DIVISION ONE
FILED: 10/15/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 12-0429
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
BRADLEY CORWIN BINKLEY Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR201180164

The Honorable Michael R. Bluff, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Acting Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

Craig Williams — Prescott Valley
Attorney for Appellant

G E M M I L L, Judge

¶1 Defendant Bradley Binkley appeals his convictions and sentences for luring a minor for sexual exploitation and attempted tampering with physical evidence. The only issue on appeal is whether the trial court abused its discretion by denying his challenge, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to the State's use of peremptory challenges to strike six male jurors. Because the *Batson* challenge was untimely, and also because the trial court reasonably concluded that the State's reasons for striking the prospective jurors were gender-neutral, we reject Binkley's argument and affirm his convictions and sentences.

¶2 Detective Pam Edgerton of the Yavapai County Sheriff's Office created a profile on "Tagged.com" under the fictitious name "Brenna Fox" in March 2011. The profile was posted on an adult only website, and it listed a birth date of June 23, 1991, which made "Brenna" 19 years old. However, the comments section of the profile indicated that "Brenna" was actually 13 years old. "Brenna" was contacted by Binkley on March 26, 2011, and they began corresponding. Binkley started inquiring about sex with "Brenna," and she confirmed that she was 13 years old. Binkley was subsequently arrested. During an interview, Binkley was told that his home would be searched for evidence. Before the warrant was served, Binkley tried to have his neighbor remove items from his house.

BACKGROUND

¶3 Binkley was indicted on April 8, 2011 on two counts of luring a minor for sexual exploitation ("Count 1" and "Count 2"), class 3 felonies, and one count of attempted tampering with physical evidence ("Count 3"), a class 1 misdemeanor. Ariz. Rev. Stat. (A.R.S.) § 13-3554, § 13-705, § 13-1001, and § 13-2809.[1] He was convicted on all three counts. Binkley was sentenced to the presumptive term of three-and-a-half years imprisonment for Count 1 and six months in the county jail for Count 3. For Count 2, the court suspended imposition of sentence and placed him on lifetime probation after his release from prison. Binkley received six months credit for time served in jail prior to sentencing. Binkley filed a timely notice of appeal, and we have jurisdiction pursuant to Arizona Constitution Article VI, section 9 and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

ANALYSIS

¶4 In *Batson v. Kentucky*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the use of peremptory strikes against jurors solely on the basis of race. *Batson,* 476 U.S. at 89. In *J.E.B. v. Alabama ex rel. T.B.,* 511

[1] We cite the current versions of applicable statutes when no revisions material to this decision have occurred since the events in question.

U.S. 127, 143, 114 S.Ct. 1419, 1429, 128 L.Ed.2d 89 (1994), the Court held that peremptory challenges cannot be used against jurors on the basis of gender.

¶5 Binkley argues that the trial court erred and abused its discretion when his *Batson* challenge was denied and the court did not impanel a new jury. He further argues that the State used peremptory challenges to strike jurors in violation of the Equal Protection Clause.

Timeliness

¶6 We first examine whether the *Batson* challenge was timely. A *Batson* challenge is untimely if made after the jury is impaneled and the stricken jurors are excused. *State v. Harris*, 157 Ariz. 35, 36 754 P.2d, 1139, 1140 (1988).

¶7 Here, Binkley made the *Batson* challenge on the second day of trial. The jury was impaneled, prospective jurors were excused, opening statements had been given, and the State had begun its case in chief. The trial court nevertheless allowed both parties to address the *Batson* issue. Binkley argued that the State made gender discriminatory strikes. In response, the State opposed the challenge because it was untimely and because there were gender-neutral reasons for each of its peremptory strikes. After hearing the State's explanations and Binkley's response, the court denied the *Batson* challenge as untimely and also because the prosecutor provided gender-neutral reasons for

the strikes. We affirm the trial court's untimeliness ruling, and for reasons that follow, we also affirm the trial court's ruling on the merits of Binkley's claim.

Gender Neutrality

¶8 We next turn to the court's ruling that the State's proffered reasons for striking jurors were gender-neutral. We will consider whether the strikes were made in violation of the Equal Protection Clause of the Fourteenth Amendment.

¶9 Binkley argues that the State engaged in purposeful discrimination when it exercised all six of its peremptory strikes against male jurors, leaving a jury of nine women and one man. As he did at trial, Binkley argues that women who were kept in the jury pool had similar qualities to men who were stricken by the State, evidencing gender-based discrimination.

¶10 When considering a *Batson* challenge, we defer to the trial court's finding of fact unless clearly erroneous. *State v. Lucas*, 199 Ariz. 366, 368, ¶ 6, 18 P.3d 160, 162 (App. 2001). "A denial of a *Batson* challenge will not be reversed unless clearly erroneous." *State v. Newell*, 212 Ariz. 389, 400, ¶ 52, 132 P.3d 833, 844 (2006). We review the trial court's application of the law *de novo*. *Lucas*, 199 Ariz. at 368, ¶ 6, 18 P.3d at 162.

¶11 A *Batson* challenge involves a three-step analysis. First, the defendant must make a prima facie showing of

discrimination. If the showing is made, the burden shifts to the State to provide a neutral explanation for striking jurors. If the State provides a facially neutral reason for the strike, the trial court determines whether the "defendant has established purposeful discrimination." *Batson*, 476 U.S. at 97-98; *Newell*, 212 Ariz. at 401; 132 P.3d at 845.

¶12 The first step of a *Batson* analysis is generally deemed to be moot when the State provides an explanation for its peremptory strikes. *Hernandez v. New York*, 500 U.S. 352, 352, 111 S.Ct. 1859, 1862, 114 L.Ed.2d. 395 (1991); *State v. Garcia*, 224 Ariz. 1, 10, ¶ 25, 226 P.3d 370, 379 (2010). After Binkley made the *Batson* challenge, the State offered to give gender-neutral reasons for its peremptory strikes. Thus, we examine whether the State met its burden of showing non-discriminatory reasons for its peremptory strikes.

¶13 We conclude that the State offered gender-neutral reasons for each of its peremptory strikes. The State exercised a peremptory strike on Juror No. 7 because of his occupation as an artist. The prosecutor stated,

> I know that may sound silly, but I generally don't like jurors who have sort of non-conforming sort of employment sitting on juries, particularly people like artists and that sort of thing. In my experience, sometimes they may be a little more likely to believe what a defendant might have to say, even if what the defendant has to say

> is something that may not be real credible to the rest of us.

¶14 Next, the prosecutor struck Juror No. 5 because of an appointment that conflicted with trial. During voir dire, Juror No. 5 offered to try to reschedule the appointment, but because the prosecutor had several remaining strikes, he felt it was appropriate to exercise a strike. In addition, the prosecutor indicated that there was another, lesser reason for striking Juror No. 5, which was the prospective juror's low computer skills.

¶15 The prosecutor explained that he struck Juror No. 27 because the juror had been a witness in the past, was a retired executive, currently worked as a substitute teacher, and had low computer skills.

¶16 The prosecutor explained that he exercised a peremptory strike against Juror No. 22 because he previously served on a jury that found somebody not guilty and also had a sibling involved in the criminal justice system.

¶17 Next, the prosecutor struck Juror No. 18 because he failed to disclose a previous conviction, was relatively young, and did not have any children.

¶18 Finally, the prosecutor exercised a strike against Juror No. 16 because he had previously read a newspaper article about the proceedings.

¶19 The basis for a peremptory strike must be more than a denial of improper motive, but it need not be "persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995); *Hernandez*, 500 U.S. at 360 ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."); *Lucas*, 199 Ariz. at 368; 18 P.3d at 162.

¶20 Here, in his explanation of peremptory challenges, the prosecutor discussed the occupations of two jurors. Juror No. 7 was employed as an artist and Juror No. 27 was a substitute teacher and retired executive. It is appropriate to consider a prospective juror's occupation and employment history when exercising peremptory challenges. *State v. Hernandez*, 170 Ariz. 301, 305-06, 823 P.2d 1309, 1313-14 (App. 1991); *see also United States v. Jackson*, 914 F.2d 1050, 1052-53 (8th Cir. 1990). Furthermore, the occupation of an artist is not peculiar to any gender. *State v. Brown*, 998 S.W.2d 531, 545 (Mo. 1999) (peremptory strike based on a prospective juror's occupation as an artist was sufficiently gender-neutral). The prosecutor explained that, in his experience, artists would be more likely to believe a defendant. This court has held that as long as it is not based upon an improper factor, "perceived sympathy on the part of a prospective juror toward a defendant is a legitimate basis for a peremptory strike." *Hernandez*, 170 Ariz. at 305-06,

823 P.2d at 1313-14 (citation omitted); *see also State v. Martinez*, 196 Ariz. 451, 456 ¶ 17, 999 P.2d 795, 800 (2000) (peremptory strike against a prospective juror whose occupation could possibly make him sympathetic to the defendant was race-neutral). Thus, we find no abuse of discretion in the court's acceptance of the explanation.

¶21 The prosecutor stated that he struck Juror No. 5 because he had an appointment that conflicted with trial. This explanation is sufficiently gender-neutral.

¶22 The prosecutor explained his strike of Juror No. 22 on the basis of prior jury service as well as his sibling's involvement in the criminal justice system. Participation in a prior acquitting jury is a valid reason for a peremptory challenge. *Trostle*, 191 Ariz. 4, 12, 951 P.2d 869, 877 (1997). Additionally, family criminal involvement is a nondiscriminatory basis to strike a prospective juror. *State v. Reyes*, 163 Ariz. 488, 490-91, 788 P.2d 1239, 1241-42 (1989); *see also United States v. Johnson*, 54 F.3d 1150, 1163 (4th Cir. 1995) (prospective juror's husband was involved in criminal activity); *United States v. Jackson*, 914 F.2d 1050, 1052-53 (8th Cir. 1990) (prospective juror's nephew was incarcerated). The trial court did not abuse its discretion by concluding that the State satisfied the second prong of *Batson* for Juror No. 5 and Juror No. 22.

¶23 In offering his explanation for Juror No. 18, the prosecutor explained that the prospective juror did not disclose a prior conviction during voir dire, he had no children, and was relatively young. A prospective juror's age and lack of children are neutral reasons for exercising peremptory strikes. *State v. Medina*, 232 Ariz. 391, 404, ¶ 45-46, 306 P.3d 48, 61 (2013) (upholding peremptory strikes based on prospective jurors' youth); *State v. Sanderson*, 182 Ariz. 534, 540, 898 P.2d 483, 489 (App. 1995) ("Prospective jurors' age, marital status and lack of employment have been identified as non-discriminatory reasons supporting the exercise of peremptory strikes."); *Hernandez*, 170 Ariz. at 304-05, 823 P.2d at 1312-13 (upholding peremptory strike based on considerations of youth and lack of children). This court has also held that withholding answers during voir dire is a neutral reason that complies with *Batson*. *Reyes*, 163 Ariz. at 490-91, 788 P.2d at 1241-42*; see also United States v. Brown*, 553 F.3d 768, 796 (5th Cir. 2008) (a prospective juror's lack of veracity on the juror form regarding a prior conviction was a legitimate reason for peremptory challenge). When the prosecutor asked Juror No. 18 if he had any problems other than minor traffic problems, the prospective juror failed to disclose a previous conviction.

¶24 Finally, the prosecutor explained that he struck Juror No. 16 because he read a newspaper article about the

proceedings. Learning about the case prior to trial is a valid, gender-neutral reason for a peremptory challenge. We find no abuse of discretion in the trial court's acceptance of the prosecutor's gender-neutral explanation regarding this prospective juror.

¶25 Binkley asserts that the State exercised peremptory challenges against Juror No. 5 and Juror No. 27 because they had low computer skills yet did not strike women who had similar computer skills. As detailed above, however, the State did not cite a lack of computer knowledge as the primary basis for either of these strikes. Thus, Binkley has not established that the men who were removed from the panel were "similarly situated" to women who remained. Moreover, Binkley used peremptory challenges against four men and two women.

¶26 The trial court expressly found that the State offered gender-neutral reasons for its strikes. Because the trial court is in a better position to assess the credibility and validity of the State's reasons, we defer to that finding. *Hernandez*, 500 U.S. at 364. Furthermore, "[b]ecause the Defendant bears the burden to prove purposeful discrimination, this court will not reverse the trial court's determination unless the reasons provided by the State are clearly pretextual." *State v. Roque*, 213 Ariz. 193, 204, ¶ 15, 141 P.3d 368, 379 (2006). Accordingly, we discern no reversible error.

CONCLUSION

¶27 For the foregoing reasons, we affirm the trial court's denial of Binkley's *Batson* challenge.

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JOHN C. GEMMILL, Judge

CONCURRING:

/s/
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MAURICE PORTLEY, Presiding Judge

/s/
_____
KENT E. CATTANI, Judge