IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

---

THE STATE OF ARIZONA,
*Appellee*,

*v.*

CHADWICK BURNS,
*Appellant*.

No. 2 CA-CR 2015-0278
Filed October 4, 2016

---



---

Appeal from the Superior Court in Pima County
No. CR20142821001
The Honorable Teresa Godoy, Judge Pro Tempore

**AFFIRMED**

---

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Mariette S. Ambri, Assistant Attorney General, Tucson
*Counsel for Appellee*

Emily Danies, Tucson
*Counsel for Appellant*

---

**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

---

V Á S Q U E Z, Presiding Judge:

**¶1** After a jury trial, Chadwick Burns was convicted of the sale of a dangerous drug and sentenced to a prison term of 10.5 years. On appeal, Burns argues the trial court erred by denying his request to inspect an unmarked police vehicle used during the drug sting operation that led to his arrest. He also argues the court erred by denying his *Batson*[1] challenge to the state's peremptory strike of the only African American from the jury panel. For the reasons that follow, we affirm.

**Factual and Procedural Background**

**¶2** We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Burns's conviction. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). In June 2014, Tucson Police officers conducted a sting operation directed at street sales of narcotics. Officer Lorence Jove, working undercover and driving an unmarked vehicle, made contact with Angelina Parks and, after she entered the vehicle, Jove asked for "G," the street name for methamphetamine. Parks told Jove to drive to a nearby motel, where they parked in the front parking lot to the left of another car.

**¶3** Jove gave Parks $30 in marked currency, and Parks walked to the far end of the motel complex, where she entered one of the rooms. Burns met Parks at the door, and after a few minutes, the two walked back toward Jove's vehicle. Although Parks went directly to the front passenger window of Jove's vehicle, Burns walked to the back of the nearby car. Parks leaned in through the

---

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

window and informed Jove that the methamphetamine would cost $40. Meanwhile, Jove watched Burns place the methamphetamine—wrapped into a small ball in "the corner of a shopping bag"—onto the trunk of the sedan. Jove gave Parks a $20 bill, explaining it was all he had left. Parks then walked back to Burns, collected $10 for change as well as the ball of methamphetamine, and returned to Jove to complete the transaction. Burns and Parks were arrested later that night, and officers found one of the marked $20 bills in Burns's possession.

**¶4** A grand jury indicted Burns for the sale of a dangerous drug. His first trial ended with a hung jury. During voir dire at the second trial, the state used a peremptory strike to dismiss the only African American member of the jury panel. Because Burns is also African American, defense counsel raised a *Batson* challenge. The state responded that it had race-neutral reasons to dismiss the juror, and the trial court denied the challenge. The jury found Burns guilty as charged, and the court sentenced him 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).

**Disclosure**

**¶5** Burns argues the trial court erred by denying his motion to inspect the undercover vehicle. Because "a trial court is in the best position to rule on discovery requests," we review the court's denial of a motion for disclosure for an abuse of discretion.[2] *State v.*

[2] Burns suggests the denial of his motion to inspect the undercover vehicle also violated his due-process right to present a defense. *See State v. Abdi*, 226 Ariz. 361, ¶ 27, 248 P.3d 209, 215 (App. 2011) ("The constitutional rights to due process and confrontation guarantee a criminal defendant 'a meaningful opportunity to present a complete defense.'"), *quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986). As the state points out, however, Burns did not raise this argument below and does not argue any constitutional violation resulted in fundamental, prejudicial error. Burns did not respond to the state's assertion in his reply brief, and we do not address the issue further. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d

*Bernini*, 222 Ariz. 607, ¶ 8, 218 P.3d 1064, 1068 (App. 2009), *quoting State v. Fields*, 196 Ariz. 580, ¶ 4, 2 P.3d 670, 672 (App. 1999); *see also State v. Bernini*, 220 Ariz. 536, ¶ 7, 207 P.3d 789, 791 (App. 2009).

**¶6** Burns filed a pretrial motion to inspect Jove's vehicle, noting that "some of the jury panel" from the first trial had "indicated that a better understanding of the level of tint and other physical aspects of the car would be useful for any future jury." In response, the state disclosed additional photographs "taken . . . at night from the undercover vehicle showing [Jove's] ang[le] of vision and what he [could] see from the vehicle." The state also offered to take any additional photographs Burns wanted but argued that, because the "vehicle [was] still used in undercover operations," any further disclosure "could jeopardize[] on[]going investigations." After a hearing, the trial court denied Burns's request to inspect the vehicle but ordered the state to provide any additional photographs requested by Burns.

**¶7** On appeal, Burns first suggests the state was required to permit an inspection of the vehicle pursuant to Rule 15.1(e)(1), Ariz. R. Crim. P. That rule provides that the prosecutor must, "within thirty days of a written request, make available to the defendant for examination . . . [a]ny specified items" under Rule 15.1(b)(5). The items described under Rule 15.1(b)(5) include "all papers, documents, photographs or tangible objects that the prosecutor intends to use at trial." Thus, Burns argues that the undercover vehicle was a "tangible object" subject to disclosure. Although the vehicle was the subject of Jove's testimony, the prosecutor did not "use" the vehicle during Burns's trial, and therefore Rule 15.1(e)(1) does not apply. *Cf. State v. Stewart*, 139 Ariz. 50, 59, 676 P.2d 1108, 1117 (1984) (list of items enumerated under rule includes exhibits used at trial).

**¶8** Next, Burns argues he was entitled to examine the vehicle pursuant to Rule 15.1(g). Under Rule 15.1(g), additional disclosure is warranted if "the defendant has substantial need . . .

---

601, 607 (2005); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

for material or information not otherwise covered by Rule 15.1." In addition, the defendant must show he "is unable without undue hardship to obtain the substantial equivalent by other means." Ariz. R. Crim. P. 15.1(g). In other words, the trial court may consider whether the defendant already has access to information necessary to present his defense without the requested materials. *See Fields*, 196 Ariz. 580, ¶ 9, 2 P.3d at 673. Arizona favors liberal disclosure. *See State v. Ford*, 108 Ariz. 404, 409, 499 P.2d 699, 704 (1972). But Rule 15.1(g) does not authorize a defendant to conduct a "fishing expedition[]," *State v. Kevil*, 111 Ariz. 240, 242, 527 P.2d 285, 287 (1974), *quoting State ex rel. Corbin v. Superior Court*, 103 Ariz. 465, 468, 445 P.2d 441, 444 (1968), or, as noted above, to obtain the evidence requested when a substantial equivalent is available by other means, Ariz. R. Crim. P. 15.1(g).

**¶9** *Fields* guides our analysis in this case. In *Fields*, this court considered whether the trial court had erred in granting the defendants' request for "a physical inspection of the Tucson City/County Crime Laboratory . . . for purposes of observing and videotaping the personnel, equipment, and procedures used in analyzing blood for the presence of intoxicants." 196 Ariz. 580, ¶ 1, 2 P.3d at 671. The defendants alleged that the "Department of Health Services . . . had failed 'to carry out its statutorily mandated function of regulating' forensic labs and that the Crime Lab had failed 'to follow scientifically acceptable procedures in connection with blood analyses.'" *Id.* ¶ 3. This court noted that although they had claimed prior instances of improper procedures and malfunctioning equipment at the lab, the defendants did not allege the test results in their own cases were inaccurate. *Id.* ¶¶ 6-7. Nor did they explain how the "lab deficiencies affected their test results," or "what admissible evidence they expect[ed] to find" during the observation. *Id.* Instead, their arguments were grounded solely on "assertions of counsel, . . . such as, 'it is necessary for the Defendants' expert to be able to actually view the setting in which the analys[e]s are conducted, and the procedures actually employed.'" *Id.* ¶ 8 (alteration in original). And we noted that other evidence already accessible to the defendants, such as independent testing of the blood samples, "would be the best evidence" to resolve the factual dispute. *Id.* ¶ 9.

**¶10** In this case, the record shows several other people were present at the motel complex and parking lot before the sale, including inside the room where Parks met Burns. Nevertheless, we recognize Jove provided the only testimony that Burns had been in possession of the methamphetamine before the sale. Thus, what Jove could actually see out of the tinted back passenger window during the encounter that night was relevant to Burns's defense.[3] *Cf. State v. Superior Court*, 107 Ariz. 332, 334, 487 P.2d 399, 401 (1971) (defendant must show how evidence "could have made a valid contribution to his defense"). However, Burns has not demonstrated a substantial need for an inspection of the vehicle satisfying the requirements of Rule 15.1(g).

**¶11** Burns advances a number of reasons an inspection of the vehicle was necessary. First, he asserts he would have "take[n his] own photographs without using special lenses or aperture settings in an attempt to produce images that would be as close as possible to what the human eye would see at night from the inside of the vehicle." But the state offered "to take additional pictures showing the views from the undercover vehicle or to use [a] tint meter to measure the tint on [the] windows if defense counsel provide[d] the [s]tate with a list of what pictures and tint readings he would like." Burns does not explain why the state could not provide the photographs he desired.

**¶12** Second, Burns argues "[t]he physical inspection of the vehicle would be imperative in order to further impeach [Jove]." However, Burns had the opportunity to cross-examine Jove, and, as the state argued below, Jove was "the only one that can say . . . what

---

[3] The state argues "the officer could see [Burns's] actions without looking through any tinting" by looking out the front passenger window, which was rolled down. Although Jove's initial testimony regarding his line of sight was ambiguous, he provided a photograph in which he "recreate[d] the scene as best [he] could," including the positions of the vehicles, where Burns had been standing, and his "exact view" out of the vehicle. And that exhibit shows without ambiguity that Jove looked through the back passenger window.

he was able to see" that night through the window. And Burns cannot show why the additional photographs provided and offered by the state would not have provided a substantially equivalent basis for impeaching Jove's testimony about what he could or could not see. *See Fields*, 196 Ariz. 580, ¶¶ 4, 8, 2 P.3d at 672-73.

**¶13** Third, Burns argues on appeal that he could have recreated the scene with his investigator and "called this individual to . . . testify to what he could see while looking through the tinted windows of the vehicle at night." But Burns did not raise this argument below in either his motion for inspection or during the hearing on this issue. Discovery requests are best handled by the trial court, which has "a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and . . . can better assess the impact of what occurs before [it]." *State v. Tankersley*, 191 Ariz. 359, ¶ 35, 956 P.2d 486, 495 (1998), *abrogated on other grounds by State v. Machado*, 226 Ariz. 281, ¶¶ 10-16, 246 P.3d 632, 634-35 (2011); *see Bernini*, 222 Ariz. 607, ¶ 8, 218 P.3d at 1068. And when a party fails to raise an argument below, we generally deem that argument forfeited, particularly when the issue "falls within the trial court's purview and discretion." *State v. West*, 238 Ariz. 482, ¶ 49, 362 P.3d 1049, 1063 (App. 2015). Because Burns did not raise this argument below and does not argue it resulted in fundamental, prejudicial error on appeal, we decline to address it further. *See id.* Accordingly, the trial court did not err in denying Burns's request to inspect the vehicle.[4] *See Bernini*, 220 Ariz. 536, ¶ 7, 207 P.3d at 791.

## ***Batson*** **Challenge**

**¶14** Relying on *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), Burns argues the trial court erred by denying his challenge of the prosecutor's peremptory strike of the only African American member of the jury panel. "When reviewing a trial court's ruling on

[4]Because Burns did not show a substantial need satisfying Rule 15.1(g), we need not address the state's other argument, that further disclosure would endanger ongoing undercover investigations.

a *Batson* challenge, we defer to its factual findings unless clearly erroneous, but review its legal determinations de novo." *State v. Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d 787, 793 (App. 2007); *see also Hernandez v. New York*, 500 U.S. 352, 365 (1991) (court's assessment of prosecutor's credibility afforded great deference).

**¶15** A *Batson* challenge consists of three steps:

> First, the challenging party must make a prima facie showing of discrimination based on race, gender, or another protected characteristic. Next, "the striking party must provide a race-neutral reason for the strike." The explanation need not be persuasive or plausible so long as it is facially neutral. Third, the trial court must determine the credibility of the proponent's explanation and whether the opponent met its burden of proving discrimination.

*State v. Butler,* 230 Ariz. 465, ¶ 40, 286 P.3d 1074, 1084 (App. 2012) (citations omitted), *quoting State v. Gallardo,* 225 Ariz. 560, ¶ 11, 242 P.3d 159, 164 (2010). Only in the third step does the persuasiveness of the explanation become relevant: "In determining whether the defendant has proven purposeful discrimination, 'implausible or fantastic justifications may (and probably will) be found to be pretext[ual].'" *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006) (alteration in original), *quoting Purkett v. Elem*, 514 U.S. 765, 768 (1995). The defendant bears the burden of proving that the prosecutor's peremptory strike amounted to purposeful discrimination. *State v. Bustamante*, 229 Ariz. 256, ¶ 17, 274 P.3d 526, 531 (App. 2012).

**¶16** Here, after Burns raised his *Batson* challenge, the prosecutor offered his race-neutral explanation for striking the potential juror before the trial court could determine whether a prima facie case of racial discrimination existed. *See Hernandez*, 500 U.S. at 359 (first *Batson* step becomes moot when prosecutor offers explanation without prompting). The prosecutor stated, "It was concerning to the [s]tate that she is a paralegal that could not

remember a jury trial that she sat on as well as she moved from the paralegal profession[] to a caregiver position." In addition, he explained the potential juror had "a brother with a criminal conviction" and "[o]ther people that [the state] did strike did have criminal convictions." These justifications were race neutral on their face and supported by the record. *Cf. State v. Lucas*, 199 Ariz. 366, ¶ 9, 18 P.3d 160, 162 (App. 2001) (strike of prospective juror who worked as attorney race neutral).

**¶17** Burns argues, however, that there were three other prospective jurors "who had relatives or who themselves had criminal convictions" and a fourth prospective juror who had "informed the court he was a drug addict in recovery" but that the state did not strike any of them. Essentially, Burns invites this court to conduct a comparative analysis of the jurors as described in *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008). But "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *State v. Medina*, 232 Ariz. 391, ¶ 48, 306 P.3d 48, 61 (2013), *quoting Snyder*, 552 U.S. at 483. Our supreme court has therefore declined to conduct a comparative juror analysis "when the similarities between peremptorily stricken jurors and those remaining on the panel were not raised at trial." *Id.* Because Burns failed to develop this argument below, we also decline to conduct such an analysis.

**¶18** In any event, even if we exclude the state's justification related to the former conviction, the state also expressed concern over the potential juror's legal experience, her change in career, and the fact that she could not recall any detail about a jury trial on which she had served as a juror. Burns responds that "the [s]tate did not further question [the potential juror] about when she was a paralegal, how long ago, and how long ago she sat on a jury" and therefore asserts these justifications are "a weak excuse for striking the only African American from the panel." But the state's justification "need not rise to the level of a challenge for cause." *Hernandez*, 500 U.S. at 362-63. And it was Burns's burden to raise these questions below. *See Bustamante*, 229 Ariz. 256, ¶ 17, 274 P.3d at 531; *see also West*, 238 Ariz. 482, ¶ 49, 362 P.3d at 1063. Accordingly, we cannot say the trial court abused its discretion by

denying Burns's *Batson* challenge. *See Hernandez*, 500 U.S. at 365; *Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d at 793.

## Disposition

**¶19** For the foregoing reasons, we affirm Burns's conviction and sentence.