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AUG 31 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2010-0299
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
GLENN CORNELL WORLEY,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000114

Honorable James L. Conlogue, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Glenn Worley was convicted of seven counts of sexual conduct with a minor under fifteen years of age, all dangerous crimes against children. The trial court sentenced him to seven consecutive terms of life imprisonment without the possibility of parole for thirty-five years. On appeal, Worley argues the court erred: (1) in denying his *Batson*[1] challenge to the state's peremptory strike of a prospective juror; (2) in refusing to dismiss a juror for misconduct; and (3) in precluding testimony regarding the victim's cellular telephone records. He also contends the evidence was insufficient to sustain the jury's guilty verdicts. For the reasons stated below, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Worley's convictions. *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In June 2009, then twelve-year-old T.E. moved from Idaho to live with her mother's cousin, D.C., and his wife in Sierra Vista. T.E. met Worley, who was thirty-four, at church, and the two became friends. They communicated through text messages, electronic mail (email) messages, and cellular telephone calls and visited each other. On one occasion, T.E. sent Worley pictures she had taken of herself wearing a bikini top. On another, Worley sent her an email with attachments of videos showing adult women performing oral sex on men and suggested he wanted T.E. to do the same thing to him. Between December 1, 2009, and February 9, 2010, Worley engaged in sexual conduct with T.E. on

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

several occasions, including oral sexual conduct on at least four occasions and vaginal intercourse on three occasions. Their last sexual contact took place on Super Bowl Sunday 2010, when T.E. performed oral sex on Worley.

¶3 On February 7, 2010, D.C. discovered Worley's and T.E.'s sexually suggestive email messages. D.C. then called the police to report what he had found. Several days later, T.E. participated in a police-staged confrontation call to Worley. During their conversation, Worley gave incriminating responses to T.E.'s questions and references about their sexual contacts.

¶4 Worley was charged with seven counts of sexual conduct with a minor, dangerous crimes against children. He was convicted of all counts and the trial court sentenced him as described above. This appeal followed.

Discussion

Batson Challenge

¶5 Worley first argues the trial court erred in denying his *Batson* challenge to the state's peremptory strike of the only African-American venireperson during jury selection. Worley maintains he was deprived of a fair cross-selection of the community on his jury because the state struck the only venireperson who was a member of Worley's race. We will not reverse a trial court's denial of a *Batson* challenge unless it is clearly erroneous. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844 (2006).

¶6 Excluding a potential juror on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). A *Batson* challenge to the removal of a potential juror on grounds of

discrimination involves a three-step process: "(1) the party challenging the strikes must make a prima facie showing of discrimination; (2) the striking party must provide a race-neutral reason for the strike; and (3) if a race-neutral explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful racial discrimination." *State v. Cañez*, 202 Ariz. 133, ¶ 22, 42 P.3d 564, 577 (2002). Whether the reasons offered for striking a juror are nondiscriminatory or merely pretexts "turns on the lawyer's credibility, and 'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.'" *State v. Gallardo*, 225 Ariz. 560, ¶ 11, 242 P.3d 159, 164 (2010), *quoting Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (alteration in *Snyder*).

¶7 During voir dire, F. was called to replace another venireperson who had been excused. The following exchange took place between the prosecutor and F.:

> [PROSECUTOR]: Mr. F[.], you are the only one that I didn't get a chance to address. So, all of these questions, I am not going to do it all over again for you, did you hear me when I was addressing the rest of the panel?
>
> MR. F[.]: Yes.
>
> [PROSECUTOR]: Is there anything that you would have raised your hand about?
>
> MR. F[.]: No.
>
> [PROSECUTOR]: You don't have any quarrel with the law and can decide this case aside from the TV shows and everything else?
>
> MR. F[.]: I was born and raised on [a plantation]. 12 years old, I don't have any—I am neutral. I will be as fair as I can.

> [PROSECUTOR]: You are going to give the State a fair trial?
>
> MR. F[.]: Yes.
>
> [PROSECUTOR]: Thank you.

¶8 When the state later used a peremptory strike to remove F., Worley made a *Batson* challenge, claiming the strike was racially motivated. The trial court then asked the prosecutor to provide race-neutral reasons for removing him. The prosecutor responded that F. "was kind of reticent," and "ha[d] no children." The prosecutor added:

> Third and most important, when I asked him about my other questions . . . , he said that he grew up on a plantation for the first 12 years of his life. That's a non sequitur, totally nonsensical. I don't know what to make out of that. Either the man is trying to pull my leg or he doesn't or he lacks the intelligence, in fact, to give me an answer that makes sense.
>
> So, I don't think that he is a very good or qualified juror, quite frankly.

¶9 Although the trial court did not explicitly find Worley had made a prima facie showing of discrimination, "[t]he first step of the *Batson* analysis is complete when the trial court requests an explanation for the peremptory strike." *Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenge[] and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991); *accord State v. Garcia*, 224 Ariz. 1, ¶ 25, 226 P.3d 370, 379 (2010).

¶10 The state, however, satisfied the second step of the *Batson* analysis by offering "an explanation based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360. "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* There was nothing inherently discriminatory about the state's reasons for striking F.—that he was reticent, had no children,[2] and gave a "nonsensical" response to the prosecutor's questioning.

¶11 In addressing the third step of the *Batson* analysis, the trial court determined that the reasons offered by the state were race neutral and did not suggest any purposeful discrimination. However, Worley contends the state's third reason, that an African-American person who claimed to have grown up on a plantation is either nonsensical or lacking in intelligence, "speaks of a race motivated reason for removing a black man from the jury panel."

¶12 We disagree with Worley's interpretation of the state's explanation. There is nothing to suggest the prosecutor struck F. because he had grown up on a plantation, a factor Worley apparently relates to F. being African-American. Rather, the prosecutor's explanation focused on his belief that F.'s response about where he was born and raised

[2]Worley claims the state kept G., a Caucasian woman, on the jury even though she also had no children. However, the record is unclear whether either F. or G. had children. They were not asked directly whether they had children, and neither mentioned children in their responses. And, even though the state may have been mistaken, this reason nonetheless was facially race neutral and thus satisfied the second step of the *Batson* analysis.

had nothing to do with the question posed. The prosecutor asked F. whether he had "any quarrel with the law and c[ould] decide this case aside from the TV shows and everything else," to which F. responded he "was born and raised on [a plantation]" until he was "12 years old." The prosecutor's explanation that F.'s response was "a non sequitur [and] totally nonsensical" was accurate and thus not based on the prospective juror's race. *See State v. Hernandez*, 170 Ariz. 301, 305, 823 P.2d 1309, 1313 (App. 1991) (prospective juror's mode of answering questions is permissible, race-neutral basis for peremptory strike). The trial court did not err in ruling the state's explanations were race neutral and not pretextual.

¶13 Worley nevertheless argues the state treated F. differently than it treated other non-minority jurors. Specifically, Worley claims F. "was no more reticent" than some of the other jurors who ultimately served on the jury. On the record before us, we cannot determine whether F. was treated differently. "The third step in the *Batson* analysis is 'fact intensive and . . . the trial court's finding at this step is due much deference.'" *Garcia*, 224 Ariz. 1, ¶ 27, 226 P.3d at 379, *quoting Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845 (omission in *Garcia*). The trial court not only was required to determine the validity of the prosecutor's explanations by evaluating his sincerity, but also to evaluate the behavior of the jurors. *See State v. Gay*, 214 Ariz. 214, ¶ 19, 150 P.3d 787, 794 (App. 2007). These are determinations that the court was in the best position to make, *see Cañez*, 202 Ariz. 133, ¶ 28, 42 P.3d at 578, and we will not second-guess the court's decision.

¶14 Worley has not met his burden of proving purposeful racial discrimination in the state's decision to strike F. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."); *see also Garcia*, 224 Ariz. 1, ¶ 21, 226 P.3d at 379. The trial court therefore did not err in denying Worley's *Batson* challenge.

Juror Misconduct

¶15 Worley next argues the trial court improperly denied his motion to dismiss a juror for misconduct. "When there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative, or on motion of any party, shall excuse the juror from service in the case." Ariz. R. Crim. P. 18.4(b). The party challenging the juror bears the burden of establishing the juror could not be unbiased and fair. *State v. Trostle*, 191 Ariz. 4, 12-13, 951 P.2d 869, 877-78 (1997). "In assessing a potential juror's fairness and impartiality, the trial court has the best opportunity to observe prospective jurors and thereby judge the credibility of each." *State v. Hoskins*, 199 Ariz. 127, ¶ 37, 14 P.3d 997, 1009 (2000). We therefore review a trial court's assessment of that question for a clear abuse of discretion. *State v. Blackman*, 201 Ariz. 527, ¶ 13, 38 P.3d 1192, 1198 (App. 2002).

¶16 On the second day of trial, defense counsel moved the court to dismiss B. because the juror was "staring at Mr. Worley th[e] whole time basically in disgust, . . . start[ing] right when there was the opening argument by [the state]." Counsel argued the expression on B.'s face was "that he has made up his mind about Worley, he is guilty, and . . . [wa]s such that that's not an impartial juror." Counsel also claimed B.'s behavior

was affecting other jurors, who "instead of listening to the witness" were "watching [B.] watching Mr. Worley."

¶17 Defense counsel then asked the trial court to designate B. as an alternate and to speak to the three other jurors, who counsel claimed had been influenced by B.'s behavior. The court responded that it would observe B.'s behavior. Defense counsel then asked the court to obtain and view the security videotape from the first day of trial, claiming the video would support his statements about B. The trial court agreed to preserve the videotape. Later that same day, the court informed the parties it had paid very close attention to B. and, because it observed no inappropriate behavior, denied Worley's request to dismiss B.

¶18 Worley contends on appeal, as he did below, that "[t]he fact that [B.] did not misbehave on the second day of trial," while the trial court was observing him, does not mean "the juror was behaving appropriately on the first day." Although Worley maintains the court should have made further inquiry and reviewed the security videotape, he did not renew his request for the court to view the tape. Rather, when the court stated it did not see B. behaving inappropriately, defense counsel responded that he was "not asking the court to review [the videotape] to change its ruling," but "to preserve that record for appellate review."

¶19 Worley argues in his reply brief that it was not necessary for him to ask the trial court again on the third day of trial to view the security tape, because he had already done so on the second day, and the court denied such request. But, although on the second day of trial the court noted that "the tape, without sound, without context, would

be very difficult to review and be able to read the minds of the jurors," the court did not rule on Worley's request to view the videotape. It essentially took the matter under advisement, informing the parties that the tape "[wa]s still available and [the court and the parties could] take that up." Because Worley did not renew his request and because the court never made a ruling in the first instance, we will not do so for the first time on appeal. We cannot say the court abused its discretion in denying Worley's request to dismiss B. for misconduct. *See Blackman*, 201 Ariz. 527, ¶ 13, 38 P.3d at 1198.

Preclusion of Evidence

¶20 Next, Worley contends the trial court erred in precluding testimony regarding the victim's email records. We review a trial court's evidentiary rulings for an abuse of discretion, *see State v. Wassenaar*, 215 Ariz. 565, ¶ 38, 161 P.3d 608, 618 (App. 2007), but we review "'purely legal issues de novo,'" *State v. Newell*, 212 Ariz. 389, ¶ 73, 132 P.3d 833, 848 (2006), *quoting State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶21 At trial, Sierra Vista Police Department Detective Lamay testified regarding emails exchanged by T.E. and Worley. On cross-examination, defense counsel sought to admit Exhibit D, a document he claimed would show "T[.E.] ha[d] been sending the[] emails to herself." The trial court precluded the exhibit on the ground it constituted inadmissible hearsay.

¶22 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Ariz. R. Evid. 801(c), and "is not admissible except as provided by applicable

constitutional provisions, statutes, or rules," Ariz. R. Evid. 802. However, we are unable to determine whether Exhibit D in fact was inadmissible hearsay because it is missing from our record on appeal. In its absence, we assume the record supports the trial court's ruling. *See State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982).

¶23 Worley nevertheless argues that, because he offered Exhibit D during cross-examination, it should have been admitted because "any evidence which is relevant to the defendant's theory of the case should be admissible on cross-examination." To the extent Worley contends the trial court's exclusion of this testimony on hearsay grounds violated his right to confront the witness by limiting cross-examination and, when cross-examining witnesses he is not bound by the Arizona Rules of Evidence, we disagree. "The accused does not have an unfettered right to offer [evidence] that is . . . inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *accord State v. Wooten*, 193 Ariz. 357, ¶ 31, 972 P.2d 993, 999 (App. 1998). The trial court did not err in precluding Exhibit D.[3]

Sufficiency of Evidence

¶24 Finally, Worley contends the evidence was insufficient to sustain the guilty verdicts. We review the sufficiency of the evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "A conviction must be supported by substantial

[3]Worley also argues he "should have been allowed the opportunity to establish[] sufficient foundation for the admission of the exhibit" and that "the aspect of the ruling regarding late disclosure unfairly penalized [him]." However, he does not cite any authority that supports this argument. We therefore do not consider it further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (brief shall contain argument "with citations to the authorities, statutes and parts of the record relied on"); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal waives claim).

evidence of guilt." *State v. Martinez*, 226 Ariz. 221, ¶ 12, 245 P.3d 906, 908 (App. 2011). "Substantial evidence is more than a mere scintilla and 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. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). The substantial evidence required to support a conviction may be circumstantial or direct. *State v. Anaya*, 165 Ariz. 535, 543, 799 P.2d 876, 884 (App. 1990). And, "[t]o set aside a jury verdict based on insufficient evidence, it must clearly appear that, on any hypothesis, there is no sufficient evidence to support the conclusion reached by the jury." *Martinez*, 226 Ariz. 221, ¶ 12, 245 P.3d at 908-09.

¶25 To support a conviction for sexual conduct with a minor, the state had to prove Worley "intentionally or knowingly engag[ed] in sexual intercourse or oral sexual contact with any person . . . under fifteen years of age." A.R.S. § 13-1405(A), (B). Section 13-1401(3), A.R.S., defines sexual intercourse as "penetration into the . . . vulva . . . by any part of the body," and § 13-1401(1) defines oral sexual contact as "oral contact with the penis."

¶26 At trial, T.E. testified that she had performed oral sex on Worley "[a]t least four [times]" and that Worley had "put his penis . . . in [her] vagina . . . [a]t least three [times]." The jury also heard testimony that Worley had sent T.E. sexually suggestive emails, including one that read, "I want you to suck my dick every time we meet, so now you can't say that I didn't ask!!!" And, the jury listened to a tape-recording of a confrontation call made by T.E. to Worley, in which they discussed their sexual contacts.

During that conversation, among other things, T.E. told Worley they had "been pretty lucky lately" that she had not gotten pregnant and asked that they use a condom in future, to which Worley agreed. This was sufficient evidence that Worley had committed the seven counts of sexual conduct with which he had been charged.

¶27 Worley maintains, however, that his convictions were not supported by sufficient evidence because T.E. "never testified with any specificity about any of the alleged acts, . . . couldn't remember how many times the conduct had occurred, and . . . was prodded to state that it had happened four times total." But, as noted above, T.E. testified she had engaged in sexual intercourse with Worley three times and she had performed oral sex on him four times. No more specificity was required. *See State v. Davis*, 206 Ariz. 377, ¶ 61, 79 P.3d 64, 77 (2003) ("If the indictment, the evidence, the jury instructions, and jury forms reflect the same number of offenses, the State does not need to prove the exact date of the offenses.").

¶28 Nor do we agree with Worley's assertion that T.E. was prodded to say the oral sexual contact occurred four times. At trial, T.E. testified:

> [T.E.]: I sucked [Worley's] penis [on Super Bowl Sunday].
>
> . . . .
>
> [PROSECUTOR]: Did that happen on any other occasion?
>
> [T.E.]: Yes.
>
> [PROSECUTOR]: How many other occasions?
>
> [T.E.]: Two.

. . . .

[PROSECUTOR]: Okay. That happened three times?

[T.E.]: Maybe one.

[PROSECUTOR]: Three, maybe four, is that what you are saying?

[T.E.]: Four times.

[PROSECUTOR]: Four times?

[T.E.]: Yes.

[PROSECUTOR]: You are sure of that?

[T.E.]: At least four.

[PROSECUTOR]: Okay. No fewer than four then?

[T.E.]: No.

Although T.E. initially said the oral sexual contact occurred three times, she ultimately indicated she was certain it had occurred at least four times. Considered in context, we disagree with Worley's contention that the victim's testimony about the number of incidents was prodded by the state.

Disposition

¶29 For the reasons stated above, we affirm Worley's convictions and sentences.

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

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge