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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. OLIVER MICHAEL PRYOR, Petitioner.	2 CA-CR 2010-0399-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062087

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner
Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Petitioner Oliver Pryor seeks review of the trial court's summary dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Pryor was convicted after a jury trial of two counts of continuous sexual abuse of a child, both dangerous crimes against children, and two counts of furnishing obscene or harmful items to a minor. The trial court sentenced him to a combination of concurrent and consecutive, presumptive prison terms totaling 42.5 years. We affirmed his convictions and sentences on appeal. *State v. Pryor*, No. 2 CA-CR 2008-0375 (memorandum decision filed Oct. 21, 2009).

¶3 Pryor then filed a petition for post-conviction relief arguing his trial counsel had been ineffective for failing to raise a claim based on *Batson v. Kentucky*, 476 U.S. 79 (1986), that the state had improperly used its peremptory strikes to remove several male jurors. He provided an affidavit from his trial counsel stating counsel had been concerned that the jury "had only three men" and therefore did not have "a fair balance between men and women," and counsel would have made a *Batson* challenge "had [he] noticed the prosecutor's use of strikes to remove mostly men from the panel." *See Batson*, 476 U.S. at 85-86 (defendant has "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria"); *see also J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994) (gender valid basis for *Batson* claim). He also included a minute entry and affidavit showing the prosecutor's use of peremptory strikes to remove male potential jurors had been challenged unsuccessfully in a previous, unrelated case. The trial court summarily denied his claim, finding Pryor had failed to state a colorable claim of prejudice because he had not shown the state's peremptory strikes of male jurors had a discriminatory purpose and had not shown "the male jurors would have in fact been more sympathetic to [Pryor's] case." *See Strickland v. Washington*, 466 U.S. 668, 687 (1984)

(to prevail on ineffective assistance of counsel claim, defendant must show counsel's performance deficient under prevailing professional norms and deficient performance prejudiced defense).

¶4 Pryor asserts on review that the trial court erred in requiring him to show prejudice. He argues, "because errors involving composition of the jury" require automatic reversal, it was not necessary for him to demonstrate he was prejudiced by counsel's purported ineffectiveness in failing to raise a *Batson* claim. Although Pryor is correct that when the denial of a *Batson* claim is successfully challenged on appeal, we must reverse the conviction, *see Batson*, 476 U.S at 100, his argument appears to presuppose that a *Batson* challenge would have been successful if raised by his trial counsel. Even assuming, without deciding, that Pryor has demonstrated his counsel should have raised a *Batson* challenge, that alone is not sufficient to show prejudice. He also must show a reasonable probability a *Batson* challenge would have resulted in a different jury. *See Strickland,* 466 U.S. at 694 (to establish prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *see also Batson*, 476 U.S. at 99 n. 24 & 100 (state must provide "neutral explanation" for strikes if defendant makes prima facie showing strikes improperly motivated; in event of successful challenge, trial court should either "discharge the venire and select a new jury from a panel not associated with the case" or "disallow the discriminatory challenges" and reinstate challenged jurors). Pryor has not made a colorable showing of such a probability.

¶5 Of the fifty-four potential jurors questioned during voir dire, nineteen were men, eleven of whom were struck for cause. The prosecutor used five of her six peremptory strikes to remove men, leaving three on the jury, which was composed of fourteen individuals including two alternate jurors. But Pryor has identified nothing in the record suggesting the state lacked a gender-neutral reason to strike the five men from the panel. The fact the prosecutor's use of peremptory strikes to remove male jurors had been challenged under *Batson* in a previous, unrelated case does not weigh in Pryor's favor. That challenge was not successful and therefore does not suggest the prosecutor lacked a valid reason to strike the male jurors in Pryor's trial. Indeed, the trial court in the other case apparently determined defense counsel had not made the prima facie showing required under *Batson*. We find no abuse of discretion in the trial court's determination here that Pryor failed to demonstrate a colorable claim of prejudice.

¶6 For the reasons stated, although we grant review, we deny relief.

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

CONCURRING:

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

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