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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. AARON WADE SMILEY, Appellant.	)	2 CA-CR 2011-0366 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102796001

Honorable Kenneth Lee, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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and Joseph L. Parkhurst
Tucson
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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Aaron Smiley was charged with first-degree murder and possession of a deadly weapon by a prohibited possessor. A jury found him guilty of the lesser-included offense of second-degree murder and, after a separate trial on the weapons misconduct charge, of that offense as well. He was sentenced to a presumptive sixteen-year term of imprisonment for second-degree murder to be followed by a presumptive 2.5-year term of imprisonment for prohibited possession. On appeal, Smiley contends the trial court erred in denying his challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the state's striking of the only African-American person on the jury panel; denying his requested jury instructions regarding second-degree murder and manslaughter; and imposing the presumptive prison term on the murder charge, asserting the sentence is excessive. We affirm for the reasons stated below.

¶2 Under *Batson* and its progeny, a challenge to a party's use of a peremptory strike to remove a juror involves three steps: first, the challenger must establish a prima facie case of discrimination; second, the party striking the juror must give a race-neutral reason for striking the juror; and third, the trial court must decide whether to accept the proffered reason or to reject it on the ground that the person opposing the strike has established it was motivated by purposeful discrimination. *State v. Gallardo*, 225 Ariz. 560, ¶ 11, 242 P.3d 159, 164 (2010). We review a trial court's rejection of a *Batson* challenge for "clear error." *State v. Hardy*, ___ Ariz. ___, ¶ 11, 283 P.3d 12, 16 (2012).

¶3 During jury selection, the state struck Juror 11, an African-American woman and the sole African-American on the jury panel. Smiley, an African-American man, objected under *Batson*, insisting the state was required to provide a race-neutral

reason for removing Juror 11 from the panel. The prosecutor responded she did not believe she was required to give her reason for striking the juror unless and until the trial court found Smiley had made a prima facie case of discrimination. Defense counsel responded, "my prima facie case is that the State struck the sole African American juror. My client is African American."

¶4 The trial court found Smiley had established a prima facie case of discrimination, and the prosecutor stated: "The reason I struck her is that when asked if anyone required more than one witness or had a certain number of witnesses in mind that they would need to find proof beyond a reasonable doubt, [Juror 11] raised her hand." Rejecting Smiley's argument the prosecutor had "offered an insufficient race-neutral reason pursuant to *Batson v. Kentucky*," the court rejected Smiley's objection, stating, "I think the State has articulated a non-race-related basis for striking her in terms of her concerns about the quantum of evidence that this particular juror would require in order to find in the State's favor." Challenging the court's acceptance of the state's reason for striking Juror 11 as race-neutral, Smiley argues the prosecutor "should not [have] be[en] believed," and insists the reason was pretextual, particularly because the juror had assured the court she could follow the court's instructions and the law.

¶5 In determining whether a proffered reason for striking a juror is truly "race-neutral" and not a "pretext for discrimination," trial courts have been directed to "evaluate[] the striking party's credibility, considering the demeanor of the striking attorney and the excluded juror." *Hardy*, ___ Ariz. ___, ¶ 12, 283 P.3d at 16. Also relevant to a trial court's determination whether a "'nondiscriminatory motive'" is behind

a strike, is that the striking party "'accepted other minority jurors on the venire.'" *Id.*, *quoting Gallardo*, 225 Ariz. 560, ¶ 13, 242 P.3d at 164; *see also State v. Martinez*, 196 Ariz. 451, ¶ 16, 999 P.2d 795, 800 (2000) (trial court must assess credibility of proponent and explanation in determining whether opponent of strike has met burden of proving discrimination). The explanation need only be facially neutral and legitimate, not plausible or persuasive. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995); *see also Martinez*, 196 Ariz. 451, ¶ 16, 999 P.2d at 800. Because a trial court is in the best position to assess credibility of individuals before it and make factual findings based on that assessment, we grant it great deference in determining whether to accept as race-neutral a party's stated reason for striking a juror. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991); *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006).

¶6 We have no basis for reversing here. The trial court's finding that the prosecutor had provided a race-neutral reason for removing Juror 11 was based not only on the reason itself but, we can infer, the court's determination that the prosecutor was credible and its acceptance of her assurance that her decision to strike the juror had not been racially motivated. We also can infer that, notwithstanding the juror's assurances she would follow the law and the court's instructions, the court nevertheless accepted as credible the prosecutor's concern the juror misunderstood the quantum of evidence necessary to render a verdict in the state's favor. By asking this court to simply disbelieve the prosecutor and reject her professed race-neutral reason for removing Juror 11, Smiley is asking us to second-guess the trial court's credibility assessment. This we will not do. *See Hernandez*, 500 U.S. at 365.

¶7 Smiley next contends the trial court erred when it denied his request for a jury instruction that would have informed the jurors that if they found him not guilty of first-degree murder but guilty of second-degree murder, the jury then had to consider whether he had committed the lesser-included offense of manslaughter before rendering a guilty verdict on the offense of second-degree murder. But as Smiley concedes in his opening brief, during the settling of instructions, his counsel agreed with the state and the court that his proposed instructions, including the one at issue here, were "basically subsumed and taken care of by the Court's instructions."

¶8 Because he did not dispute the trial court's rejection of his requested instruction and agreed the court's instructions were proper, he thus forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Consequently, he was required to show there was error and that it was so egregious it deprived him of a fair trial or a right that was essential to his defense. *See State v. Moore*, 222 Ariz. 1, ¶ 75, 213 P.3d 150, 164 (2009). Additionally, we review de novo whether jury instructions correctly stated the law. *State v. Roque*, 213 Ariz. 193, ¶ 138, 141 P.3d 368, 401 (2006). And in making that determination, we review the instructions as a whole. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). We see no error, much less error that could be characterized as fundamental and prejudicial. The jury was instructed properly on the charged offense and its lesser-included offenses.

¶9 As the state asserts in its answering brief on appeal, the trial court properly instructed the jury consistent with *State v. LeBlanc*, 186 Ariz. 437, 438, 440, 924 P.2d

441, 442, 444 (1996), and the statutes defining the offenses. The jury was instructed it could consider the offense of second-degree murder if it found Smiley not guilty of first-degree murder or could not agree whether he had committed that offense. The court also instructed that if the jury believed he had committed either first-degree or second-degree murder but had a reasonable doubt as to which of the two offenses he had committed, it was required to find him guilty of second-degree murder. The court further instructed that if it found him not guilty of first-degree and second-degree murder or could not decide whether he had committed either offense, it then was required to consider the lesser offenses of manslaughter by sudden quarrel or heat of passion or manslaughter, instructing the jury on the elements of these offenses. And, the court charged the jury if it concluded Smiley was guilty of either second-degree murder or one of the two kinds of manslaughter, but could not decide which, it was required to find him guilty of the lesser offenses—one of the two kinds of manslaughter—rather than second-degree murder.

¶10 These instructions were correct. Smiley's proffered instruction, which would have permitted the jury to consider the manslaughter offenses even if it found him guilty of second-degree murder, was, as Smiley's trial counsel correctly conceded, incorporated in the trial court's instructions. Specifically, the court implicitly told the jury to consider the manslaughter charges even if it had found him guilty of second-degree murder when it instructed the jury that if it concluded Smiley had committed second-degree murder and one of the manslaughter offenses but could not decide which, it was required to find him guilty of the lesser offense.

¶11 But even if we assume the instructions were flawed, we see no error that could be characterized as both fundamental and prejudicial. First, the instructions did not, as Smiley contends, shift the burden of proof to him. We reject his argument to the contrary to the extent he claims the instructions erroneously "treated manslaughter upon sudden quarrel or heat of passion as a lesser-included offense of second[-]degree murder." *Peak v. Acuña*, 203 Ariz. 83, 50 P.3d 833 (2002), does not, as Smiley contends, directly support that assertion and case law is to the contrary. *See State v. Gipson*, ___ Ariz.___, ¶¶ 4, 17, 277 P.3d 189, 190, 192 (2012) (finding manslaughter instruction properly given as lesser-included offense of first-degree murder). And this court rejected similar arguments in *State v. Eddington*, 226 Ariz. 72, ¶¶ 29-33, 244 P.3d 76, 85-86 (App. 2010), and *State v. Garcia*, 220 Ariz. 49, ¶¶ 3, 7-8, 202 P.3d 514, 515, 516-17 (App. 2008), finding any error in the instructions had not been prejudicial.

¶12 With respect to the question of prejudice, the instructions here told the jury, at least implicitly, to consider the manslaughter offenses even if it found Smiley guilty of second-degree murder; the jury had to consider the manslaughter offenses because only then would it be in the position to determine whether it believed he had committed second-degree murder or one of the manslaughter offenses but could not decide which one. As in *Eddington*, here "the jury was aware both from defense counsel's argument and from the trial court's instructions that, if the murder was the result of a sudden quarrel or the heat of passion stemming from adequate provocation by the victim, [Smiley] would be guilty of the less serious offense of manslaughter, not second-degree murder." 226 Ariz. 72, ¶ 32, 244 P.3d at 86. Specifically, trial counsel had argued "[a]t

most" the state had sustained its burden as to "heat of passion manslaughter." Based on the arguments and instructions given, the lesser offense of manslaughter was "in [the] jurors' minds" when they considered second-degree murder. *Id*. Nor did the instructions prejudice the defense on the ground they shifted the burden of proof to Smiley. The court adequately instructed the jury on burdens of proof and we are not persuaded the instructions relating to manslaughter and second-degree murder shifted that burden.

¶13 Additionally, we presume jurors follow the instructions they are given, *Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847, and would not have disregarded the definition of manslaughter when they deliberated. *See Garcia*, 220 Ariz. 49, ¶ 7, 202 P.3d at 516. When viewed as a whole, *see Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268, the instructions adequately and correctly informed the jury on the law and any error in the instructions could not have been prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607; *see also Eddington*, 226 Ariz. 72, ¶ 32, 244 P.3d at 86 (finding similar instruction not prejudicial).

¶14 Smiley's final argument is that, given the mitigating circumstances he claims existed here, the presumptive prison term was excessive. We will not disturb a sentence within the permissible statutory range unless the trial court has abused its broad sentencing discretion by acting in a manner that can be characterized as arbitrary or capricious or the court fails to investigate facts relevant to sentencing. *State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978). As long as a sentence is within permissible statutory limits, we will not modify or reduce it unless it is clearly excessive. *State v. Gillies*, 142 Ariz. 564, 573, 691 P.2d 655, 664 (1984).

¶15 A sentencing court is required to consider all mitigating factors in determining the appropriate sentence. *See* A.R.S. § 13-701(E). Although the court must consider the evidence in mitigation before it, the court is not required to find the evidence constitutes a mitigating circumstance. *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). "'The consideration of mitigating [factors] is solely within the discretion of the [trial] court.'" *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004), *quoting State v. Webb*, 164 Ariz. 348, 355, 793 P.2d 105, 112 (App. 1990). Additionally, "we presume the court considered any evidence relevant to sentencing that was before it." *State v. Cazares*, 205 Ariz. 425, ¶ 7, 72 P.3d 355, 357 (App. 2003). Moreover, "an appellate court presumes that the trial court considered all relevant mitigating factors in rendering its sentencing decision." *State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App. 1995).

¶16 Nothing in the record before us shows the trial court abused its discretion when it imposed the sixteen-year, presumptive prison term. Although the court found no mitigating or aggravating circumstances existed, it was not required to do so. Smiley is correct that he presented evidence in mitigation to the court. We presume the court considered that evidence. *See*. *Id*. Moreover, the record demonstrates that the court reviewed the presentence report and letters that had been submitted. The court was well aware of the mental health issues Smiley points to in his opening brief, which the prosecutor noted during argument, as did defense counsel in urging the court to impose a mitigated term. There is no basis upon which we may interfere. The prison term is not patently excessive.

¶17 We affirm the convictions and the sentences imposed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.