IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CALVIN RAY MURRAY,
Appellant.

No. 2 CA-CR 2019-0269
Filed June 28, 2021

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20185749001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
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Counsel for Appellee

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Calvin Murray appeals from his conviction and sentence for third-degree burglary, arguing the trial court improperly denied his *Batson*[1] challenge to the state's peremptory strike of a Black panel member and the evidence was insufficient to support his conviction because he was authorized to be present in the store at the time of the offense. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Murray. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). Murray worked as a night baker for a store in Tucson. On the night of December 13, 2018, he went to the store's Oracle Road location, where he occasionally covered shifts for other employees, although it was not his assigned "home store." Murray entered the store and, after helping a delivery driver move several items, removed two cash drawers from the front registers, each containing approximately $200; he then left the store with them.

¶3 The next morning, the opening manager discovered the two cash drawers were missing and called the general manager, who reviewed surveillance footage from the previous night. He recognized Murray in the video footage and called the police. An officer spoke with Murray at his home, and Murray admitted he had been at the store the night before, stated "I did it," and explained he had taken the money because he "was broke." He told the officer that he had taken approximately $150 and that he had gone into the store to check his schedule because he thought he worked that night, but it turned out that he was not scheduled.

¶4 Following a jury trial, Murray was convicted as noted above and sentenced to a one-year prison term. This appeal followed. We have

[1]*See generally Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Batson Challenge

¶5 Murray, who is Black, first argues the state struck a Black juror "for discriminatory purposes," violating *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), and because the trial court "failed to remedy the error in any way," we must reverse his conviction and remand his case for a new trial. We will not reverse a court's denial of a *Batson* challenge absent clear error. *See State v. Newell*, 212 Ariz. 389, ¶ 52 (2006). However, we review the court's application of the law de novo. *See State v. Lucas*, 199 Ariz. 366, ¶ 6 (App. 2001).

¶6 A prosecutor's use of a peremptory strike to exclude a prospective juror solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson*, 476 U.S. at 89. "A *Batson* challenge involves three steps: (1) The defendant must make a prima facie showing of discrimination, (2) the prosecutor must offer a race-neutral reason for each strike, and (3) the trial court must determine whether the challenger proved purposeful racial discrimination." *State v. Hardy*, 230 Ariz. 281, ¶ 12 (2012). During the third step, 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." *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 339 (2003). Because the "trial court is in a better position to assess" this fact-intensive inquiry "turn[ing] on issues of credibility," its "finding at this step is due much deference." *Newell*, 212 Ariz. 389, ¶ 54.

¶7 During voir dire, the trial court informed the potential jurors that Murray had been charged with third-degree burglary of a business. The court then asked the jury pool whether "any members of [their] family or close friends [had] ever been involved" in a similar case, and C.W., one of two Black members of the jury panel, indicated her "daughter's father" had "twice" been involved in a similar case approximately three years earlier in which he had been the accused. She further stated he is "serving 20 years right now." The court asked C.W. if she had "follow[ed] the case or kn[e]w enough about it to form an opinion about how [she] thought he was treated," and she responded, "No." She also indicated that nothing about her daughter's father's situation would "interfere with [her] ability to be fair to both sides" in Murray's case. Additionally, C.W. informed the

court that her "best friend's husband" is a law enforcement officer and that she had never before served on a jury.

¶8 The trial court subsequently asked whether any members of the panel had family or close friends who had been arrested or convicted of burglary or theft, and C.W. again mentioned her "daughter's dad." Another potential juror, M.S., stated his nephew had been convicted of burglarizing a business "three or four years ago" but he had "[n]ot really" followed the case or known much about it, and it would not be difficult for him to be fair. And, panel member K.K. informed the court that her niece had been charged with grand theft auto in Tucson about ten years ago but nothing about that case would make it difficult for her to be fair.

¶9 The state used a peremptory strike to remove C.W. from the jury panel and Murray objected, alleging the strike had been motivated by race in violation of *Batson*. Murray argued C.W. had not said anything during voir dire "that would indicate that she was [stricken] for anything but her race." The state responded by pointing to C.W.'s statement that "her ex-husband or her boyfriend was incarcerated for a theft related charge" and noted the reason behind the strike was that C.W. "might be more compassionate about theft charges or burglary charges." Murray then noted that C.W. had stated "her ex-husband or her child's father's incarceration had no impact on her ability to sit here fairly." After indicating it was unclear whether Murray had made a prima facie showing of discrimination "given the fact that [there was] another Black juror on [the] panel," the trial court nevertheless found the state's reason for striking C.W. "race neutral" and "valid on its face" and denied Murray's *Batson* challenge.

¶10 On appeal, Murray asserts, for the first time, that a comparison of the responses given by C.W., M.S., and K.K. demonstrates that the state's strike of C.W. was pretextual and racially motivated because all three prospective jurors stated one of their family members or close friends had been charged with an offense similar to burglary, but only C.W. was stricken.[2] And, he contends, M.S.'s and K.K.'s "close familial

[2]Murray's arguments on appeal relate to the third prong of *Batson*. Under the first prong, although the trial court indicated it was unsure whether Murray had made a prima facie showing that the state's strike of C.W. was racially discriminatory, it allowed the state to provide an explanation for the strike. *See State v. Medina*, 232 Ariz. 391, ¶ 45 (2013) ("By asking the prosecutor to give race-neutral reasons for striking these jurors, the trial court implicitly found that [the defendant] had made a prima facie

relationship[s]" with their nephew and niece, respectively, "[l]end[] further suspicion to the State's intent in exercising the strike against" C.W. because she "did not indicate a personal relationship with [her daughter's father] at all." Further, Murray argues C.W.'s testimony that her best friend's husband was a law enforcement officer "would likely make her more sympathetic to the prosecution," and the fact that C.W. had never served on a jury before, while M.S. had served on a jury that ultimately acquitted a burglary defendant, "makes it abundantly clear that the State's purported reason for striking [C.W.] was invalid."

¶11 Additionally, Murray contends the state mischaracterized C.W.'s testimony by stating she had mentioned the incarceration of her "ex-husband" or "boyfriend" for a theft-related charge when, in fact, she "never indicated such a close relationship with the person, referring to him repeatedly as her daughter's father." Supporting his argument, Murray asserts a "person can share a child with another without having ever had a close or significant relationship," and C.W.'s statements indicated she "never had a close personal relationship" with her daughter's father or such a relationship no longer existed. Murray argues C.W.'s responses showed she had "no opinion about how her daughter's father had been treated, that she had not followed his case, and that there was nothing about the incident that would affect her decision-making or her ability to be fair," and did not demonstrate any likelihood that the relationship would have "reasonably engender[ed] sympathy" for him. Thus, Murray argues, the state's strike was pretextual.

¶12 Murray acknowledges he did not raise these arguments below but contends the *Batson* test "does not mention rebuttal by the defense" and argues "this . . . evidence of pretext must be considered in order to adequately protect [his] fundamental constitutional right to a fair and impartial jury composed of his peers." He cites *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 241 n.2 (2005), for the proposition that the Supreme Court "has considered issues not raised by the defense when it found that a *Batson* challenge should have been granted."

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showing of discrimination."). The burden then shifted to the state to give a race-neutral basis for its peremptory strike, and it accordingly explained that C.W. had stated her "ex-husband or her boyfriend" had been convicted of a similar offense. *See Purkett v. Elem*, 514 U.S. 765, 767 (1995); *State v. Reyes*, 163 Ariz. 488, 490-91 (App. 1989) (family involvement in criminal justice system is proper basis for juror strike).

¶13 The state counters that because Murray failed to raise these arguments below, the record is therefore undeveloped as to M.S. and K.K. and "it is inappropriate to carry out a cross-comparison" on appeal, and that "Murray's belated speculation about the nature of" C.W.'s relationship with her daughter's father "does not satisfy his burden of showing the trial court clearly erred." Moreover, citing *Rice v. Collins*, 546 U.S. 333, 338 (2006), *Batson*, 476 U.S. at 93 & 94 n.18, and *State v. Garcia*, 224 Ariz. 1, ¶ 21 (2010), the state contends that although *Batson* "does not explicitly indicate that the opponent of the strike must counter the proponent's explanation, the burden of proving that the proponent of the strike acted with discriminatory intent always falls on the opponent, and never shifts to the proponent." It further argues *Miller-El II* is distinguishable in light of the "extensive voir dire" on a "thoroughly developed issue" conducted in that case, as well as other evidence of the pretextual nature of the strikes. We agree.

¶14 Although "a prosecutor's reason for striking a black panelist [that] applies just as well to an otherwise-similar non-black who is permitted to serve . . . is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step," *State v. Gay*, 214 Ariz. 214, ¶ 21 (App. 2007) (quoting *Miller-El II*, 545 U.S. at 241), a "retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial," *State v. Medina*, 232 Ariz. 391, ¶ 48 (2013) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008)). We decline to conduct such a comparison here. *See State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 37 (2017) ("We will not examine more detailed comparisons than were presented to the trial court."), *abrogated on other grounds by State v. Escalante*, 245 Ariz. 135, ¶¶ 15-16 (2018).

¶15 Because Murray did not argue below that C.W. was similarly situated to any of the other non-minority jurors on the panel, the state did not have an opportunity "to offer distinctions between allegedly similarly situated jurors or to clarify which factors were given more weight in [its] choice to strike" C.W. *Medina*, 232 Ariz. 391, ¶ 49. Similarly, "the trial court did not have an opportunity to conduct an in-depth comparison of the jurors who were stricken and those who remained on the panel." *Id.* Thus, we cannot say the court clearly erred in finding Murray had not carried his burden of showing purposeful discrimination. *See id.* ¶¶ 43, 49 ("Because [the defendant] did not argue that any juror on the panel had some or all of the factors for disqualification presented for [the stricken jurors], we do not find that the trial court clearly erred."); *Newell*, 212 Ariz. 389, ¶ 52.

¶16 And, because "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike," *Purkett v. Elem*, 514 U.S. 765, 768 (1995), a defendant's failure to object to a prosecutor's characterization of a juror results in failure to meet that burden, *see State v. Bustamante*, 229 Ariz. 256, ¶ 17 (App. 2012). Moreover, Murray's failure to object resulted in an undeveloped record as to the closeness of C.W.'s relationship with her daughter's father, about which we will not speculate. *See Newell*, 212 Ariz. 389, ¶ 52.

¶17 Further, "[a]lthough not dispositive, the fact that the state accepted other [minority] jurors on the venire is indicative of a nondiscriminatory motive." *State v. Gallardo*, 225 Ariz. 560, ¶ 13 (2010) (first alteration in *Gallardo*, second alteration in *Roque*) (quoting *State v. Roque*, 213 Ariz. 193, ¶ 15 (2006), *abrogated on other grounds by Escalante-Orozco*, 241 Ariz. 254, ¶ 14). As the trial court noted, another Black juror remained on the panel. For these reasons, the court did not clearly err in rejecting Murray's *Batson* challenge.

Sufficiency of the Evidence

¶18 Additionally, Murray argues the evidence was insufficient to support his conviction for third-degree burglary and, therefore, the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. We review both sufficiency of evidence and questions of statutory interpretation de novo. *See State v. West*, 226 Ariz. 559, ¶ 15 (2011); *State v. Holle*, 240 Ariz. 300, ¶ 8 (2016).

¶19 Under Rule 20(a)(1), a trial court must grant a judgment of acquittal if no substantial evidence supports a conviction. "Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Rodriguez*, 192 Ariz. 58, ¶ 10 (1998). "[T]he 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." *West*, 226 Ariz. 559, ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). And, "[w]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal." *Id.* ¶ 18 (alteration in *West*) (quoting *State v. Lee*, 189 Ariz. 590, 603 (1997)). In reviewing the sufficiency of the evidence, we neither reweigh evidence nor assess the credibility of witnesses. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013). "Evidence is no less substantial simply because the

testimony is conflicting or reasonable persons may draw different conclusions therefrom." *State v. Mercer*, 13 Ariz. App. 1, 2 (1970).

¶20 Murray was charged under A.R.S. § 13-1506(A), which provides that a person commits third-degree burglary by "[e]ntering or remaining unlawfully in . . . a nonresidential structure . . . with the intent to commit any theft or any felony therein." "Enter or remain unlawfully" is defined as:

> [A]n act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged except when the entry is to commit theft of merchandise displayed for sale during normal business hours, when the premises are open to the public and when the person does not enter any unauthorized areas of the premises.

A.R.S. § 13-1501(2).

¶21 At trial, the store's general manager testified that night bakers' shifts begin at midnight, and, although employees are not allowed to clock in more than five minutes before their shift, as long as the dough had been delivered, bakers could start their job before the beginning of their scheduled shift. He also testified that Murray had entered the restaurant by using a lockbox code he had provided to Murray. Other evidence presented at trial indicated Murray had a key to the store or the delivery driver let him enter.

¶22 The general manager further testified that although Murray had "trained . . . or worked a few days the previous week" at the Oracle Road location, that location was not his "home store" and he was not scheduled to work there during "the week that the incident happened." Additionally, he confirmed that if Murray had not taken the cash drawers that night, he would not have "prosecuted him for trespass" because Murray "was authorized to be there," and he indicated he believed the case was about a theft rather than a trespass, "an unauthorized person," or "an unlawfully present person." However, the manager also testified Murray had not been authorized to be at the store on the night in question because "[h]e was not scheduled" to work at any location that night and it was not "normal for an unassigned night baker to come and go as they please."

¶23 The senior vice president of the franchise ownership company testified that once a baker was "deemed worthy of access, they had unfettered access to the store" and that there was "no way to limit" a night baker's access. But, he also testified employees do not "have unfettered access to come and go and hang out at the [store] whenever they want" and having access to the store does not "mean that [employees are] authorized to be there at any given moment." Specifically, he stated that if an employee is not scheduled to work, "buying a cup of coffee," or "meeting their friends there," "there's no business to be in the [store]."

¶24 At the close of the state's case, Murray moved for a judgment of acquittal pursuant to Rule 20, arguing that because he had "authority to enter" the store, and thus could not have "remained [there] unlawfully," the evidence was insufficient to support a conviction for third-degree burglary. The state countered that Murray had not been scheduled to work and had entered or remained in the store unlawfully with intent to commit a theft. The trial court concluded that "whether [Murray's] entering and remaining at the [store] actually became unauthorized or was unauthorized" was "a factual issue" for the jury and denied the motion.[3]

¶25 On appeal, relying on principles of statutory interpretation, Murray contends application of the plain language of § 13-1501(2) would lead to absurd results, and we should "reject a strict application of the language of the burglary statute which would render the employee's presence unlawful once criminal intent was formed." Supporting his argument, Murray cites *State v. Altamirano*, 166 Ariz. 432, 436-37 (App. 1990), for the proposition that "a person cannot burglarize their own home, despite the fact that a person does not have license or authority to commit a theft or felony in his home." Thus, he asserts, because "[a]n employee is no more an intruder in his place of work than a resident in his

[3]Murray subsequently requested clarification of the jury instruction on "enter[ing] or remain[ing] unlawfully," asking the court to instruct the jury that both the person's presence and intent must be unauthorized, unlicensed, or not otherwise privileged. He argued that if mere presence, intent, and an ability to steal was sufficient to establish unlawful presence, "every indoor felony or . . . theft" would be considered a burglary and that such an interpretation is absurd, overbroad, and "confusing to the jury." The court disagreed, noting the existing instruction was clear that the state had to prove "either someone entered into a nonresidential structure or remained unlawfully and their intent in doing so was to commit a theft either by entering or remaining unlawfully."

home," we should look beyond the plain language and hold the burglary statute—essentially, the definition of "remain[ing] unlawfully" under § 13-1501(2)—is inapplicable "when an employee commits a theft or some other felony while present at their place of employment during a time when they are authorized to be present." Murray also cites out-of-state case law, asserting that "Arizona courts have not yet decided whether a current employee can be convicted of burglary for committing a theft from their employer at a time in which they are authorized to be present in the place of business."

¶26 Murray's argument is premised on his assertion that he had "full authority and license" to "be present in the Panera Bread at the time he committed the theft." Murray contends that, as an employee, he had keys or key-code access to the store and "there were no limitations placed upon his use of either." Murray further asserts that although he was not, in fact, scheduled to work at that location that night, he thought he was supposed to work and went to the store to check his schedule. And, he argues, absent evidence that employees are not permitted to go in and check their schedules, the "mere fact that he was mistaken does not mean that he was present at a time he was not authorized to be." Accordingly, Murray points to the manager's testimony "that this was not a case about [his] unlawful or unauthorized presence, but rather a case about [his] unauthorized taking." Finally, Murray points to testimony indicating that although employees are not allowed to clock in more than five minutes before their shift, as long as the dough has been delivered, bakers can start their job before the beginning of their scheduled shift. He contends that although he was over thirty minutes early, the dough was delivered nearly three minutes after he arrived, and therefore his presence was not unauthorized.

¶27 The state counters that "both the plain language of the statute and Arizona case law" support Murray's conviction, and that his "out-of-state case law addressing differing burglary statutes is unpersuasive." Moreover, the state argues, the evidence was sufficient to support Murray's conviction because it showed he had "entered or remained in the restaurant with intent to steal the cash drawers, and he did not have an 'absolute and unconditional right to enter and remain on the property.'" The state points to evidence that Murray was not scheduled to work that night and appears to suggest that even if Murray had been scheduled to work, his presence would still have been unauthorized because he arrived over five minutes before midnight—the time he was permitted to clock in.

¶28 A plain reading of § 13-1506(A), applied to the facts of this case, including that Murray was not scheduled to work on the night in question and it was not his "home store," supports his conviction for third-degree burglary. *See State v. Givens*, 206 Ariz. 186, ¶ 5 (App. 2003) ("If the language is clear, we must follow the text as written without employing other rules of statutory construction."). And, under § 13-1501(2), the element of entering or remaining unlawfully is met when the person's intent in doing so is not "licensed, authorized or otherwise privileged." As the state argues, regardless of how or why Murray entered the store, this element was satisfied because the evidence "showed that [his] intent in remaining in the restaurant was to take the cash drawers." *See Altamirano*, 166 Ariz. at 435 ("It is clear that although a person enters another's premises lawfully and with consent, his presence can become unauthorized, unlicensed, or unprivileged if he remains there with the intent to commit a felony.").

¶29 Even under Murray's interpretation of the statute, his argument fails. Based on the evidence presented at trial, the jury could have concluded Murray did not have unconditional access to the store and was not authorized to remain at the time of the offense. Moreover, testimony that the store would not have prosecuted him for trespassing if he had not taken the money and that this is not a case about Murray's unlawful or unauthorized presence is not dispositive. Indeed, although the testimony at trial was conflicting as to whether Murray was authorized to be at the store in the first place that night, this does not render the evidence insufficient to support his conviction. *See Mercer*, 13 Ariz. App. at 2; *West*, 226 Ariz. 559, ¶ 16. Because sufficient evidence supported the finding that Murray entered or remained in the store unlawfully, the evidence is therefore sufficient to support his conviction for third-degree burglary, and the trial court did not err in denying his Rule 20 motion.

Disposition

¶30 For the foregoing reasons, we affirm Murray's conviction and sentence.