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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JUL 29 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	2 CA-CR 2009-0261 DEPARTMENT B
v.	MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court
MARTIN LEON CORRAL, Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072263

Honorable Richard Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes — Tucson
Attorneys for Appellant

E C K E R S T R O M, Judge.

¶1 After a jury trial, appellant Martin Leon Corral was convicted of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol

concentration of .08 or greater, both committed while his license was suspended, revoked or restricted. On appeal he contends the trial court erred when it denied his motion to strike the jury panel during voir dire and when it denied his challenge, under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the state's use of a peremptory strike to remove a Hispanic member of the jury panel. We affirm for the reasons stated below.

¶2 During voir dire, the trial court asked the potential jurors whether any of them had had negative experiences involving a person who was intoxicated while driving. A few of the panel members responded that friends or family had been injured or killed in accidents caused by drunk drivers. Corral moved to strike the panel based on the number of jurors who responded, and the court denied his motion. On appeal, Corral contends that by denying his motion the court deprived him of his right to due process and a fair trial by an impartial jury.

¶3 We review a trial court's ruling on a motion to strike a jury panel for an abuse of discretion. *See State v. Glassel*, 211 Ariz. 33, ¶ 36, 116 P.3d 1193, 1205 (2005). As the party challenging the panel, Corral had the burden of showing "the jurors could not be fair and impartial." *State v. Davis*, 137 Ariz. 551, 558, 672 P.2d 480, 487 (App. 1983). In reviewing Corral's claim, we will not presume the jury panel was tainted and had been prejudiced by the information some members had shared during voir dire. *See State v. Doerr*, 193 Ariz. 56, ¶ 18, 969 P.2d 1168, 1173-74 (1998). "Unless the record affirmatively shows that a fair and impartial jury was not secured, the trial court must be affirmed." *State v. Greenawalt*, 128 Ariz. 150, 167, 624 P.2d 828, 845 (1981).

¶4 The record establishes that the court asked the members of the panel the relevant question whether they or a member of their family or close friend had been "in a situation involving someone that you feel was under the influence of alcohol, a traffic-related situation," cautioning the panel members not "to go into any detail that might prejudice the rest of the jurors." Those panel members who responded did so with only minimal details. The first panel member responded the incident had involved "vehicular manslaughter" and the court dismissed her when she admitted the incident would influence her decision in the case. Another person's cousin had been "killed in a DUI" and yet another stated her oldest son had been hit by a drunk driver twenty years earlier. Another juror admitted her sister "had a DUI about four years ago, and I have had a sobriety test before." Those who were permitted to remain on the panel assured the court they could decide the case fairly and "with an open mind." The court also asked jurors generally about whether they drank alcohol and one juror was dismissed when he admitted he was "against driving and drinking" no matter how little the person had to drink.

¶5 Corral's conclusory assertion that "[t]he potential jurors' responses were of a type that could have affected or influenced the verdict" is nothing more than speculation. The information panel members provided was personal in nature, and the trial court's questioning of the remaining panel members assured that, despite their personal experiences, they could be fair and impartial. Corral is not entitled to relief based on his suggestion that the court should have questioned the panel members to determine whether any of them had been unduly prejudiced by the information divulged

by others. Corral waived this complaint by not requesting such an inquiry during voir dire. *See* Ariz. R. Crim. P. 18.5(d); *see also State v. Detrich*, 188 Ariz. 57, 64-65, 932 P.2d 1328, 1335-36 (1997).[1] Given the limited extent and personal nature of the information disclosed and the absence of anything in the record establishing the panel had been tainted or could not be impartial, we cannot say the trial court abused its discretion by refusing to strike the entire panel.

¶6 Corral, who is Hispanic, also contends the trial court erred when it rejected his challenge to the state's use of a peremptory strike to remove "what may have been the only Hispanic juror." *Batson* prohibits the use of a peremptory strike to remove a prospective juror from a panel based upon that person's race. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). When reviewing the court's ruling on a

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[1]In his reply brief Corral contends he was not required to ask that the trial court question the jurors further in order to preserve this issue, relying on *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998). In addition to the fact that we are not bound by Ninth Circuit precedent, *State v. Swoopes*, 216 Ariz. 390, ¶ 35, 166 P.3d 945, 956 (App. 2007), that case is distinguishable. There, statements made by a member of the jury panel were far more prejudicial and carried a greater possibility of negatively affecting other members of the panel. The defendant in *Mach* was charged with and convicted of sexual conduct with a minor under the age of fourteen; a panel member, a social worker with Child Protective Services, stated repeatedly that in her experience, allegations made by child-victims had always been confirmed and, over a three-year period, she had never been aware of any situation in which a child who claimed to have been sexually assaulted had lied. *Mach*, 137 F.3d at 631-32. She also claimed expertise in this area. *Id*. Reversing the conviction, the Ninth Circuit stated, "At a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by [the panel member]'s expert-like statements." *Id*. at 633. Unlike the statements made by panel members here, the statements in that case went to the very heart of the truth-finding process. Moreover, the Ninth Circuit's passing reference to what the trial court should have done does not establish an independent ground for reversing a conviction based on a court's denial of a motion to strike a jury panel.

Batson challenge, we defer to its factual findings unless they are clearly erroneous, but we review de novo the court's application of the law. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001).

¶7 In particular, we will not disturb the trial court's ruling as to whether the state had discriminatory intent in striking a juror unless that finding is clearly erroneous. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). The court's analysis of this question necessarily involves its evaluation of credibility, which often includes an assessment of the "'demeanor of the attorney who exercises the challenge.'" *Id.*, *quoting Hernandez v. New York*, 500 U.S. 352, 365 (1991); *see also State v. Cañez*, 202 Ariz. 133, ¶ 28, 42 P.3d 564, 578 (2002) ("We give great deference to the trial court's ruling, based, as it is, largely upon an assessment of the prosecutor's credibility.").

¶8 In making a *Batson* challenge, a defendant must first make a prima facie showing that the state's use of a peremptory strike was race-based. *Hernandez*, 500 U.S. at 358. The burden then shifts to the state to provide a race-neutral explanation for striking the prospective juror. *Id.* at 358-59. The explanation "'must be more than a mere denial of improper motive, but it need not be "persuasive or even plausible."' . . . [T]he party challenging the strike must persuade the trial court that the proffered race-neutral explanation is pretextual." *Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d at 793, *quoting State v. Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d 160, 162 (App. 2001) (citation omitted).

¶9 Here, at the end of voir dire, Corral's counsel referred to a prospective juror who had been stricken from the panel by the prosecutor and stated, "We have a prima fa[]ci[e] case [of discriminatory intent]" because the stricken panel member "is [of]

Hispanic background. My client is [of] Hispanic background. He's entitled to have other members on the panel that are of his own racial background." The trial court turned to the prosecutor to provide a reason for striking the prospective juror. She stated:

> Your Honor, [the] State can avow to the Court that the purpose for striking the juror was not due to the juror's race. The reason[s] that the State did strike this juror was because he was not engaging during questions. I found he was looking down at the desk most often and that he was slow to answer when he was reading the questions off the board.
>
> Because being a juror does require paying attention to lots of information and processing that at a rapid or more rapid pace than normal conversation, perhaps I felt that he would not be as engaged as the other jurors.

¶10 Attempting to discredit the prosecutor's explanation, Corral's counsel stated, "The Court itself didn't note any problems when the Court engaged him. I believe that he was candid in his answers . . . whenever anyone asked him a question. He was responsive to the Court when the Court asked him questions." Counsel added, "I'm not going to avow to the Court that [the prosecutor] necessarily purposefully did that. But I know my client is allowed to have someone on the jury panel that is of his own race and that the State's proffer is not appropriate."

¶11 Finding first that Corral had made a prima facie case that the state's decision to strike the juror appeared race-based, the trial court then found that "the State's reason for striking the juror is legitimate." The court added that "the juror's rate of speech was rather slow . . . he spent more time answering the question than the other jurors did."

¶12 On this record we cannot find the court abused its discretion in accepting the state's explanation for striking the prospective juror, or in rejecting Corral's suggestion that the state's explanation was pretextual. The prosecutor expressed race-neutral reasons for striking the juror, and the trial court, which was in the best position to determine whether she was being disingenuous, accepted her explanation. And there was no discriminatory intent inherent in her explanation, *see Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

¶13 We affirm the convictions and the sentences imposed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

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

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