IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 09/15/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee, v. TODD MAURICE LEE, Appellant.	)	1 CA-CR 09-0790 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-030208-001-DT

The Honorable George H. Foster, Jr., Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Todd Maurice Lee appeals his convictions and sentences for one count of first-degree murder, one count of assisting a criminal street gang, two counts of misconduct involving weapons, one count of discharge of a firearm at a non-residential structure, and two counts of aggravated assault. He argues the trial court abused its discretion in denying his *Batson*[1] challenge, the prosecutor improperly vouched for non-testifying witnesses in her opening statement, and the State's gang expert improperly vouched during his testimony that Lee committed the murder. For the following reasons, we affirm.

BACKGROUND

¶2 The evidence at trial, viewed in the light most favorable to upholding the convictions, demonstrated the following. On December 31, 2007, Lee approached a car that was being driven by Mikesha in the area of 21st and Hidalgo avenues in Phoenix. Trevone, Mikesha's brother, sat in the back seat, and her cousin, Raymond, sat in the front passenger seat. Lee was a documented member of the Lindo Park Crips criminal street gang. Trevone and Raymond were documented members of the Vista Bloods, a rival criminal street gang. The two gangs were engaged in a gang war at the time, and there was personal animosity between Lee and Trevone. Words were exchanged, and as the victims drove away, Mikesha saw, in the rearview mirror, Lee

[1] *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)

pull out a gun and start shooting at them. Mikesha called 9-1-1 as she drove to a nearby medical clinic for help for Raymond, who had been shot. He did not survive. Trevone's girlfriend, Kimesha, testified that she ran to the scene of the shooting after hearing the shots and saw Lee running, and no one else in the vicinity.

¶3 At the time of the shooting, Lee was on probation for a prior felony conviction and was a prohibited possessor. When he was arrested a week later, Lee told police, "I didn't think you guys would get here that fast."

¶4 Lee testified at trial that contrary to Mikesha's testimony he did not shoot at the vehicle, but ran from it when he thought he saw someone in the back seat reaching for a weapon. He testified that as he ran, he saw Trevone standing outside the car, heard gun shots, and felt bullets "flying past my head." Two of Lee's cousins testified that they were with Lee when he approached the victims' car and they ran after Lee when they saw him start to run; then they heard gun shots as well. None of them called 9-1-1 after the shooting.

¶5 The jury found Lee guilty of first-degree murder of Raymond, two counts of aggravated assault of Mikesha and Trevone, two counts of misconduct involving weapons, and one count each of discharge of a firearm at a non-residential structure and assisting a criminal street gang. The jury found

as aggravating circumstances that the offenses involved the infliction or threatened infliction of physical injury and were committed with the intent to promote, further, or assist criminal conduct by a criminal street gang. Following the trial court's imposition of a life sentence on the murder conviction and lesser terms on the other counts, Lee filed a timely notice of appeal.

DISCUSSION

I. *Batson* Challenge

¶6 Lee argues that the trial court erred in denying his *Batson* challenge because the prosecutor's initial reasons for striking Juror No. 70, the only African-American on the panel—that she was not invested in the community because she was not married, had no children, and was very young—were so general that they could be used as a "pretext for striking every young African-American from jury panels in all trials." He argues that Juror No. 70's responses to *voir dire* failed to support the prosecutor's other reasons for striking this juror: that she was uneducated, and she could not remember any details of a trial on which she had served as a juror only two years before. He argues that it "blinks reality to deny" that the prosecutor excluded the only African-American from the jury for any reason other than race.

¶7 We review a trial court's decision regarding the prosecutor's motives for a peremptory strike for clear error. *State v. Murray*, 184 Ariz. 9, 24, 906 P.2d 542, 557 (1995). "We give great deference to the trial court's ruling, based, as it is, largely upon an assessment of the prosecutor's credibility." *State v. Cañez*, 202 Ariz. 133, 147, ¶ 28, 42 P.3d 564, 578 (2002).

¶8 The Equal Protection Clause of the Fourteenth Amendment prevents the prosecution from striking prospective jurors based solely upon race. *Batson*, 476 U.S. at 89. "A *Batson* challenge proceeds in three steps: '(1) the party challenging the strikes must make a prima facie showing of discrimination; (2) the striking party must provide a race-neutral reason for the strike; and (3) if a race-neutral explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful racial discrimination.'" *State v. Roque*, 213 Ariz. 193, 203, ¶ 13, 141 P.3d 368, 378 (2006) (citations omitted). For the purposes of step two, the State's burden is satisfied by a facially valid explanation, which need not be "persuasive, or even plausible." *State v. Newell*, 212 Ariz. 389, 401, ¶ 54, 132 P.3d 833, 845 (2006). However, during the third step, the persuasiveness of the justification becomes relevant and "implausible or fantastic justifications may (and probably will)

be found to be pretext[ual]." *Id.* (citation omitted). It is during this step that the trial court evaluates the credibility of the state's proffered explanation, considering factors such as "the prosecutor's demeanor . . . how reasonable, or how improbable, the explanations are . . . and . . . whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 339 (2003).

¶9 Lee is African-American. The State exercised one of its peremptory strikes on Juror No. 70, and Lee challenged the strike on *Batson* grounds, noting that Juror No. 70 was the only African-American juror remaining on the panel after the trial court had completed the process of excusing jurors for cause. The court found that the defendant had made a "proper basis for a *Batson* challenge" and asked the prosecutor to articulate the reasons for the strike.

¶10 The prosecutor responded that Juror No. 70 did not fit the "demographic" the State wanted in its jurors, which included persons who were married, had children, were educated, and "who otherwise had a stake in the community, an investment in the community; things that they wanted to uphold and protect and cherish, being children and spouses." The prosecutor explained:

> [Juror No. 70] doesn't fall into any of those categories. By her answers, she demonstrated to us that she's not educated, and I'll give you a direct quote. When asked on her demographics on the back of her jury card,

> she said, and I quote, I ain't got no husband, end quote.
>
> She has no children. [W]hen answering about her jury service –- which she's very young[,] [t]hat was just also not one of our target jurors, was her age; and you'll see our other strikes had to do with some age – she said, she couldn't remember what she served on.
>
> That was very troubling to us. If you'll recall, the other jurors who had said they had prior jury service . . . could articulate what it was about, what they served on the jury for; and we find it very troubling, from the State's point of view, that someone of her age who, by necessity, had to have served on a jury fairly recently could not recall anything about it except, and I quote, not guilty, from the State's point of view, we obviously don't like the words, not guilty, and if that's the only thing that young woman can remember about her time as a juror, it gives us great pause as to: one, did she take that jury service very seriously of that voting not guilty.
>
> Now, she did say, or I think you elicited from her that it was civil and not criminal. We're still troubled by that, and I think I have articulated several non-[race] and [race] neutral reasons for our strike, and I ask that you uphold our strike.

Asked to respond, Lee argued that Juror No. 70 had performed her civic duty by serving as a juror, had relatives in the Phoenix Police Department, and was similarly situated to other jurors who were unmarried and single mothers, and accordingly he believed the strike was racially motivated.

¶11 The trial court disagreed with the prosecutor's conclusion that Juror No. 70 had no education based on her

statement, “I ain’t got no husband.” The court concluded that the statement “doesn’t mean she doesn’t have education; it’s just that she doesn’t have very good grammar.” The court also disagreed with the prosecutor’s conclusion that young, unmarried females with no children were “not invested in society,” in the absence of any admissions by the prospective jurors that they “didn’t like their home, their job, their investment in life.” The court, however, found that the State had met its burden of showing that there was a race-neutral reason for the strike, reasoning:

> In this case, this particular juror seems to indicate that they’ve [sic] been in this community for a period of time. Their [sic] last jury service was two years ago. The notion that a person can serve on a jury only two years ago and not know anything and not be able to articulate anything about the case would support a rational – any reasonable person to question that person’s true interest in this process.
>
> While this court may disagree that a person [who] is not married and [has] no children – to say that person’s not invested in the community assumes too much, and the court does not believe that those are valid reasons, but the reason offered that the person in question appeared not to be vested – not so much in the community, but in this process is a legitimate reason for striking that person from a jury.
>
> The court further notes that the jury – jurors that have – the other jurors that have removed, all of them are not, as we say in this community, Anglo or White. There are a number of persons who identified

> themselves on the biographical information as Hispanic or Latino; . . . therefore, given the totality of the circumstances, the Court cannot say that there was not a [race] neutral reason for striking Juror No. 70.
>
> The Batson challenge is denied.

¶12 The court found that the State satisfied the second step of the *Batson* challenge by offering a facially race-neutral explanation for the strike, that is, that the prospective juror's inability to articulate anything about her service on a jury two years prior suggested she would not be invested in the judicial process if she were chosen for this jury. The court additionally found that the prosecutor's concern about whether this juror would take seriously her service on a jury was reasonable and concluded that it was not simply a pretext for racial discrimination.

¶13 We cannot say that the trial court abused its discretion in making these findings. *See Cañez*, 202 Ariz. at 147, ¶ 28, 42 P.3d at 578 ("We give great deference to the trial court's ruling, based, as it is, largely upon an assessment of the prosecutor's credibility."). Asked if anyone had served on a jury in the past, Juror No. 70 responded, "Yes, and it was a civil, and it was not guilty. It was, like, a --." After clarifying that it was not a criminal case, but a civil case, in Arizona, the court asked her, "Do you remember what . . . it was all about? Was it a car accident?" Juror No. 70 responded, "I

can’t really remember. It was a long time ago, Sorry. All I just know, it was. . .” The court then asked, “Okay. Anything about that experience that you think might interfere with your ability to be fair and impartial?” Juror No. 70 responded, “No.”

¶14 We are not persuaded by Lee’s argument that Juror No. 70 was prevented from explaining what the prior case was about because the trial court interrupted her twice. We cannot tell from the record whether the court interrupted this juror’s explanation, or simply resumed asking questions because the juror had stopped speaking. Had the court in fact prevented this juror from explaining what the prior case was about, however, we would anticipate that defense counsel or the trial court would have said so during the discussion on the *Batson* challenge. Neither mentioned it. Nor are we convinced on this record by Lee’s argument that the prosecutor’s failure to question this juror further on her prior jury service shows that her inability to recall what the case was about was simply a pretext for striking her because she was African-American. The prosecutor’s reasoning was not only that she did not remember what the case was about, but that she was so young that her service could not have occurred that long ago, a circumstance that the trial court also found concerning. We also reject Lee’s argument that the prosecutor repeatedly mischaracterized

Juror No. 70's service on a jury in a civil case by referring to the verdict as "not guilty." The State explained that although the trial for which this person served as a juror was described by her as a civil trial, "not guilty" nevertheless was a phrase the State did not like to hear.

¶15 Lee asserts, however, that regardless of the above analysis, the prosecutor's conclusion that Juror No. 70 was uneducated based on her statement, "I ain't got no husband," and that she had no investment in the community based on her lack of marriage and children, were pretextual and therefore grounds for reversal. *See State v. Lucas*, 199 Ariz. 366, 369, ¶¶ 11, 13, 18 P.3d 160, 163 (App. 2001) (even if one of the State's claimed reasons is valid under *Batson*, reversal is required if the State considers any discriminatory factor in making the strike). But we have repeatedly found that marital status, age, work history, and education are appropriate and race-neutral reasons for striking jurors. *State v. Sanderson*, 182 Ariz. 534, 540, 898 P.2d 483, 489 (App. 1995) (noting that "[p]rospective jurors' age, marital status and lack of employment have been identified as non-discriminatory reasons supporting the exercise of peremptory strikes"); *State v. Rodarte*, 173 Ariz. 331, 334-35, 842 P.2d 1344, 1347-48 (App. 1992) (finding no *Batson* violation in strike based on work history and marital status). Moreover, although the trial court disagreed with the prosecutor's

conclusion that this prospective juror was uneducated based on her statement, "I ain't got no husband," or that she had no investment in the community based on her lack of marriage and children, the court did not suggest that these reasons were simply a pretext for discrimination, or that they were not race-neutral. *See Newell*, 212 Ariz. at 401, 132 P.3d at 845 (the trial court is in a better position to determine whether the defendant has established purposeful discrimination, because this inquiry is fact-intensive and turns on credibility). We assume the trial court was aware of *Lucas* and, if it had concluded the other reasons offered by the prosecutor for the peremptory strike of Juror No. 70 were pretextual, it would have granted Lee's *Batson* challenge. We therefore find unpersuasive Lee's argument that these reasons were race-based and tainted the entire process, requiring reversal.

¶16 Nor do we find the facts in this case similar to those in *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005), on which Lee also relies. In *Miller-El II*, the United States Supreme Court held that the defendant had shown a *Batson* violation based on extensive evidence, including the prosecutor's peremptory strike of ten of eleven black members remaining on the venire panel after others were excused for cause or by agreement; a side-by-side comparison that revealed the prosecutor had mischaracterized black jurors' responses in

voir dire, questioned black and nonblack jurors differently, and failed to strike nonblack jurors with identical responses; the State repeatedly "shuffled" the jury with the apparent purpose of repositioning black jurors to a higher juror number; and a policy and past history by the office of systematic exclusion of blacks from juries. *Id.* at 240-66. Lee has failed to show the same systematic discrimination and side-by-side comparison that prompted the Supreme Court to find *Batson* error in *Miller-El II*. On this record, we find no *Batson* error.

II. Vouching Regarding Absent Witnesses

¶17 Lee argues it was reversible error "for the prosecutor to vouch to the jury that there were witnesses who did not testify, who could have testified in support of the prosecutor's version of the facts." Specifically, he argues that it was improper vouching for the prosecutor to suggest during opening statement, and the State's gang expert to testify at trial, that members of the rival gangs involved in the charged offenses "will not testify in trials" because of the code of silence, and it was not uncommon for witnesses of gang crimes to fail to come forward, become uncooperative, or recant, for fear of retaliation.

¶18 The background on this issue is as follows. During opening statement, the prosecutor noted that during trial, "you're going to hear a lot of gang testimony and you'll hear

quite a bit of evidence regarding gang culture." She noted that "Gangs gain their control power status by creating fear," and "it's uncommon for gang members to cooperate with the police." She elaborated:

> You'll hear even if they're victimized, it's uncommon for them to call and seek the help of the police. You'll hear it's uncommon for them to rely on the justice system because instead of the justice system, they rely on revenge.
>
> . . .
>
> Gang members don't [rely] on the justice system they rely on revenge. They rely on retaliation. Take matters into their own hands and street justice mentality. But you'll hear during the course of the trial that it goes beyond that; beyond just taking things into their own hands. Gang members also don't want to be labeled as snitches. Being labeled as a snitch among gang members makes you a target and ultimately it can get you killed. As a result, there is a perceived code of silence among gang members.
>
> Now other than gang members themsel[ves], you'll also hear testimony that in gang related cases it's uncommon . . . for witnesses to come forward, especially when crimes occur in the gang territory and you'll hear that often times witnesses don't come forward because they fear retaliation.
>
> You'll hear often times when a witness does come forward and give information to the police, that later on the police may not be able to find them again because later they'll become uncooperative.
>
> You'll hear that sometimes witnesses who do come forward initially will later recant or

> change their story. Now all of this gang culture is important in this case because it lays the groundwork for a lot of what you're going to see and what you're going to hear during the course of this trial.

¶19 The State's gang expert subsequently testified at length about the gang culture and a gang member's violent way of life. He testified that a gang member would support the gang "by selling drugs, committing [felonies], [and] intimidating others so they don't inform the police of their activities." He stated that gang members maintain a code of silence, and, instead of reporting crimes to police, "[t]hey take care of matters in their own hands." He explained that gangs retaliate against community members who are not gang members when they "snitch," as part of a program of intimidation and violence, and it is not uncommon for witnesses to gang crimes to recant.

¶20 Lee did not object at trial to any statement the prosecutor made in opening, or to the gang expert's testimony on witnesses' traditional reluctance to report gang-related crimes to police. We accordingly review this issue for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Lee thus bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608. Fundamental error is error going to the foundation of the case, error that takes from the defendant

a right essential to his defense, and error of such magnitude that the defendant could not have received a fair trial. *Id*. at ¶ 24.

¶21 There are "two forms of impermissible prosecutorial vouching: (1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. King,* 180 Ariz. 268, 276-77, 883 P.2d 1024, 1032-33 (1994) (citation omitted). It is the latter form of vouching about which Lee complains.

¶22 However, we find no error, much less fundamental error. We construe the prosecutor's arguments as placing in context the evidence at trial, including the gang expert's testimony on the violent and intimidating nature of criminal street gangs; the flight after the shooting of Trevone and his subsequent failure to cooperate with police; the uneven cooperation of Mikesha, and the fear that prompted her to leave town after the shooting; and the numerous threatening phone calls made to Kimesha, one by a person whose voice she believed was Lee's, causing her to move out of state. These statements also provided some context to the failure of a defense witness to call 9-1-1 after the shooting because he did not want to get involved, and the inconsistencies in another defense witness's versions of events, as well as her reluctance to testify at

trial because of threats. The gang's culture of fear and intimidation was relevant to place these witnesses' testimony in context, and to prove the gang-related nature of two of the offenses: assisting a criminal street gang and misconduct involving weapons based on discharging a weapon at an occupied structure to assist a criminal street gang.

¶23 We therefore cannot agree with Lee that either the prosecutor's opening statement or the gang expert's testimony was meant to, or did, clearly convey to the jury that the State had witnesses who would corroborate its version of events, but that they were too intimidated to testify. We accordingly find no error.

III. Expert Testimony

¶24 Lee next argues that "it was reversible error for the prosecution's 'gang expert' to vouch to the jury that [Lee] committed the murder and the murder enhanced [his] gang status." Specifically, he points to the following exchange between the State and the gang expert:

> [State]: Would shooting at a car occupied by Vista Bloods enhance the defendant's status within the Lindo Park Crips?
>
> [Witness]: It did.
>
> [State]: Would it also enhance the status of the Lindo Park Crips as a whole?
>
> [Witness] It did.

> [State]: And, similarly, besides just shooting at the car, would actually murdering R.S. enhance the defendant's status in the Lindo Park Crips?
>
> [Witness]: It did.
>
> [State]: Does it also enhance the gang and their power and respect within the community?
>
> [Witness]: Yes, it did.

Defense counsel did not object at the time, and instead elicited testimony from this expert on cross-examination that if a member of the Vista Bloods had come into the area controlled by the Lindo Park Crips and shot at them, his gang status would have been enhanced as well. Because Lee did not object at trial to the gang expert's testimony, we review this issue for fundamental error only.

¶25 Expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *See* Ariz. R. Evid. 702. An expert may rely on evidence not admissible at trial in reaching his opinion. Ariz. R. Evid. 703; *cf. State v. Smith,* 215 Ariz. 221, 228-29, ¶¶ 21-26, 159 P.3d 531, 538-39 (2007) (holding that medical examiner's discussion of prior examiner's findings and opinions was not hearsay nor in violation of defendant's confrontation rights). Moreover, an expert's opinion is not inadmissible merely "because it embraces an ultimate issue to be decided by the

trier of fact," but may be admitted if it assists the jury in understanding the evidence. Ariz. R. Evid. 704; *State v. Fornof*, 218 Ariz. 74, 79-80, ¶ 21, 179 P.3d 954, 959-60 (App. 2008).

¶26 Here, the State did not offer the detective as a fact witness who had investigated the homicide, but rather as an expert witness. He testified he had expertise in criminal street gangs and his role in this case was to show that the shooting was gang-motivated. This evidence was, at a minimum, relevant and assisted the jury in its determination of whether Lee committed the crime of assisting the interests of a street gang. *See Fornof*, 218 Ariz. at 79-80, ¶ 21, 179 P.3d at 959-60.

¶27 Moreover, the trial court adequately clarified that the detective offered this testimony as an expert witness, not as a fact witness. After receiving a follow-up jury question asking if the expert's opinion regarding Lee's enhanced reputation was based on "documented" fact, or was just "a professional opinion/judgment," the trial court recognized that this question "illustrate[d] the problem with jurors expecting the experts to tell them what happened in a case and making a factual determination for them." The trial court therefore asked the detective whether he was offering the testimony as an opinion based on his gang expertise. The detective confirmed that his testimony was based on his gang expertise as well as

his knowledge obtained in this investigation, other investigations, and information from a variety of other sources. The trial court was in the best position to ascertain whether the detective's testimony that the murder "did" enhance Lee's status in the gang, in response to the prosecutor's hypothetical questions on whether it "would" enhance his status, would have had an improper impact on the jury. *See State v. Jones,* 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). We therefore find no error.

¶28 On this record, in the absence of any objection at trial, we are not persuaded that admission of the gang expert's opinion that the murder enhanced Lee's status in the gang, an opinion relevant to the issue of whether the shooting assisted a criminal street gang, was error of such magnitude that Lee could not have received a fair trial. *See Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608.

¶29 Furthermore, Lee has failed to persuade us that the jury could have acquitted him absent the expert's testimony, as required to reverse on fundamental error review. *See id*. at 569, ¶ 27, 115 P.3d at 609. The prosecutor did not mention in closing the detective's testimony that the murder "did" enhance Lee's status in the gang. Rather, she argued that the offense of assisting a criminal street gang had been proven in pertinent part by the detective's testimony that "this homicide *would*, in

fact, benefit the Lindo Park Crips." (emphasis added.) She further argued that the offense of misconduct involving weapons based on firing a gun at a structure to assist a criminal street gang had been established in pertinent part by the detective's testimony that "shooting at a rival gang member's car, whether he kills someone or not, certainly benefits the Lindo Park Crips and enhances their status as a violent gang." To convince the jury that Lee was in fact the shooter, however, the prosecutor instead relied on the testimony of eyewitnesses Mikesha and Kimesha, the forensic evidence, and the implausibility of Lee's version of events. On this record, it would be sheer speculation to suggest that the jury could have acquitted Lee had it not been for this expert testimony, an insufficient basis for the necessary prejudice to reverse on fundamental error review. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006). We accordingly find the trial court did not fundamentally err by failing to sua sponte strike this testimony.

CONCLUSION

¶30 For the foregoing reasons, we affirm Lee's convictions and sentences.

/s/_
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DONN KESSLER, Judge