IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0518
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOSE JAIME SILVA-ACOSTA,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-118155-001DT

The Honorable Janet E. Barton, Judge

AFFIRMED

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Attorneys for Appellant

J O H N S E N, Judge

¶1 Jose Jaime Silva-Acosta appeals his convictions and sentences for molestation of a child and sexual abuse, both

crimes involving a victim under 15 years of age. Silva-Acosta argues the superior court erred in denying his *Batson*[1] challenge and allowing the jury to view a recording of the victim's forensic interview. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Silva-Acosta inappropriately touched a six-year-old girl while the two were in her backyard.[2] Based on this conduct, the State charged him with one count each of molestation of a child and sexual abuse, and alleged the victim was under 15 years of age. The jury found Silva-Acosta guilty, and the court sentenced him to 17 years' incarceration for the molestation and ten years' probation for the sexual abuse conviction, to be served upon his discharge from prison for the molestation conviction. We have jurisdiction of Silva-Acosta's appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033(A)(1) (2011).

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

[2] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Silva-Acosta. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

DISCUSSION

A. *Batson* Challenge.

¶3 During voir dire, Silva-Acosta raised a *Batson* challenge to the State's peremptory strike of juror number nine. He argued the State wanted to strike the juror because she, like he, was Hispanic and spoke Spanish. The State explained, in part, the basis for its strike as follows:

> Your Honor, there was a myriad of reasons why I decided to strike number nine. In fact, she was my last juror to strike. I kind of kept her making sure I got rid of the individuals that I thought should be off the jury, but it was [sic] more important than her.
>
> A number of reasons why I decided to strike her was: One, for her certain age and not being married and not having any kids, I didn't know why how [sic] she would relate to the case. I had an uneasiness with her that I cannot explain. I just couldn't get a good read on her.

Finding the State's reasons for striking the juror nondiscriminatory, the court denied the *Batson* challenge.

¶4 On appeal, Silva-Acosta asserts the court erred because the State's proffered explanations for the strike – that the juror was "of a certain age," unmarried and childless – "are vague and appear to be all purpose for striking every possible juror." In support of his argument that the State's explanation was a pretext, Silva-Acosta notes the prosecutor "chose not to ask [the juror] any questions" and "the prosecutor did not

really care about any further information because he had already decided he was going to strike this Hispanic jury panelist."

¶5 We review the superior court's denial of the challenge 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).

¶6 The Equal Protection Clause of the Fourteenth Amendment prohibits 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) (quotations 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) (quotations omitted). 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.* (quotations omitted). It is during this final step that the superior 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).

¶7 As an initial matter, the facts here are unlike those present in *Miller–El v. Dretke (Miller–El II)*, 545 U.S. 231 (2005), on which Silva-Acosta relies. In that case, 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 11 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 non-Black jurors differently and failed to strike non-Black jurors with identical responses; the prosecutor 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 prosecutor's office of systematic exclusion of Blacks from juries. *Id.* at 240–66. Silva-Acosta fails to show the same systematic discrimination

here that prompted the Supreme Court to find *Batson* error in *Miller–El II*.

¶8 On this record, we find no *Batson* error.[3] Although one of the explanations cited by the prosecutor (an inexplicable "uneasiness" with the juror) could, standing alone, be problematic in a *Batson* challenge, the prosecutor also provided race-neutral and objective grounds that have been recognized as valid nondiscriminatory reasons for striking a juror. *See Rice v. Collins*, 546 U.S. 333, 336 (2006) (youth and marital status cited as race-neutral explanations for striking a potential juror); *State v. Sanderson*, 182 Ariz. 534, 541, 898 P.2d 483, 490 (App. 1995) (same). The superior court was in the best position to evaluate the credibility of the prosecutor's explanation. *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."). Finally, in response to another argument by Silva-Acosta, we are not persuaded that the superior court erred by declining to hold that the prosecutor's failure to question

[3] By turning to the State to explain its rationale for striking juror number nine, the superior court apparently found Silva-Acosta had made a prima facie showing of discrimination. We note that juror number nine was not the only Hispanic panelist; at least one Hispanic was selected to serve on the jury.

juror number nine about her marital status and childlessness demonstrated discriminatory intent.

¶9 Accordingly, we cannot conclude that the court erred in finding the State struck juror number nine for nondiscriminatory reasons.

B. Video of Forensic Interview.

¶10 The victim was seven years old at the time of trial. She provided conflicting testimony regarding her ability to remember specifics of the unlawful touching underlying the charges against Silva-Acosta. For example, although the victim testified she could not remember the incident, she also testified that Silva-Acosta touched her "private." She first testified he touched her breast with his hand and licked her breast, but later testified he did not lick her. In light of these inconsistencies, the State sought to play for the jury a video recording of the forensic interview conducted with the victim six days after the incident. Over Silva-Acosta's objection, the court permitted the recording to be played for the jury. The recording was not admitted in evidence.

¶11 Silva-Acosta first argues the court's ruling violated his constitutional right to confront the victim. *See* U.S. Const. amend. VI. He contends that, because the victim "testified she did not recall all of the facts, defense counsel could not cross-examine her on details or the accuracy of the

information on the tape as to some of the allegations against [him]." He also asserts a violation of Arizona Rules of Evidence 801(d)(1) and 803(5).

¶12 We generally review a superior court's ruling on the admissibility of evidence for a clear abuse of discretion. *State v. King*, 213 Ariz. 632, 636, ¶ 15, 146 P.3d 1274, 1278 (App. 2006). However, we review *de novo* challenges to admissibility based on the Confrontation Clause. *Id.*

¶13 As this court noted in *King*, the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), "held that the Confrontation Clause prohibits the admission of testimonial evidence *from a declarant who does not appear at trial* unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *King*, 213 Ariz. at 637, ¶ 17, 146 P.3d at 1279 (citing *Crawford*, 541 U.S. at 68) (emphasis added). Here, Silva-Acosta's confrontation rights were not violated because the victim testified at trial, where Silva-Acosta's counsel cross-examined her. Therefore, no violation of his right to confront the victim occurred. *See State v. King*, 180 Ariz. 268, 276, 883 P.2d 1024, 1032 (1994); *State v. Salazar*, 216 Ariz. 316, 318-19, ¶¶ 9-10, 166 P.3d 107, 109-10 (App. 2007).

¶14 Silva-Acosta's contention that the videotape constituted inadmissible hearsay is equally unavailing.

Assuming the tape contained hearsay, it properly could be played for the jury as a recorded recollection pursuant to Rule 803(5).[4]

¶15 Rule 803(5) is an exception to the hearsay rule that allows for the admissibility of a recorded recollection, defined as:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Ariz. R. Evid. 803(5).

¶16 As noted, the victim had difficulty remembering the details of the incident at trial. However, she also testified that she remembered talking to the police about the touching and that her memory regarding the incident was better at the time of the interview, less than a week after the alleged crimes were committed. Consequently, the recorded interview squarely fits the definition of a recorded recollection and therefore was admissible as a hearsay exception under Rule 803(5). *See State*

[4] Because the recording was not admitted in evidence, it was not included in the record transmitted to this court. The court reporter did not make a record of what was said in the recording, and Silva-Acosta did not otherwise take steps to include it in the record on appeal.

v. Martin, 225 Ariz. 162, 165, ¶ 11, 235 P.3d 1045, 1048 (App. 2010) (holding that a videotape is a "record" for purposes of Rule 803(5)). The superior court accordingly did not abuse its discretion in allowing the jury to view and hear the recording.

CONCLUSION

¶17 We affirm Silva-Acosta's convictions and sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
PATRICK IRVINE, Judge