FILED BY CLERK
DEC -7 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FRANCISCO ANTHONY SALOMON, Appellant.	2 CA-CR 2008-0310 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054212

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Frank P. Leto
Tucson
Attorneys for Appellant

E S P I N O S A, Presiding Judge.

¶1 After a jury trial, Francisco Salomon was convicted of two counts of kidnapping and one count each of aggravated assault, disorderly conduct, aggravated assault against a minor, burglary, armed robbery, and aggravated robbery, all stemming from a home invasion in September 2005. The trial court sentenced him to a combination of concurrent and consecutive mitigated prison terms totaling fourteen years. On appeal, he contends the trial court erred in precluding his proffered expert witness and in denying his motion for a mistrial based on the prosecutor's use of peremptory jury strikes. We affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In September 2005, A. was home with her three young children when Salomon, who was carrying a gun, and several other armed men kicked in her front door and began ransacking the house. Although some of the men were masked, Salomon was not and she saw his face as he pointed his weapon at her and her son, ordered them to lie down, and threatened to kill one of her crying children. After searching the house for a safe, which A. did not have, the men took a shotgun and a Playstation video game console and left in a green vehicle. A. immediately called the police and described the vehicle in which the men had fled. Shortly thereafter, officers located the car next to the Santa Cruz River and captured and arrested Salomon and four other men in the riverbed. A. came to the police station later that day and identified Salomon as one of the men who had broken into her home. Salomon

was charged with offenses related to the home invasion and was convicted and sentenced as outlined above.[1]

Discussion

Admission of Expert Testimony

¶3 Salomon first argues the trial court erred in precluding expert testimony on factors that may affect eyewitness identification. We review a trial court's preclusion of expert witness testimony for an abuse of discretion. *See State v. McCutcheon*, 162 Ariz. 54, 58, 781 P.2d 31, 35 (1989). Expert testimony regarding eyewitness identification is admissible if: (1) the expert is qualified; (2) the subject is a proper subject of expert testimony; (3) the opinion conforms to a generally accepted explanatory theory; and (4) the probative value of such testimony is not outweighed by any prejudicial effect. *See State v. Chapple*, 135 Ariz. 281, 291, 660 P.2d 1208, 1218 (1983); *see also State v. Nordstrom*, 200 Ariz. 229, ¶ 29, 25 P.3d 717, 730 (2001). "Expert opinion on eyewitness identification will not frequently meet the standard for proper subject, however, and a trial court's discretionary ruling generally will be upheld." *State v. Roscoe*, 184 Ariz. 484, 495, 910 P.2d 635, 646 (1996).

¶4 After Salomon was arrested, he was brought to the Marana Police Station and A. identified him in the "show-up," which consisted of Salomon as well as the other four

[1]Two defendants were tried separately from Salomon. Salomon was tried with a codefendant, his half-brother, who was also convicted of armed robbery and aggravated robbery, but is not a party to this appeal.

men arrested in the riverbed. At trial, Salomon sought to introduce the expert testimony of Linda Demaine regarding factors affecting eyewitness identifications. After reviewing her report, which focused specifically on the reliability of A.'s identification, and interviewing Demaine, the state moved to preclude her testimony on the basis of Rule 702, Ariz. R. Evid. The trial court heard argument on this matter as well as Salomon's offer of proof and found this was not the type of case that required expert testimony for the jury to reach a conclusion, implicitly finding A.'s identification not a proper subject for expert testimony. *See McCutcheon*, 162 Ariz. at 56-58, 781 P.2d at 33-35 (quantum of evidence amassed against defendant relevant to determination whether eyewitness expert necessary); *see also State v. Lindsey*, 149 Ariz. 472, 473, 720 P.2d 73, 74 (1986) (expert testimony regarding recognized principles of behavioral science only appropriate where facts needed to make ultimate judgment may not be within common knowledge of ordinary juror).

¶5 Relying on *Chapple*, Salomon contends the court committed reversible error in precluding Demaine from testifying because "the key issue in the case was the identification" due to what he contends was a dearth of evidence linking him to the crime.[2] Contrary to Salomon's assertions, however, *Chapple* is not analogous to this case. There, a murder defendant was identified by two interested, related witnesses more than a year after

[2]Even were we to agree the trial court erred in precluding Demaine's testimony, this conclusion would not necessarily require reversal. *See State v. Hooper*, 145 Ariz. 538, 546 n.1, 703 P.2d 482, 490 n.1 (1985) (noting reversal in *Chapple* required after court both erroneously precluded expert testimony and admitted unduly prejudicial photograph).

the crime, following prior inconsistent identification attempts. 135 Ariz. at 285-86, 660 P.2d at 1212-13. The state presented no evidence whatsoever linking the defendant to the crime other than the belated eyewitness identifications. *Id*. Furthermore, the defendant presented numerous alibi witnesses who testified he was in Illinois and not Arizona the night of the murder. *Id*. Finding the trial court erred in precluding expert testimony about general facts and studies on eyewitness testimony, our supreme court stated that in most circumstances expert testimony on this issue is inappropriate, but given the unusual facts in *Chapple* and the state's reliance solely on eyewitness identification, such evidence was appropriate. *Id*. at 296-97, 660 P.2d at 1223-24.

¶6 Here, although Salomon contends there was no direct physical evidence linking him to the crime, the state presented substantial circumstantial evidence of his guilt. Immediately following the invasion, A. reported that several Hispanic males fled her home in a green car with a "fin" on the back. A short time later, police officers spotted a green car with a rear spoiler occupied by several people on a road near A.'s home. They attempted to stop the car by activating their overhead lights, but the driver did not pull over and they lost sight of the car in traffic.[3] A short time later, officers found the empty car parked alongside the riverbed. Inside it, they found hats, a mask, and gloves as well as a Playstation. When they searched the riverbed, which several witnesses testified is not used for recreation

[3]At trial, an officer explained department protocol prohibits chasing suspects of nonviolent crimes, and the officers who initially located the vehicle were not aware it was being sought in connection with an armed home invasion.

because it is overgrown with vegetation, near a waste treatment plant, and full of snakes, they found Salomon and his codefendants. All five men had tried to evade the police officers who were seeking them on foot and with a helicopter. Police officers also recovered additional hats and masks in the riverbed that were similar to the ones found in the car.

¶7 Additionally, officers discovered a shoe print on A.'s front door, which experts analyzed and found consistent with the shoes Salomon had been wearing when he was apprehended.[4] Several weeks later, police executed a search warrant on Salomon's parents' property, where they recovered two guns hidden in a car. These weapons were consistent with what A.'s son, T., had described to police, and one was covered in dirt and dried mud.

¶8 We agree with the state that this case is more like *McCutcheon*, where our supreme court reaffirmed and clarified its holding in *Chapple*. In *McCutcheon*, the defendant was charged with the armed robbery of a drugstore. 162 Ariz. at 56, 781 P.2d at 33. Following a second robbery approximately one week later, police officers recovered a bag belonging to the defendant that contained the drugs taken during the first robbery. *Id*. When they found the defendant, he was carrying $1,300 in cash and a revolver. *Id*. The store pharmacist later identified the defendant in a photographic lineup. *Id*.

---

[4]Salomon complains that it was unfair for the trial court to admit the state's shoeprint identification expert but not his eyewitness testimony expert. This argument is without merit. A trial court need not admit one expert because the party's opponent has successfully introduced expert testimony on a different subject.

¶9 Affirming the trial court's ruling precluding the defendant's expert witness, the supreme court distinguished *Chapple*, noting that it "presented an extremely complex factual scenario," where "*nothing* connected the defendant to the crime" and thus, under its "peculiar circumstances," the evidence was admissible. *Id*. at 57, 781 P.2d at 34. The court emphasized that the holding in *Chapple* was not intended to supplant the "'usual discretionary ruling that the trier of fact needs no assistance from expert testimony on the question of reliability of identification'" and that "'in the usual case,'" it would uphold a trial court's preclusion of such witnesses. *Id*., *quoting Chapple*, 135 Ariz. at 296-97, 660 P.2d at 1223-24. The court also reiterated that expert testimony would be inappropriate "'in even the most extraordinary case[s]'" if the testimony is offered to show "'the likelihood that a particular witness is correct or mistaken.'" *Id*., *quoting Chapple*, 135 Ariz. at 297, 660 P.2d at 1224. In light of the "prompt, positive, unambiguous eyewitness identification supported by considerable other physical evidence tying the defendant [in *McCutcheon*] to the crime," the court concluded "[t]he only real purpose of the proffered testimony . . . would be to attack the credibility of a specific witness." *Id.* at 58, 781 P.2d at 35.

¶10 Although, as Salomon correctly points out, *McCutcheon* is not entirely on point,[5] we find the present case far closer to *McCutcheon* than it is to *Chapple*. There was strong, albeit circumstantial, evidence tying Salomon to the home invasion and A. identified

[5]For example, unlike here, the defendant in *McCutcheon* did not make an offer of proof and the recovered property was directly linked to the defendant. 162 Ariz. at 56, 781 P.2d at 33.

him just hours after the incident. And like in *McCutcheon*, it would appear the only purpose for having this expert witness testify would have been to discredit A.'s testimony.[6] 162 Ariz. at 58, 781 P.2d at 35. Accordingly, we cannot say the trial court abused its discretion in precluding Demaine's testimony.

¶11 Citing *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967), Salomon further contends the trial court's refusal to admit Demaine's testimony violated his Sixth and Fourteenth Amendment rights to present a defense. He argues the trial court "mechanistically applied an evidentiary rule to defeat [his] presentation of expert testimony," and wrongly "made [its] own determination that [Salomon] could argue factors of reliability without any evidentiary support." But neither *Chambers* nor *Washington* addresses the admission of expert identification testimony, and the right to present a defense "is not unlimited" and can be curtailed by evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). Moreover, Salomon's contention that the court applied the rule "mechanistically" is not supported by the record, which reflects it considered both written and oral arguments on this issue and ruled after taking the matter under advisement. Because this was clearly not a "mechanistic[] appli[cation]" of this evidentiary rule and because Salomon does not make any arguments regarding the constitutionality of Rule 702, we need not further address his constitutional claim.

---

[6]This conclusion is strengthened by Demaine's expert report, which focuses almost entirely on attacking the validity of A.'s identification.

***Batson* Challenge**

¶12 Salomon next contends the prosecutor violated his right to equal protection under the law by striking minority jurors from the panel. The Equal Protection Clause of the Fourteenth Amendment prohibits a peremptory strike against a juror based solely on race or ethnicity. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *State v. Purcell*, 199 Ariz. 319, ¶ 22, 18 P.3d 113, 119 (App. 2001). 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. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844-45 (2006); *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001).

¶13 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 present a prima facie showing of discrimination based on race, gender, or ethnicity. *See Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d at 162. The proponent must then provide a facially neutral explanation for the strike. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (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. 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), *aff'd*, 196 Ariz. 188, 994 P.2d 395 (2000). "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 trial court's finding is entitled to great deference. *Id*.

¶14 Salomon argues the trial court erred when it did not grant his motion for a mistrial based on his *Batson* challenge. At the conclusion of jury selection, Salomon challenged the panel, noting that of the six minorities in the jury pool, the state had struck four of them. The trial court accepted this as a prima facie showing of discrimination, *see Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d at 162, but accepted the prosecutor's race-neutral justifications for all the strikes. We address each challenged strike in turn.[7]

Juror H.

¶15 After striking Juror H. from the panel, the prosecutor explained he did so because she had agreed she would describe herself as a "conspiracy theorist[]."[8] He was also concerned that she seemed to be a leader, described herself as a skeptic, and had volunteered that she was "likely to come up with the alternative or play the devil's advocate for something."

---

[7]At trial, Salomon offered specific arguments only about Juror H. However, because he generally challenged the striking of all four of the minority jurors, we entertain his arguments relating to the other minority jurors as well.

[8]Although Salomon argues in his opening brief that Juror H. was the only African-American on the panel, the state points out in its answering brief and Salomon concedes in his reply that another African-American juror was seated. *See Eagle*, 196 Ariz. 27, ¶ 12, 992 P.2d at 1125 ("Although not dispositive, the fact that the state accepted other [minority] jurors on the venire is indicative of a nondiscriminatory motive.").

¶16 Salomon points out, as he did at trial, that another woman indicated she felt she was a skeptic and conspiracy theorist but was not struck. When two jurors offer substantially similar answers to questions and the minority juror is struck but the non-minority juror remains, it may be evidence of a pretextual strike. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). However, this does not appear to be the case here. The prosecutor explained that the other juror seemed "basically rational" but not necessarily a leader who would be a holdout. On the other hand, the prosecutor described Juror H. as "an intellectual" who used the words "devil's advocate" to describe herself and might "be the type who is a leader who may think she knows a . . . lot."[9]

¶17 Salomon contends, citing *Snyder v. Louisiana*, 552 U.S. 472 (2008) and *Miller-El*, that the state "ignore[d] th[e] [jurors'] similarity by labeling [the other juror] a follower and [Juror H.] a leader." But he fails to acknowledge that H. made affirmative statements that she would play the devil's advocate. Because there were significant distinctions between H.'s answers, which the prosecutor noted in the trial court, and those of similarly answering jurors, *Snyder* and *Miller-El* do not require that we override the trial court's judgment.[10]

---

[9]Salomon accuses the prosecutor of mischaracterizing Juror H.'s answers describing herself as a conspiracy theorist, *see Miller-El*, 545 U.S. at 244, but there is no doubt she described herself as a person who would be a devil's advocate, which was the prosecutor's concern.

[10]In *Snyder* the prosecutor claimed an African-American juror looked nervous and, because he was a student teacher, "'he might, to go home quickly, come back with guilty of a lesser verdict'" to avoid a penalty phase. 552 U.S. at ___, 128 S. Ct. at 1208. The trial judge accepted these explanations without question or comment. *Id*. The Court disregarded the prosecutor's first reason because "the record [did] not show that the trial judge actually

Salomon also maintains, citing federal Ninth Circuit cases, that "[s]ubjective statements of the prosecutor are not enough" to overcome a *Batson* challenge, but the prosecutor's rationale was clearly supported by facts in the record.[11] *See State v. Cañez*, 202 Ariz. 133, ¶ 26, 42 P.3d 564, 577 (2002) (no error in denying *Batson* challenge when objective facts supported strikes). And, after hearing the prosecutor's explanation, the trial court accepted his reasons as a racially neutral justification. *See id.* ¶ 28 (deference to trial court because its ruling is "largely upon an assessment of the prosecutor's credibility"); *see also Snyder*, 552 U.S. at ___, 128 S. Ct. at 1208 (demeanor of attorney exercising strike best evidence of discriminatory intent). Accordingly, we conclude the trial court properly denied Salomon's *Batson* challenge as to Juror H.

---

made a determination" about the juror's demeanor. 552 U.S. at ___, 128 S. Ct. at 1209. It then found the claim that the juror was a student teacher and therefore would return a lesser verdict at odds with the record. 552 U.S. at ___, 128 S. Ct. at 1209-11. Additionally, the Court noted that other jurors appeared to have more pressing outside time commitments, yet the prosecutor did not attempt to strike them. 552 U.S. at ___, 128 S. Ct. at 1211-12. Salomon does not develop an argument based on the facts in *Snyder* and we do not find it applicable here.

[11]Salomon relies on *Ali v. Hickman*, 571 F.3d 902 (9th Cir. 2009); *Green v. LaMarque*, 532 F.3d 1028 (9th Cir. 2008); and *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006), but we are not bound by Ninth Circuit decisions. *See State v. Swoopes*, 216 Ariz. 390, ¶ 35, 166 P.3d 945, 956 (App. 2007). Moreover, there is some doubt that in Arizona, a prosecutor must provide an objective verification for a facially neutral but subjective justification of a peremptory strike. Under *State v. Cruz*, 175 Ariz. 395, 399, 857 P.2d 1249, 1253 (1993), this was the law. However, our supreme court has noted that "[t]he *Cruz* rule has been called into question by the [United States] Supreme Court's subsequent holding" in *Purkett v. Elem*, 514 U.S. 765, 768 (1995), which held that a prosecutor's explanation need only be facially race-neutral, not "'persuasive, or even plausible.'" *State v. Cañez*, 202 Ariz 133, ¶ 25, 42 P.3d 564, 577 (2002), *quoting Purkett*, 514 U.S. at 768.

Juror L.

¶18 Fifty-five-year-old Juror L. apparently had long hair and wore dark sunglasses in the courtroom. He also claimed to have worked in Pima County for the last twenty-seven years and also to have served with the military in Fallujah. The trial court was "interested" in Juror L. because he seemed "too old" to have been in Fallujah, but pressed the prosecutor to further explain why he was striking him. The prosecutor articulated that he did not like that L. had a ponytail and wore dark sunglasses and also believed L. was "overstating" and "not describing [his military service] accurately." Although the judge disputed that L.'s ponytail was a good reason to strike him, he ultimately accepted the prosecutor's overall explanation as race neutral.

¶19 Salomon argues that Juror L.'s claims regarding service in Iraq cannot suffice as a racially neutral explanation sufficient to withstand scrutiny under *Batson* because the trial court noted neither attorney had inquired further about L.'s age, and it had no reason to doubt his claims. But the parties were not required to ask more questions of this juror. In *Cañez*, our supreme court upheld the trial court's denial of a *Batson* claim in a nearly identical situation.[12] There, the prosecutor struck a juror who was twenty-one years old and had had only twelve years of education, but claimed to be a nurse. 202 Ariz. 133, ¶ 18, 42 P.3d at 576. "The prosecutor believed that someone of her age and education could not be

[12]Neither the state nor Salomon cites *Cañez* for any purpose, although it is directly on point to this particular issue.

a nurse and that her candor was thus called into question." *Id*. Although the court thought it might be possible she was a nurse and "believed she would be a good juror," the prosecutor's "concern regarding candor was race-neutral." *Id*. As in the present case, the prosecutor asked no follow-up questions to clarify her employment. *Id*. Because our supreme court upheld the trial court's ruling on substantially analogous facts as those present here, *see id*. ¶ 28, we cannot say this trial court clearly erred by ruling against Salomon as regards to Juror L.[13]

Juror A.

¶20 In striking Juror A., the prosecutor described him as "very quiet and slow in his responses" during voir dire, but learned of an "animated discussion between him and [Juror L.]" in the hallway. The prosecutor was already concerned about Juror L. and was concerned that Juror A., "who str[uck him] as a follower type," was fraternizing with him in the hall. The judge agreed that A. was "very slow in his responses from the very beginning when he was called."

¶21 Salomon contends that "nothing in the record supports the prosecutor's claim that [Juror A.] had difficulty articulating answers" because his answers "appear no different

[13]Because this issue is resolved by *Cañez*, we need not address whether Juror L.'s sunglasses and ponytail constituted valid rationales. We do note, however, that Salomon appears to be mischaracterizing the record when he claims the trial court stated that L. "wore sunglasses in a well lit room because he had a 'light issue.'" The record indicates the trial court did not make any findings on this, but rather merely offered a possible reason for the sunglasses.

from other answers during voir dire," but this claim is without merit. As Salomon concedes, the trial court also found A. to be slow and, based on the record before us, we cannot say the court's observation was incorrect. *See Gay*, 214 Ariz. 214, ¶ 19, 150 P.3d at 794 (trial court in best position to evaluate behavior of jurors). Because "mode of answering questions" is a proper basis on which to strike a prospective juror,[14] *State v. Hernandez*, 170 Ariz. 301, 305, 823 P.2d 1309, 1313 (App. 1991), we find no error in the trial court's ruling that striking A. was not pretextual.[15] *See Snyder*, 552 U.S. at ___, 128 S. Ct. at 1208 (juror's demeanor a race-neutral reason for peremptory challenges).

Juror J.

¶22 Finally, the prosecutor stated that he struck Juror J. because he seemed passive and also because he had a nephew who was a repeat offender. The prosecutor additionally noted J. is "a guy who is at least middle age who has no hobbies." He was concerned the juror was "not seeming to participate in the proceedings," and, as a result, the prosecutor

---

[14]We are perplexed by Salomon's lengthy discussion of what the trial court meant by "slow." It appears Salomon would not object to striking a juror for being "slow," meaning intellectually deficient, although he would dispute that Juror A. was intellectually deficient. He does, however, disagree with striking a juror for answering slowly, which he argues is the more natural inference in this case. But, as discussed above, that is a valid, race-neutral reason.

[15]Salomon does not respond to the prosecutor's proffered rationale that he was concerned about Juror A. being friendly with Juror L. Because we have found a valid, race-neutral rationale, we need not consider whether this would be a valid justification for this strike, but acknowledge that it might be. *See Redding v. State*, 464 S.E.2d 824, 826 (Ga. Ct. App. 1995) (peremptory strike of juror who was friend of another juror stricken for cause valid under *Batson*).

"had a vibe" that J. was "a follower" and "seem[ed] to be somebody who is easily swayed." The trial court observed that J. appeared "totally inattentive to the questions."

¶23 Even assuming Salomon is correct that the prosecutor could not cite Juror J.'s lack of a hobby as a valid reason to overcome his *Batson* challenge, the other explanations do satisfy its requirements. Although Salomon correctly notes that two non-minority jurors who were not stricken also had family members involved in the criminal justice system, the prosecutor explained that J.'s nephew's criminal record was only one of several factors leading him to exercise a peremptory strike. In addition, the prosecutor had valid concerns about J.'s participation because he seemed passive and inattentive and this was confirmed by the trial court. This factor alone survives *Batson* scrutiny as it did in the case of Juror A. *See Snyder*, 552 U.S. at __, 128 S. Ct. at 1208 (juror's inattentive demeanor is reason to execute peremptory strike); *Hernandez*, 170 Ariz. at 305, 823 P.2d at 1313.

¶24 Because the prosecutor offered race-neutral explanations for his strikes of the four minority venirespeople, which the trial court accepted after due consideration,[16] we cannot say it clearly erred in denying Salomon's *Batson* challenge. *See Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d at 844.

---

[16]Indeed, the record reflects the trial court not only required race-neutral justifications for the strikes, but seriously engaged the prosecutor in discussion about these strikes, challenging his proffered rationales and requiring him to articulate with specificity his reasons for them.

Disposition

¶25 For the foregoing reasons, Salomon's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003).