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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OF ARIZONA, Appellee, v. MARCO ERNESTO ACOSTA-GARCIA, Appellant.	2 CA-CR 2010-0342 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094518001

Honorable Edgar B. Acuña, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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B R A M M E R, Judge.

¶1 Marco Acosta-Garcia appeals from his robbery conviction. He asserts the trial court erred in rejecting his challenge to the prosecutor's preemptive strike of a juror and by imposing an aggravated sentence. We affirm Acosta-Garcia's conviction but vacate his sentence and remand his case to the trial court for resentencing.

¶2 Viewed in the light most favorable to sustaining the jury's verdict, *see State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008), the evidence establishes that, as the victim parked his automobile, Acosta-Garcia blocked the victim's car with his own, got out, and demanded money from the victim. He left after the victim gave him $100. After a two-day trial, the jury acquitted him of the charged offense of armed robbery but convicted him of the lesser-included offense of robbery. Citing as aggravating factors Acosta-Garcia's lack of remorse, criminal history, and dangerousness to the community, the trial court sentenced him to a "slightly aggravated," five-year prison term.

¶3 Pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), Acosta-Garcia challenged the prosecutor's preemptive strike of a potential juror, Z. In *Batson*, the United States Supreme Court held the Equal Protection Clause of the Fourteenth Amendment prohibits the state from using peremptory strikes to remove prospective jurors "solely on account of their race." 476 U.S. at 89. The trial court asked the prosecutor to provide her reason for striking Z. The prosecutor responded:

> When the Court first swore in the panel I always look at the people in the jury box to see to make sure everyone is raising all their hands and swearing. [Z.] actually looked down and his lips barely moved when he made the oath. He didn't have any input on any other questions except for [those

> background questions asked of all jurors on] the board. I feel that he may have a hard time actually being engaged in the process with the other jurors because he is so soft spoken, and I believe his voice may be over[]shadowed by the others so I don't believe he would be a good fit for this jury.

Acosta-Garcia acknowledged he did not "observe [Z.] when he was being asked questions" and "can't speak to whether or not he was responding or not responding." He noted, however, that Z. could retake the oath. The court stated that whether Z. had actually taken the oath was "subjective," but also commented Z. had a "strong accent" and was "difficult to understand." It found the prosecutor's explanation was "sufficient" and race-neutral, and denied Acosta-Garcia's *Batson* challenge.

¶4 When reviewing a trial court's ruling on a *Batson* challenge, we review de novo the court's application of the law but defer to its findings of fact unless clearly erroneous. *See State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844-45 (2006). A trial court's analysis of a *Batson* challenge involves three steps. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). First, the challenging party must make a prima facie showing of discrimination based on race, gender, or another protected characteristic. *State v. Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d 160, 162 (App. 2001). The proponent must then provide a facially neutral explanation for the strike. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). The explanation need not be persuasive or plausible so long as it is facially neutral. *Id.* at 768. Third, the court must determine the credibility of the proponent's explanation and whether the opponent met its burden of proving discrimination. *State v. Martinez*, 196 Ariz. 451, ¶ 16, 999 P.2d 795, 800 (2000); *State v. Eagle*, 196 Ariz. 27, ¶ 9, 992 P.2d 1122, 1125 (App. 1998). "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." *Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845. Therefore, the court's finding is entitled to great deference. *Id.*

¶5 Acosta-Garcia argues the prosecutor's reason for striking Z. was pretextual, and the trial court therefore erred in the third step by finding the prosecutor credible. He first notes the prosecutor did not strike several prospective jurors who also did not respond to any questions other than the general background questions, and that the court had commented the jury seemed unusually quiet. But Acosta-Garcia identifies nothing in the record suggesting those other prospective jurors appeared, in the words of the prosecutor, to be as "soft spoken" as Z., to the point where the prosecutor believed he would not be "engaged" in the deliberations process.[1] And the court is in the best position to view the demeanor of the jurors and evaluate the validity of the prosecutor's explanation. *See Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845; *see also Thaler v. Haynes*, ___ U.S. ___, 130 S. Ct. 1171, 1175 (2010) (even in absence of personal recollection of juror's demeanor, judge may accept prosecutor's explanation as credible).

¶6 Acosta-Garcia also argues the prosecutor's failure to "conduct any follow-up questioning" of Z. demonstrates the prosecutor's reason for striking him was

[1]We agree with Acosta-Garcia that the prosecutor's description of Z.'s conduct during the oath was more likely intended to illustrate Z.'s demeanor and not to suggest Z. should retake the oath. Although the trial court discussed the oath, it did so in response to Acosta-Garcia's argument below. And nothing in the record suggests the court found the prosecutor's explanation based on Z.'s demeanor to be inadequate or incredible; consistent with the prosecutor's explanation, the court noted that Z. was difficult to understand.

pretextual. We disagree. The cases Acosta-Garcia cites in support of the proposition are readily distinguishable and do not suggest the trial court clearly erred here in finding the prosecutor credible. In each, there were several additional facts present that strongly suggested the prosecutor's explanation was not credible. For instance, in *Ali v. Hickman*, 584 F.3d 1174, 1187-88 (9th Cir. 2009), the Ninth Circuit Court of Appeals found impermissible the prosecutor's use of a peremptory strike purportedly based on the juror's objectivity, when the juror "stated unequivocally" that a molestation incident would not affect her objectivity, and the prosecutor "fail[ed] to clear up any lingering doubts about [the juror's] objectivity by asking follow-up questions." Similarly, in *Miller-El v. Dretke*, 545 U.S. 231, 243-44 (2005), the Supreme Court noted the prosecutor not only had failed to ask any follow-up questions, but also had mischaracterized the juror's "outspoken support" for the death penalty and ignored similarly situated jurors. *See also Kesser v. Cambra*, 465 F.3d 351, 364 (9th Cir. 2006) (prosecutor failed to explain how juror being "unusually pretentious" about her work "render[ed] her unsuitable for the jury" and prosecutor's reason not supported by record); *Green v. LaMarque*, 532 F.3d 1028, 1033 (9th Cir. 2008) (prosecutor failed to strike similarly situated jurors, some with "experiences [that] were considerably more suggestive of possible anti-prosecution bias"; other bases for strike not supported by record; used peremptory strikes to eliminate all African-American jurors). For the reasons stated, we find no basis to disturb the court's determination that the prosecutor's peremptory strike did not violate the Fourteenth Amendment.

¶7 Acosta-Garcia next contends the trial court erred by imposing an aggravated prison sentence. He first argues that aggravation of his sentence based in part on A.R.S. § 13-701(D)(21)[2] was improper because that factor was not proven to the jury beyond a reasonable doubt. Acosta-Garcia did not raise this argument below and, consequently, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶8 But the trial court did not rely on § 13-701(D)(21) in aggravating Acosta-Garcia's sentence. Although the state alleged § 13-701(D)(21) as an aggravating factor, it did not mention it at either the aggravation hearing or at sentencing. Nor did the court refer to § 13-701(D)(21) in its sentencing minute entry or colloquy. And, despite Acosta-Garcia's contrary argument, the fact the court found Acosta-Garcia had a prior federal conviction for illegal entry and stated at sentencing that it "considered those things that [it had] previously mentioned on the record" does not suggest the court had aggravated Acosta-Garcia's sentence based on § 13-701(D)(21). Accordingly, we do not address this argument further.[3]

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[2]Section 13-701(D)(21) permits the trier of fact to find as an aggravating factor that "[t]he defendant was in violation of 8 United States Code § 1323, 1324, 1325, 1326 or 1328 at the time of the commission of the offense." Those code sections involve the violation of certain federal immigration provisions.

[3]We also note that Acosta-Garcia is incorrect that subsection (D)(21) was the only "statutorily enumerated" aggravating factor found by the trial court. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶¶ 24-25, 218 P.3d 1069, 1079-80 (App. 2009) (aggravated sentence improper if based solely on § 13-701(D)(24) "catch-all"), *citing State v. Schmidt*, 220 Ariz. 563, 208 P.3d 214 (2009). The court also noted Acosta-Garcia's criminal history, which included felonies committed within the preceding ten years, which is an aggravating factor enumerated in § 13-701(D)(11).

¶9 But we agree with Acosta-Garcia that the trial court erred in relying upon his "lack of remorse" as an aggravating factor. A defendant's failure to express remorse is usually nothing more than a refusal to admit guilt. *State v. Hardwick*, 183 Ariz. 649, 656, 905 P.2d 1384, 1391 (App. 1995). Such a refusal is irrelevant for sentencing purposes and its consideration as an aggravating factor usually will violate the defendant's Fifth Amendment privilege against self-incrimination. *Id.*; *see also State v. Carriger*, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984) ("A defendant is guilty when convicted and if he chooses not to publicly admit his guilt, that is irrelevant to a sentencing determination."). We find nothing in the record suggesting the court's lack-of-remorse finding was based on anything other than Acosta-Garcia's failure to admit his guilt.

¶10 Although Acosta-Garcia did not raise this argument below, a trial court's reliance on an improper factor in imposing an aggravated sentence constitutes fundamental, prejudicial error unless the court clearly would have imposed the same sentence absent the factor. *See State v. Munninger*, 213 Ariz. 393, ¶¶ 12-15, 142 P.3d 701, 705 (App. 2006) (when clear trial court would have imposed aggravated sentence even absent improper aggravating factor, error neither fundamental nor prejudicial). The state argues the record demonstrates the trial court would have imposed the same sentence absent its consideration of the improper factor. We disagree. Although there were other, valid, aggravating factors present, the court found several mitigating factors and imposed only a five-year sentence, only six months longer than the presumptive term, suggesting that whether to impose an aggravated sentence at all was a close

question. *See* A.R.S. § 13-703(I). Because we cannot say with certainty that the court would have imposed the same sentence absent its consideration of the improper factor, we must vacate Acosta-Garcia's sentence and remand the case for resentencing.

¶11 We affirm Acosta-Garcia's conviction but vacate his sentence. We remand the case to the trial court for Acosta-Garcia to be resentenced.

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

CONCURRING:

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

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