DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. CONNIE FRANCES SERMENO, Appellant.	)	1 CA-CR 10-0286 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-137150-004-DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
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Attorneys for Appellee

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B A R K E R, Judge

¶1 Defendant, Connie Francis Sermeno, appeals her convictions and sentences for aggravated robbery, kidnapping, and felony murder. She argues that the trial court committed reversible error in a re-trial of the felony-murder and kidnapping charges after the first jury hung on these charges, by denying her *Batson* challenge, by failing to recuse herself because of bias, and by disclosing to the jury during *voir dire* that Sermeno had been previously convicted of the aggravated robbery offense. For the reasons below, we affirm.

¶2 A grand jury indicted Sermeno and four others on charges of first-degree murder, kidnapping, and aggravated robbery of the victim on June 20, 2006. The indictment identified kidnapping and/or robbery as the predicate offenses for felony murder, charged in the alternative to premeditated murder. In the first trial, the jury convicted Sermeno of aggravated robbery and found it was a non-dangerous offense, but was unable to reach a verdict on the kidnapping and murder charges. In a re-trial of the kidnapping and felony-murder charges, another jury convicted Sermeno of both charges, and found both offenses dangerous. The judge who presided over both trials sentenced Sermeno to life without possibility of release for twenty-five years on the felony-murder charge, and lesser concurrent terms on the kidnapping and aggravated robbery convictions. Sermeno filed a timely notice of appeal.

¶3 Co-defendant Patricia Chavez, who had agreed to testify as part of a plea to second-degree murder, was the key witness at both trials. She testified that she had spent the night with Albert, Sermeno's son, at Sermeno's trailer near Southern Avenue and 23rd Street in Phoenix the night before the murder.

¶4 The morning of the murder, Chavez testified Sermeno came out of the bedroom with Jose, Sermeno's boyfriend, and announced to Chavez, Albert, and another son, Carlos, that she had only eighty-five cents remaining on her pre-paid electricity card. Chavez, a prostitute, made arrangements to meet the victim at a convenience store at 24th Street and Southern Avenue, and go with him to a motel for sex, to make money to help out.

¶5 When Chavez told Sermeno and the others that she was going to have sex with the victim to help out with the electricity, Albert suggested she bring him back to the trailer, and the three men would rob him. Chavez agreed to tell the victim that her children were in the trailer, that she needed money to pay the babysitter, and that he should hand the money to Sermeno when she answered the door. According to Chavez's testimony, Sermeno agreed to let the men know when Chavez knocked on the trailer door so they could hide, and to open the door to let Chavez and the victim come inside the trailer so the

men could beat and rob him.

¶6 Chavez testified that Sermeno opened the door when she returned with the victim, took the money, and went into a back room as Chavez and the victim entered the trailer. Chavez testified that she turned up the radio as a signal for the men to come out from where they were hiding. Chavez then walked to a room at the back of the trailer and joined Sermeno. Chavez later returned to the front room and saw Carlos and Jose tying the victim's hands with an electrical cord. She saw them wrap him in a sheet and put him in the back of the van he had been driving.

¶7 Chavez testified that after the men left with the victim, Sermeno showed her his wallet, and told her Albert had given it to her. Chavez also testified that Sermeno put the victim's wedding band on her finger and said, "It's mine." Sermeno and Chavez then cleaned up the blood in the trailer.

¶8 According to Chavez, the men returned about an hour later in the van the victim had been driving, and they unloaded property from the back of the van and put it into Sermeno's bedroom closet at her direction. Sermeno told Albert to take Jose in the van to the supermarket to put some money on the pre-paid electricity card and to buy some beer. Chavez and Albert dropped Jose off near the trailer, drove the van to a field near South Mountain Park, and abandoned it.

¶9 The following day, police recovered the victim's body from the desert north of Phoenix. Police found the body lying face down, with his hands bound behind his back, and a bloody footprint on each of his shoulder blades. The medical examiner testified that homicidal violence caused the death, and the most likely mechanism was positional asphyxiation.

¶10 Property and DNA evidence linked to the victim connected Sermeno's trailer to the robbery and the violent beating. A photograph of Sermeno taken by police following her arrest showed her wearing the victim's wedding band.

Disclosure of Robbery Conviction During Voir Dire

¶11 Sermeno argues that the trial court erred by disclosing to the jury during voir dire in the second trial that another jury had convicted her of the aggravated robbery, a disclosure that deprived her of her right to a fair trial before the jury even heard any evidence. She argues that the prior conviction was inadmissible at trial for impeachment purposes because she did not take the stand and testify, and any probative value it had was substantially outweighed by unfair prejudice. She argues that the judge compounded this prejudice when she sustained an objection on speculation grounds to Sermeno's closing remark, "[T]here is a previous finding of guilt, and what you don't know is what the basis of that previous finding of guilt was. What was it?"

¶12 The background on this issue is as follows. The judge informed counsel before voir dire in the second trial that she planned to question the panel on whether they would accept that a prior jury had convicted Sermeno of the aggravated robbery charge. Defense counsel objected, arguing that because the first jury failed to find that the aggravated robbery was a predicate offense for the felony murder, "this jury has to hear every single bit of evidence that that aggravated robbery finding was based on," and the evidence would necessarily be different in this second trial. She argued that under these circumstances it was "incredibly damaging" for this jury to be told that another jury had already convicted Sermeno of the aggravated robbery. The judge denied the objection, stating that she was not going to retry the aggravated robbery, and she accordingly needed to know if the prospective jurors could accept the previous finding of guilt as binding.[1] The judge subsequently advised the venire panel during voir dire as follows:

> All right. I just have a few final questions for you, and one of the things I will tell you in this case is that a prior jury has already found this defendant guilty of the crime of aggravated robbery. You have to accept that prior jury's finding, and you

[1]The judge told counsel she would start over with a new panel if defense counsel was able to supply her with persuasive legal authority to support her position that the conviction was not binding on this jury. Sermeno failed to do so.

> cannot go back and revisit it. So you have to accept that finding of guilt.
>
> Is there anyone sitting here who, because they did not make that decision, would be unable to accept that decision?

¶13 The judge subsequently also instructed the jury as follows:

> The defendant has previously been found guilty of aggravated robbery. You must accept this prior finding.

The judge also instructed the jury on the elements of aggravated robbery at Sermeno's request, on the elements of robbery at the State's request, and on the requirement of felony murder that the murder be committed in the course of, and in furtherance of or immediate flight from, the predicate felony, in this case, kidnapping and/or robbery. The judge subsequently sustained the prosecutor's objection on grounds of speculation to Sermeno's closing remark, "[T]here is a previous finding of guilt, and what you don't know is what the basis of that previous finding of guilt was. What was it?"

¶14 On this record, we find that it was error for the judge to advise the second venire panel that it must accept another jury's finding that Sermeno was guilty of aggravated robbery, and to instruct the jury in final instructions that it was bound by this prior conviction. Although the judge did not identify the specific legal authority on which she based her

ruling, we conclude that she could only have relied on the theory that the aggravated robbery conviction in the first trial had *res judicata* or *collateral estoppel* effect in the second trial. Because, however, the judge did not enter judgment on the aggravated robbery conviction before the re-trial on the kidnapping and felony-murder charges, neither *collateral estoppel* nor *res judicata* applied to preclude re-litigation of this conviction. *See State v. Nunez*, 167 Ariz. 272, 278, 806 P.2d 861, 867 (1991) ("A verdict, before judgment has been entered thereon, has no finality, cannot be executed and cannot be pleaded in bar as *res judicata* or offered in evidence as collateral estoppel.") (quoting *State v. Williams*, 131 Ariz. 211, 213, 639 P.2d 1036, 1039 (1982)). The judge accordingly erred in instructing the venire panel during voir dire that it must accept the prior jury's finding that Sermeno was guilty of aggravated robbery, and in giving the jury final instructions to the same effect. *See id.*

¶15 Sermeno did object at trial to the judge's proposal to instruct the venire panel that it must accept her prior conviction for aggravated robbery, but on different grounds than she raises on appeal. We accordingly review this issue for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (holding that review of claims raised for the first time on appeal is for fundamental

error only); *State v. Bolton*, 182 Ariz. 290, 304, 896 P.2d 830, 844 (1995) (holding that objection on grounds of lack of foundation and speculation did not preserve objection that admission of evidence violated confrontation right). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). On fundamental error review, Sermeno bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused her prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶16 Here, the error that occurred cannot repeat itself as a judgment on the aggravated robbery conviction has now been entered. The error is essentially moot.[2] We decline to find

[2]The dissent focuses on whether the use of *collateral estoppel* is appropriate in this criminal case, noting there are cases going each way and agreeing with those that reject its use. We view this case from a somewhat different light, similar to that referenced in footnote 7 in the dissent, where evidence may be admissible even if not binding. *See Allen v. State*, 995 A.2d 1013, 1027 (Md. App. 2010). Specifically, the now-established judgment of conviction for aggravated robbery would be admissible as a fact for the jury to consider. As to the instant case, the jury first returned a verdict of guilty as to aggravated robbery on December 17, 2009. Less than two months later, on February 8, 2010, the second trial commenced. As part of that trial, and similar to what would be required in any third trial, the jury received the following instruction:

that the prejudice prong of the fundamental error standard is satisfied when the error which occurred could not be present in a re-trial based on the same evidence heard by the prior jury. Thus, there is no reversible error here.

Judge's Failure to Recuse Herself

¶17 Sermeno also argues that the trial judge deprived her of a fair trial by failing to recuse herself because of bias and lack of impartiality resulting from an "*ex parte* communication" that the first jury had split eleven-to-one on the felony-murder charge.

> The crime of first-degree felony murder requires proof that: (1) The defendant and other persons committed or attempted to commit kidnapping and/or robbery; and (2) In the course of and in furtherance of the crime or immediate flight from the crime, the defendant or another person caused the death of any person.

As to element one, the most compelling information available from the State's perspective is that Sermeno was actually convicted by a prior jury of aggravated robbery, which includes all the elements of a robbery. We are hard pressed to see that this information, even if not binding on a jury, would be inadmissible as there is no *unfair* prejudice involved in admitting the result of the jury on the very issue in question. In the face of such evidence, we see no prejudice and no need to require a re-trial here. We routinely allow evidence of conviction to establish elements of certain offenses. *E.g.* A.R.S. § 28-1383(A)(1) (to show that a person's license to drive has been suspended, cancelled, or revoked as an element of an aggravated driving while under the influence conviction). We need not resolve whether the jury would be required to accept the prior conviction, but in the face of that evidence we deem it extremely unlikely that a subsequent jury would not find that a robbery was committed, just as the jury in this trial did.

¶18 This issue arose before voir dire of the venire panel for the second trial, in a discussion that ensued after the judge informed counsel that she anticipated asking the jurors if they would be able to accept that Sermeno had already been convicted of aggravated robbery. In the context of this discussion and in later clarification, the judge noted that it was her understanding that the prior jury had deadlocked eleven-to-one on the felony-murder count, and "that the one juror just didn't agree with the felony murder rule." The judge explained that she learned this information "second hand from somebody else whose neighbor was on the jury, and this is what they told this other person." She added, "[b]ut, you know, I believe that what happened is we had some jury nullification back there, because if they followed the law and they find the predicate, which they found, then they had to have felony murder, unless you had some kind of jury nullification."

¶19 Following jury selection, immediately before the jury was sworn in, Sermeno made an oral motion seeking to disqualify the judge "pursuant to Rule 10.1" on the basis of her "improper" conversation about the jury split in the first trial, and requesting an evidentiary hearing on what precisely the judge was told. The judge denied the motion, noting that she could have joined Sermeno in her post-verdict interviews of the jurors

after the admonition was lifted, and she had not heard "anything about this case that would cause [her] to recuse [her]self."

¶20 Sermeno renewed her motion following opening arguments, arguing that the judge's impartiality was in serious question, as evidenced by her asking these jurors whether they could follow the felony-murder rule, "unlike what you did with the first jury panel on the last trial." The judge again denied the motion, noting that the information she had heard, whether right or wrong, had not impacted her impartiality; that Sermeno had volunteered far more information about what went on in the jury room than the judge had learned from the neighbor; and that she always asks jurors during voir dire if they can follow the felony murder rule. The judge subsequently denied Sermeno's motion for new trial made, in part, on the same basis.

¶21 The right to a fair trial includes the right to a trial presided over by a judge who is impartial and free of bias or prejudice. *State v. Mincey*, 141 Ariz. 425, 442, 687 P.2d 1180, 1197 (1984). Under Rule 10.1(a), a defendant is entitled to a new judge "prior to the commencement of . . . trial . . . if a fair and impartial . . . trial cannot be had by reason of the interest or prejudice of the assigned judge." Ariz. R. Crim. P. 10.1(a). A trial judge is presumed to be free from bias and prejudice, and a defendant has the burden to establish bias and prejudice by a preponderance of the evidence. *See*

State v. Ellison, 213 Ariz. 116, 128, ¶ 37, 140 P.3d 899, 911 (2006).

¶22 We find no merit in Sermeno's argument that mere exposure to information on the reason the jury hung on the felony-murder charge in the first trial required the judge to recuse herself from re-trial of the charges. A judge is required to recuse herself "in any proceeding in which the judge's impartiality might reasonably be questioned," including when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." Ariz. R. Sup. Ct. 81, Canon 2.11(A)(1). Although the Judicial Code of Conduct prohibits a judge from considering *ex parte* communications, *see* Ariz. R. Sup. Ct. 81, Canon 2.9(A), mere exposure to such communications neither requires recusal, nor dictates a conclusion that the judge was biased or prejudiced against the defendant. *State v. Carver*, 160 Ariz. 167, 173-74, 771 P.2d 1382, 1388-89 (1989). The test for determining whether a judge must disqualify herself because of bias based on an allegation such as was made in this case is "[w]hether an objective, disinterested observer fully informed of the facts underlying the grounds on which . . . disqualification [was] contemplated would entertain a significant doubt that justice would be done in the case."

State v. Smith, 203 Ariz. 75, 79, ¶ 16, 50 P.3d 825, 829 (2002) (quoting Op. Ariz. Judicial Ethics Advisory Comm. 96-14 at 1).

¶23 The record fails to support Sermeno's argument on appeal that the judge was "obviously influenced" by this *ex parte* communication and considered it "in making an important determination to inform the jury of the prior conviction for aggravated robbery." The judge assured Sermeno that (1) the *ex parte* communication did not impact her impartiality, (2) she intended to ask the prospective jurors if they would be able to accept the prior conviction for aggravated robbery because she believed governing legal authority required them to do so, (3) contrary to Sermeno's allegation, she always asked jurors during voir dire about the felony murder rule because of past experience with jurors who had difficulty following it, and (4) the information passed on to her about the jury split after the admonition was lifted might have been incorrect, and she brought it to Sermeno's attention only because it differed from what the jurors told Sermeno following the verdict. We find nothing in the record that would suggest that this *ex parte* communication in fact influenced the judge, or caused her prejudice or bias; the record confirms that she had questioned prospective jurors in voir dire during the first trial on the felony murder rule in the same fashion she did in this trial. On this record, we find that Sermeno failed to meet her burden of showing bias, and the

judge accordingly did not abuse her discretion in denying Sermeno's motion that she recuse herself. *See Carver*, 160 Ariz. at 174, 771 P.2d 1389. Nor do we find any merit in Sermeno's argument that the judge erred in denying her request to refer this matter to the presiding judge for an evidentiary hearing. Because Sermeno did not file her motion for recusal in accordance with the requirements of Rule 10.1(b), she was not entitled to an evidentiary hearing in front of the presiding criminal judge pursuant to Rule 10.1(c).

Batson *Challenge*

¶24 Sermeno argues first that the trial court violated her right to equal protection under the Fourteenth Amendment by denying her *Batson* challenge to the prosecutor's peremptory strike of juror number 17. The background on this issue is as follows. Sermeno challenged the prosecutor's strike of juror number 17, arguing that she was "one of only two Hispanics on the jury," the other being juror number 31. The judge called on the prosecutor, who responded that he struck this juror because she had "difficulty speaking English, which I think is a prerequisite." He explained:

> [I]t was very difficult to understand her. So, clearly, she would have had difficulty understanding this particular case. I point that out because the State has alleged this is a case that involved an accomplice as well as the felony murder rule. And I, as

> the prosecutor, want someone who is more conversive in the English language.
>
> Additionally, she appears to lack – not only does she not speak English with facility, but she also appears not to have schooling in the sense that she indicates that she is employed as a Wal-Mart cake decorator. And again, for the reasons I indicated before, the charge and that sort of thing, I would want somebody who is a little bit more educated, so that perhaps understands what is going on.

The prosecutor additionally noted that he had not struck two other jurors with Hispanic surnames, jurors number 31 and 44. The judge told the prosecutor she was not sure that jurors needed to be fluent in English and asked him to explain his concern. The prosecutor responded:

> The jury instructions, I believe, are, if not convoluted, they are difficult to follow. First thing that I will have to argue is that the defendant was an accomplice, and with the four variations as to how one is an accomplice, and then and I do speak very quickly, and I do not believe that she was picking up everything that I was saying or that I would say.
>
> And then on top of that, we then have to talk about in the course or furtherance of the crime, which is the second prong of the felony murder rule, so I do not believe that was somebody that could adequately help me. I am cognizant that number 23 also had a problem speaking the English language. And I understand that, however, he is more educated as I see it, book schooling as opposed to other things, and so that's the reason why I struck her.

Sermeno in turn responded that she did not believe that difficulty in speaking English necessarily equated with difficulty in understanding English, and others on the panel (whom she did not identify) also had the same degree of education, twelve years of school, and accordingly the prosecutor's reasons for striking this juror were simply a pretext for striking the juror based on her race.

¶25 The judge denied the *Batson* challenge, finding that the prosecutor had provided race-neutral reasons for striking this juror that were not specious; reasoning, "I could understand having concerns when you have an accomplice liability case and you are having to explain some of the more complex legal theories that you would want someone that you feel has the capability to fully understand and grasp those theories."

¶26 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). During the third step, 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*, 537 U.S. 322, 339 (2003). In determining whether defendant has met his burden to show purposeful discrimination, however, "implausible or fantastic justifications may (and probably will) be found to be pretext[ual]." *State v. Newell*, 212 Ariz. 389, 401, ¶ 54, 132 P.3d 833, 845 (2006) (quoting *Purkett v. Elem*, 514 U.S 765, 768 (1995)). Moreover, if the prosecutor's race-neutral explanation is unconvincing in light of all of the circumstances, the explanation itself can suffice to show *Batson* error. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

¶27 We review a trial court's decision regarding the State'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).

¶28 We find no *Batson* error. By asking the prosecutor to respond to Sermeno's challenge, the trial judge implicitly found that Sermeno had met her burden to make a *prima facie* showing of discrimination, and thus satisfied the first step in the *Batson* challenge. *See Newell*, 212 Ariz. at 401, ¶ 54, 132 P.3d at 845; *cf. State v. Garcia*, 224 Ariz. 1, 10, ¶ 25, 226 P.3d 370, 379 (2010) (holding once the State offers a race-neutral explanation and the trial court has ruled on the ultimate issue, whether the defendant has made *prima facie* case is moot). We find no error in the judge's finding that the prosecutor satisfied the second step of the *Batson* challenge by offering a facially race-neutral explanation for the strike, that is, that he struck this juror because of her lack of formal education and her difficulty in speaking, and, by inference, understanding, the English language, and not because of her race. *See Garcia*, 224 Ariz. at 10, ¶¶ 23-26, 226 P.3d at 379 (holding that prosecutor's explanation that he had struck juror with Hispanic surname because she had limited education, difficulty understanding and reading English, and had been at her current job only a year, was race-neutral); *see also United States v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993) (holding that lack of English proficiency, a statutory requirement for serving on a federal jury, is race-neutral).

¶29 Finally, we cannot say that the judge erred in finding that Sermeno failed to meet her burden on the third step — to show that the prosecutor's explanation was merely a pretext for purposeful discrimination. The prosecutor's explanation of this peremptory strike was neither implausible nor unconvincing in light of all the circumstances. The prosecutor's concern over a juror's ability to understand the complicated jury instructions was not unreasonable. The first jury had asked for clarification several times on the accomplice instruction and was unable to reach a verdict on the felony-murder charge even though it had convicted Sermeno of a predicate offense, aggravated robbery.

¶30 We cannot say, moreover, that it was unreasonable for the prosecutor to infer from this juror's poor ability to speak the English language, combined with her lack of extensive formal education, that she would be less able than others on the panel to understand the complicated instructions on felony-murder and accomplice liability. The judge implicitly agreed with the prosecutor that it was difficult to understand this juror, a finding to which we give deference. *See United States v. Murillo*, 288 F.3d 1126, 1136 (9th Cir. 2002) ("The trial judge is in a unique position to determine whether a witness has difficulty communicating, and therefore we grant a high level of deference to [its] finding on this point."). Moreover, the

record supports such a finding. Asked to describe the crime of which she had been the victim, juror number 17 said:

> Where my neighbor - there was two teenagers and they were cracking the eggs of my truck, and we didn't know who was it, and then finally one of my older sons he got there, like, at midnight because he saw when they was throwing the eggs at the truck. So we called the police, and they take – they didn't take him to jail because he was on probation. So he say, "I was sure that they take it to the Court," and I did, because that way they stopped doing it.

¶31 It is not unreasonable to infer that a juror who has difficulty speaking the English language would have difficulty understanding it. *See United States v. Alvarado*, 951 F.2d 22, 24-25 (2d Cir. 1991) (finding no *Batson* error in peremptory strike of Hispanic juror for lack of fluency in English); *Commonwealth v. Valentin*, 649 N.E.2d 1079, 1081-82 (Mass. 1995) ("Both sides were entitled to jurors who could adequately understand and evaluate the testimony, deal with the central question of credibility, and grasp and apply complex concepts."); *see also United States v. Hunter*, 86 F.3d 679, 683 (7th Cir. 1996) (finding no *Batson* violation in prosecutor's strike of juror "because she had only a high school education and because her confused answers to certain voir dire questions called into question her ability to follow the complex evidence during the trial"). Moreover, the prosecutor specifically noted that he generally speaks quickly, and, "I do not believe that

she was picking up everything that I was saying or that I would say." On this record, we find no clear error in the judge's finding that the prosecutor's motive for striking this juror was genuine, and not a pretext for racial discrimination.

¶32 We find no merit in Sermeno's argument for the first time on appeal that the judge erred in failing "to conduct a comparative juror analysis to see if there was evidence that the juror's education level and speech issues equally applied to otherwise-similar non-minority panelists who were selected to serve," and her unsupported argument that others on the jury had not been struck although they had a high school education like juror number 17. The United States Supreme Court has emphasized that the defendant bears the ultimate burden of persuasion that the prosecutor's peremptory strike was racially motivated. *Johnson v. California*, 545 U.S. 162, 170-71 (2005).

¶33 Although the trial court must evaluate the prosecutor's explanation in light of all the circumstances, *see Snyder*, 552 U.S. at 478, it was up to Sermeno to persuade the trial court that the juror's education level and English language proficiency applied equally to otherwise similar non-minority panelists. *See Johnson*, 545 U.S. at 170-71. We decline to find that a judge commits *Batson* error simply by failing to conduct such a comparative analysis *sua sponte* on the record. *See United States v. You*, 382 F.3d 958, 969 (9th Cir.

2004) (holding that although trial courts *may* employ comparative analysis to ascertain whether prosecutor had discriminatory purpose, they are not required to do so). Sermeno has also failed to cite to any portion of the record other than her own argument that demonstrates that the prosecutor failed to strike other non-Hispanic jurors who had only a high-school education, and were otherwise similarly situated. In the absence of any support in the record for this argument, we find no merit in it. In short, on this record, we find no *Batson* error.

Conclusion

¶34 For the foregoing reasons, we affirm.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

N O R R I S, Judge, concurring in part, dissenting in part.

¶35 I agree with the majority's resolution of Sermeno's recusal and *Batson* arguments. I also agree with the majority's conclusion the superior court erroneously instructed the jury during voir dire and in final instructions that it was required to accept Sermeno's prior conviction for aggravated robbery. I part company with the majority and respectfully dissent, however, from its conclusion the error was not prejudicial and

its assumption there is no need to remand on the felony-murder and kidnapping charges because, as a matter of law, a subsequent jury would be required to accept the aggravated-robbery conviction now that the superior court has entered a judgment on that conviction.[3]

¶36 The court's instruction to the jury it was required to accept Sermeno's prior conviction for aggravated robbery constituted fundamental, reversible error. This was not a case in which the court's error was harmless because the evidence supporting the conviction was overwhelming. The State's case relied on the credibility of a single witness, Patricia Chavez, a prostitute with two prior felony convictions who only agreed to testify against Sermeno in exchange for a plea to second-degree murder, who admitted "conning johns" for money, and who told various, conflicting stories about what had happened on the day of the victim's death. The court's instruction to the prospective jurors during voir dire -- before they had heard any evidence -- went to the heart of Sermeno's defense this witness was not credible and should not be believed. The court's instruction predisposed the jurors to infer -– before hearing any evidence -- that because a different jury had found Sermeno guilty of aggravated robbery, that jury must have believed this

[3]Sermeno has not raised any substantive arguments challenging her conviction for aggravated robbery.

witness, and, accordingly, they should too. The court essentially encouraged the jury to view the evidence through the lens of guilt, not presumed innocence. *State v. Ingenito*, 432 A.2d 912, 918 (N.J. 1981).

¶37 Additionally, even if, despite the court's instruction at the beginning of the case, the jury had some qualms about Patricia Chavez's credibility at the close of the case, the jury may well have put those concerns aside after the court re-instructed it that Sermeno was guilty of aggravated robbery. After all, as the State essentially argued in closing, because another jury had found Sermeno guilty of aggravated robbery, she must be guilty of the kidnapping as the two offenses were committed together, by the same people, for the same purpose. And, after all, because another jury had convicted Sermeno of the aggravated robbery, she must also be guilty of the felony murder because it occurred during the course and in furtherance of the aggravated robbery.

¶38 In light of the intertwined relationship between the aggravated robbery and the kidnapping and felony-murder charges, the court's instruction deprived Sermeno of a fair trial. It prejudicially tainted the jury's consideration of the evidence of Sermeno's liability for both the kidnapping and the felony murder.

¶39 The majority, however, does not discuss or for that matter even acknowledge the prejudicial effect of the error. Instead, it concludes the error is "essentially moot" because the superior court has now entered a judgment on the aggravated-robbery conviction and, if we were to remand, the jury would be required to accept Sermeno's conviction for aggravated robbery. Thus, according to the majority, in a subsequent retrial, a new jury would hear the same instruction this jury heard and the result would be the same.

¶40 But, I do not agree that on remand the jury would be required to conclusively accept Sermeno's conviction for aggravated robbery. Left unsaid but assumed by the majority is that on remand, the State would be entitled to rely on, and Sermeno would be prohibited from challenging, the aggravated-robbery conviction because of the doctrine of collateral estoppel.

¶41 Under collateral estoppel, when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a subsequent case. *State v. Nunez*, 167 Ariz. 272, 276, 806 P.2d 861, 865 (1991) (internal citation omitted). Here, the majority has assumed the State can use collateral estoppel against Sermeno. Whether the prosecution can use collateral estoppel offensively against a defendant in a criminal case is a question

that has not, as far as I can determine, been decided in Arizona. But, that question has been decided by other courts -- several state and federal courts have held collateral estoppel may not be used offensively against a defendant in a criminal case.[4] For example, in *Ingenito*, 432 A.2d 912, the defendant was charged with several weapons offenses. A jury convicted the defendant of the unlicensed transfer of weapons. In a subsequent trial before a different jury on a different charge -- possession of a firearm by a convicted felon -- the trial court allowed the prosecution to prove the possession element of that charge by introducing into evidence the defendant's conviction on the unlicensed-transfer charge. *Id.* at 913-14. The Supreme Court of New Jersey held collateral estoppel did not entitle the prosecution to use the defendant's prior conviction on the unlicensed-transfer charge to establish the possession element

[4]In *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), the United States Supreme Court held a defendant in a criminal case may assert collateral estoppel as a defense under certain circumstances. The Supreme Court has not ruled whether the prosecution may use collateral estoppel offensively in a criminal case. Members of the Court have suggested it cannot. *See United States v. Dixon*, 509 U.S. 688, 710 n.15, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) (Scalia, J., writing majority opinion joined by four Justices, stated in dicta that under *Ashe*, "an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one -- though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time.") (internal citations omitted).

of the other charge. The court rested its holding on the defendant's constitutional right to trial by jury:

> [W]e conclude that collateral estoppel, applied affirmatively against a defendant in a criminal prosecution, violates the right to trial by jury in that not only does it seriously hobble the jury in its quest for truth by removing significant facts from the deliberative process, but it constitutes a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations. Hence, the collateral estoppel doctrine, which serves to establish virtually conclusive evidence of a critical element of criminal guilt, cripples the jury in the discharge of its essential responsibilities contrary to the constitutional guarantees of the jury right in a criminal trial.

Id. at 918-19.[5] *See also United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994) (defendant's prior conviction by jury for wire fraud could not be used as collateral estoppel to conclusively establish predicate offense in trial before second jury for violation of federal RICO statute); *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005) (prior guilty pleas to illegal reentry offenses did not prohibit defendant, under

[5]Under our state constitution, criminal defendants are entitled to a jury trial if the alleged offense is "serious" as opposed to "petty," *Derendal v. Griffith*, 209 Ariz. 416, 420, ¶ 13, 104 P.3d 147, 151 (2005) (discussing Ariz. Const. art. 2, § 24), or if the statutory offense had a common-law antecedent that guaranteed a right to trial by jury at the time Arizona became a state. *Id*. at 425, ¶ 36, 104 P.3d at 156 (discussing Ariz. Const. art. 2, § 23).

doctrine of collateral estoppel, from contesting alienage and raising other defenses on charge of attempted illegal entry); *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998) (same); *Gutierrez v. Superior Court*, 29 Cal. Rptr. 2d 376 (Cal. Ct. App. 1994) (prosecution barred from relying on attempted-murder conviction to prove defendant's identity and intent in subsequent murder prosecution after victim died; collateral estoppel would deprive defendant of right to present defenses to jury); *Allen v. State*, 995 A.2d 1013 (Md. Ct. Spec. App. 2010) (trial court should not have instructed jury it was required to accept as a fact defendant had committed underlying felony in subsequent retrial for felony murder); *People v. Goss*, 521 N.W. 2d 312 (Mich. 1994) (collateral estoppel did not bar defendant from asserting he had not committed predicate felony in retrial for felony murder); *State v. Scarbrough*, 181 S.W.3d 650 (Tenn. 2005) (collateral estoppel did not allow prosecution to establish predicate felony for felony murder based on defendant's prior conviction for aggravated burglary).[6]

[6]Although Sermeno did not use the term "offensive collateral estoppel" in objecting to the court's instruction to the jury that it was required to accept the aggravated-robbery conviction as conclusive evidence, through counsel, she argued the instruction would be "incredibly damaging" and would prevent the jury from evaluating the evidence presented at trial. Additionally, she argued the court's instruction violated her constitutional right to a jury trial. Sermeno's objections adequately informed the superior court its instruction interfered with her jury trial rights.

¶42 To be sure, the state and federal courts that have considered the offensive use of collateral estoppel are not all in agreement, and some courts have applied the doctrine against a defendant in a criminal case. *See*, for example, *Hernandez-Uribe v. United States*, 515 F.2d 20 (8th Cir. 1975) (defendant who had previously pleaded guilty to being in the country illegally collaterally estopped from relitigating alienage), and *People v. Ford*, 416 P.2d 132 (Cal. 1966) (trial court entitled to instruct jury defendant had been convicted of underlying felonies and it only needed to determine whether defendant had committed underlying felonies during the homicide in defendant's retrial for felony murder). In general, these courts have applied offensive collateral estoppel for reasons of efficiency, reasoning that a judge or jury has already decided the fact question in issue. I see four problems in applying the judicial efficiency rationale here, however.

¶43 First, *Hernandez-Uribe* and cases like it are alienage cases involving repetitive criminal conduct. *Allen*, 995 A.2d at 1025-26 (discussing alienage cases and noting they "concern violations that are often recurring and result in repeated retrials at great expense and burden to the United States government."); *Goss*, 521 N.W.2d at 319 (same point). That is not the case here. Further, although not an alienage case, many courts have distinguished *Ford* because it did not consider

whether offensive collateral estoppel would violate a defendant's constitutional right to a jury trial. *Gutierrez*, 29 Cal. Rptr. 2d at 385-86; *Allen*, 995 A.2d at 1026; *Goss*, 521 N.W.2d at 320-21.

¶44 Second, judicial efficiency should not be allowed to interfere with the right of an accused to defend himself in a criminal case. An accused "has at stake [an] interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970).

¶45 Third, judicial efficiency only goes so far. Here, although the superior court instructed the jury it was required to accept Sermeno's conviction for aggravated robbery, the State still had to prove the other elements of the felony-murder charge as well as the kidnapping charge, and it took the State almost four days just to present its case-in-chief.

¶46 Fourth, in Arizona we place great store in juries. We accept that they may render inconsistent verdicts because of leniency or compromise. *See State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969) (overruling, in part, *State v. Fling*, 69 Ariz. 94, 210 P.2d 221 (1949), which held an acquittal on one count, charging an act that was an essential element of another

count on which the jury convicted, required the court to vacate the conviction because the verdicts were inconsistent). In my view, the offensive use of collateral estoppel in a case such as this amounts to a *sub rosa* repudiation of *Zakhar* and

> constitutes an invasion of the factfinding and ultimate decisional functions of the jury. If an essential element of a case is presented as concluded or settled, effectively withholding from the jury crucial underlying facts, the jury's capacity to discharge fully its paramount deliberative and decisional responsibilities is irretrievably compromised. It follows in such circumstances that the defendant's jury right will have been, commensurately, abridged.

Ingenito, 432 A.2d at 916.

¶47 I am not willing to join the majority's assumption offensive collateral estoppel would apply as a matter of law on remand[7] and thus the prejudice caused by the superior court's

[7]Although rejecting offensive collateral estoppel, two courts have held the prosecution may introduce evidence of a defendant's prior conviction for a predicate felony in a felony-murder case if the trial court determines the probative value of the prior conviction is not substantially outweighed by the risk of unfair prejudice. *Allen*, 995 A.2d at 1027; *Scarbrough*, 181 S.W.3d at 659-60. *See also Pelullo*, 14 F.3d at 888 (evidence of defendant's prior conviction may be admissible as evidence of an element of the charged offense if trial court determines its probative value is not substantially outweighed by the risk of unfair prejudice); *but see Ingenito*, 432 A.2d at 920-22 (evidence of prior conviction is not admissible because it is not merely evidential in character but amounts to de facto collateral estoppel). Because the majority has assumed offensive collateral estoppel would apply as a matter of law on remand here -- which means it believes the jury would be required to accept Sermeno's conviction for aggravated robbery as conclusive

instruction is of no moment. I therefore respectively dissent from the majority's conclusion the error here is now moot and not reversible. I would remand for a new trial on the kidnapping and felony-murder charges.

/s/
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PATRICIA K. NORRIS, Judge

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evidence -- it has, even under this approach, deprived the superior court of the opportunity to consider whether her conviction should be admitted as evidence under Arizona Rule of Evidence 403.