DIVISION ONE
FILED: 04/03/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0066
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
TIMOTHY JESSE VALENZUELA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR2007-00687

The Honorable Andrew W. Gould, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

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

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By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Timothy Jesse Valenzuela appeals his convictions and sentences on two counts of armed robbery and aggravated assault, arguing the superior court should not have denied his *Batson*

challenge nor his request for a mistrial made, first, after he appeared before prospective jurors in handcuffs and, second, after certain jurors raised questions regarding their voir dire examination. Although we disagree with Valenzuela's mistrial arguments, we agree with Valenzuela's *Batson* argument and remand to the superior court for further proceedings consistent with this decision.

I. Batson Error[1]

¶2 Valenzuela argues the superior court should not have found he failed to make a prima facie case that the State had exercised its peremptory challenges with discriminatory intent when it struck two of three Hispanic prospective jurors. As we explain, we agree.

¶3 The Equal Protection Clause of the Fourteenth Amendment prevents peremptory strikes of prospective jurors based solely on race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986). *Batson* established a three step process for analyzing claims of discrimination in jury selection. Initially, the party opposing the strike must establish a "prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an

[1]We defer to a superior court's factual findings unless they are clearly erroneous when considering a *Batson* challenge. We review, however, a superior court's legal determination de novo. *State v. Gay*, 214 Ariz. 214, 220, ¶ 16, 150 P.3d 787, 793 (App. 2007).

inference of discriminatory purpose." *Id.* at 93-94, 106 S. Ct. at 1721. If the party opposing the strike is able to establish a prima facie case, the burden shifts to the striking party to provide a race-neutral explanation for the strike. *Id.* at 94, 106 S. Ct. at 1721. Then, if the striking party provides such an explanation, the court must determine whether the challenger has carried its burden of proving purposeful racial discrimination. *Id.* at 98, 106 S. Ct. at 1724; *see also State v. Roque*, 213 Ariz. 193, 203, ¶ 13, 141 P.3d 368, 378 (2006). At issue here is the first step: whether Valenzuela established a prima facie case of discrimination when the State exercised its peremptory challenges to remove two out of three Hispanic members of the jury panel.

¶4 The record before us reflects the State used its peremptory challenges to remove from the jury panel a Native American and, then, two Hispanic members of the jury panel, leaving only one Hispanic juror on the panel. Defense counsel challenged the State's exercise of its peremptory challenges to remove these potential jurors from the panel. The superior court found Valenzuela had established a prima facie case of discriminatory motive in striking the Native American juror and asked for and received from the State an explanation for this strike which it then determined was sufficient and not pretextual. The court then found Valenzuela had failed to make

a prima facie case of discriminatory motive with respect to the two Hispanic jurors. In making this determination, the court found "the State [had] spread its strikes equally between Caucasians and Hispanics" and, further, Valenzuela had failed to demonstrate that, like the two excluded jurors, he was Hispanic.

¶5 A defendant can raise a *Batson* objection, however, even if he or she is not of the same race as the challenged juror. *See Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); *State v. Katazorke*, 167 Ariz. 599, 810 P.2d 597 (App. 1990) (anticipating *Powers*). Accordingly, the court should not have concluded Valenzuela had failed to make a prima facie showing of discriminatory purpose based on its belief that to do so he also had to show he was of the same race as the two Hispanic jurors excluded through the State's exercise of its peremptory strikes.[2]

¶6 Because the court premised its finding Valenzuela had failed to establish a prima facie case of purposeful discrimination on an impermissible factor, we remand this matter to the superior court to determine whether Valenzuela made a prima facie showing of purposeful discrimination. If the superior court determines Valenzuela failed to make such a showing then it need not take any further action in this matter.

[2]We note defense counsel also believed Valenzuela had to be Hispanic to raise a *Baston* challenge. On appeal, the State has not argued waiver.

If, however, the court determines Valenzuela made such a showing it shall afford the State an opportunity to present a race-neutral explanation for the strikes. If the State provides such an explanation, the court shall then determine whether Valenzuela has carried his burden of proving purposeful racial discrimination. If the court determines Valenzuela demonstrated such discrimination, it shall vacate Valenzuela's convictions and grant him a new trial.

II. Mistrial: Handcuffs

¶7 Valenzuela next argues the superior court abused its discretion in denying his request for a mistrial after he appeared before the venire panel in handcuffs. Even assuming certain of the prospective jurors saw Valenzuela in handcuffs, which on this record is doubtful,[3] the court did not abuse its discretion in denying the mistrial motion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000) (appellate court reviews superior court's denial of motion for mistrial for abuse of discretion).

¶8 On the first day of trial, immediately after the clerk called the names of the original 26 prospective jurors, and asked them to fill the empty seats, Valenzuela's counsel asked to approach. After an unrecorded bench conference, the court

[3]Defense counsel told the court, "So at this time I don't know which jurors have seen the handcuffs."

asked the prospective jurors to leave for a short recess. Defense counsel moved for a mistrial, asserting some of the jurors may have seen Valenzuela in handcuffs. After ascertaining the sheriff's deputy had not realized Valenzuela was handcuffed, and ordering the handcuffs removed, the court denied the motion, explaining:

> Your client is dressed in a suit. He has had his hands under the counsel table for most of the five minutes or ten minutes the jury has been in here. He has long sleeves on.
>
> I note when you mentioned it to me, and he pulled his hands up, I could see a flash of the handcuffs for a moment here or there. So most of the jurors seated behind your client wouldn't be able to even see those handcuffs. There were some jurors that were seated momentarily in the jury box where they might have been able to look over at your client.
>
> I can't find at this point the prejudice is so great that it merits a mistrial. That would be the most extreme remedy in the case. So the motion is denied.

¶9 As a general matter, a criminal defendant is entitled to be free from visible restraints in the courtroom absent compelling circumstances. *See generally Deck v. Missouri*, 544 U.S. 622, 629, 125 S. Ct. 2007, 2012, 161 L. Ed. 2d 953 (2005) (court abuses discretion in allowing visible restraints at trial in absence of compelling circumstances); *State v. Gomez*, 211 Ariz. 494, 502-03, ¶¶ 40-41, 123 P.3d 1131, 1139-40 (2005)

(same). Under the circumstances presented here, however, the superior court did not abuse its discretion in denying Valenzuela's mistrial motion. As the court explained, only those members of the panel in the jury box could possibly have seen "a flash of the handcuffs for a moment here or there," and most of the jurors would not have been able to see the handcuffs. In *State v. Speer*, 221 Ariz. 449, 462-63, ¶¶ 72-75, 212 P.3d 787, 800-01 (2009), our supreme court found the brief appearance of a defendant in handcuffs in the courtroom during preliminary proceedings, observed by one juror, was analogous to the "not inherently prejudicial" inadvertent exposure of a defendant in restraints to jurors outside the courtroom. Accordingly, the court held the defendant was not entitled to a mistrial absent a showing of actual prejudice. In our view, *Speer* is controlling here and Valenzuela must establish prejudice, which he has failed to do. Although Valenzuela argues questions subsequently raised by certain jurors about his note-taking during voir dire suggests the jurors were concerned for their own safety, and his appearance before them in handcuffs possibly "communicated that he was a dangerous man" and could harm them if convicted, that argument is speculative at best. On the record before us, the superior court did not abuse its discretion in finding Valenzuela had suffered no prejudice from the incident.

III. Mistrial: Prospective Juror Questions

¶10 Finally, Valenzuela argues the superior court committed reversible error and deprived him of his rights to an impartial jury and due process of law when it refused to grant a mistrial after an unspecified number of jurors commented they had observed Valenzuela writing down their names and responses to questions asked of them during voir dire. We disagree.

¶11 On the second day of trial, the bailiff notified the court that jurors had concerns about "defendant taking their names down as they were seated" and "were inquiring why [the court] didn't use numbers instead of their names." On the third day of trial, outside the presence of the jury, Valenzuela moved for a mistrial, asserting the jurors' concerns demonstrated they were biased against him. At the court's request, the bailiff explained:

> Before I brought the jury into court, Judge, one of the jurors . . . asked me why they used their names in seating the jury panel as opposed to issuing them numbers. And then a couple of the other jurors kind of got involved in the conversation and they were all standing around at that point, and I believe it was a lady said yes, the defendant was writing the names down as they were seated.
>
> And they wanted to know the procedural issues, this is how we do it in Yuma County or why it was done that way. And I just said I wasn't sure, that it had always been done that way, but they need to write a

> direct question down and I would provide it to court and counsel.

The court notified the parties it would instruct the jury Valenzuela and any party had a right to take part in jury selection, which included writing down names and comments about each juror. The court also advised the parties it would excuse any juror who felt he or she would be biased or prejudiced because of this and would declare a mistrial if less than 12 jurors remained. Accordingly, when the jury returned to the courtroom, the court instructed the jury as follows:

> Let me instruct you that a defendant or any party in a criminal case or civil case has a right to take part in jury selection, and that includes assisting their attorney, making their own notes about jurors, writing down names or comments regarding juror responses.
>
> * * *
>
> Once again I want to emphasize every party has the right to participate in jury selection, and that is what happens. Defendants, plaintiffs, people, if they are victims in the case if they choose to, they can sit down and write jurors' names and write down responses. It is a common experience, it happens in every trial, there is nothing unusual about that.

> With that being said, is there anyone who feels that they would be biased or prejudiced against the defendant because they observed him writing down their names or comments during jury selection? If you do, please raise your hand and let me know. Okay. I don't see any hands.

¶12 Under these circumstances, we see no abuse of discretion in the court's decision not to grant a mistrial, and instead, to instruct the jury as noted above. The court was in the best position to ascertain whether the jurors' questions reflected bias or prejudice, and we defer to the court's conclusion the jurors were simply asking a "fairly honest, straightforward question" it could resolve with an instruction and an inquiry as to whether this caused them concern. Further, as our supreme court has instructed, we are to presume jurors follow their instructions. *State v. Kuhs*, 223 Ariz. 376, 387, ¶ 55, 224 P.3d 192, 203 (2010). The court's response to the jurors' questions was appropriate, and we see no issue involving "contamination by outside influences" as found in the cases cited by Valenzuela on appeal. Valenzuela was not deprived of his rights to trial by an impartial jury and the court did not abuse its discretion in denying his request for a mistrial.

CONCLUSION

¶13 For the foregoing reasons, although we reject Valenzuela's arguments the court should have granted his motions for a mistrial, we nevertheless agree with his *Batson* argument. We therefore remand this matter to the superior court to determine whether the State engaged in improper race discrimination during jury selection.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
MAURICE PORTLEY, Judge