FILED BY CLERK
APR 20 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GABRIEL ALFONSO CARRASCO, Appellant.	2 CA-CR 2010-0280 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900056

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Jeffrey L. Sparks — Phoenix
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Appellant Gabriel Carrasco was charged with reckless trafficking in stolen property, weapons misconduct, and possession of a forged instrument. After Carrasco filed a motion to sever the third count from the other two, the state moved to dismiss that count, which the trial court granted. A jury found him guilty of weapons misconduct and acquitted him of trafficking in stolen property. The court sentenced Carrasco to the presumptive prison term of ten years. On appeal he contends the court erred in denying his claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), that the state had unlawfully used a peremptory strike to remove the only African-American from the jury panel. He also challenges his sentence, arguing the court either misspoke or sentenced him to prison on count one, the charge of which the jury had acquitted him.

¶2 Carrasco first contends the trial court erred when it rejected his *Batson* challenge to the state's use of a peremptory strike to remove the only African-American from the jury panel. The Equal Protection Clause of the Fourteenth Amendment prohibits a party from using a peremptory strike to remove a prospective juror from the jury panel based solely upon race. *Batson*, 476 U.S. at 89. To assert a *Batson* challenge, the party objecting to the strike must first make a prima facie showing of discrimination, after which the striking party must articulate a race-neutral reason for seeking to remove the panel member. *See State v. Roque*, 213 Ariz. 193, ¶ 13, 141 P.3d 368, 378 (2006). If the striking party provides a race-neutral explanation for striking the panel member, the trial court must decide whether the party challenging the strike has sustained his or her burden of proving purposeful racial discrimination. *Id.* That is, the challenging party must persuade the court that the proffered reason for striking the panel member is

pretextual. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). On review, we defer to the trial court with respect to any factual findings unless those findings are clearly erroneous, but we review any legal determinations de novo. *Id*. ¶ 16.

¶3 In the third step of the *Batson* process, the trial court must assess the credibility of the striking party's explanation and determine "'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*, 537 U.S. 322, 339 (2003). "Th[e] 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 [an appellate c]ourt." *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006). Consequently, because "'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge,'" we will not reverse the trial court's ruling unless it is clearly erroneous. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008), *quoting Hernandez v. New York*, 500 U.S. 352, 365 (1991) (alteration in *Snyder*); *see also Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d at 793; *Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d at 844-45.

¶4 Asserting the objection here, defense counsel pointed out to the trial court that F. was the only African-American on the jury panel, adding that he did not see any reason for the state to have struck that juror. The court asked the prosecutor to provide an explanation for striking F., thereby presumably concluding Carrasco had satisfied the first step of the *Batson* procedure by establishing a prima facie case of discrimination. *See Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845. The prosecutor responded, "I don't have any real reason that I could articulate, Your Honor. I just didn't feel it had nothing to do

with the fact that he was black. It didn't feel [sic] that I wanted him among the jury." He then added, "I didn't have a good feel, one way or the other," explaining he had two peremptory strikes remaining and wanted to use them rather than forfeit them. Defense counsel responded that in his view, the prosecutor had failed to provide a race-neutral reason for striking F., who should remain on the panel, noting the prosecutor apparently had consulted a police officer in coming up with the purported race-neutral reason for striking F. Denying the *Batson* motion, the court stated it did not "see any purposeful discrimination" and did not "believe that the strike really had anything to do with race . . . under the circumstances." The court added that it saw independent reasons the prosecutor could have had for striking F., which was that F. had been "very quiet and not—well, very quiet and reluctant to participate in the voir dire."

¶5 Relying in part on *State v. Boston*, 170 Ariz. 315, 823 P.2d 1323 (App. 1991), Carrasco contends on appeal that the explanation the prosecutor gave for striking F. had been unrelated to the case and that the prosecutor had not sufficiently rebutted the prima facie showing of discrimination. Although the *Batson* "process does not demand an explanation that is persuasive, or even plausible," *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995), some explanation is required. Here, the prosecutor stated he did not "have any real reasons that [he] could articulate." He added, "It had nothing to do with the fact that he was black," and "It didn't feel that I wanted him among the jury." Although the court found "there was no purposeful discrimination" the court correctly noted, "There was no explanation given one way or the other . . . ." Nevertheless, Carrasco is not entitled to reversal of his conviction.

¶6 We agree with the state that, although the trial court asked the prosecutor for a race-neutral explanation for striking F., no explanation was required because Carrasco had not set forth a prima facie case of discrimination. *See Purkett*, 514 U.S. at 767 (explaining proponent of strike has burden of production to come forward with race-neutral explanation only after defendant has made out prima facie case of racial discrimination). A "prima facie case of purposeful discrimination [is established] by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94. "The presence of minority group members on the jury undermines an inference that the state exercised its strikes in a racially-discriminatory fashion." *State v. Thompson*, 190 Ariz. 555, 557, 950 P.2d 1176, 1178 (App. 1997).

¶7 In *Thompson*, the court found the defendant had not established a prima facie case of discrimination where the state struck one African-American from the panel but another African-American remained on the panel and served on the jury. *Id*. As the state points out, a defendant establishes a prima facie case by showing that the state had removed from the panel the only prospective juror of the same ethnicity as the defendant. *See State v. Johnson*, 183 Ariz. 623, 633, 905 P.2d 1002, 1012 (App. 1995). But, "the mere fact that a prosecutor exercised peremptory challenges against veniremen of a defendant's race does not necessarily establish a *prima facie* case." *State v. Jackson*, 157 Ariz. 589, 590, 760 P.2d 589, 590 (App. 1988). And here, unlike in *Thompson*, the stricken panel member was a minority but not of the same ethnicity as Carrasco, who is Hispanic.

¶8 Carrasco relies on *Crittenden v. Ayers*, 620 F.3d 962 (9th Cir. 2010), to support his argument on appeal. That opinion was withdrawn and an amended opinion on denial of rehearing and rehearing en banc was issued in *Crittenden v. Ayers*, 624 F.3d 943 (9th Cir. 2010), on which the state relies. There the court stated, "the prosecutor's use of a peremptory strike against the only African-American prospective juror is a relevant consideration, although it does not by itself raise an inference of discrimination." *Id*. at 955. As we stated above, Carrasco is not African-American but Hispanic, and the fact that the prosecutor struck the only African-American on the panel did not, in and of itself, establish a prima facie case. *See Johnson*, 183 Ariz. at 633, 905 P.2d at 1012; *Jackson*, 157 Ariz. at 590, 760 P.2d at 590. Nothing else during voir dire suggested the prosecutor's reason for striking F. had been racially motivated. *See Jordan*, 171 Ariz. at 66, 828 P.2d at 790. Therefore, despite the prosecutor having provided no explanation for striking F., there was no indication of discriminatory intent and the court did not err in permitting the strike.

¶9 We also reject Carrasco's second argument on appeal—that the trial court possibly sentenced him for count one, the offense of which he was acquitted, rather than count two. The sentencing minute entry incorrectly listed the offense as recklessly trafficking in stolen property, a class three felony. But the court corrected the error, which it characterized as clerical, in an amended sentencing minute entry. And the transcript from the sentencing hearing confirms the court imposed the presumptive, ten-year prison term on count two—the charge for which the jury rendered a guilty verdict. The initial error was corrected and the court's true intent is clearly reflected "by reference

to the record." *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). Therefore, we need not remand this matter for further clarification. *See State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992).

¶10 Carrasco's conviction and sentence are affirmed.

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

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

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