IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL OLIVERI,
Appellant.

No. 2 CA-CR 2013-0009
Filed February 9, 2015

Appeal from the Superior Court in Pima County
No. CR20082120
The Honorable Michael Miller, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
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By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

John William Lovell, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

H O W A R D, Judge:

¶1 After a jury trial, appellant Daniel Oliveri was convicted of aggravated driving under the influence of an intoxicant (DUI), specifically: DUI with a suspended or revoked license and driving with an alcohol concentration (AC) at or above .08 with a suspended or revoked license, DUI having two or more prior DUI violations in the preceding eighty-four months, and driving with an AC of .08 or greater having two or more DUI violations in the previous eighty-four months. He was sentenced to concurrent eight-year prison terms. On appeal, he argues that the trial court erred in rejecting his challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), of the state's peremptory strike of a Hispanic juror and that the criminal restitution order (CRO) imposed by the court at sentencing was improper. We vacate the CRO but otherwise affirm Oliveri's convictions and sentences.

¶2 "[W]hen considering a *Batson* challenge, we will defer to the trial court's findings of fact unless clearly erroneous." *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001). "We review de novo the trial court's application of the law." *Id.*

> A trial court's analysis of a *Batson* challenge involves three steps. First, the challenging party must make a prima facie showing of discrimination based on race, gender, or another protected characteristic. Next, "the striking party must provide a race-neutral reason for the strike." The explanation need not be persuasive or plausible so long as it is facially neutral. Third, the trial court

> must determine the credibility of the proponent's explanation and whether the opponent met its burden of proving discrimination.

State v. Butler, 230 Ariz. 465, ¶ 40, 286 P.3d 1074, 1084 (App. 2012) (citations omitted), *quoting State v. Gallardo*, 225 Ariz. 560, ¶ 11, 242 P.3d 159, 164 (2010). The "'third step is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is this Court.'" *Id.*, *quoting State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006). "Therefore, the court's finding is entitled to great deference." *Id.*

¶3 During jury selection, Oliveri challenged the state's peremptory strike of the only Hispanic venireperson. In response, the state explained that it had struck the potential juror

> for a few reasons. One is that there wasn't much information about her—which always concerns me when picking a jury—as well as the fact that she is from the east side. The area that this happened is towards the east side. And that she worked at AFNE , which is a call center.
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> . . . .
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> . . . [And] lots of different people work at call centers, including criminals. It concerns me; maybe she has friends or has worked with people who may have a criminal background.

¶4 The trial court then denied Oliveri's motion. It observed that, "[t]his may be" a case in which "there are relatively few distinguishing characteristics" between jurors and that the reasons to strike a particular juror "may not be overwhelming." It found, however, that "there was no basis to believe that the strike was exercised for improper reasons."

¶5 On appeal,[1] Oliveri acknowledges that we owe the trial court's decision deference, but nonetheless contends the state's reasons for the strike were not plausible. He relies primarily on reasoning gleaned from the dissenting opinion in *Cook v. LaMarque*, 593 F.3d 810 (9th Cir. 2010), to argue that the state's explanation is not believable. Even if the cited reasoning were the majority's in that decision, however, it has no application here. The dissent in *Cook*, like the majority, engaged in comparative juror analysis pursuant to California law to evaluate the credibility of the prosecutor's reasons for striking the juror. *Id.* at 813-14, 836-37; *see also Ali v. Hickman*, 584 F.3d 1174, 1179 n.3 (9th Cir. 2009) ("California courts . . . require[] . . . comparative juror analysis even if such an analysis was not performed by the trial court."). But, because the United States Supreme Court has warned that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial," *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008), we do not conduct comparative juror analysis if not raised at trial, *State v. Medina*, 232 Ariz. 391, ¶ 48, 306 P.3d 48, 62 (2013) ("[W]e decline to do [comparative juror analysis] when the similarities between peremptorily stricken jurors and those remaining on the panel were not raised at trial.").[2] Oliveri did not raise a comparative juror claim at trial; therefore, we decline to conduct such a review on appeal. *See id.*

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[1]In his opening brief, Oliveri discusses in some detail a motion to vacate the judgment filed below in which he raised the *Batson* issue. Because Oliveri did not separately appeal the trial court's denial of that motion, we lack jurisdiction to address it, and we therefore disregard those portions of Oliveri's brief. *See* A.R.S. § 13-4033(A)(3); *State v. Wynn*, 114 Ariz. 561, 563, 562 P.2d 734, 736 (App. 1977).

[2]We remind counsel of his obligation to "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client." ER 3.3(a)(2), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

¶6 Oliveri further argues the state's explanation for striking the potential juror was not a sufficiently "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98 n.20, *quoting Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981). But, as the United States Supreme Court explained in *Purkett v. Elem*, the warning Oliveri cites "was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." 514 U.S. 765, 769 (1995). And, a "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* However imprecise the state's reasons, they do not deny equal protection, and the trial court found the state's explanation credible. Oliveri has identified no basis for us to disturb that determination.

¶7 Oliveri next argues, and the state concedes, that the CRO entered at sentencing was improper. The trial court here, in its sentencing minute entry, provided that "all fines, fees, assessments and/or restitution" the court had imposed were "reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." As this court has determined, in these circumstances, "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009); *see also* A.R.S. § 13-805(C); *State v. Cota*, 234 Ariz. 180, ¶ 16, 319 P.3d 242, 247 (App. 2014). Therefore, because this portion of the sentencing minute entry is not authorized by statute, the CRO must be vacated. *See Lopez*, 231 Ariz. 561, ¶ 6, 298 P.3d at 911.

¶8 We vacate the CRO, but otherwise affirm Oliveri's convictions and sentences.