IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 10-0656
	)	1 CA-CR 10-0668
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT B
	)	
	)	**MEMORANDUM DECISION**
ALBERT CISNEROS SANCHEZ,	)	
	)	(Not for Publication –
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2007-173556-001 DT and CR2010-103388-001 DT

The Honorable Julie P. Newell, Judge *Pro Tempore*

AFFIRMED

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

Bruce Peterson, Office of the Legal Advocate — Phoenix
by Frances J. Gray, Deputy Legal Advocate
Attorneys for Appellant

B A R K E R, Judge

¶1 Albert Cisneros Sanchez appeals his convictions and sentences for burglary in the second degree and possession of burglary tools, and the resulting revocation of the probation he was serving on a prior offense, on the ground the trial court committed structural error in excusing two jurors for cause. Sanchez asserts he should have received the opportunity to rehabilitate them through additional *voir dire*. He contends that the trial court further violated his *Batson*[1] rights in excusing these same two jurors. For the reasons that follow we find no reversible error and affirm.

Facts and Procedural History

¶2 The evidence at trial, viewed in the light most favorable to conviction, showed that the owner of a vacant house in southwest Phoenix saw Sanchez leave the side door of the house and attempt to leap the fence. A police officer in the neighborhood located Sanchez in an alley behind the house and detained him. After the owner reported that copper pipes had been removed, wires had been cut, and walls had been torn out, another officer arrested him. The officers searched Sanchez and found a pair of wire cutters and a flashlight. The arresting officer testified that Sanchez told her he had seen a lot of clothing in the backyard, and "[he] just wanted to see if there was anything good [he] [could] take." Sanchez told the officer

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

he had gone inside the house and a shed on the property. Sanchez had "white powder in his hair" and "white dust on his clothes and his hands." Outside the side entry door, police found a bag with copper piping and wiring that had been cut. A jury convicted Sanchez of the charged offenses.

¶3 The judge subsequently found the existence of a prior historical felony conviction, and that the instant offense was committed while Sanchez was on probation. She sentenced Sanchez to a presumptive term of six and one-half years on the burglary conviction, and one and three-quarter years on the possession conviction, to be served concurrently. She revoked his probation, designated the undesignated offense a felony, and sentenced Sanchez to serve one year in prison with credit for 366 days of pre-sentence incarceration. Sanchez filed a timely notice of appeal in both cases, and this court consolidated the cases on appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and 13-4033(A)(1) (2010).

¶4 The background on the issues raised on appeal is as follows. Before *voir dire*, each of the prospective jurors had completed a brief written biographical form. The form asked for the juror's name, place of employment, and race. The form also requested information as to whether the juror had ever been convicted of a felony, and, if so, where and when, and whether

the juror's civil rights had been restored. By the juror's signature on the form, each prospective juror declared "under penalty of law that the foregoing is true and correct."

¶5 One juror, subsequently identified by the prosecutor as Juror No. 11, marked "yes" to the question whether he had ever been convicted of a felony, but did not detail where and when, and did not mark "yes" in response to the question whether his civil rights had been restored. He checked that his race was "Black/African American." Another juror, subsequently identified as Juror No. 20, marked "yes" both to the question whether he had ever been convicted of a felony, and whether his civil rights had been restored, but did not detail where and when he had been convicted of the felony. He checked that his race was American Indian/Alaska Native.

¶6 At the start of *voir dire*, the trial judge advised the venire panel that, to be qualified for jury service, a person must be eighteen years or older, a citizen, a resident of Maricopa County, and "must not have been convicted of a felony unless your civil rights have been restored." She advised the panel that she would be happy to discuss the matter in private if the lack of qualifications involved a confidential or sensitive matter, but asked "any person [who] does not have all of these qualifications, [to] please raise your hand now." She then noted, "I take it by your silence the answer is no."

¶7 After the judge had completed *voir dire*, she invited counsel to ask any follow-up questions. The prosecutor did not ask any follow-up questions; defense counsel conducted only brief follow-up. The judge concluded *voir dire* and ordered a recess to allow her and counsel to consider strikes for cause and peremptory strikes, and directed the panel to return to the courtroom in thirty-five minutes.

¶8 After the judge had identified a number of prospective jurors she planned to excuse for cause, the prosecutor outlined his concerns with respect to the jurors mentioned by the judge, and then commented:

> I would also note, Juror Number 11 indicated on his biographical information that he had been previously convicted of a felony. He left the boxes as to whether he thinks his rights have been restored blank.

The prosecutor challenged Juror No. 11's qualifications to be a juror. The prosecutor also mentioned that another juror, who was later identified as Juror No. 20, had indicated on the written form that he had been convicted of a felony but noted that his civil rights had been restored.

¶9 Sanchez asked to question Juror No. 11 to make sure he had not mistakenly checked the wrong box. The bailiff twice attempted to locate Juror No. 11. However, the panel was on break and the bailiff was not successful. The judge accordingly

denied this request for additional questioning. The judge instead struck both Juror No. 11 and Juror No. 20 for cause over Sanchez's objection, explaining that the failure of these two prospective jurors to supply the requested details on the written form regarding their prior felony convictions, and the inconsistency between their written responses and their oral responses on whether they had ever been convicted of a felony caused her concern.

¶10 On further inquiry by the judge, Sanchez confirmed that he had an "additional" concern that Juror No. 11, in the judge's words, "falls under a possible *Batson* challenge." The trial judge later noted that Juror No. 20 also "falls into a *Batson* category."

¶11 Sanchez argues first that the trial judge committed structural error in excusing these two jurors for cause without allowing him to attempt to rehabilitate them, depriving him of his constitutional right to an impartial jury. We review a trial court's decision to excuse a juror for cause for abuse of discretion. *State v. McGill*, 213 Ariz. 147, 152, ¶ 14, 140 P.3d 930, 935 (2006); *State v. Glassel*, 211 Ariz. 33, 47, ¶ 46, 116 P.3d 1193, 1207 (2005). The scope and extent of *voir dire* is also left to the sound discretion of the trial court. *State v. Walden*, 183 Ariz. 595, 607, 905 P.2d 974, 986 (1995). We look to the entire *voir dire* to determine whether the trial court

abused its discretion, and we will not disturb the trial court's decision to limit *voir dire* or to excuse jurors for cause unless the defendant demonstrates that the jury was not fair and impartial. *Id.*; *see also State v. Moody*, 208 Ariz. 424, 451, ¶ 95, 94 P.3d 1119, 1146 (2004) (holding that to succeed on a claim regarding inadequate questioning of the jury panel, the defendant must demonstrate "not only that the voir dire examination was inadequate, but also that, as a result of the inadequate questioning, the jury selected was not fair, unbiased, and impartial").

¶12 We find no abuse of discretion in the judge's excusing these two jurors from service without further *voir dire*. Arizona law provides that convicted felons may not serve as jurors, unless their civil rights have been restored. A.R.S. § 21-201(3) (2002). Arizona Criminal Procedure Rule 18.4(b) provides that a judge shall excuse a juror when there is "reasonable ground to believe that a juror cannot render a fair and impartial verdict." Among the reasons a judge may excuse a juror for cause is if the juror has "been convicted of a felony." *See* Ariz. R. Crim. P. 18.4(b) cmt.

¶13 The judge had reasonable ground to believe that Juror No. 11 was simply not qualified to serve as a juror; he had stated on his biographical form that he had been convicted of a felony, and he had not noted that his civil rights had been

restored. *See* A.R.S. § 21-201(3). Moreover, the judge had reason to believe that Juror No. 11 had not been candid with the court, either on the original form, or in his repeated failure to acknowledge the conviction in oral *voir dire*. We cannot say the judge abused her discretion in declining to delay jury selection until the panel returned from recess to allow Sanchez to re-open *voir dire* to attempt to rehabilitate him.

¶14 Nor are we persuaded that the judge abused her discretion in excusing Juror No. 20 for cause without further *voir dire*. Based solely on his written responses regarding the prior felony conviction, this juror met the legal qualifications, as he stated on the form that his civil rights had been restored. But the judge found it troubling that Juror No. 20 did not supply the date and place of his conviction asked for on the written form and did not admit to the prior felony conviction when asked in oral *voir dire*. These discrepancies gave the judge reasonable grounds to believe that this juror also was not being candid with the court. Thus, reasonable grounds existed to excuse him for cause without re-opening *voir dire*.

¶15 The judge had given Sanchez a "reasonable time to conduct a further oral examination of the prospective jurors," as required under Rule 18.5(d). Sanchez apparently simply had not noticed these jurors' responses to the qualifying question

on their written forms before *voir dire* ended. On this record, we find no abuse of discretion in the judge's resolution of this issue.

¶16 Moreover, even if the trial court did abuse its discretion in striking these jurors for cause without allowing further *voir dire*, Sanchez has failed to present any evidence that the jury that ultimately convicted him was not fair or impartial, as necessary for reversal. *See Walden,* 183 Ariz. at 609, 905 P.2d at 988 (holding that judge's erroneous striking of juror for cause does not warrant reversal "unless the record affirmatively shows that such a fair and impartial jury was not secured"); *cf. State v. Hickman,* 205 Ariz. 192, 199-200, ¶ 32, 68 P.3d 418, 425-26 (2003) (holding that trial court's error in *refusing* to strike juror for cause is subject to harmless error review).

¶17 Sanchez misplaces his reliance on *State v. Anderson,* 197 Ariz. 314, 4 P.3d 369 (2000), a capital case, for the proposition that any error involving the composition of the jury is structural error, requiring reversal. In *Anderson,* our supreme court held that the denial of the defendant's request for oral *voir dire* that might have rehabilitated three jurors who had expressed general objections to capital punishment in a written questionnaire, and the judge's discharge of these jurors based on their unexamined views, constituted structural error,

requiring reversal. *Id.* at 317-24, ¶¶ 4-24, 4 P.3d at 372-79. The *Anderson* court narrowly held only that "[h]armless error analysis is inapplicable to the erroneous grant of challenges for cause on *Witherspoon*-type issues," that is, issues involving a capital defendant's constitutional right not to be tried by a jury chosen by excluding persons who have a general objection to the death penalty. *Id*. at 318-24, ¶¶ 6-24, 4 P.3d at 373-79. We find nothing in Anderson to suggest that our supreme court intends its holding to apply outside the special and unique circumstances of death penalty jurisprudence. *See id*. at 322-24, ¶¶ 20-24, 4 P.3d at 377-79.

¶18 Moreover, the facts in *Anderson* are distinguishable. The judge in this case did not deny appellant oral *voir dire*; she simply declined to re-open *voir dire* after the prosecutor challenged Juror No. 11 based on the felony conviction he reported in his written form, and noted that Juror No. 20 had also reported having been convicted of a felony. Under these circumstances, *Anderson* does not apply. *See State v. Canez*, 202 Ariz. 133, 147, ¶ 30, 42 P.3d 564, 578 (noting "we need not address *Anderson* because here, oral voir dire *was* conducted"). Thus, the general rule that an error in striking a juror is not cause for reversal unless the record affirmatively shows that a fair and impartial jury was not secured applies. *See Walden,* 183 Ariz. at 609, 905 P.2d at 988; *see also State v. Morris*, 215

Ariz. 324, 334, ¶ 40, 160 P.3d 203, 213 (2007) ("Although a 'defendant in a criminal case is entitled to a fair and impartial jury for the trial of his case, . . . he is not entitled to be tried by any particular jury.'") (quoting *State v. Atwood*, 171 Ariz. 576, 607, 832 P.2d 593, 624 (1992)). Here, the record fails to show any evidence demonstrating that the jury that tried Sanchez was not fair and impartial. Under these circumstances, any error in discharging these jurors for cause does not require reversal. *See id.*

Batson *Challenge*

¶19 Sanchez next argues that the trial court committed structural error by excluding these same jurors after denying him the opportunity to rehabilitate them through additional *voir dire*, by "knowingly permit[ing] the State to evade the scrutiny of a *Batson* inquiry." He argues that the State's delay in bringing Juror No. 11's lack of qualifications to the court's attention supports an inference that the State's reason for challenging Juror No. 11 for cause was racial. We find no merit in this argument.

¶20 The Equal Protection Clause of the Fourteenth Amendment prevents peremptory strikes of prospective jurors based solely upon race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). "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). "We review a trial court's decision regarding the State's motives for a peremptory strike for clear error." *Id*. at ¶ 13. "We give great deference to the trial court's ruling, based, as it is, largely upon an assessment of the prosecutor's credibility." *Canez*, 202 Ariz. at 147, ¶ 28, 42 P.3d at 578.

¶21 In this case, the judge herself determined to excuse these two minority jurors, not because of their race, but because of their prior felony convictions and their lack of candor with the court regarding same. We have found that the judge had reasonable grounds to excuse these jurors on this basis. Our review of the record gives us no cause to believe that the prosecutor deliberately delayed his challenge of Juror No. 11 until after the close of *voir dire* for discriminatory purposes, or that the judge struck these two minority jurors for the purpose of allowing the prosecutor to evade a *Batson* inquiry. The prosecutor did not, in fact, seek to have Juror No. 20 for cause; it was the judge who determined that the lack of details provided on his prior conviction on the written form

and his lack of candor with the court in oral *voir dire* provided cause to excuse him as well. Accordingly, we find no merit in Sanchez's claim that these jurors were excused based on their race. The *Batson* challenge has no merit.

Conclusion

¶22 For the foregoing reasons, we affirm Sanchez's convictions, the revocation of his probation, and his sentences.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
PATRICIA K. NORRIS, Judge