**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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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, | ) | |
| | ) | 2 CA-CR 2009-0131 |
| Appellee, | ) | DEPARTMENT B |
| | ) | |
| v. | ) | MEMORANDUM DECISION |
| | ) | Not for Publication |
| ROBIN DIANE TORRES, | ) | Rule 111, Rules of |
| | ) | the Supreme Court |
| Appellant. | ) | |
| | ) | |

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800745

Honorable James L. Conlogue, Judge

AFFIRMED

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

Slaton Law Office, P.C.
By Sandra Slaton — Scottsdale
Attorney for Appellant

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

**¶1** After a jury trial, appellant Robin Torres was convicted of possession of methamphetamine for sale and sentenced to a mitigated, five-year term of imprisonment. On appeal, she argues her conviction is not supported by sufficient evidence. She also contends her conviction should be reversed based on the prosecutor's remarks during closing argument and his use of peremptory strikes to remove a venireperson from the jury panel. Finding no error, we affirm.

## Factual and Procedural Background

**¶2** "We view the evidence in the light most favorable to upholding the jury's verdict." *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In October 2008, police officers found methamphetamine, drug paraphernalia, and about $800 in cash in Torres's apartment while executing a search warrant. Among the items discovered were gram scales, a modified straw, and plastic bags that contained smaller baggies of methamphetamine. Torres admitted to detectives that these items belonged to her.

**¶3** At trial, a police officer testified about the significance of the various items found in Torres's apartment. He noted that gram scales are often used to measure small quantities of drugs for sale. The numerous plastic bags found were consistent with those commonly used to package drugs for sale. The modified straw, which had been cut at an angle on its end, is typically used "like a little spoon or scooping instrument when people sell in very small amounts." And the cash in Torres's purse, which consisted mainly of twenty-dollar bills, was significant because the "typical street sale amount" of about one-quarter of a gram of methamphetamine "i[]s usually sold at the $20 level."

**¶4** In her defense, Torres emphasized her statements to detectives that she had only given drugs to her friends but she never had sold them. She used the scales, she claimed, only to confirm that she had purchased the proper amount of drugs and had not been "ripped off." She also presented evidence at trial that she recently had been paid for doing handy work, and she regularly received money from her mother to cover her expenses.

**Sufficiency of the Evidence**

**¶5** Torres contends the trial court erred by denying her motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., because the state presented no evidence the methamphetamine she had possessed was for sale. She asserts there was insufficient evidence to support the conviction. A judgment of acquittal is appropriate only when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "'Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003), *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996).

**¶6** We review the denial of a motion for a judgment of acquittal for an abuse of the trial court's discretion and will only reverse if there are no probative facts to support the conviction. *See State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). Similarly, in reviewing challenges to the sufficiency of evidence, we examine the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against the defendant. *State v. Rienhardt*, 190 Ariz. 579, 588-89,

951 P.2d 454, 463-64 (1997). And we will reverse only if it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). The evidence required to support a conviction can be direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). "There is no distinction in the probative value of direct and circumstantial evidence." *State v. Green*, 111 Ariz. 444, 446, 532 P.2d 506, 508 (1975).

**¶7** Here, the state presented substantial, albeit circumstantial, evidence that Torres had possessed methamphetamine for sale. She admitted owning the gram scales, the modified straw, and the baggies containing methamphetamine. And in her purse, along with the baggies of methamphetamine, officers found a large amount of cash in denominations consistent with drug transactions. Thus, when viewing the evidence in the light most favorable to upholding the verdict, we conclude there was sufficient evidence to support the conviction and the trial court did not err in denying the Rule 20 motion. *Cf. State v. Jung*, 19 Ariz. App. 257, 261-62, 506 P.2d 648, 652-53 (1973) (finding drug packaging and paraphernalia for measuring and weighing drugs allowed inference of possession for sale, notwithstanding "absence of evidence of any sale or transaction by defendant").

**¶8** Although Torres maintained below that she had possessed the drugs and paraphernalia only for her personal use and had legitimate sources of income, the fact that she presented this defense did not entitle her to a judgment of acquittal, as she appears to suggest. If reasonable minds can differ on inferences to be drawn from the

evidence, the evidence must be considered substantial and the case submitted to the jury. *See State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004); *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). To the extent Torres is asking this court to reweigh the evidence on appeal, we refuse to do so. *See State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

**Closing Argument**

**¶9** During closing argument, the prosecutor summarized as follows:

> You, as the jury, it's your job and you are the only people, not the Judge, not the lawyers, you decide what really happened. You decide which witnesses to believe, which parts of the story to believe. For example, because the defendant said these things in her interview, obviously they are not to be taken as true. It's your job, as a jury, to use your common sense and weigh all the evidence.

Torres contends the statements constituted impermissible vouching and a comment on her refusal to testify. As Torres acknowledges, however, she did not object to the prosecutor's remarks below. Torres has therefore forfeited the right to relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

**¶10** When determining whether a prosecutor's remarks were improper, a court must view them in their entire context and assess how they were perceived by the jury. *See State v. Rutledge*, 205 Ariz. 7, ¶ 33, 66 P.3d 50, 56 (2003). Viewing the remarks here in context, we find nothing that constitutes error, fundamental or otherwise. As the above-quoted passage demonstrates, the prosecutor reminded jurors during closing argument that it was uniquely their role to serve as the finders of fact, to weigh the

evidence, and to determine the credibility of witnesses. These remarks correctly stated the law, *see State v. Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d 1020, 1024 (App. 2009), and largely mirrored the trial court's instructions to the jury. When viewed in context, the prosecutor's remark that "because the defendant said these things in her interview, obviously they are not to be taken as true," illustrated the prosecutor's broader point that it was for jurors to "decide which witnesses to believe [and] which parts of the story to believe." This, too, was a correct statement of the law. *See State v. Dixon*, 216 Ariz. 18, ¶ 10, 162 P.3d 657, 660 (App. 2007) (observing jury may reject defendant's version of events).

**¶11** In short, Torres focuses on the prosecutor's remark in isolation and without considering its context. Rather than suggesting Torres's statements to police officers were necessarily false, the prosecutor merely informed jurors that her statements were not necessarily true or controlling, and it was their "job . . . to . . . weigh all the evidence." In its overall context, therefore, the prosecutor's closing argument was not improper.

**¶12** Even assuming the prosecutor's remarks were improper, Torres still would not be entitled to relief. Fundamental error is a rare type of error that goes to the foundation of a case and denies the defendant the possibility of a fair trial. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Here, the prosecutor's remark did not constitute a comment on Torres's exercise of constitutional rights because it did not invite the jury to draw an inference about her guilt from her refusal to testify. *See State v. Guerrero*, 173 Ariz. 169, 172, 840 P.2d 1034, 1037 (App. 1992). Thus, any error could not be characterized as fundamental.

**¶13** Similarly, to the extent the remark could be construed as impermissible vouching, nothing in the record establishes Torres suffered prejudice as a result. The prosecutor did not insinuate that he had special knowledge Torres was lying or guilty, *see State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993), and any effect of the prosecutor's suggestion Torres had lied would be trivial given the nature of the remark. Indeed, the fact that no objection was raised below to this single, fleeting remark suggests it either escaped notice or was not worth noting. Hence, even assuming the comment was improper, Torres has failed to demonstrate that it constituted fundamental error and resulted in prejudice. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

### ***Batson* Challenge**

**¶14** The final issue raised on appeal concerns the prosecutor striking Ms. T., the only African-American woman, from the venire panel. When Torres raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), the prosecutor explained that he had struck this prospective juror because she was a teacher who had a bachelor's degree in education, and "it's conventional wisdom among prosecutors that teachers don't make the best jurors for the prosecution." The trial court accepted the prosecutor's explanation as providing a neutral, legitimate basis for the peremptory strike. Torres challenges this determination.

**¶15** A trial court's analysis of a *Batson* challenge involves three steps. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). Initially, the party challenging the strike must make a prima facie showing of discrimination based on race, gender, or some other protected characteristic. *State v. Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d 160, 162

(App. 2001). The proponent must then provide a neutral explanation for the strike. *Id.* Finally, the challenging party must persuade the court that the proffered reason is pretextual. *Id.* In this third step, the trial court must determine the credibility of the proponent's explanation and "'whether the proffered rationale has some basis in accepted trial strategy.'" *Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d at 793, *quoting Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003); *State v. Eagle*, 196 Ariz. 27, ¶ 9, 992 P.2d 1122, 1125 (App. 1998), *aff'd*, 196 Ariz. 188, 994 P.2d 395 (2000). "Th[e] 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 [an appellate c]ourt." *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845 (2006). We therefore defer to the trial court's factual findings and will reverse only if those findings are clearly erroneous. *Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d at 793.

**¶16** The sole issue here is whether the trial court erred in determining the proffered reason for striking Ms. T. was not a pretext. Torres contends the rationale was pretextual because other jurors who had "a teaching or education-related profession" were not struck from the venire panel. The record does not compel this conclusion, however, given that "the other jurors were not similarly situated." *State v. Martinez*, 196 Ariz. 451, ¶ 18, 999 P.2d 795, 800 (2000). One juror, Mr. M., was an eighth-grade civics teacher with a bachelor's degree in secondary education, as Torres noted below. But he also had an associate's degree in the administration of justice and had a daughter who worked for a police department. Another potential juror, Mr. D., had teaching experience "as a human intelligence instructor for soldiers" and was a retired military counterintelligence agent. And a third potential juror, Ms. R., stated only that she

"work[ed] for the Vail School District," but she did not specify whether she was a teacher or whether she had any education-related degrees. She also stated she had family members who worked for police departments.

**¶17** These differences suggest a non-discriminatory purpose for the state's reluctance to exercise any of its limited preemptory strikes: the non-stricken jurors each had features to their biographies or backgrounds, beyond their vocations as teachers, that a prosecutor might reasonably find relevant in assessing their suitability, from the state's perspective, for jury service. We therefore find no basis to second-guess the trial court's determination that the prosecutor's stated rationale for striking Ms. T. was credible.

**Disposition**

**¶18** For the foregoing reasons, we affirm Torres's conviction and sentence.

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

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

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