counsel for state asked some polite follow-up questions, and she indicated that she had heard so many different stories, she wasn't sure what happened, and that she sort of had vague details of the crime that he was accused of.
>
> It is the Court's position that's certainly a race neutral reason for striking Juror Number 34, but the record should also reflect that juror number 34, he was the last juror. And so, the State simply could have only exercised five strikes, and juror 34 would not have been part of the panel in any event.

The court continued:

> Also, just to make the record clear, we had a general voir dire panel of 45. All of that voir dire panel, remarkably there were 15 Spanish members, Hispanic members of the jury panel. There were two African American members of the jury panel, and it looked like there were a couple of [P]acific [I]slanders. So to be perfectly honest, I haven't in my entire career as a prosecutor or judicial officer seen such a bad jury panel to begin with.

There was no further discussion of the issue.

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[3] Regardless of whether the court meant to say "neutral" rather than "control," or this is a transcription error, we believe the court meant "neutral."

¶16 *Batson* objections require a three-part inquiry. First, the opponent of a peremptory challenge must establish a prima facie case of racial discrimination. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Second, the proponent of the strike must come forward with a race-neutral explanation. *Id*. A "legitimate reason" for purposes of *Batson* is not necessarily a reason that makes sense, but a reason that does not deny equal protection. *Id*. at 769. Finally, if a race-neutral explanation is given, the trial court must decide whether the opponent of the strike has proven purposeful racial discrimination. *Id*. at 767.

¶17 The trial court should have required the State to provide a race-neutral explanation for its strike on the record. Even so, we find no fundamental error. We will not presume the State did not provide a race-neutral explanation to the court and Guzman during the unrecorded bench conference, especially where the record indicates such an explanation was given. The minute entry which memorialized the trial court's ruling states, "THE COURT FINDS *the State has provided* race-neutral reasons for the strike and believes the reasons are reasonable." (Emphasis added.) Therefore, the record indicates the State did provide a race-neutral explanation and, absent more, we will not presume otherwise. Finally, there is nothing in the record to indicate Guzman was not allowed to respond to the court's determination

or that he was not allowed to attempt to persuade the court that the State's strike was actually based on race.

¶18 Within his argument on this issue, Guzman also briefly argues that because juror 22 was similarly situated to juror 34, the State's failure to strike juror 22 shows the strike of juror 34 was based on race. Juror 22 had two cousins, one of whom was charged with a drug offense and one of whom was charged with murder. One of those two cousins had served time and the other was being tried in Maricopa County at the same time as this trial. The record, however, does not indicate which of the two cousins was in trial at that time. Because Guzman did not raise this issue below, we review only for fundamental error.

¶19 We again find no error. Unlike juror 34, juror 22 never claimed his cousin was convicted of murder simply because he was in the wrong place at the wrong time. In contrast, juror 22 simply stated his cousins "did what they did, and they got what they got." Juror 34's statement communicated a belief her cousin was wrongly convicted, notwithstanding her later attempts to minimize her initial statement. Juror 22 did not communicate any similar belief.

¶20 Finally, Guzman argues that the trial court's comment about "such a bad jury panel" shows the court was unfair in its consideration of his *Batson* motion and requires reversal of his conviction. Once again, Guzman did not raise this issue below

and therefore we review only for fundamental error. The record does not reveal to us why the judge made this unusual comment.[4] If the judge meant his "bad jury panel" statement to be taken literally, it was obviously inappropriate. Likewise, the comment was not appropriate even if the judge intended his words to mean the exact opposite of what he said, as a sarcastic or flippant comment; a judge should avoid making any statements that a listener or reader might take as evidence of prejudice or imprudence. *See State v. Williams*, 113 Ariz. 14, 16, 545 P.2d 938, 940 (1976) (citation omitted) ("The trial court has a duty to 'refrain from making unnecessary comments or doing any act which might cause prejudice[.]'"). Nevertheless, because the court made the comment outside the presence of the jury, we decline to reverse based on the comment. *See id.* (citation omitted) (concluding that "remarks made outside the hearing of the jurors, even if prejudicial to the appellant, could not keep the jury from exercising an impartial judgment on the merits, and do not warrant a reversal").

[4] Neither party has suggested that there may have been a transcription error in recording the judge's statement nor does the record suggest any obvious mistake.

CONCLUSION

¶21 Because we find no reversible error, we affirm Guzman's conviction and sentence.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
JOHN C. GEMMILL, Judge