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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JUAN PABLO REYES-VALENZUELA, Appellant.	2 CA-CR 2011-0313 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084290

Honorable Christopher C. Browning, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Kathryn A. Damstra
Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Juan Reyes-Valenzuela was convicted of four counts of sale of a narcotic drug and one count of possession of a narcotic drug for sale. The trial court sentenced him to mitigated, concurrent five-year prison terms on each count. On appeal, Valenzuela argues the court erred by (1) denying his *Batson*[1] challenge to the state's peremptory strikes of two potential jurors and (2) finding his absence was voluntary and permitting him to be tried in absentia. For the reasons stated below, we affirm.

Factual Background and Procedural History

¶2 In October 2008, Tucson Police Department Officer Ward Beattie was on assignment with the Counter Narcotics Alliance, a multi-agency task force, when he began investigating a suspected drug dealer, later identified as Valenzuela. Beattie called Valenzuela's cellular telephone number and made arrangements to purchase heroin. Later that night, Beattie met Valenzuela in a parking lot in central Tucson and purchased two grams of heroin for $100. Over the next week, Beattie met Valenzuela two additional times and made similar purchases.

¶3 When Beattie arranged a fourth meeting, his supervisor decided that Valenzuela would be arrested after the transaction was completed. Beattie purchased two grams of heroin from Valenzuela and returned to the police station to process the evidence. In the meantime, surveillance officers followed Valenzuela and arrested him outside a nearby restaurant. During an inventory search of Valenzuela's vehicle, officers discovered an additional 12.77 grams of heroin. Valenzuela was charged with four

[1]*Batson v. Kentucky*, 476 U.S. 79 (1985).

counts of sale of a narcotic drug and one count of possession of a narcotic drug for sale. He was convicted as charged and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Batson Challenge

¶4 Valenzuela argues "the trial court erred in denying [his] *Batson* challenge where the state struck the only African-American juror and the only Native[-]American juror on the panel." He maintains "the prosecutor's unreasonable and improbable explanations . . . did not have a legitimate basis in accepted trial strategy, but rather w[ere] pretextual based on race and ethnicity" and "should not be believed." In each instance, the court found the prosecutor had provided a satisfactory race-neutral reason for exercising the strike and denied Valenzuela's challenge.

¶5 When reviewing a trial court's ruling on a *Batson* challenge, we defer to its factual findings unless clearly erroneous, but review de novo the court's application of the law. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits parties from using peremptory strikes to remove prospective jurors based solely on their race or ethnicity. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007); *State v. Purcell*, 199 Ariz. 319, ¶ 22, 18 P.3d 113, 119 (App. 2001). A trial court's analysis of a *Batson* challenge involves three steps. First, the opponent of the strike must make a prima facie showing of discrimination. *Purcell*, 199 Ariz. 319, ¶ 23,

18 P.3d at 119. The proponent then must provide a facially neutral explanation for the strike. *State v. Martinez*, 196 Ariz. 451, ¶ 16, 999 P.2d 795, 800 (2000). The explanation need not be "persuasive or even plausible, only 'legitimate.'" *Id.*, *quoting Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curium). Finally, the court must determine the credibility of the proponent's explanation and whether the opponent has met its burden of proving discrimination. *Martinez*, 196 Ariz. 451, ¶ 16, 999 P.2d at 800; *Purcell*, 199 Ariz. 319, ¶ 23, 18 P.3d at 119.

¶6 "This third step is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is this Court." *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006). Therefore, the court's finding is entitled to great deference, *Hernandez v. New York*, 500 U.S. 352, 365 (1991), and we will not disturb its ruling unless it is clearly erroneous, *Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d at 844. In determining the credibility of the state's explanation, the court considers factors such as "'the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy." *Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d at 793, *quoting Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 339 (2003).

¶7 Here, Valenzuela challenged the state's peremptory strikes of potential jurors S.P., who is African-American, and D.J., who is Native American. Although the state argued Valenzuela had not made a prima facie showing of discrimination, the trial court nonetheless asked the state to "articulate for the record" its reasons for the strikes, noting S.P. was the only African-American on the panel. Because the state offered an

explanation and the court ruled on the "ultimate question" of intentional discrimination, "the preliminary issue of whether [Valenzuela] had made a prima facie showing [is] moot." *Hernandez*, 500 U.S. at 359; *see also State v. Rodarte*, 173 Ariz. 331, 333, 842 P.2d 1344, 1346 (App. 1992). We thus turn to the state's reasons for the strikes.

¶8 As to S.P., the state explained:

> He is unemployed. I just don't have very much information. He doesn't read the newspaper, never been on a jury before. He has no bumper stickers. I had more information on other people I felt would serve my case a little bit better.

And as to D.J.:

> She is employed by WIC, Women, Infants and Children, sort of a helping type of vocation. Just get a little bit inside my head, I tend not to use those types of jurors that tend to be in helping professions. In addition, she had prior jury service in which she found someone not guilty. I tend to be a little bit superstitious and I look at those jurors a little bit more critically, and she did have a prior not guilty. Th[ose are] the reason[s] I struck her.

The trial court ultimately stated it was satisfied that the state's explanations were "race neutral" and did not violate *Batson*.

¶9 On appeal, Valenzuela apparently does not challenge the facial neutrality of the prosecutor's explanation. Instead, he argues the state's rationale should not be believed because "examination of the other jurors belies [the explanation]." He maintains that some of the non-minority jurors who were not struck shared some of the same characteristics and "general background[]" as S.P., and "[t]he only obvious distinction between [S.P.] and these other jurors was his race." He maintains that, like S.P., they "had never been on a jury, did not read any newspapers and had no bumper

stickers." In response, the state contends that the "key difference between [these other jurors] and S.P. is that S.P. was unemployed and the rest, with the exception of one retiree, had jobs."

¶10 As to D.J., Valenzuela similarly argues that the state's explanation was not sufficient. He acknowledges the state struck another potential juror who was non-minority—one who, like D.J., worked in a "helping profession" and had previously served on a jury that acquitted a defendant in a criminal case. However, Valenzuela contends the state's explanation for striking D.J. was implausible because a few of the other non-minority jurors who were not struck could be characterized as working in a helping profession or previously had acquitted a defendant. The state responds that, unlike the others, "D.J. was the only juror who worked in social services."

¶11 Valenzuela is correct that, as to S.P., much of the prosecutor's explanation does not meaningfully distinguish him from the other potential jurors who were retained by the state. Like S.P., several of those jurors did not read the newspaper, had never served on a jury, and did not have bumper stickers. However, we do not agree that because S.P. had these behaviors and experiences in common with other non-minority jurors, this established that the state's explanation was a mere pretext for discrimination. The prosecutor also stated that S.P. "is unemployed," a factor this court previously has identified as a valid race-neutral basis for a strike. *State v. Sanderson*, 182 Ariz. 534, 540, 898 P.2d 483, 489 (App. 1995). Similarly, the state cited D.J.'s work in a "helping profession" as the primary basis for striking her, and we also have stated that a person's

employment history is an appropriate consideration. *Rodarte*, 173 Ariz. at 335, 842 P.2d at 1348.

¶12 The state's rationale for excluding S.P. and D.J. based primarily on their employment status had a basis in accepted trial strategy. *See Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d at 793. The trial court therefore did not err in concluding that the reasons given by the state for striking them were not pretextual. In each case, the prosecutor's explanation was reasonable and not improbable. *See id*. And, to the extent the court's credibility determination hinged on the prosecutor's demeanor, that court, not this court, was in the best position to make that determination. *See id*. The trial court did not abuse its discretion in finding that Valenzuela failed to prove racial discrimination. *See id.* ¶ 29.

Voluntary Absence

¶13 Valenzuela also argues his convictions "must be reversed because his constitutional right to be present at trial was violated." Although Valenzuela acknowledges he "was warned at his arraignment . . . that the trial could go forward in his absence," he maintains "the notice was inadequate." He also contends that "his probable deportation [or confinement] rendered his [absence] involuntary." We review the trial court's determination on the question of voluntary absence for an abuse of discretion. *State v. Reed*, 196 Ariz. 37, 38, 992 P.2d 1132, 1133 (App. 1999).

¶14 "A[defendant's] presence at trial is protected by the Sixth and Fourteenth Amendments to the United States Constitution and by article II, section 24 of the Arizona Constitution." *State v. Schackart*, 190 Ariz. 238, 255, 947 P.2d 315, 332 (1997).

However, that right can be relinquished voluntarily *State v. Garcia-Contreras*, 191 Ariz. 144, 147, 953 P.2d 536, 539 (1998). Rule 9.1, Ariz. R. Crim. P., provides:

> Except as otherwise provided in these rules, a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it. The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear.

To make a prima facie showing under Rule 9.1, the state must show the "defendant had 1) personal notice of the time of the proceeding, 2) his right to be present at it, and 3) a warning that the proceeding would go forward in his absence." *State v. Tudgay*, 128 Ariz. 1, 2, 623 P.2d 360, 361 (1981). If the Rule 9.1 requirements have been met, the trial court can infer the defendant's absence is voluntary, and the burden shifts to the defendant to show that his absence was involuntary. *Id.* at 3, 623 P.2d at 362; *State v. Sainz*, 186 Ariz. 470, 473, 924 P.2d 474, 477 (App. 1996); *see also* Ariz. R. Crim. P. 9.1 2007 cmt. ("The word 'infer' is used in Rule 9.1 to indicate that the presumption of voluntariness is rebuttable.").

¶15 Valenzuela has not met his burden of rebutting the presumption in this case. At his arraignment in November 2008, the trial court notified Valenzuela that his next hearing would be a case-management conference on January 5, 2009, at 9:00 a.m. The court admonished him that "if you fail to appear at [the conference] or any other [hearing] scheduled in your case, including your trial, that hearing could go forward in your absence." At his arraignment, Valenzuela was given the name and telephone number of his court-appointed attorney and was ordered to provide his attorney with

current contact information and to contact and meet with his attorney. In December 2008, Valenzuela posted bond and was released from custody. When he failed to appear at the case-management conference, his attorney informed the court that "he ha[d] been unable to contact [him]," and the court issued a warrant for Valenzuela's arrest.

¶16 The day before trial, Valenzuela's counsel filed a motion in limine seeking "to prevent the State from proceeding in absentia." He argued "[t]he State has not shown . . . that [Valenzuela] was sufficiently admonished about his failure to appear at trial" and "[the state has] the burden to show that [he] is voluntarily absent." The state countered that "[Valenzuela] . . . was adequately advised that the proceedings would continue without him" and "the burden is on the defendant to prove that his absence is involuntary." The court denied Valenzuela's motion, noting its prior admonishment and that there had been no showing that his absence was involuntary. We see no abuse of discretion.

¶17 At his arraignment, Valenzuela was told, both orally and in writing, that failure to appear at trial could result in the trial proceeding without him. And although at that time a trial date had not yet been set, the court subsequently ordered Valenzuela's attorney to send a "trial acknowledgment to defendant's last known address." Valenzuela had previously been ordered to furnish his attorney with current contact information. *See State v. Rice*, 116 Ariz. 182, 186, 568 P.2d 1080, 1084 (App. 1977) (defendant has duty under conditions of release to maintain contact with court and attorney as to trial date and any changes thereto); *cf. State v. Pena*, 25 Ariz. App. 80, 81, 541 P.2d 406, 408 (App. 1975) (Rule 9.1 does not require defendant receive notice of rights after every

continuance). Moreover, Valenzuela had personal notice of the date of the case-management conference and his right to attend and was admonished that it and subsequent hearings could go forward in his absence. This satisfies the notice requirements of the rule. *See Tudgay*, 128 Ariz. at 3, 623 P.2d at 362. The state thus made a prima facie showing pursuant to Rule 9.1, and the burden then shifted to Valenzuela to rebut the inference of voluntary absence. *See id.* at 3, 623 P.2d at 362; *Sainz*, 186 Ariz. at 473, 924 P.2d at 477.

¶18 At the hearing on the motion in limine, Valenzuela's counsel stated only that he was "trying to ascertain" whether Valenzuela had been "deported to Mexico" after posting bond. After trial, after the jury returned its verdicts, the state and defense counsel still were not aware of Valenzuela's whereabouts. The prosecutor informed the court that it was her "guess" that Valenzuela "probably" had been deported, and defense counsel offered no additional information. And at sentencing, although Valenzuela noted that he had family in Mexico, he never mentioned, much less explained, his absence from trial.[2]

¶19 On appeal, Valenzuela similarly refers only to his "probable deportation" or "possible confinement," but puts forth no evidence to support his claim that he was involuntarily absent. He maintains the trial court should have held an evidentiary hearing to resolve "any lingering factual question." But in the absence of facts to support his

[2]Valenzuela apparently was arrested on drug-related charges in Maricopa County in October 2010, well after the instant trial ended. That arrest facilitated his presence at sentencing in this case. The presentence report, prepared in September 2011, also indicated Immigrations and Customs Enforcement had an outstanding warrant of removal pending.

claim, the court did not abuse its discretion by proceeding in absentia. *See Sainz*, 186 Ariz. at 473, 924 P.2d at 477 (trial court should not proceed "if subsequently discovered facts show that a defendant's absence was not voluntary"). Valenzuela's speculation about "probable deportation" or "possible confinement" is insufficient to carry his burden to rebut the inference that his absence was voluntary.[3]

Disposition

¶20 For the reasons stated above, Valenzuela's convictions and sentences are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[3]Even assuming Valenzuela had been taken into custody by immigration officials after he was released on bond, nothing in the record supports his argument that he "probably was deported." In *State ex rel. Thomas v. Blakey*, 211 Ariz. 124, ¶ 11, 118 P.3d 639, 642 (App. 2005), this court pointed out that "[i]n such circumstances the law gives [Valenzuela] the option of requesting political asylum, . . . requesting a hearing before the immigration court (during which time he could be detained or released on bail), . . . or requesting to be voluntarily released to his own country."