

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

FILED BY CLERK

APR 24 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0104
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
SANTIAGO HERNANDEZ,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20113302001

Honorable Scott Rash, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Rebecca A. McLean

Tucson
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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Santiago Hernandez was convicted of possession of a narcotic drug and possession of drug paraphernalia. The trial court suspended the imposition of sentence and placed Hernandez on probation for a period of

eighteen months. On appeal, Hernandez argues the trial court's denial of his challenge of the state's peremptory strike of Juror B., the sole African-American member of the jury panel, violated his rights under the Equal Protection Clause. For the following reasons, we affirm.

¶2 Hernandez argues the trial court erred by denying his *Batson*¹ challenge of the state's peremptory strike of Juror B. He contends the state's explanations of the strike were pretextual and the strike violated his rights under the Equal Protection Clause of the United States Constitution. When reviewing the court's ruling on a *Batson* challenge, we defer to its factual findings unless clearly erroneous, but we review de novo its application of the law. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001). We will not reverse a court's ruling on a *Batson* challenge absent clear error. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844 (2006).

¶3 A party may not exercise a peremptory strike on the basis of race or ethnicity. *State v. Purcell*, 199 Ariz. 319, ¶ 22, 18 P.3d 113, 119 (App. 2001). A *Batson* challenge is used to determine if such a prohibited strike has been made, and it involves three steps: (1) the opponent of the strike must make a prima facie showing of discrimination; (2) the proponent must give a neutral reason for the strike; and (3) the trial court must evaluate whether the opponent has established discrimination on a prohibited ground. *Id.* ¶ 23. The neutral reason required at the second step "need not be 'persuasive or even plausible, only legitimate.'" *Id.*, quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995). And the opponent of the strike has the burden of establishing discrimination and cannot carry that burden through inference alone. *Newell*, 212 Ariz. 389, ¶ 58, 132 P.3d at 846; *State v. Paleo*, 200 Ariz. 42, ¶ 6, 22 P.3d 35, 37 (2001)

¹*Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986).

(“Throughout the process, the burden of persuasion remains on the party alleging discrimination.”).

¶4 In this case, after the state had used a peremptory strike to remove Juror B. from the jury panel, Hernandez made a *Bastón* challenge on the basis that Juror B. was “the only juror present that is of African-American race.” When asked for a race-neutral reason for the strike, the prosecutor explained Juror B. “seemed confused when she sat here” and “did not fill out half of [her juror questionnaire.]” He stated he had “serious concerns . . . whether or not she [could] follow the Court’s instructions if she can’t follow the instructions to fill out a simple questionnaire.” The trial court found the state had a race-neutral basis for striking the juror. Hernandez contended however that the state’s reason was pretextual, arguing other potential jurors also had not “completely fill[ed] out the form” and that Juror B. had given “similar answers to several other jurors.” The court rejected Hernandez’s arguments, again finding “a race-neutral basis for striking” Juror B.

¶5 Hernandez argues on appeal that the failure of other jurors to fill out the questionnaires completely and the prosecutor’s failure to ask follow up questions of Juror B. to further investigate her confusion indicate the prosecutor’s stated reason for exercising the state’s strike was pretextual. As the state points out, the juror questionnaires are not included in the record on review. Even assuming, however, that Hernandez’s claim regarding the questionnaires is correct, the prosecutor also cited Juror B.’s confusion in conjunction with her failure to follow direction as the basis for his strike. And, although Hernandez argues Juror B.’s answers to the questions asked of her were “similar to other jurors,” we note the court had to repeat a question posed to her before she answered.

¶6 In *Thaler v. Haynes*, the Supreme Court reiterated the guiding principles when reviewing trial courts’ rulings on *Batson* challenges that (1) “when the explanation for a peremptory challenge ‘invoke[s] a juror’s demeanor,’ the trial judge’s ‘first hand observations’ are of great importance”; and (2) “the best evidence of the intent of the attorney exercising a strike is often that attorney’s demeanor.” 559 U.S. 43, ___, 130 S. Ct. 1171, 1175 (2010), quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (alterations in *Thaler*). Here, the court accepted the prosecutor’s proffered reason related to Juror B.’s confusion, and we are in an inferior position to assess the accuracy of the state’s observations about the venire person in question. See *Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845. We therefore have no basis to conclude the court abused its discretion, and we find no error.

¶7 Hernandez’s convictions and terms of probation are affirmed.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Michael Miller

MICHAEL MILLER, Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.