IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JERMON ROSS, *Appellant*.

No. 1 CA-CR 19-0214
FILED 03-09-2021

Appeal from the Superior Court in Maricopa County
No. CR2017-134281-001
The Honorable Jay R. Adleman, Judge

VACATED AND REMANDED FOR NEW TRIAL

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mikel Steinfeld
Counsel for Appellant

OPINION

Presiding Judge Samuel A. Thumma delivered the opinion of the Court, in which Chief Judge Peter B. Swann joined. Judge Randall M. Howe concurred in part and dissented in part.

T H U M M A, Judge:

¶1 The State used a peremptory strike against Prospective Juror 15, the only African American potential juror on the panel. Defendant Jermon Ross, who also is African American, objected under *Batson v. Kentucky*, 476 U.S. 79 (1986). The State offered two grounds for the strike: (1) Prospective Juror 15 was "extremely inarticulate" and (2) Prospective Juror 15 had "blessed" Ross when entering the courtroom, by making the sign of the cross with his cane and saying "good luck, or nod[ing] good luck" to Ross. Ross disputed both explanations, arguing neither was supported by record evidence. The court rejected the "extremely inarticulate" explanation as unsupported by record evidence. The "blessing" explanation also was unsupported by record evidence. The court, however, accepted the "blessing" explanation as race-neutral, denied Ross' *Batson* challenge and dismissed Prospective Juror 15.

¶2 With Prospective Juror 15 dismissed, the jury was seated and later found Ross not guilty of some serious felony offenses and guilty of others. The court sentenced Ross to lengthy prison terms.

¶3 Ross argues the rejection of the State's "extremely inarticulate" explanation was an implicit finding that the explanation was a pretext for racial discrimination, rendering the "blessing" explanation unconstitutionally tainted under *State v. Lucas*, 199 Ariz. 366 (App. 2001). In the alternative, Ross argues there was no record evidence supporting the "blessing" explanation, meaning the court erred in denying his *Batson* challenge because the State provided no proper race-neutral explanation for the strike.

¶4 Although it found the "extremely inarticulate" explanation unsupported by record evidence, the superior court did not find that explanation was race-based. Thus, the court's rejection of the "extremely inarticulate" explanation did not, under *Lucas*, taint the "blessing" explanation. But because the superior court could not properly rely on a

disputed avowal describing purported in-courtroom physical conduct by a prospective juror as the basis for the "blessing" explanation, there was no record evidence allowing the court to conclude it was a race-neutral explanation for the strike. Accordingly, because the State provided no proper race-neutral explanation, the superior court erred in denying the *Batson* challenge and striking Prospective Juror 15. As a result, Ross' convictions and sentences are vacated, and this matter is remanded for a new trial.

FACTS AND PROCEDURAL HISTORY

¶5 The State tried 16-year-old Ross as an adult on three counts of armed robbery, three counts of kidnapping, two counts of aggravated assault, and one count of endangerment for robbing a teenage couple with a baby and shooting another 16-year-old.

¶6 During voir dire, Prospective Juror 15 answered standard questions asked of all potential jurors, addressing his employment, marital and familial status and prior jury service. The superior court asked clarifying questions about his jury service. The transcript from that brief exchange is short and unremarkable. The parties did not ask any follow up questions of Prospective Juror 15. Although they asked specific questions of other potential jurors, the parties did not ask Prospective Juror 15 any questions when given the opportunity to do so. The parties did not challenge Prospective Juror 15 for cause and, after voir dire, the parties passed the panel (which included Prospective Juror 15) for cause.

¶7 After the State used a peremptory strike against Prospective Juror 15, the only African American potential juror, Ross raised a *Batson* challenge. Outside the presence of the potential jurors, the State then offered its two explanations, both of which it argued were race neutral.

¶8 In offering the "extremely inarticulate" explanation, the State claimed Prospective Juror 15 "had a very difficult time discussing his prior jury service or even what he did for a living." "Given the other jurors we have on the panel," the State continued, Prospective Juror 15's "personality . . wasn't going to mesh well with the other jurors. The other jurors are more articulate in their presentation of just about every aspect of it." The State added Prospective Juror 15 would not "be able to follow along with the complex arguments that are going to be made with regard to self-defense and . . . justification."

¶9 Ross countered that the State's explanation was insufficient. Ross noted that Prospective Juror 15's prior jury service, where he was foreperson, showed he was able to serve as a juror. Ross added: "I'm not sure why he's not going to mesh well with the other jurors, but, again, we believe this is a race-based challenge that's inappropriate." In rejecting the State's "extremely inarticulate" explanation, the court found the evidentiary record did not show Prospective Juror 15 was inarticulate. While noting he spoke "at his own pace" and "was a little slow in his answers," the court found there was nothing unusual about Prospective Juror 15's responses. Thus, the court concluded the "extremely inarticulate" explanation was unsupported by record evidence, meaning it did not constitute a proper race-neutral explanation for the State's strike.

¶10 Turning to the "blessing" explanation, the State avowed that when Prospective Juror 15 first "walked into the courtroom, he blessed the defendant. He took his cane and made the cross sign at [Ross] and said good luck, or nodded good luck, and then went and took his seat." The court interrupted, asking if anyone else saw the actions described and sought clarification. In response, the State again avowed that Prospective Juror 15 "came in right at the entrance, he took the cane that he uses to walk with, he went like this and mouthed good luck, and then went and took his seat." This avowal by the State, made as the trial day was ending just before 5:00 p.m., referred to an event that would have occurred when the potential jurors first entered the courtroom before 11:00 a.m. that same day.

¶11 At the time of the purported blessing, there were at least ten other trial participants in the courtroom, not counting any of the approximately 100 potential jurors. The court asked whether any of those ten or so trial participants saw the blessing. No one had, including other individuals at counsel table for the State. Ross' counsel disputed the avowal, stating "we didn't see that." The State had not mentioned the issue during voir dire and there was no evidence in the record of the blessing. The State had not challenged Prospective Juror 15 for cause. The courtroom audio-visual recording did not capture the location where Prospective Juror 15 was standing when the incident would have occurred.

¶12 After noting an attorney is "an officer of this court," the superior court quickly added it "would be deeply troubled" if Prospective Juror 15 blessed Ross while walking into the courtroom. The court noted such conduct "would [implicate] a cause strike." The court added, however, "I'd give the same courtesy to any other officer of the court that I'd be giving to [the attorney avowing to the blessing], which is if he saw something like that, that would be a race-neutral reason." The court continued:

> Simply in terms of the reference that [the attorney avowing to the blessing] made, if that is, in fact, something that he saw, and I take it you all observe these jurors and use that information in making your preliminary [sic] strikes, that's something undoubtedly [the State] would have used in making this strike, so, again the *Batson* challenge is respectfully denied.

¶13 The empaneled jury, which did not include Prospective Juror 15, found Ross not guilty of both counts of armed robbery, but found him guilty of attempted armed robbery, kidnapping, aggravated assault, and endangerment.

¶14 Ross moved for a new trial, again challenging the denial of his *Batson* challenge. At oral argument on the motion, the attorney who avowed to the blessing said "[m]y observations were my observations." The court denied Ross' motion, cautioning it would be "better for future reference" if the State had raised the issue "in the morning or right before lunch," which would have allowed the issue to be addressed with Prospective Juror 15 during voir dire. After finding the disputed avowal about the "blessing" was "credible," the court concluded "the peremptory strike, in my view, was based on nonracially based reasoning." The court added that, had the court not accepted the avowal, "then that juror likely would have remained on the jury because I didn't think there was another reason, to my liking, that would have satisfied *Batson*."

¶15 The court sentenced Ross to concurrent prison terms, the longest of which was 13.5 years, on six of the seven convictions, and a mandatory consecutive prison term of 10 calendar years for the seventh conviction. This court has jurisdiction over Ross' timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1), 13-4031 and 13-4033(A)(2021).[1]

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

DISCUSSION

¶16 The denial of a *Batson* challenge is reviewed for clear error, with issues of law reviewed de novo. *State v. Newell*, 212 Ariz. 389, 400 ¶ 52 (2006) (citing cases). The superior court is in the best position to assess credibility, meaning an appellate court grants "great deference" to that court's credibility findings in addressing an explanation offered for a strike. *See Batson*, 476 U.S. at 98 n.21.

I. The *Batson* Standard.

¶17 The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution bars exercising a peremptory strike based on a juror's race. *Batson*, 476 U.S at 89. A *Batson* challenge involves a three-step analysis: (1) the opponent of the strike must make a prima facie showing of racial discrimination; (2) if shown, the striking party then has the burden to provide a facially race-neutral reason for the strike, which need not be "'persuasive, or even plausible;'" then (3) the opponent must show the facially neutral reason is pretextual, constituting purposeful discrimination. *Newell*, 212 Ariz. at 401 ¶ 54 (2006) (citation omitted). "To accept a prosecutor's stated nonracial reasons, the court need not agree with them. The question is not whether the stated reason represents a sound strategic judgment, but 'whether counsel's race-neutral explanation for a peremptory challenge should be believed.'" *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (citation omitted). Ross had the ultimate burden of persuasion to sustain his *Batson* challenge. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995).

II. *Lucas* and the Lack of Record Evidence Supporting the "Extremely Inarticulate" Explanation.

¶18 Ross contends *Lucas* requires reversal because the superior court's rejection of the State's "extremely inarticulate" explanation as not being supported by record evidence required that court to find the "blessing" explanation was unconstitutionally tainted. *Lucas* directs that "'[o]nce a discriminatory reason has been uncovered -- either inherent or pretextual -- this reason taints' any other neutral reason for the strike." 199 Ariz. at 369 ¶ 11 (citation omitted). Ross' argument under *Lucas* presumes the superior court found the "extremely inarticulate" explanation was discriminatory. That argument, however, does not track what happened here.

¶19 The superior court did not find the State's "extremely inarticulate" explanation was discriminatory, either inherently or as pretext. Ross concedes this on appeal but argues the court's conclusion that the explanation was not supported by the record is an implicit finding that it was pretextual. Contrary to Ross' argument, the court rejected the "extremely inarticulate" explanation because it was unsupported by the record, not that it was discriminatory. Stated differently, the court found that because the "extremely inarticulate" explanation was not supported factually, the explanation could not justify the strike under *Batson*. A finding that an explanation is not supported factually does not constitute a finding that the explanation was discriminatory.

¶20 The superior court is presumed to have applied *Lucas*. *See State v. Williams*, 220 Ariz. 331, 334 ¶ 9 (App. 2008). If that court had, in fact, found the "extremely inarticulate" explanation was discriminatory, it would have granted the *Batson* challenge under *Lucas*, which holds that a single discriminatory explanation taints any other race-neutral explanations. 199 Ariz. at 369 ¶ 11. Here, however, the superior court also addressed the "blessing" explanation, something that would have been unnecessary under *Lucas* if it had found the "extremely inarticulate" explanation was discriminatory. For these reasons, the court's rejection of the "extremely inarticulate" explanation did not taint the "blessing" explanation.

III. Lack of Record Evidence Supporting the "Blessing" Explanation.

¶21 Ross next argues the superior court erred by deferring to a lawyer's disputed avowal to support the "blessing" explanation because it was not supported by the record evidence. The question, then, is whether a lawyer's disputed avowal describing a juror's in-courtroom physical conduct (that, as described, could have supported a challenge for cause as noted by the superior court) can, by itself, constitute record evidence to support a race-neutral explanation under *Batson*.

¶22 As the State concedes, resolving a *Batson* challenge turns on the superior court's determination based on record evidence. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019); *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016). *Batson* "requires the judge to assess the plausibility of [the explanation offered for a challenged strike] . . . in light of all *evidence* with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 251–52 (2005) (emphasis added; citing cases). "The court then evaluates the *facts* to determine whether a party engaged in purposeful discrimination." *State v. Paleo*, 200 Ariz. 42, 44 ¶ 6 (2001) (emphasis added; citing cases). In making

this "fact-intensive" inquiry, *Newell*, 212 Ariz. at 401 ¶ 54, the court is to consider "all the circumstantial evidence that 'bear[s] upon the issue of racial animosity,'" *Foster*, 136 S. Ct. at 1748 (citation omitted); *accord Kesser*, 465 F.3d at 359 ("*Batson* requires inquiry into '"the totality of the relevant facts" about a prosecutor's conduct.'") (citations omitted).

¶23 Typically, the record evidence providing the basis for an explanation offered in response to a *Batson* challenge arising out of courtroom conduct consists of a prospective juror's answers, provided under oath, during voir dire, at times accompanied by the juror's demeanor observed during voir dire. *See, e.g.*, *State v. Medina*, 232 Ariz. 391, 404–05 ¶¶ 4550 (2013); *Newell*, 212 Ariz. at 401–02 ¶¶ 55–58; *State v. Martinez*, 196 Ariz. 451, 455–57 ¶¶ 13–18, 21–22 (2000). Record evidence also can include the judge's observations and, when not in dispute, observations by others. *See, e.g.*, *State v. Murray*, 184 Ariz. 9, 25 (1995) (in rejecting *Batson* challenge based on counsel's observation, superior court found reasons for strikes were "'consistent with my own assessments of those particular jurors.'"); *State v. Decker*, 239 Ariz. 29, 31–32 ¶¶ 8–11 (App. 2016) (although unable to see potential juror's demeanor given courtroom layout, superior court found "lack of information" in answering voir dire questions, along with undisputed demeanor issues, were race-neutral reasons defeating *Batson* challenge); *State v. Eagle*, 196 Ariz. 27, 30 ¶ 11 (App. 1998) (rejecting *Batson* challenge where record reflected potential juror "appeared young" and was "extremely nervous"). The issue here, however, is not the validity of an attorney's impression of a prospective juror's answers to questions, demeanor or body language. Instead, it is whether the attorney's avowal describing purported affirmative physical acts in the courtroom by Prospective Juror 15, which were not seen by anyone else in the courtroom, may constitute record evidence sufficient to defeat a *Batson* challenge.

¶24 In Arizona, an avowal by counsel is not evidence. *See State v. Woods*, 141 Ariz. 446, 455 (1984) ("We follow a rule of trial by law and evidence, not by avowal of counsel."); *Volk v. Superior Court*, 235 Ariz. 462, 470 ¶ 25 (App. 2014) ("By rejecting Father's tax returns in their entirety and adopting counsel's estimate, the court leaves the clear impression that avowals, not evidence, formed the basis of its decision."). In the decades after *Batson* was decided in 1986, no Arizona opinion -- and there have been nearly 80 -- has found that a disputed avowal about a juror's purported conduct in the courtroom provides sufficient record evidence to support an

explanation that could defeat a *Batson* challenge. And decisions from other jurisdictions are consistent with Arizona opinions.[2]

¶25 Arizona courts also have stressed the need to make a record of courtroom conduct relevant to a *Batson* challenge. Although in a different context, *State v. Jackson* found the defendant waived a *Batson* challenge by raising it after the jury was seated and potential jurors excused. 170 Ariz. 89, 92–93 (App. 1991). In doing so, *Jackson* noted the importance of making an evidentiary record during voir dire of objective courtroom observations (in that case, whether a potential juror had a ponytail) relevant to explanations offered for a strike. *Id.* "If the issue had been raised in a timely manner, the trial court would have been able to observe the [potential juror who was struck] and see whether the prosecutor was correct [that he had a ponytail]. Failure to do so is a waiver of the argument." *Id.*

¶26 Here, record evidence of the purported blessing easily could have been obtained during voir dire. It purportedly occurred as the potential jurors entered the courtroom the first time, before voir dire began. During voir dire, which lasted several hours, Prospective Juror 15 answered standard questions asked of him and the other potential jurors. If the State had asked Prospective Juror 15 about the purported blessing, he would have answered those questions under oath and on the record. *See* Ariz. R. Crim. P. 18.5(a), (c), (d). Depending on his answers, the State could have challenged Prospective Juror 15 for cause. *See* Ariz. R. Crim. P. 18.5(f). Indeed, the superior court noted the conduct described in the disputed avowal would implicate a strike for cause. But the State did not raise the purported blessing at any time during voir dire or during challenges for cause. By the time it raised the issue, the record contained no evidence of the purported blessing, and the time to make such an evidentiary record had passed. *See* Ariz. R. Crim. P. 18.5(g) ("All challenges for cause must be

---

[2] *Farmer v. State*, a 2000 Mississippi Court of Appeals case, did rely on an attorney's avowal, noting "the prosecutor stated as an officer of the court that she knew [the potential juror] from somewhere but could not specify where." 764 So. 2d 448, 454 (Miss. Ct. App. 2000). The defendant failed "to offer rebuttal or argue pretext at the trial level" and waived the issue on appeal, and the appellate court stated the rejection of a *Batson* challenge "was not clearly erroneous or against the overwhelming weight of the evidence." *Id. Farmer*, however, did not involve a disputed avowal and the undisputed avowal was not about courtroom conduct. Moreover, in this case, Ross did not waive the issue and he argues pretext and objects to reliance on the disputed avowal. *Farmer* also has never been followed outside Mississippi and is not binding on this court in any event.

made and decided before the court may call on the parties to exercise their peremptory challenges.").

¶27 This avoidable gap in the evidentiary record shows why the disputed avowal accepted by the superior court does not satisfy *Batson*. *See Miller-El*, 545 U.S. at 246 (questioning the "'failure to engage in any meaningful voir dire examination on a subject the [party exercising peremptory strikes] alleges it is concerned about'" when later exercising strikes) (citation omitted); *accord Flowers*, 139 S. Ct. at 2249 (quoting *Miller-El*, 545 U.S. at 246); *cf. Miller-El*, 545 U.S. at 244 (noting, where voir dire testimony conflicted with the explanation provided for peremptory strike, "we expect [counsel] . . . would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike").

¶28 In responding to a *Batson* challenge, the State had the burden to offer an explanation that, if dependent on conduct by a potential juror that purportedly occurred in the courtroom, was supported by the evidentiary record. *See also Batson*, 476 U.S. at 98 (noting party opposing *Batson* objection must do more than "merely" deny "a discriminatory motive" or affirm good faith; "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'") (citations omitted). Ross then had the burden to offer "evidence," not mere "inference, to show that the peremptory strike was a result of purposeful racial discrimination." *Newell*, 212 Ariz. at 402 ¶ 58 (citing *Purkett*, 514 U.S. at 768). Such a burden becomes impossible for a defendant to meet if the proffered explanation rests only on a disputed avowal describing courtroom conduct not reflected in the record evidence and not seen by anyone else.

¶29 The requirement that a party must offer record evidence to support such a challenged strike does not, somehow, run counter to *Batson* or create other mischief. Instead, it reflects that an avowal, in Arizona and in this context, is not evidence. It also relieves the court of the obligation to weigh the credibility of the attorney making the disputed avowal against the credibility of others in the courtroom in determining what actually occurred. Instead, requiring record evidence supporting a challenge based on purported in-courtroom physical conduct by a prospective juror allows the inquiry to focus on whether the explanation is race-neutral, the cornerstone of *Batson*. This is the approach used by the superior court in rejecting the "extremely inarticulate" explanation. It should have used the same approach in addressing the "blessing" explanation.

¶30 The time to make a record supporting the purported "blessing" explanation was during voir dire. Because that did not happen, there was no record evidence to support the explanation. Given that evidentiary void, which cannot be filled by an unverified disputed avowal, no factual basis for the purported "blessing" explanation exists. As with the "extremely inarticulate" explanation, there was no record evidence supporting the purported "blessing" explanation. Accordingly, because neither explanation the State offered was supported by the record, the superior court erred in finding the State had offered a proper race-neutral explanation for the peremptory strike.[3]

III. The Dissent Does Not Cure the Lack of Record Evidence Supporting Either Explanation.

¶31 The Dissent views the law quite differently than the majority. But the Dissent cites no case in which a court accepted, as the factual basis for a *Batson* challenge, a disputed avowal by counsel describing purported in-courtroom physical conduct by a prospective juror. The parties cite no such case. Nor has the majority, or presumably the Dissent, found such a case. That void, along with the lack of record evidence supporting either of the State's proffered reasons for exercising the peremptory strike of Prospective Juror 15, shows Ross' *Batson* challenge should have been granted. Given that, addressing a few of the Dissent's points will suffice here.[4]

---

[3] Given this conclusion, this court need not address Ross' argument that the Arizona Constitution should adopt the approach established in Washington state to provide "a stronger guarantee than *Batson*" by requiring an objective inquiry during the third step of the *Batson* analysis. Similarly, *Lucas* rejected a similar argument that the applicable rights under the Arizona Constitution differ from those under the United States Constitution. 199 Ariz. at 367 ¶ 5.

[4] The Dissent states the purported blessing was "uncorroborated," not "disputed." Ross' counsel -- by stating "we didn't see that" and calling it into question -- clearly disputed the purported blessing as that term is classically defined. More broadly, the Dissent does not show how using "uncorroborated" as opposed to "disputed" would alter the analysis. Regardless of which term is used, the fact remains that there was no record evidence of Prospective Juror 15's purported conduct.

¶32 *First*, as shown above, "[i]n Arizona, an avowal by counsel is not evidence." *Supra* ¶ 24 (citing cases). The Dissent at ¶ 43 counters that, in different circumstances, procedural rules authorize an avowal or offer of proof. True, such procedural rules do exist. *See* Ariz. R. Crim. P. 16.4(a) (dismissal of prosecution); Ariz. R. Crim. P. 10.2(b) (notice of change of judge); Ariz. R. Evid. 103(a) (allowing an "offer of proof" for evidence excluded at trial); *see also* A.R.S. § 13-3967(B) (determining release conditions in a criminal case is to be made "on the basis of available information"). But those procedural rules do not apply here. More specifically, those procedural rules do not apply to *Batson* challenges or, more broadly, to jury selection at all. The Dissent does not suggest otherwise. Although the Arizona Supreme Court likely could enact a procedural rule authorizing an avowal as a factual basis for a peremptory challenge, it has not done so. That has meaning. By enacting procedural rules authorizing avowals in other contexts but not for jury selection, the Arizona Supreme Court has negated any suggestion that the lack of such a rule authorizes avowals here.

¶33 *Second*, the Dissent relies on United States Supreme Court opinions for the proposition that *Batson* did not "hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor." *Id.* at ¶ 54 (quoting *Thaler v. Haynes*, 559 U.S. 43, 48 (2010) and citing *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) and *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion)). The Dissent, however, disregards the distinction between the avowal here, which described physical action of a prospective juror purportedly committed in open court, and the subjective characterizations of prospective jurors' demeanor, based on, for example, facial expression, tone of voice or body language, at issue in those cases. Although not acknowledged by the Dissent, the authority the Dissent cites recognizes this difference. *Snyder*, for example, noted another court "was correct that 'nervousness cannot be shown from a cold transcript, which is why . . . the [trial] judge's evaluation must be given so much deference.'" 552 U.S. at 479 (citation omitted). *Thaler* similarly set forth a standard for "where the explanation for a peremptory challenge is based on a prospective juror's demeanor." 559 U.S. at 48; *accord Hernandez*, 500 U.S. at 360 (addressing peremptory strikes based on "the specific responses and the demeanor of the two [potential jurors] during *voir dire*"). The purported blessing here clearly is physical conduct, not subjective demeanor observations like "nervousness."

¶34 *Third*, the Dissent at ¶¶ 44, 52–53 suggests that *Jackson*, 170 Ariz. 89, concluded that disputed avowals by counsel about objective behavior in the courtroom constituted sufficient evidence to support a *Batson* challenge. Not so. *Jackson* is a waiver case. Indeed, if *Jackson* were dispositive, the parties no doubt would have discussed it in their briefing. They did not. Indeed, in more than 100 pages of briefing in this appeal, neither Ross nor the State cite *Jackson*, let alone suggest it is dispositive. Nor has any other decision, in Arizona or elsewhere, suggested that *Jackson* resolves the issue presented here. Yet *Jackson* is instructive, although in a different way than suggested by the Dissent.

¶35 *Jackson*, which as discussed above, arose in a different context, shows that Arizona recognizes "the importance of making an evidentiary record during voir dire of objective courtroom observations (in that case, whether a potential juror had a ponytail) relevant to explanations offered for a strike." *Supra* ¶ 24. *Jackson* observed that "[i]f the issue had been raised in a timely manner, the trial court would have been able to observe the [potential juror who was struck] and see whether the prosecutor was correct [that he had a ponytail]. Failure to do so is a waiver of the argument." 170 Ariz. at 91–92.

¶36 The Dissent at ¶¶ 44 & n.5, 45, 52, 53 several times quotes three words in the *Jackson* opinion: the court "saw no error." But quoting three words from one sentence in one paragraph of a multi-page opinion provides no context. In context, the paragraph including those three words confirms that *Jackson* is a waiver case:

> One of appellant's attorneys stated that she did not recall the stricken juror having a ponytail. The court stated that it did not recall the juror, but would accept the prosecutor's avowal. We see no error. We note that this issue was raised after the jury had been selected and the rest of the panel dismissed. If the issue had been raised in a timely manner, the trial court would have been able to observe the individual and to see whether the prosecutor was correct. Failure to do so is a waiver of the argument.

Jackson, 170 Ariz. at 92–93. In context, *Jackson* turned on waiver, not a conclusion that a disputed avowal of objective courtroom conduct constituted evidence. It is no surprise that the parties here did not invoke *Jackson*.

¶37 The primary proposition of law underlying this opinion is that a court cannot properly rely on a disputed avowal from counsel describing affirmative physical acts of a potential juror purportedly taken in the courtroom to defeat a *Batson* challenge. That standard appears to have been applied since 1986 when *Batson* refined the focus on constitutional challenges to peremptory strikes. Significantly, the Dissent cites no case, in the 35 years since *Batson*, in which a court accepted a disputed avowal by counsel about purported physical acts in the courtroom as the sole factual basis to support a peremptory strike challenged under *Batson*. Moreover, the majority fully recognizes that the credibility of the attorney asked to justify the peremptory strike, and the trial court's ability to assess credibility, remain a critical aspect of a *Batson* challenge, *provided that* the proffered explanation for a peremptory strike based on courtroom conduct is supported by record evidence. *See, e.g.*, *Flowers*, 139 S. Ct. at 2244 (noting assessing such credibility and demeanor issues "lie peculiarly within a trial judge's province); *Snyder*, 552 U.S. at 477 ("The trial court has a pivotal role in evaluating *Batson* claims.").

¶38 In the end, the Dissent at ¶¶ 47 & 50 correctly states that a *Batson* challenge much be resolved "in light of all the relevant facts and circumstances . . . and the arguments of the parties." *Flowers*, 139 S. Ct. at 2243. The focus on "relevant facts" implicates the evidentiary record, which is at the core of the disagreement between the majority and the Dissent. Because the record here lacked any "relevant facts" supporting the "blessing" explanation, which depended solely on a disputed avowal of conduct purportedly occurring in open court, it was inadequate. That left the State with no race-neutral explanation for its peremptory strike of Prospective Juror 15, the only African American juror that remained on the panel. As a result, the superior court erred in denying the *Batson* challenge.

CONCLUSION

¶39 Ross' convictions and resulting sentences are vacated and this matter is remanded for a new trial.

H O W E, Judge**,** concurring in part, dissenting in part:

¶40 I concur with the Majority's conclusion that *State v. Lucas*, 199 Ariz. 366 (App. 2001), does not require the reversal of the trial court's ruling on Ross's objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), on the "extremely inarticulate" ground the prosecutor proffered as his second reason for the peremptory strike. Although the trial court found that the

record did not support that ground, the trial court never found that this ground was intended to discriminate against Ross or the juror, so it cannot support a *Batson* objection.

¶41 Except for my agreement on this point, however, I respectfully dissent from the remainder of the Majority's decision that the trial court nevertheless erred in overruling Ross's *Batson* objection. The Majority holds that when a defendant claims that a prosecutor has exercised a peremptory strike to discriminate against a juror in violation of *Batson*, and the prosecutor has avowed that particular facts exist that support a race-neutral reason for the strike, the trial court cannot find the prosecutor credible unless independent evidence in the record proves those facts. *Supra* ¶ 28. This holding is contrary to Arizona law and United States Supreme Court precedent applying *Batson*.

¶42 First, the Majority holds that in ruling on the *Batson* objection at issue here, the trial court could not consider as evidence the prosecutor's avowal that he saw the prospective juror bless and wish Ross good luck, relying on the legal truism that "[i]n Arizona, an avowal by counsel is not evidence." *Supra* ¶ 24. But that truism applies only to substantive matters being tried before a jury or trial court—guilt or innocence, for example, in criminal cases. *See, e.g.*, *State v. Woods*, 141 Ariz. 446, 454–55 (1984) (In determining a defendant's guilt, the jury could not consider the prosecutor's avowal that he had "good" reasons for offering a witness a plea agreement.). It does not apply to procedural trial matters, where a trial court's reliance on counsel's avowals of fact are quite common.

¶43 For example, in seeking an extension of time to try a criminal defendant, a prosecutor must avow that he does not seek the extension to avoid the time limits Arizona Rule of Criminal Procedure 8 imposes. *See* Ariz. R. Crim. P. 16.4(a); *Earl v. Garcia*, 234 Ariz. 577, 578 ¶ 6 (App. 2014). In seeking a change of judge as of right under Arizona Rule of Criminal Procedure 10.2(b), counsel is explicitly *required* to make certain avowals of fact to justify changing the assigned judge. To impress upon counsel that the trial court will rely on his avowal, Rule 10.2(b)(1) notes that counsel makes his avowal "as an officer of the court." In a hearing on a motion to reexamine a defendant's release conditions, the prosecutor may make avowals to the court. *Mendez v. Robertson*, 202 Ariz. 128, 130 ¶ 7 (App. 2002). In seeking an extension of time to file a time-extending motion, counsel's avowal that a party did not receive notice of an entry of judgment is sufficient to receive the extension. *United Metro Materials, Inc. v. Pena Blanca Prop., L.L.C.*, 197 Ariz. 479, 483 ¶ 22 (App. 2000). In seeking admission of evidence, counsel must make an offer of proof by avowal of what the

evidence is and what it will show, and the trial court can rely on that avowal in ruling on the evidence's admissibility, *State v. Plew*, 155 Ariz. 44, 46 (1987), even when counsel's avowed description of the evidence is disputed, *State v. Zaid*, 249 Ariz. 154, 158 ¶ 10 (App. 2020). In short, the trial court commonly can and does consider a prosecutor's avowals of fact in ruling on procedural matters.

¶44 And included among the procedural matters in which avowals may be considered are *Batson* objections. In *State v. Jackson*, a defendant raised a *Batson* objection to the prosecutor's peremptory strike of the only African American on the jury panel. 170 Ariz. 89, 92 (App. 1991). The prosecutor explained that he struck the juror because the juror wore a ponytail, which indicated that the person "tended toward liberalism and doing his own thing." *Id.* Defense counsel did not recall that the juror wore a ponytail. *Id.* The trial court did not recall the juror but accepted the prosecutor's avowal. *Id.* On appeal, this Court "s[aw] no error." *Id.*[5]

¶45 This Court saw no error because trial courts routinely accept counsels' avowals in procedural matters—as the nonexclusive list in ¶ 43 demonstrates—and nothing shows that *Batson* matters should be treated differently. Of course, whether a prosecutor violated a defendant's or a

---

[5] The Majority declines to accept *Jackson*'s significance, criticizing the dissent's reliance on "three words from . . . one paragraph of a multi-page opinion," purportedly taken out of context. *Supra* ¶ 36. But in the context of an appellate opinion reviewing a defendant's claim of error, no words are more important—or case-dispositive—than "We see no error." 170 Ariz. at 92. And the factual context—clearly laid out in ¶¶ 44 and 53 of this dissent—shows that *Jackson* is directly contrary to the Majority's ruling today.

The Majority further denigrates *Jackson*'s significance by noting that the parties here did not cite it in their briefing. *Supra* ¶ 34. But "our review is not limited to the authorities cited by the parties." *State v. Ingram*, 239 Ariz. 228, 230 ¶ 8 n.4 (App. 2016); *see also State v. Zaman*, 190 Ariz. 208, 211 (1997) (court relied on its own research in resolving issue). "If application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law, it is appropriate for us to consider the issue." *Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993). Limiting this Court only to argument and authorities raised by the parties risks reaching an incorrect result. *Id.* In *Jackson*, this Court "s[aw] no error" in the trial court's reliance on a prosecutor's avowal of fact to deny a *Batson* objection, 170 Ariz. at 92, which contradicts the Majority's analysis and must be addressed. Who has correctly read *Jackson* will have to await further review.

juror's right to equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution as recognized in *Batson* is a weighty matter, but it is still a procedural matter about how the trial will be conducted, not a substantive matter of a defendant's guilt or innocence. Thus, under Arizona law, a trial court can consider a prosecutor's avowal of fact in ruling on a *Batson* objection.

¶46 The Majority explains away the common use of avowals in procedural matters by claiming that those avowals are specifically authorized by rules of procedure, and since no rule authorizes the use of avowals in *Batson* proceedings, avowals cannot be used in those proceedings. *Supra* ¶ 32. But the Majority cites no authority holding that avowals can be used only when rules of procedure specifically authorize them. Indeed, it cannot do so because avowals are accepted in many circumstances without any authorization by a rule, *see Zaid*, 249 Ariz. at 158 ¶ 10; *Mendez*, 202 Ariz. at 130 ¶ 7; *United Metro Materials, Inc*., 197 Ariz. at 483 ¶ 22, including *Batson* objections, *Jackson*, 170 Ariz. at 92.

¶47 Not only does the Majority err in stating Arizona law on the use of avowals, its holding that a trial court cannot believe a prosecutor's race-neutral reason for a strike based solely on its evaluation of the prosecutor's demeanor and credibility is contrary to *Batson* and its progeny. The issue for the trial court in ruling on a *Batson* objection is whether the prosecutor exercised the peremptory strike to intentionally discriminate on the basis of the juror's race. *Batson*, 476 U.S. at 98; *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). Of course, in making this determination, the trial court must consider the reason "in light of all of the relevant facts and circumstances . . . and the arguments of the parties." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019); *Snyder*, 552 U.S. at 478 (noting that "all of the circumstances that bear upon the issue of racial animosity must be consulted"). But because the exercise of a peremptory strike is "inherently subjective," *Miller-El v. Dretke*, 545 U.S. 231, 267 (2005) (Breyer, J., concurring), "[t]here will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge," *Hernandez v. New York*, 500 U.S. 352, 365 (1991). The "record evidence" that the Majority believes *Batson* requires to independently verify the prosecutor's credibility will often be hard to come by.

¶48 This case illustrates this very point. The prosecutor struck the only African American on the venire, and Ross's counsel objected under *Batson*. The trial court asked for a response, and the prosecutor said his reasons for striking the juror had "nothing to do with race." The prosecutor explained that when the juror "walked into the courtroom, he blessed the defendant. He took his cane and made the cross sign at him and said good luck, or nodded good luck, and then went and took his seat." The trial court asked the prosecutor if he himself had seen that or if someone else had, and the prosecutor answered,

> No, I saw it. I was standing right here. He came in right at the entrance, he took the cane that he uses to walk with, he went like this and mouthed good luck, and then went and took his seat.

The trial court asked if "anyone else on your side of the aisle saw what you saw when he would have entered or that was just you," and the prosecutor said that no one else had seen the conduct. The trial court turned to Ross's counsel, who said, "[W]e didn't see that."

¶49 The trial court then accepted the prosecutor's reason as race-neutral:

> [The prosecutor]'s an officer of this court. If he's telling me that the gentleman walked in here and blessed anyone on either side of the aisle, I would be deeply troubled by that. And so to the extent that he would have looked at Mr. Ross and done that, or in Mr. Ross' direction and done that, we can't have somebody under those circumstances on this jury.

The court found that the juror's blessing Ross and wishing him good luck was "a race-neutral reason why the State would want to strike anyone, regardless of race." Ross's counsel suggested that the court examine the video recording of the proceeding. The trial court allowed counsel to do so, but noted that it did not need to see the video because it would "give the same courtesy to any other officer of the court that [it would give] to [the prosecutor], which is if he saw something like that, that would be a race-neutral reason." Because the camera was focused on the bench, however, it did not record the jurors entering the courtroom. The trial court denied Ross's *Batson* objection.

¶50 The trial court did exactly what *Batson* and subsequent United States Supreme Court decisions require. It considered the proffered reason "in light of all of the relevant facts and circumstances . . . and the arguments of the parties." *Flowers*, 139 S. Ct. at 2243. It questioned the prosecutor about the circumstances surrounding his observation of the juror's conduct, it sought input from defense counsel, and it explored whether the video recording would support or disprove the prosecutor's reason. And then, based on its evaluation of the circumstances and the prosecutor's demeanor, it determined that the prosecutor was credible in saying that he struck the juror because he observed the juror bless Ross and wish him good luck, indisputably a race-neutral reason and no pretext for discrimination. The trial court resolved the *Batson* objection in the way the Supreme Court not only permits but *expects*. *See Hernandez*, 500 U.S. at 365 ("[T]he best evidence often will be the demeanor of the attorney who exercises the challenge.").

¶51 The Majority nevertheless holds that the trial court cannot rely on its own evaluation of the prosecutor's credibility because it did not see the juror's conduct itself to determine whether the prosecutor was accurately recounting the juror's conduct. It avows that "no Arizona opinion—and there have been nearly 80—has found a disputed avowal about objective conduct in the courtroom provides sufficient record evidence to support an explanation that could defeat a *Batson* challenge." *Supra* ¶ 24. The Majority's statement, however, is inaccurate in two respects. First, the Majority characterizes the avowal as "disputed," but this is not so. Ross's counsel did not contradict the prosecutor's avowal, did not tell the trial court that she observed the juror's conduct and he did not make the cross sign at the defendant and wish him good luck. She merely said, "[W]e didn't see that," meaning that she could neither corroborate nor contradict the prosecutor's avowal. The Majority's use of "disputed" in this context means nothing more than "uncorroborated."

¶52 Second, even if defense counsel's response would constitute "disputing" the avowal, the Majority is wrong in claiming that "no Arizona opinion" has found that a disputed avowal about objective courtroom conduct is sufficient to overrule a *Batson* objection. The Majority once again overlooks *Jackson*. In *Jackson*, this Court "s[aw] no error" in the trial court's reliance on the prosecutor's avowal of fact about a juror's appearance—which the defense counsel "disputed" in the sense that the Majority uses that term—in denying a *Batson* objection. 170 Ariz. at 92. *See supra* ¶ 44.

¶53 The Majority has a very different view of *Jackson*. It views that decision as holding that the defendant waived his *Batson* objection by failing to raise it before the jury panel had been dismissed. *Supra* ¶ 25. But that is not the case. The defendant did not waive his *Batson* objection; the trial court actually ruled on the objection, relying on the prosecutor's avowal of fact about the juror's appearance to find the reason for the strike was race-neutral. 170 Ariz. at 92. What the defendant waived—because the objection was addressed after the juror in question and the jury panel had been dismissed—was the argument that the trial court could not rely on the prosecutor's avowal to resolve the objection: "If the issue had been raised in a timely manner, the trial court would have been able to observe the individual and to see whether the prosecutor was correct. Failure to do so is a waiver of the *argument*." *Id.* at 92–93 (emphasis added). Thus, *Jackson* held that absent an objection to the prosecutor's avowal before the juror in question has been dismissed, the trial court *can* rely on the avowal in ruling on a *Batson* objection.[6] *Id.* at 92 ("We see no error."). Although seeing the juror's hairstyle to validate the prosecutor's avowal would have been preferable, the trial court did not need to see the juror to judge the prosecutor's credibility under *Batson*.

¶54 More important than *Jackson*, however, the United States Supreme Court came to the same conclusion nearly 20 years later in *Thaler v. Haynes*, 559 U.S. 43 (2010). In that case, the Supreme Court held that the trial court need not have personally observed the conduct giving rise to the reason for the peremptory strike to be able to determine the prosecutor's credibility:

> [W]here the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor.

---

[6] The Majority uses *Jackson* to argue that because the prosecutor in this case made his avowal of fact about the blessing after the juror in question and the jury panel had been dismissed, the *prosecutor* waived his ability to provide his race-neutral reason, and the trial court consequently could not rely on the prosecutor's avowal. *Supra* ¶¶ 25–26. This stands *Jackson* on its head.

Id. at 48 (also noting that it had not established such a rule in *Snyder*). The Supreme Court repeated in *Thaler* the refrain found throughout its *Batson* decisions that "the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." *Id.* at 49 (citing *Snyder*, 552 U.S. at 477; *Hernandez*, 500 U.S. at 365).

¶55 The Majority contends that *Thaler* does not control this case because *Thaler* dealt with striking a juror based on demeanor, while the strike here was based on the juror's conduct. *Supra* ¶ 33. The Majority does not explain, however, the difference between "demeanor" and "conduct" for purposes of determining whether the prosecutor intended to discriminate against the juror. Both are valid reasons for exercising a peremptory strike, and the Majority does not explain why the trial court *can* judge the prosecutor's credibility without observing the juror's underlying conduct when the reason is demeanor, but *cannot* do so when the reason is the underlying conduct itself.

¶56 The Majority does not do so because no difference exists between the two. The prosecutor struck the juror in *Thaler* because the juror was "somewhat humorous" and "not serious," conduct that indicated that the juror would not consider the possibility of imposing a death sentence "in a neutral fashion." 559 U.S. at 44. The prosecutor struck the juror here because the juror blessed Ross and wished him good luck, conduct that no doubt indicated—just as the juror's conduct did in *Thaler*—that the juror would not judge the case in a neutral fashion. Both strikes are based on conduct and the demeanor the conduct revealed. The trial court in each instance could evaluate the prosecutor's credibility without observing the underlying conduct. *Thaler* cannot be distinguished and controls this case.

¶57 The trial court's determination of the prosecutor's credibility without observing the juror's underlying conduct therefore accorded with *Thaler*. Undoubtedly, the fact that no one but the prosecutor saw the conduct at issue in this case counts against him in the credibility determination, but that does not mean that the trial court could not believe that the prosecutor accurately saw and described the juror's conduct. The trial court observed the prosecutor during the trial and questioned him about the reason for his strike. The trial court questioned Ross's counsel, who did not directly contradict the prosecutor, merely stating that she "didn't see that." Based on these circumstances, the trial court found that the prosecutor spoke truthfully when he avowed that the juror blessed Ross and wished him good luck. Nothing precluded the trial court from so finding.

¶58 As the Supreme Court's *Batson* opinions make clear, the focus of resolving a *Batson* objection is the trial court's evaluation of the prosecutor's credibility, which, as *Thaler* holds, does not require the trial court to have observed the juror's behavior. For that reason, the Majority's focus on independent record evidence is mistaken. The Majority's analysis transforms the exercise of a peremptory strike into a strike for cause. The Majority holds that the prosecutor was required to make a record of the juror's conduct at the time it occurred, finding that the prosecutor could (and should) have made a strike for cause, and that his failure to do so waives the reason for the peremptory strike. *Supra* ¶¶ 25–26. But not only is a peremptory strike *not* a strike for cause, *Batson*, 476 U.S. at 97 ("[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."), the notion that a prosecutor must make a record *before* the *Batson* issue arises or waive the reason conflicts with *Thaler*, 559 U.S. at 48.[7] Requiring the prosecutor to make a record before the *Batson* issue arises is also procedurally inappropriate because the exercise of peremptory strikes occurs *after* the exercise of strikes for cause. *See* Ariz. R. Crim. P. 18.5(f) ("All challenges for cause must be made and decided before the court may call on the parties to exercise their peremptory challenges.").

¶59 As this analysis shows, Arizona law and Supreme Court precedent do not support the Majority's conclusion that the trial court cannot rely on its evaluation of the prosecutor's credibility and demeanor to determine whether the prosecutor is telling the truth about his reason for peremptorily striking a juror without independent record evidence corroborating that reason. The unstated concern underlying the Majority's analysis is that without hard evidence supporting a reason for a peremptory strike, a prosecutor may simply concoct a race-neutral reason, and any reason without evidence is simply a denial of a discriminatory motive or an assurance of good faith, necessarily insufficient under *Batson*. *Purkett v. Elem*, 514 U.S. 765, 769 (1995). But as the Supreme Court has recognized, trial courts are more than capable of guarding against such perfidy. Trial courts "possess the primary responsibility to enforce *Batson* and prevent racial discrimination" in the jury selection process. *Flowers*, 139 S. Ct. at 2243; *Snyder*, 552 U.S. at 477 ("The trial court has a pivotal role in evaluating *Batson* claims."). Judging credibility and demeanor are issues that "lie peculiarly within a trial judge's province." *Snyder*, 552 U.S. at 477 (citation and quotation marks omitted). The trial court here questioned the prosecutor, observed his demeanor, considered the surrounding

[7] The Majority supports its waiver analysis with *Jackson*. *Supra* ¶ 25. But the Majority misreads that decision. *Supra* ¶¶ 52–53.

circumstances, and found the prosecutor credible. The court did what it was supposed to do.

¶60 The Majority's analysis is also inconsistent with the application of this Court's standard of review for *Batson* claims. The issue before the trial court was whether the prosecutor struck the African American juror from the jury panel because of the juror's race. The trial court considered the prosecutor's reason—that the juror blessed Ross and wished him good luck—in light of all the facts and circumstances and arguments, including the prosecutor's demeanor, and found that the prosecutor did not intend to discriminate. Because the trial court's ruling turned on its evaluation of credibility, this Court is required to "give those findings great deference." *Batson*, 476 U.S. at 98, n.21; *Snyder*, 552 U.S. at 479 (appellate court's standard of review of *Batson* factual determinations is "highly deferential"). This Court must affirm the trial court's ruling that the prosecutor did not intend to discriminate "unless it is clearly erroneous." *Snyder*, 552 U.S. at 477. Nothing in the record shows that the trial court's determination was clearly erroneous. Nevertheless, the Majority does not defer to the trial court's factual findings on credibility and finds that its *Batson* ruling should be reversed. This violates *Batson*.

¶61 The Majority's analysis misapplies Arizona law and Supreme Court precedent in holding that the trial court erred in denying Ross's *Batson* objection. I would hold that the trial court properly denied it. I would therefore affirm Ross's convictions and sentences.