NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHRISTOPHER SHAWN ECK, Appellant.	2 CA-CR 2012-0311 DEPARTMENT B <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20120017001

Honorable Howard Hantman, Judge

VACATED IN PART; AFFIRMED IN PART

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K E L L Y, Judge.

¶1 Christopher Eck appeals from his convictions and sentences for one count each of assault and aggravated assault with a deadly weapon or dangerous instrument. He argues the trial court erred in denying his *Batson*[1] challenge to the state's peremptory strike of a potential juror, denying his motion for a mistrial and motion for a judgment of acquittal, and giving a jury instruction that he claims improperly shifted the burden of proof to him. We vacate Eck's assault conviction and affirm his aggravated assault conviction.

Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). One evening in December 2011, Eck invited victim R.F. to his home. The two spent the evening "hanging out and drinking" with Eck's girlfriend B.H. Eck was listening to the radio and, at some point, R.F. turned it off. Eck became angry and told R.F., "[D]on't ever . . . touch my radio." R.F. felt "uneasy" and began gathering his things to leave. Eck repeatedly asked R.F. to stay and, when R.F. refused, Eck "took offense" and pulled out a knife. R.F. tried to dial 9-1-1 on his cellular telephone, but Eck cut him on the top of his hand before he could complete the call. B.H. screamed at Eck to stop and, as R.F. was trying to leave the home, Eck stabbed him two times. Outside, Eck continued to attack R.F. until neighbors eventually separated them. Eck later admitted to police that he had stabbed R.F., but claimed he had been attacked first by R.F. Eck was arrested and

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

convicted as described above. The trial court imposed concurrent sentences, the longer of which was five years' imprisonment, and this appeal followed.

Discussion

Batson Challenge

¶3 Eck argues the trial court erred by denying his *Batson* challenge to the state's peremptory strike of prospective juror W.M., an African American veniremember. We review the court's decision for clear error. *State v. Gallardo*, 225 Ariz. 560, ¶ 10, 242 P.3d 159, 164 (2010).

¶4 In *Batson v. Kentucky*, the United States Supreme Court held that excluding a potential juror based solely on race violates the Equal Protection Clause of the Fourteenth Amendment. 476 U.S. 79, 89 (1986); *State v. Butler*, 230 Ariz. 465, ¶ 36, 286 P.3d 1074, 1083 (App. 2012). A trial court's analysis of a *Batson* challenge consists of three steps: (1) the challenging party "must make a prima facie showing of discrimination based on race . . . or another protected characteristic," (2) "'the striking party must provide a race-neutral reason for the strike,'" and (3) the court must evaluate the credibility of the proponent's explanation to determine whether the opponent has met his burden to prove discrimination. *Butler*, 230 Ariz. 465, ¶ 40, 286 P.3d at 1084, *quoting Gallardo*, 225 Ariz. 560, ¶ 11, 242 P.3d at 164. To satisfy the second step, the state's explanation "need not be persuasive or plausible so long as it is facially neutral." *Id.* In the third step, the court evaluates the persuasiveness of the state's justification, which is a fact-intensive determination that turns on issues of credibility. *State v. Newell*, 212 Ariz.

389, ¶ 54, 132 P.3d 833, 845 (2006). Therefore, the court's finding "is due much deference." *Id.*

¶5 In Eck's objection to the trial court, he stated that W.M. was "the only African American on the jury panel" and that the case had "some issues with respect to . . . race" because Eck's girlfriend, B.H., was African American. After the court asked the state to explain its strike,[2] the prosecutor responded that she had struck W.M. because he had "voted not guilty on a[] [previous] assault case." She noted she had struck other prospective jurors who had found criminal defendants not guilty in previous cases and explained she "is always very wary of people who have found people not guilty [in] the past" because "in [her] experience they're willing to . . . hold the State to a higher burden than is required." Eck noted that the state had failed to strike juror B.S., who also had found a criminal defendant not guilty while serving on a previous jury. The court denied Eck's challenge.

¶6 On appeal, Eck argues the trial court should have concluded the state's justification for striking W.M. was pretextual because "[t]here were no other African Americans on the panel," and it had not struck B.S. even though he had "voted not guilty on a previous jury trial." "[A] defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination" and side-by-side comparisons of jurors who were struck and those allowed to serve may provide some evidence of intentional

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[2]By requesting a response, the court implicitly found Eck had satisfied his burden in step one and the burden shifted to the state to provide a race-neutral reason. *See State v. Gay*, 214 Ariz. 214, n.4, 150 P.3d 787, 793 n.4 (App. 2007). This preliminary issue became moot once the state provided a race-neutral explanation for its strike. *Id.*

discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 240, 241 (2005), *quoting Batson*, 476 U.S. at 96.

¶7 Here, the record supports the trial court's conclusion that the state's race-neutral reason for striking W.M. was credible. The state struck two other jurors who, like W.M., had served on one prior jury and found a defendant not guilty. As Eck concedes, B.S.'s previous jury experience was distinguishable from that of W.M. because B.S. had served on two juries, voting not guilty in one and guilty in the other. Moreover, the state argues, and Eck does not dispute, that four minority jurors remained on the panel after the state's strikes, three of whom served on the jury. *See Gallardo*, 225 Ariz. 560, ¶ 13, 242 P.3d at 164 (accepting other minority jurors indicative of nondiscriminatory motive). Therefore, the court did not clearly err by overruling Eck's *Batson* challenge. *Id.* ¶ 10.

Motion for Mistrial

¶8 Eck argues the trial court erred in denying his motion for a mistrial "because the statements of a prosecution witness impermissibly tainted the jury regarding [his] planned justification defense." We review the denial of a motion for a mistrial for an abuse of discretion. *See State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000). "This deferential standard of review applies because the trial judge is in the best position to evaluate 'the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.'" *State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993), *quoting State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983). In determining whether to grant a motion for a

mistrial based on a witness's testimony, the trial court considers "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003).

¶9 Eck's neighbor, S.M., testified that, on the night of the offense, he had been awakened by "yelling and screaming" and had observed Eck and R.F. "arguing [and] fighting." The prosecutor asked S.M. if he had heard Eck say anything during the attack. S.M. responded that he could not "quote any one thing." To refresh S.M.'s recollection, the state referred him to a specific line and page of the transcript of his interview with a police detective. The state then asked, "Do you remember the detective saying, do you remember who said who was going to kill who?" Referring to the transcript, S.M. responded "Actually, mine says, you know, we might try to say it was self-defense."[3] The trial court immediately struck the answer.

¶10 Eck moved for a mistrial arguing S.M.'s response undermined his self-defense claim because it suggested that on the night of the offense Eck "was trying to invent" a claim of self-defense. The trial court concluded there were no grounds for a mistrial and denied the motion.

[3]S.M.'s comment apparently referred to the detective's statement during the interview that the issue of whether Eck had said he was going to kill R.F. was important "because it goes to . . . intent [and Eck] might try to say it was self-defense."

¶11 On appeal, Eck argues the trial court erred in denying the motion because S.M's statement "planted early in the jury's mind the suggestion that [he] might try to invent a theory of self-defense."[4] But S.M.'s comment did not suggest Eck would "invent" a theory of self-defense. Rather, at most, it indicated the detective believed self-defense might be a potential issue in the case.

¶12 Further, even had the statement been inadmissible, Eck has not established that it influenced the jury's verdict. *See Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839. The trial court immediately ordered the statement stricken from the record. The jurors were instructed they were to disregard stricken testimony, and we presume they followed this instruction. *See Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d at 847. Moreover, the court noted, and counsel for Eck agreed, that jurors are not "attuned to these things" and often do not hear them. The trial court was in the best position to evaluate whether the statement may have had an effect on the jury. *See Bible*, 175 Ariz. at 598, 858 P.2d at 1201. Eck has not established the court abused its discretion in denying the motion for a mistrial, and therefore we find no error. *See Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d at 1012.

Motion for a Judgment of Acquittal

¶13 Eck claims the trial court erred in denying his Rule 20, Ariz. R. Crim. P., motion for a judgment of acquittal on the aggravated assault charge because he did not "use the knife as a deadly weapon in a lethal manner" and therefore the state did not present substantial evidence that the knife was a deadly weapon or dangerous instrument.

[4]After the state rested, Eck testified he had stabbed R.F. in self-defense after R.F. had threatened B.H. and tried to choke him.

We review de novo the denial of a motion for a judgment of acquittal. *State v. Tucker*, 231 Ariz. 125, ¶ 27, 290 P.3d 1248, 1261 (App. 2012).

¶14 On a motion for a judgment of acquittal "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Parker*, 231 Ariz. 391, ¶ 70, 296 P.3d 54, 70 (2013) (emphasis omitted), *quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979). As long as there is substantial evidence in the record establishing the elements of the offense, a motion for a judgment of acquittal must be denied. *See id*. Substantial evidence is "'such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990).

¶15 To prove Eck committed aggravated assault, the state was required to establish that he used a deadly weapon or dangerous instrument to commit an assault, as defined by A.R.S. § 13-1203(A). *See* A.R.S. § 13-1204(A)(2). A "deadly weapon" is "anything designed for lethal use." A.R.S. § 13-105(15). A "dangerous instrument" is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." § 13-105(12).

¶16 Here, an officer testified the knife was a spring-loaded "switch blade" with a four-inch blade, and photographs of the knife were admitted. Nevertheless, Eck claims,

as he did at trial, that the knife was not a dangerous instrument because "under the circumstances in which it [was] used" it was not "readily capable of causing death or serious bodily injury." § 13-105(12). In support, he refers to his statement to a police detective that he had "choked up" on the knife and used only "approximately an inch of the blade" to stab R.F. He concludes his statement "showed that [he] used his knife to subdue [R.F.] in a non-lethal, non-serious manner" and therefore the evidence was insufficient for the jury to determine the knife was a dangerous instrument. We disagree.

¶17 Notwithstanding Eck's statement that he "choked up" on the knife, an officer also heard him say repeatedly that he had "stuck [R.F.] good." S.M. testified that R.F. was "bleeding profusely" outside Eck's home. Photographs of R.F.'s multiple stab wounds were admitted, and R.F.'s treating physician testified that two of the wounds were "over two inches long." R.F. testified that the wounds had required sutures, staples, and stitches to close, and all three had left scars. R.F. had remained in bed for two days and had difficulty walking for three weeks after the attack. At the time of trial he still had "steady pain" from the wound in his thigh. Eck essentially asks us to reweigh the evidence, which we will not do. *See State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). Instead, we conclude the state presented sufficient evidence from which a reasonable jury could determine the switch blade, as used by Eck, was a dangerous

instrument.[5] *See* § 13-105(12); *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Accordingly, the trial court did not err in denying the motion for a judgment of acquittal.

Jury Instruction

¶18 Eck argues the trial court erred in basing its reasonable doubt instruction on language from *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). "We review the trial court's decision to give or refuse a jury instruction for an abuse of discretion." *State v. Hurley*, 197 Ariz. 400, ¶ 9, 4 P.3d 455, 457 (App. 2000).

¶19 The trial court gave the instruction over Eck's objection that it "shift[ed] the burden of proof to the defense." On appeal, Eck argues the instruction was improper because it "suggest[ed] [he] must present a 'real possibility' that he is not guilty before a jury may find him not guilty." Our supreme court has considered and rejected such challenges to the *Portillo* instruction, consistently affirming its preference that the instruction be given. *See, e.g.*, *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *Lamar*, 205 Ariz. 431, ¶¶ 48-49, 72 P.3d at 840-41. We are bound by the decisions of our supreme court and have no "authority to modify or disregard [its] rulings." *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004). Accordingly, the court did not abuse its discretion in giving the *Portillo* instruction.

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[5]Because we conclude the state presented sufficient evidence to establish the knife was a dangerous instrument, we need not address Eck's claim that the evidence was insufficient to show the knife was a deadly weapon.

Assault Conviction

¶20 The state concedes that it did not establish two separate offenses to support Eck's convictions for both aggravated assault and simple assault. *See State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008) (double jeopardy rights violated by multiple convictions for same offense). We agree.

Disposition

¶21 We vacate Eck's conviction and sentence for simple assault and affirm his conviction and sentence for aggravated assault.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge