IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

TOMAZ MELQUANE REID,
Appellant.

No. 2 CA-CR 2016-0211
Filed February 23, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20154054001
The Honorable Kenneth Lee, Judge

AFFIRMED AS CORRECTED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
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MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 After a jury trial, appellant Tomaz Reid was convicted of second-degree escape. The trial court found he had one historical prior felony conviction and sentenced him to an enhanced, minimum prison term of 1.5 years.[1] On appeal, he argues the trial court erred in overruling his challenge, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to the state's peremptory strike of the only African-American member of the jury panel. For the following reasons, we affirm.

Factual and Procedural Background

¶2 During voir dire, prospective juror J.E. responded to preliminary questions regarding his occupation, residence, and family. In the following exchange, he also responded when the trial court asked whether any members of the panel were acquainted with any employees of the Pima County Public Defender's office:

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[1]The court's sentencing minute entry erroneously states that Reid was convicted pursuant to a guilty plea. By this decision, we correct the court's minute entry to reflect his conviction after a jury trial. *See State v. Vandever*, 211 Ariz. 206, ¶ 16, 119 P.3d 473, 477 (App. 2005) (noting appellate court's authority to correct inadvertent error in sentencing minute entry). We also correct that document to specify that Reid's offense was in violation of A.R.S. § 13-2503, not A.R.S. § 13-250.

> [J.E.]: I don't recall his name. I'm a county employee. I have interacted with the—I believe it's the public defenders through the union that I belong to. It's on the union. I'm trying to recall his name—
>
> THE COURT: Do you remember if it was an attorney or other staff member of the public defender's office?
>
> [J.E.]: I know he works—I'm not sure. Howard [V.] (phonetic). He's the victim associate.
>
> THE COURT: And is your relationship with this person just purely professional?
>
> [J.E.]: Yes.
>
> THE COURT: How often do you have to work with this person?
>
> [J.E.]: It's very rare.
>
> THE COURT: Is there anything about your interaction with this person that would influence your ability to serve as a fair and impartial juror?
>
> [J.E.]: Not at all.

After voir dire was completed, the state exercised a peremptory strike against J.E., and Reid challenged the strike under *Batson*, stating, "[J.E.] is the only black individual on the jury. I listened to his answers. There is nothing in his statement that was indicative that he would be for defense. He said he worked with victim representative services . . . ."

¶3 The trial court asked for the state's position, and the prosecutor made the following statement:

> This particular juror, in addition to other ones, had a certain mark next to it. When I'm going through, listening to what is the juror saying, this juror that was paying far more attention to the defense as opposed to the State when questions were asked. It seemed as though he needed clarification on some of the questions. He didn't know for sure whether the individual Howard was actually with the prosecution office, the public defender. I believe he stated initially that he thought it was actually with the public defender office. So for those reasons we struck him.

The court asked Reid's attorney if she had any final comments, and she argued "[t]hose are not the reasons" for the strike, suggesting that J.E. may have been paying close attention to her because of her Russian accent. She stated, "It appeared he was trying to understand what I was asking him." The court then denied Reid's *Batson* challenge without further comment.

Discussion

¶4 In *Batson*, the United States Supreme Court held the state's use of peremptory strikes to remove prospective jurors "solely on account of their race" violates the Equal Protection Clause of the Fourteenth Amendment. 476 U.S. at 89. In reviewing a trial court's ruling on a *Batson* claim, we defer to the court's findings of fact unless clearly erroneous, but we review de novo the court's application of the law. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844-45 (2006).

¶5 A trial court conducts a three-step analysis when a defendant challenges a peremptory strike under *Batson*:

> First, the defendant must make a prima facie showing that the strike was racially discriminatory. If such a showing is made, the burden then switches to the prosecutor to give a race-neutral explanation for the strike. Finally, if the prosecution offers a facially neutral basis for the strike, the trial court must determine whether "the defendant has established purposeful discrimination."

Newell, 212 Ariz. 389, ¶ 53, 132 P.3d at 845, *quoting Batson*, 476 U.S. at 98. Here, neither party disputes the court's apparent findings regarding the first two steps of the analysis—that Reid had made a prima facie showing of racial discrimination and that the state articulated race-neutral reasons for the strike. *See Hernandez v. New York,* 500 U.S. 352, 365 (1991) (plurality opinion) ("In the typical . . . inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed."); *State v. Medina*, 232 Ariz. 391, ¶ 45, 306 P.3d 48, 61 (2013) (in asking for state's response to *Batson* challenge, court implicitly found prima facie showing of discrimination).

¶6 Reid instead maintains the trial court erred at step three of the analysis by implicitly accepting the prosecutor's stated reasons as credible. At this point in the process, the 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.'" *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007), *quoting Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 339 (2003) (alterations in *Gay*). "That step turns on factual determinations," and "'all of the circumstances that bear upon the issue of racial animosity must be consulted.'" *Foster v. Chatman*, ___ U.S. ___, ___, 136 S. Ct. 1737, 1747-48 (2016), *quoting Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). Thus, the determination requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93, *quoting Arlington Heights v. Metro. Hous. Dev.*

Corp., 429 U.S. 252, 266 (1977). The burden of proof rests with "the opponent of the strike," who "must persuade the trial court that the proponent's reason is pretextual and that the strike is actually based on race, gender, or another protected characteristic." *State v. Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d 160, 162 (App. 2001).

¶7 Reid points out that the trial court denied his *Batson* motion "without making any findings" on the credibility of the reasons given by the prosecutor for striking J.E. He assails, as "clearly pretextual," the prosecutor's reliance on J.E.'s comments about his acquaintance with a county employee from the public defender's office whom he saw on rare business occasions, asserting, "The fact that [J.E.] did not know much about the [employee], if anything, demonstrated that he would not be influence[d] by his acquaintance . . . and is not a valid reason to strike a juror." Reid appears to have construed the prosecutor's comment that J.E. "seemed as though he needed clarification" as a "claim that [J.E.] asked a lot of questions." Reid argues such a claim is untrue, and he maintains J.E.'s responses to the court's questions about the employee with the public defender's office did not indicate a need for clarification, but evinced a juror who was "being careful to tell the trial court everything that might be relevant," rather than one who would be "inattentive."

¶8 With respect to the prosecutor's statement that J.E. "was paying far more attention to the defense as opposed to the State when questions were asked," Reid argues J.E.'s increased attention may have been required by defense counsel's thick accent, unconventional language, and the fact that she spent more time questioning potential jurors than did the state. Relying on *Snyder*, Reid maintains the trial court erred in denying his *Batson* challenge without expressly finding this demeanor-based reason credible.

¶9 In *Snyder*, the prosecutor had responded to a *Batson* challenge with two reasons for striking an African-American member of the jury panel: (1) he "looked very nervous" during voir dire and (2) as a student teacher, he had expressed concern about missing classes, and the state was concerned this might cause him to return a "lesser verdict" in order to "go home quickly" and avoid

the penalty phase in the capital case. 552 U.S. at 478. Without further comment, the trial court allowed the strike, thereby denying the defendant's *Batson* challenge. *Id.* at 479. Snyder was convicted of first-degree murder in a Louisiana court and was sentenced to death. *Id.* at 474.

¶10 The Louisiana Supreme Court affirmed Snyder's conviction and sentence, rejecting his *Batson* challenge, and the Supreme Court vacated the judgment and remanded the case for reconsideration in light of *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005). *Snyder*, 552 U.S. at 476. The Louisiana Supreme Court again affirmed Snyder's conviction, and the Supreme Court reversed. *Id.*

¶11 The Supreme Court recognized that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike." *Id.* at 479. But it noted the trial court had made no such "specific finding" and had "simply allowed the challenge without explanation." *Id.* And the Court found the prosecutor's other explanation—that the prospective juror was concerned about hardship resulting from his jury service—was pretextual and did "not hold up" in light of other record evidence. *Id.* at 485, *quoting Miller–El II*, 545 U.S. at 252. Noting the "absence of anything in the record showing that the trial judge credited the [additional] claim that [the stricken juror] was nervous," the Court concluded the "peremptory strike [was] shown to have been motivated in substantial part by discriminatory intent" and reversed Snyder's conviction. *Id.*; *see also Lewis v. Lewis*, 321 F.3d 824, 830 (9th Cir. 2003) (if review of record "undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination"); *Lucas*, 199 Ariz. 366, ¶ 11, 18 P.3d at 163 (concluding pretextual reason taints "any other neutral reason for the strike").

¶12 But in contrast, here, the record supports the prosecutor's claim that J.E. knew a person who he believed was an employee of the public defender's office, and no other juror acknowledged having such an acquaintance. Moreover, the record does not necessarily contradict the prosecutor's assertion that J.E.

"seemed as though he needed clarification on some of the questions," as Reid assumes. This statement, like the state's assertion that J.E. appeared to pay greater attention to the defense, might have only implicated J.E.'s demeanor, which is something we cannot review based on a cold transcript. *See Snyder*, 552 U.S. at 479.

¶13 Nor are we able to consider the prosecutor's demeanor, which may often provide the "best evidence" of the state's reason for exercising a peremptory strike. *Thaler v. Haynes*, 559 U.S. 43, 49 (2010) (per curiam). But the defense attorney's acknowledgment—that "[i]t appeared [J.E.] was trying to understand what [she] was asking him"—provides some verification of the prosecutor's stated observations.

¶14 We strongly encourage trial courts to make express findings regarding the credibility of the state's proffered reasons for striking a juror before overruling a *Batson* objection. Such findings greatly aid appellate review. *See Miller-El I*, 537 U.S. at 339 (identifying relevant considerations). Moreover, a trial court's findings can have the salutary effect of demonstrating to the parties and the citizenry that *Batson* challenges are more than a mere procedural formality.

¶15 But in *State v. Cañez*, our supreme court concluded it was sufficient that the trial court denied the *Batson* challenge without more, "implicitly finding [the defendant] had not carried his burden of proving purposeful discrimination in any of the state's peremptory strikes." 202 Ariz. 133, ¶ 28, 42 P.3d 564, 578 (2002), *supplemented*, 205 Ariz. 620, 74 P.3d 932 (2003), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299, n.1, 371 P.3d 627, 631 n.1 (2016); *see also United States v. Ongaga*, 820 F.3d 152, 166 (5th Cir.) (trial court's "failure to make explicit factual findings on the third step [of *Batson* analysis] is not itself reversible error"), *cert. denied*, ___ U.S. ___, 137 S. Ct. 211 (2016). We likewise accept the trial court's implicit finding that the state did not engage in purposeful discrimination.

Disposition

¶16 Reid has failed to establish the trial court clearly erred in denying his *Batson* challenge to the state's peremptory strike of a member of the jury panel. Accordingly, his conviction and sentence are affirmed as corrected.