No. 21-_____

In the
Supreme Court of the United States

_____

Keyaira Porter,

Petitioner,

v.

State of Arizona,

Respondent.

_____

On Petition for a Writ of Certiorari to the
Supreme Court of Arizona

_____

APPENDIX

_____

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APPENDIX

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA,
Appellee,

v.

KEYAIRA PORTER,
Appellant,

No. CR-20-0147-PR
Filed July 22, 2021

Appeal from the Superior Court in Maricopa County
The Honorable Monica S. Garfinkel, Judge *Pro Tempore*
No. CR2017-137407-001
AFFIRMED

Opinion of the Court of Appeals, Division One
248 Ariz. 392 (App. 2020)
VACATED

COUNSEL:

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JUSTICE LOPEZ authored the opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, JUSTICES BOLICK and BEENE, and JUDGE ECKERSTROM* joined**.

JUSTICE LOPEZ, opinion of the Court:

¶1 We consider whether, when a *Batson* challenge is raised, a trial court must make express findings on the credibility of a demeanor-based justification for a peremptory strike when a non-demeanor-based justification is also offered and there is no evidence that either justification is pretextual. We hold that no such express finding requirement exists under federal or Arizona law.

BACKGROUND

¶2 Keyaira Porter, an African American, was charged with aggravated assault of a police officer and resisting arrest. During jury selection, the prosecutor used peremptory strikes to remove the only African American venire members: Prospective Jurors 2 and 20. Porter raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecutor responded that she struck Prospective Juror 2 because (1) the juror's brother had been convicted of aggravated assault—similar to the crime charged in this case—and (2) she "did not seem to be very sure" with her responses as to whether her brother's conviction would impact her ability to be impartial. The prosecutor struck Prospective Juror 20 because she had been the foreperson in a previous criminal case in which the jury acquitted the defendant. In response, Porter only addressed the prosecutor's explanation as to Prospective Juror 2 and emphasized that, when answering the voir dire questions, Prospective Juror 2 said her brother was treated fairly, his experience would not influence her decision-making as a juror, and she could follow the rules provided by the court. The trial court considered the arguments and denied the *Batson* challenge,

* Justice Montgomery is recused from this matter. Pursuant to article 6, section 3 of the Arizona Constitution, Hon. Peter Eckerstrom, Judge of the Court of Appeals Division Two, was designated to sit in this matter.

** Although Justice Andrew W. Gould (Ret.) participated in the oral argument in this case, he retired before issuance of this opinion and did not take part in its drafting.

reasoning that the prosecutor had articulated "reasonable" race-neutral explanations for its peremptory strikes.

¶3 The jury acquitted Porter of aggravated assault but convicted her of resisting arrest. Porter appealed, arguing that the prosecutor's disparate treatment of jurors and the failure to conduct voir dire on the topic of prior jury service revealed the prosecutor's discriminatory intent in jury selection. In a split opinion, the court of appeals remanded the case and directed the trial court to either (1) make the necessary findings relative to Prospective Juror 2, as required by *Snyder v. Louisiana*, 552 U.S. 472 (2008), or (2) if it could not reconstruct the record, vacate Porter's conviction and retry the case. *State v. Porter*, 248 Ariz. 392, 394 ¶ 1 (App. 2020). The majority reasoned that although the trial court concluded that the proffered justifications were race-neutral, it did not expressly determine whether those justifications were credible, particularly in light of the pattern of strikes against minority jurors. *Id.* The dissent concluded that neither *Snyder* nor Arizona law require trial courts to make express findings concerning demeanor-based explanations. *Id.* at 403–04 ¶¶ 37–40 (McMurdie, J., dissenting).

¶4 We granted review to determine whether federal or state *Batson* jurisprudence requires a trial court to expressly address a demeanor-based justification when two race-neutral reasons are offered, the non-demeanor-based one is explicitly deemed credible, and there is no finding that the remaining demeanor-based justification is pretextual. This is a recurring issue of statewide importance. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

¶5 As an initial matter, we note that the court of appeals resolved this appeal on the basis that the trial court failed to make specific findings regarding the demeanor-based explanation even though Porter did not raise this issue in the trial court or on appeal, and even though the parties did not brief or argue this issue. We remind our appellate court that, "[a]lthough [they] may choose to address issues the parties fail to address in the briefs, they should heed the principles underlying the waiver doctrine intended 'to prevent the court from deciding cases with no research assistance or analytical input from the parties.'" *State v. Robertson*, 249 Ariz. 256, 258–59 ¶ 9 (2020) (internal citation omitted) (quoting *Meiners*

v. Indus. Comm'n, 213 Ariz. 536, 538–39 ¶ 8 n.2 (App. 2006)). "Although we do not ordinarily consider issues not raised in the trial court or court of appeals, if good reason exists, this court may and will entertain such questions as the rule is jurisprudential rather than substantive." *State v. Hernandez*, 244 Ariz. 1, 3–4 ¶ 10 (2018) (quoting *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406 n.9 (1995)). Here, good reason exists to address the identified issue in order to clarify whether, when a *Batson* challenge is raised, our trial courts are required to make express findings concerning a demeanor-based justification for a peremptory strike.

¶6 We will not reverse a court's ruling on a *Batson* challenge unless it is clearly erroneous, *State v. Escalante-Orozco*, 241 Ariz. 254, 271 ¶ 35 (2017), *abrogated on other grounds by State v. Escalante*, 245 Ariz. 135 (2018), and we afford great deference to trial court findings in this context, *see Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *Batson*, 476 U.S. at 98 n.21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."); *State v. Smith*, 250 Ariz. 69, 86 ¶ 62 (2020) (to similar effect).

I.

¶7 We first consider whether federal *Batson* jurisprudence requires express findings that the prosecutor's race-neutral reasons were credible and non-pretextual.

¶8 The court of appeals here determined that "[t]he trial court denied the *Batson* challenge without expressly addressing either the demeanor-based explanation or the racially disproportionate impact of the strikes" and held that *Snyder* required the court "to make explicit findings on those two points." *Porter*, 248 Ariz. at 394 ¶ 1. We disagree with the court of appeals' interpretation of *Snyder*.

¶9 We begin with a brief review of *Batson*'s analytical framework. The state may exercise peremptory challenges to "assur[e] the selection of a qualified and unbiased jury," *Batson*, 476 U.S. at 91, subject to the commands of the Equal Protection Clause, U.S. Const. amend. XIV. Thus, the state may not consider race in jury selection, and it engages in unconstitutional discrimination when it denies a citizen participation in jury service on account of race. *Batson*, 476 U.S. at 91.

¶10 A *Batson* challenge involves three steps:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995); *see also State v. Medina*, 232 Ariz. 391, 404 ¶ 44 (2013) (same).

¶11 Step one of the *Batson* framework—establishing a case of prima facie racial discrimination—may be satisfied by a pattern of strikes against minority jurors. *Batson*, 476 U.S. at 97. Step two—proffering a race-neutral explanation—may be satisfied by an offer of any facially race-neutral explanation for the strikes. *Purkett*, 514 U.S. at 768. At step three, the trial court must evaluate the credibility of the striking party's proffered explanation to determine whether the reasons are pretexts for purposeful discrimination. *See Snyder*, 552 U.S. at 484–85; *State v. Gay*, 214 Ariz. 214, 220 ¶ 17 (App. 2007). To make this determination at step three, the court may consider the prosecutor's demeanor, the juror's demeanor, the reasonableness or improbability of the explanations, and whether the proffered rationale has some basis in accepted trial strategy. *Gay*, 214 Ariz. at 220–21 ¶¶ 17, 19 (citing *Cockrell*, 537 U.S. at 339); *see also Snyder*, 552 U.S. at 477 (noting that the prosecutor's demeanor is the best evidence at step three). "Comparison of stricken and non-stricken jurors' characteristics, as well as comparison of how the prosecutor questioned those jurors, may [also] be relevant." *Porter*, 248 Ariz. at 397 ¶ 14 (citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244, 2246–51 (2019)).

¶12 The crux of this case concerns whether *Snyder* requires trial courts to make express findings on the credibility of a demeanor-based justification in response to a *Batson* challenge. Here, the court of appeals interpreted *Snyder* to hold that when a trial court is presented with two explanations for a strike, and one is based on a prospective juror's demeanor, an appellate court may not presume that the trial court credited the demeanor-based explanation simply because it denied the *Batson*

challenge. Consequently, it reasoned that a trial court must always make explicit findings on demeanor-based justifications, and a "conclusory statement that there was no purposeful discrimination [is] not sufficient." *Id.* at 399 ¶ 21. We disagree. The court of appeals extended *Snyder* beyond its jurisprudential reach.

¶13 At *Batson*'s third step, as discussed, the trial court must determine whether the prosecutor's proffered reasons were a pretext for purposeful discrimination. *Supra* ¶ 11. If the peremptory strike is based on a juror's demeanor, the trial court must evaluate whether the juror's demeanor can credibly serve as the basis for the strike. *Snyder*, 552 U.S. at 477. However, *Snyder* does not require a trial court to make specific, explicit findings concerning demeanor-based justifications when it credits another race-neutral reason. In *Snyder*, the prosecutor offered two explanations for a peremptory strike: work hardship (non-demeanor-based) and nervousness (demeanor-based). *Id.* at 478. The Supreme Court concluded that the non-demeanor-based justification was clearly pretextual, given the stricken juror's lack of an actual work conflict and the significant number of other jurors who were retained despite their concerns that jury service would interfere with their work obligations. *Id.* at 479–83. The Court, however, could not determine whether the trial court considered or accepted the second, demeanor-based reason because it simply allowed the peremptory challenge without explanation. *Id.* The uncertainty attendant this unique circumstance led the Court to conclude that, because the passage of years did not allow the trial court to make an express finding on the demeanor-based justification on remand, the trial court committed clear error in rejecting the *Batson* challenge. *Id.* at 486.

¶14 The rule we elicit from *Snyder* is that appellate courts may not uphold a *Batson* ruling based on a demeanor-based justification when a non-demeanor-based justification is clearly pretextual and the trial court did not clarify which explanation it found credible in denying a *Batson* challenge. In other words, the lack of an express finding regarding the prosecutor's demeanor-based explanation is consequential only if the record clearly indicates that the other proffered reason was pretextual. Accordingly, we join the Supreme Court, the majority of federal courts, and the court of appeals' dissent in concluding that *Snyder*'s express-finding requirement is inapplicable in cases where a demeanor-based and a non-demeanor-based justification are offered and neither is clearly pretextual. *See, e.g.*, *Davis v. Ayala*, 576 U.S. 257, 274–75 (2015) (reasoning that if the non-

demeanor-based reason for a strike is sufficient, an appellate court need not consider an additional demeanor-based reason for a strike); *Thaler v. Haynes*, 559 U.S. 43, 47–49 (2010) (reasoning that none of the Court's clearly established precedent created an obligation on a trial court to make express findings of a juror's demeanor); *United States v. Thompson*, 735 F.3d 291, 299 (5th Cir. 2013) (considering a similar argument, emphasizing that *Snyder*'s holding "depended on its conclusion that the prosecution's second reason for the strike was 'suspicious,' 'implausib[le],' and 'pretextual,'" and agreeing with other circuits that *Snyder* does not require a trial court to make such record findings); *Porter*, 248 Ariz. at 403–04 ¶¶ 37–39 (McMurdie, J., dissenting).

II.

¶15 We next consider whether Arizona's *Batson* jurisprudence requires express findings that the prosecutor's race-neutral reasons were credible and non-pretextual.

¶16 First, we reject the court of appeals' reasoning that Arizona law requires express findings of all proffered peremptory strike justifications in light of the holding in *State v. Lucas* that an impermissible, non-race-neutral justification taints a race-neutral reason for the strike. 199 Ariz. 366, 369 ¶¶ 11–13 (App. 2001). In *Lucas*, the prosecutor offered two grounds to strike the only African American panel member: (1) the prospective juror was an attorney, and (2) southern men have a negative view of pregnant women who work. *Id.* at 368 ¶¶ 9–10. The first justification was a permissible race- and gender-neutral reason, whereas the second was a prohibited anecdotal generalization about men. *Id. Lucas* held that "'[o]nce a discriminatory reason has been uncovered—either inherent or pretextual—this reason taints' any other neutral reason for the strike," requiring reversal. *Id.* at 369 ¶ 11 (quoting *Payton v. Kearse*, 495 S.E.2d 205, 210 (S.C. 1998)). We need not address *Lucas*' fundamental premise that a race-neutral justification for a strike does not remedy a discriminatory reason, as *Lucas* is inapplicable here because the trial court did not find a proscribed discriminatory reason for a peremptory strike. *See, e.g.*, *State v. Butler*, 230 Ariz. 465, 475–76 ¶ 43 (App. 2012) (similarly distinguishing *Lucas* where the only justifications for the peremptory strikes were race-neutral).

¶17 Second, we decline Porter's request, based on *Williams v. State*, to implement a rule in which trial courts must make explicit determinations

at each step of *Batson*. *See* 429 P.3d 301, 308–09 (Nev. 2018). Although *Williams* implored trial courts to "spell out their reasoning and determinations" at each *Batson* step, it implicitly recognized that explicit findings may not, in fact, be required in every instance when it stated that the outcome of the case would have been different if demeanor had been the only explanation offered. *See id.* at 306, 309. And, as in *Snyder*, it emphasized that a trial court must make an explicit credibility determination on a demeanor-based strike *when* the other proffered explanation appears implausible. *Id.* at 309. To the extent that *Williams* suggests that trial courts are always required to make explicit findings at *Batson*'s third step, we reject it as inconsistent with Arizona law.

¶18 Indeed, "[Arizona] precedent allows [appellate courts] to defer to an implicit finding that a reason was non-discriminatory even when the trial court did not expressly rule on the third *Batson* factor," *Smith*, 250 Ariz. at 88 ¶ 73 (cleaned up) (quoting *State v. Prasertphong*, 206 Ariz. 70, 87 ¶¶ 63–64 (2003)); *see also State v. Canez*, 202 Ariz. 133, 147 ¶ 28 (2002) (affirming the court's implicit finding under step three in denying the *Batson* challenge); *State v. Lynch*, 238 Ariz. 84, 104 ¶ 70 (2015) (same), which the court of appeals in *Porter* acknowledged, *see* 248 Ariz. at 397 ¶ 16 ("[T]he trial court need not make detailed findings addressing all the evidence before it, and, in Arizona, may even conduct the entire step-three analysis implicitly in some cases." (internal citation omitted) (internal quotation marks omitted)); *see also Medina*, 232 Ariz. at 404 ¶ 45 (reasoning that the trial court, by requesting explanations for the prosecution's peremptory strikes, implicitly found at *Batson*'s first step that a prima facie showing of racial discrimination had been made). In other words, the court may satisfy the requirement—to evaluate whether the juror's demeanor can credibly be said to have exhibited the basis for the strike—by denying a *Batson* challenge and thereby implicitly finding that the proffered justifications are genuine and non-pretextual. *See Smith*, 250 Ariz. at 87 ¶ 67, 88 ¶¶ 72–73.

¶19 Accordingly, as with federal law, Arizona's *Batson* jurisprudence does not require trial courts to make explicit findings on demeanor-based justifications when a non-demeanor-based justification is offered and there is no evidence that either justification is pretextual.

III.

¶20 Porter also argues that the trial court erred when it purportedly failed to conduct a comparative analysis of Prospective Jurors 2 and 20 and other non-minority jurors. The trial court did, however, note that the prosecutor struck not only Prospective Juror 20, but also two non-minority jurors, for reasons related to prior jury service. Moreover, Porter did not object in the trial court to its purported failure to conduct a comparative juror analysis.

¶21 "Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." *Flowers*, 139 S. Ct. at 2248; *see also Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). However, courts are not required to employ a comparative analysis when reviewing *Batson* claims, *see Medina*, 232 Ariz. at 404–05 ¶¶ 48–49 (rejecting the argument that a comparative juror analysis is a constitutionally required aspect of *Batson* review), and this Court "decline[s] to do so when the similarities between peremptorily stricken jurors and those remaining on the panel were not raised at trial," *id.* at 405 ¶ 48. Indeed, we have ruled that the failure to properly object to a *Batson* issue cannot be cured, even under fundamental error review:

> We have previously held that *Batson* challenges must be made before the end of the jury selection process or they will not be considered on appeal. *State v. Harris*, 157 Ariz. 35 (1988). We believe that this rule should also be applied to the untimely presentation of evidence to support *Batson* arguments otherwise properly raised. This limitation on *Batson* rights passes constitutional muster, *see Allen v. Hardy*, 478 U.S. 255, 259 (1986) (new rule doesn't have fundamental impact warranting retroactive application); *Virgin Islands v. Forte*, 806 F.2d 73, 76–77 (3d Cir. 1986) (not fundamental error; waived if not timely raised), and we adhere to it.

State v. Cruz, 175 Ariz. 395, 398 (1993). Notably, the Supreme Court has warned that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *Snyder*, 552 U.S. at 483.

¶22 Porter's failure to raise this issue in the trial court deprived the prosecutor of the opportunity to distinguish allegedly similarly situated jurors and divested the trial court of the occasion to conduct an in-depth comparison of the jurors. Consequently, Porter waived this issue. *See, e.g.*, *Smith*, 250 Ariz. at 88 ¶ 71 (finding waiver of comparative analysis claim in similar circumstances); *Escalante-Orozco*, 241 Ariz. at 272 ¶ 37 (same); *State v. Garza*, 216 Ariz. 56, 65 ¶ 31 (2007) (defendant waives *Batson* challenges by failing to object at trial); *Medina*, 232 Ariz. at 405 ¶ 49 (same).

IV.

¶23 We now apply our *Batson* analysis to this case. We find that the trial court did not clearly err in denying Porter's *Batson* challenge.

¶24 Here, after the parties completed their peremptory strikes, Porter raised a *Batson* challenge, requesting that the prosecutor provide reasonable and legitimate reasons for striking the only two African American prospective jurors. At *Batson*'s second step, the trial court heard the prosecutor's explanations. The prosecutor's reasons for striking Prospective Juror 2—because her brother had been convicted of aggravated assault and she was uncertain whether it would affect her impartiality—and Prospective Juror 20—because she had been the foreperson in a previous criminal case in which the jury acquitted the defendant—were objectively race-neutral and recognized as legitimate bases for peremptory strikes. *See, e.g.*, *State v. Reyes*, 163 Ariz. 488, 491–92 (App. 1989) (upholding peremptory strike of juror whose sister was in prison for assault—one of the charges against the defendant in the case—as race-neutral and non-pretextual); *State v. Trostle*, 191 Ariz. 4, 12 (1997) (finding the prosecutor's explanation—that the juror was struck because he had previously served on a criminal jury that returned not guilty verdicts—to be "a facially objective basis for a peremptory challenge, unrelated to race or gender").

¶25 At step three, the trial court considered the prosecutor's explanations, the parties' other strikes, and the court's notes, and found that the prosecutor's justifications for striking both Prospective Jurors 2 and 20 were "reasonable" and not made with purposeful discriminatory intent. In fact, the trial court stated that it was reasonable for the prosecutor to want to eliminate one juror whose close family member was convicted of an offense similar to the charge in this case, and another who may have a stronger personality or be more willing to acquit a defendant. In light of

these express credibility findings, we must assume that the trial court implicitly determined that the demeanor-based justification concerning Prospective Juror 2's impartiality was likewise not pretextual. *See Stevenson v. Stevenson*, 132 Ariz. 44, 46 (1982) ("[O]n appeal the court must assume that the trial court found every fact necessary to support its judgment and must affirm if any reasonable construction of the evidence justifies the decision.").

¶26 Neither the Supreme Court nor this Court requires explicit findings at *Batson*'s third step when two justifications—one demeanor-based and one not—are given, neither are clearly pretextual, and the non-demeanor-based reason is expressly deemed credible by the trial court. Thus, the trial court here satisfied its obligations under federal and Arizona *Batson* jurisprudence.

¶27 We emphasize the importance of context in evaluating a *Batson* challenge. Key factors to consider include a pattern of striking all minority prospective jurors, the prosecutor's disparate questioning of jurors, side-by-side comparisons of struck and non-struck jurors, the prosecutor's misrepresentations of the record, and the relevant history of the prosecutor's peremptory strikes in past cases. *See Flowers*, 139 S. Ct. at 2243. We also express our confidence that trial judges—who are in a better position to discern the intent and demeanor of prosecutors and jurors—are uniquely situated to determine whether peremptory challenges are being used to discriminate against minority jurors. *See, e.g.*, *Batson*, 476 U.S. at 97; *Snyder*, 552 U.S. at 477; *Hernandez v. New York*, 500 U.S. 352, 365 (1991). Although express findings are not required, we encourage trial courts to make them as they will bolster their rulings and facilitate review on appeal. Taken together, on this record, we find that the trial court did not clearly err.

CONCLUSION

¶28 For the reasons set forth above, we vacate the court of appeals' opinion and affirm the trial court's denial of Porter's *Batson* challenge.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

KEYAIRA PORTER, *Appellant*.

No. 1 CA-CR 18-0301
FILED 4-9-2020

Appeal from the Superior Court in Maricopa County
No. CR2017-137407-001
The Honorable Monica S. Garfinkel, Judge *Pro Tempore*

REMANDED

COUNSEL

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By Mikel Steinfeld
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OPINION

Chief Judge Peter B. Swann delivered the opinion of the Court, in which Judge Kenton D. Jones joined. Presiding Judge Paul J. McMurdie dissented.

S W A N N, Judge:

¶1 The state, prosecuting a black defendant, sought to remove all persons of color from the jury pool. It peremptorily struck the only two black prospective jurors and attempted unsuccessfully to strike for cause the only other person of color on the panel. The defendant raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). For one of the peremptory strikes, the state proffered two facially race-neutral explanations, one of which was based on the prospective juror's demeanor. The trial court denied the *Batson* challenge without expressly addressing either the demeanor-based explanation or the racially disproportionate impact of the strikes. Applying *Snyder v. Louisiana*, 552 U.S. 472 (2008), we hold that the court was required to make explicit findings on those two points. We remand to permit the trial court to make the necessary findings or, if the passage of time has rendered that impossible, to vacate the defendant's conviction and retry the case.

FACTS AND PROCEDURAL HISTORY

¶2 Keyaira Porter, a black woman, was tried in March 2018 for aggravated assault against a police officer and resisting arrest.

¶3 During jury selection, Porter raised a *Batson* challenge based on the state's use of peremptory strikes against the only two black individuals on the prospective jury panel (Prospective Jurors 2 and 20) and its earlier unsuccessful attempt to strike for cause the only other potential juror of color (Prospective Juror 10, against whom neither party exercised a peremptory strike).

¶4 The prosecutor explained that she struck Prospective Juror 2 because that juror's "brother was convicted of a crime that is of the same nature as this matter, aggravated assault," and "[s]he did not seem to be very sure with her responses to the State whether how [sic] that impacted her or not." As to Prospective Juror 20, the prosecutor explained that she struck that juror because she "had been on a criminal jury in the past which had found an individual not guilty" and "had also been the foreperson of that jury." Finally, the prosecutor explained that her unsuccessful request to strike Prospective Juror 10 for cause was premised on the fact that Prospective Juror 10 "had a lot of emotional things going on with her, considering her daughter had just been killed not even a year ago," and "she seemed to be very upset." The state asserted that it had not based any of its decisions on "anything to do with anyone's color or nationality."

¶5 Porter pointed out that, in response to the state's questions, Prospective Juror 2 stated that her convicted brother was treated fairly, that his experience would not influence her decision-making as a juror, and that she could follow the rules provided by the court. Porter emphasized that "now there literally is no African American jurors that even remain."

¶6 The trial court denied the *Batson* challenge. The court held:

> The Court has reviewed the other strikes by both parties in this case, as well as the Court's notes. The Court does note that the State also struck juror[] 19 [], who . . . had rendered [a] not guilty verdict[] . . . .
>
> Juror 25 served as a foreperson on a prior jury, and juror 25 was stricken by the State.
>
> The Court does find that it's reasonable that the State would want to eliminate a juror that had an experience where their close family member was arrested for a similar charge to that which is involved in this case, and to strike jurors who may be stronger personalities or are willing to acquit based on the evidence presented to them.
>
> So the Court does find that the explanation given by the State is race neutral, and the strikes will be allowed for jurors . . . 2 and 20.
>
> And juror number 10, the Court had even expressed some concern about the juror's concern about her ability to focus on this case based upon her daughter's recent death, killed in a car accident.
>
> So the Court does not find any purposeful[] discrimination as to the three identified jurors.

¶7 The jury was seated and sworn, and ultimately found Porter not guilty of aggravated assault but guilty of resisting arrest. The court entered judgment on the verdict and imposed supervised probation. Porter appeals.

DISCUSSION

I. THE TRIAL COURT FAILED TO MAKE NECESSARY FINDINGS REGARDING PORTER'S *BATSON* CHALLENGE.

¶8 *Batson*, the seminal case, held that "the central concern of the . . . Fourteenth Amendment was to put an end to government discrimination on account of race," and that purposeful "[e]xclusion of black citizens from service as jurors [in a criminal case] constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." 476 U.S. at 85. *Batson* recognized that such exclusion violates both defendants' and excluded jurors' equal protection rights and also undermines public confidence in the justice system. *Id.* at 86–88; *see also, e.g.*, *Flowers v. Mississippi*, 139 S.Ct. 2228, 2242 (2019). Racial discrimination in the jury selection process "is at war with our basic concepts of a democratic society and a representative government." *Johnson v. California*, 545 U.S. 162, 172 (2005) (citation omitted). "Our Constitution's Framers recognized that trial by jury is 'the very palladium of free government.' The Federalist No. 83 (Alexander Hamilton). For the jury to perform its historic and beneficial role in our democracy, it must be constituted with no taint of purposeful discrimination based on race . . . ." *United States v. Alanis*, 335 F.3d 965, 970 (9th Cir. 2003) (footnote omitted). When jury selection is "tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial.'" *Miller-El v. Dretke ("Miller-El II")*, 545 U.S. 231, 238 (2005) (citation omitted). We take from these commands of our highest court an obligation to be vigilant in guarding against racial discrimination in jury selection, and to refrain from passively affirming convictions when we see a pattern of peremptory strikes against a racial group.

¶9 To combat racial discrimination in the jury selection process,[1] *Batson* and its progeny established a three-step analytical framework:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then

[1] We recognize that *Batson* has been extended to contexts beyond racial discrimination by criminal prosecutors. *See Flowers*, 139 S.Ct. at 2243. The case before us, however, presents a classic *Batson* issue.

> decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995). Though "[s]tates do have flexibility in formulating appropriate procedures to comply with *Batson*," *Johnson*, 545 U.S. at 168, Arizona has not elaborated on the basic framework, *see, e.g.*, *State v. Urrea*, 244 Ariz. 443, 445, ¶ 9 (2018).

¶10 The *Batson* framework is not pro forma—it "is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 U.S. at 172. "In the decades since *Batson*, th[e Supreme] Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers*, 139 S.Ct. at 2243.

¶11 Step one of the *Batson* framework may be satisfied by, among other things, a pattern of strikes against minority jurors. *Batson*, 476 U.S. at 97. Step two, in turn, may be satisfied by the striking party's offer of any facially race-neutral explanation for the strikes. *Purkett*, 514 U.S. at 768; *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion). At step two, even a "silly or superstitious" race-neutral reason will suffice, because the ultimate burden of persuasion never shifts from the opponent of the strikes. *Purkett*, 514 U.S. at 768. It is at step three that the trial court must determinate whether the proffered reasons are pretexts for purposeful discrimination. *Id.*

¶12 Step three is critical—"[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than [its ineffective predecessor case]." *Miller-El II*, 545 U.S. at 240. The prosecutor's demeanor often is "the best evidence" in step three. *Snyder*, 552 U.S. at 477. But it is not the only evidence. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Foster v. Chatman*, 136 S.Ct. 1737, 1748 (2016) (citation omitted). The trial court must "consider the prosecutor's race-neutral explanations in light of *all* of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 139 S.Ct. at 2243 (emphasis added); *see also Snyder*, 552 U.S. at 478 (holding that "all of the circumstances that bear upon the issue of racial animosity must be consulted"); *Miller-El II*, 545 U.S. at 252 (holding that *Batson* "requires the judge to assess the plausibility of [a race-neutral] reason in light of all evidence with a bearing on it").

¶13 Here, the trial court made no findings concerning the prosecutor's demeanor. And while it did determine that the proffered race-neutral justifications were indeed race neutral, it did not make a determination that those justifications were *credible* in the face of the pattern of peremptory strikes. And to the extent that the court satisfied itself that the strike of Juror 20 was supported by the strike of another juror with similar experience, there was no such analysis of the strike of Juror 2.

¶14 The step-three analysis necessarily is gestalt. *See Flowers*, 139 S.Ct. at 2251 (emphasizing that *Batson*-violation decision was not based on any one fact alone, but on "all of the relevant facts and circumstances taken together"); *see also Jones v. State*, 938 A.2d 626, 633 (Del. 2007) ("[T]he reason offered for each particular strike cannot be viewed in isolation; rather, the plausibility of each explanation 'may strengthen or weaken the assessment of the prosecution's explanation as to other challenges.'" (citation omitted)). Comparison of stricken and non-stricken jurors' characteristics, as well as comparison of how the prosecutor questioned those jurors, may be relevant. *See Flowers*, 139 S.Ct. at 2244, 2246–51; *but see State v. Medina*, 232 Ariz. 391, 405, ¶ 48 (2013) (declining to perform comparative analysis when comparison not raised at trial). The pattern or proportional racial impact of the strikes also may be relevant. *See Flowers*, 139 S.Ct. at 2244, 2251 (emphasizing the evidentiary import of state's persistent pattern of striking almost all black prospective jurors); *Medina*, 232 Ariz. at 405, ¶ 50 ("The presence of other minority jurors on the panel is evidence of the State's nondiscriminatory motive."). And when a party asserts a juror was stricken based on his or her demeanor, the court *must* evaluate whether the alleged demeanor credibly can be attributed to the juror. *Snyder*, 552 U.S. at 477. "[I]t may be uncomfortable and unpleasant for a trial judge to undertake such a difficult and subtle inquiry with the precision and persistence that may be required to determine counsel's true reasons for striking a juror." *Coombs v. Diguglielmo*, 616 F.3d 255, 264 (3d Cir. 2010). But "if *Batson* is to be given its full effect, trial courts *must* make precise and difficult inquiries to determine if the proffered reasons for a peremptory strike are the race-neutral reasons they purport to be, or if they are merely a pretext for that which *Batson* forbids," bearing in mind that purposeful discrimination need not always result from conscious racism. *Id.* (emphasis added).

¶15 The trial court's ultimate finding is entitled to great deference, *Hernandez*, 500 U.S. at 366–69 (plurality opinion), and we will not reverse the denial of a *Batson* challenge absent clear error, *State v. Newell*, 212 Ariz. 389, 400, ¶ 52 (2006). But "[d]eference does not by definition preclude relief." *Miller-El v. Cockrell ("Miller-El I")*, 537 U.S. 322, 340 (2003). We must ensure that the *Batson* framework is "vigorously enforced" to serve its

goals. *Flowers*, 139 S.Ct. at 2243. Otherwise, a *Batson* analysis becomes nothing more than a rubber stamp allowing the government to discriminate with impunity.

¶16 The *Batson* framework contemplates meaningful appellate review, not blind assent. *See Miller-El I*, 537 U.S. at 340; *State v. Lucas*, 199 Ariz. 366 (App. 2001); *State v. Anaya,* 170 Ariz. 436 (App. 1991). Express findings by the trial court enable such review and "foster[] confidence in the administration of justice without racial animus." *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994); *see also United States v. Vann*, 776 F.3d 746, 757 (10th Cir. 2015). To be sure, the trial "court need not make detailed findings addressing all the evidence before it," *Miller-El I*, 537 U.S. at 347, and, in Arizona, may even conduct the entire step-three analysis implicitly in some cases, *State v. Canez*, 202 Ariz. 133, 147, ¶ 28 (2002), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299 (2016).[2] But in other cases, express findings are essential.

¶17 In *Snyder*, the United States Supreme Court held that when the trial court is presented with two explanations for a strike and one of them is based on the juror's demeanor, we cannot presume that the trial court credited the demeanor-based explanation simply because it denied the *Batson* challenge. 552 U.S. at 479. *Snyder* explained:

> [D]eference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not

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[2] Some federal circuits have held otherwise. *See, e.g., Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013) (broadly describing "the presence of a circuit split regarding whether a trial judge must make explicit findings of fact at *Batson*'s third step"); *United States v. McAllister*, 693 F.3d 572, 579–82 (6th Cir. 2012) (remanding for "explicit on-the-record findings" after trial court rejected *Batson* challenge without giving any indication that it engaged in the required three-step analysis); *United States v. Rutledge*, 648 F.3d 555, 557–62 (7th Cir. 2011) (remanding for adjudication of *Batson* challenge on the merits where trial court made no express findings regarding credibility of explanations that one juror was struck based purely on her demeanor and other was struck based on his voiced concern that he might be stereotyped based on his race); *Dolphy v. Mantello*, 552 F.3d 236, 239 (2d Cir. 2009) (remanding for adjudication of *Batson* challenge on the merits where trial court simply stated that the reason for the strike was race neutral, thereby failing to indicate that it credited the inherently suspect explanation that juror was struck based on obesity).

> show that the trial judge actually made a determination concerning [the prospective juror]'s demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning [the prospective juror]'s demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning [the prospective juror]'s demeanor. [The prospective juror] was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled [the prospective juror]'s demeanor. Or, the trial judge may have found it unnecessary to consider [the prospective juror]'s demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial judge credited the prosecutor's assertion that [the prospective juror] was nervous.

Id. The uncertainty identified in *Snyder* will exist in *every* case in which the trial court fails to expressly accept or reject a demeanor-based explanation that is accompanied by other facially race-neutral explanations. And because Arizona law provides that one non-race-neutral reason for a strike will taint any other neutral reason for the strike, *State v. Lucas*, 199 Ariz. 366, 369, ¶¶ 11–13 (App. 2001), *Snyder* bars blind affirmance when the trial court fails to credit expressly a demeanor-based explanation coupled with another explanation. *Snyder* thereby ensures that *Batson* is meaningfully enforced in such circumstances.

¶18 The dissent emphasizes the Supreme Court's decision in *Thaler v. Haynes*, 559 U.S. 43 (2010). *See infra* ¶¶ 37–38. But *Thaler* did not alter *Snyder*. *Thaler* simply held that neither *Batson* nor *Snyder* (which, the Court noted, was temporally inapplicable in any event) established a "blanket" or "categorical" rule requiring that a judge personally observe and recall a prospective juror's demeanor. 559 U.S. at 48–49. It did *not* hold that express findings are never required. *See id.* And we can see why no findings were required in *Thaler*—that habeas case concerned a single strike based on a single explanation concerning a juror-behavior characterization that the defendant did not dispute. *Id.* at 45–46. By contrast, this case involves a successful effort to remove all of the prospective black jurors.

¶19 The dissent also cites our state supreme court's decisions in *State v. Escalante-Orozco*, 241 Ariz. 254 (2017), and *State v. Lynch*, 238 Ariz.

84 (2015). *See infra* ¶ 40. As an initial matter, and as the dissent acknowledges, the United States Supreme Court reversed *Lynch*. *See Lynch v. Arizona*, 136 S.Ct. 1818 (2016). We further note that *Lynch* did not explain or cite authority to support its conclusory acceptance of implicit step-three findings. *See* 238 Ariz. at 104, ¶ 70. With respect to *Escalante-Orozco*, the trial court "did not share" the prosecutor's observation that a juror was inattentive, "so made 'no finding of that'" and relied instead on the prosecutor's alternative explanation for the strike—the juror's occupation. 241 Ariz. at 271–72, ¶ 36. We do not perceive that as inconsistent with *Snyder*. To the contrary, it appears that the trial court in *Escalante-Orozco* complied precisely with *Snyder*—it acknowledged that it could not verify the demeanor-based explanation and accepted a different, factually verifiable race-neutral explanation.

¶20 Following the logic of *Snyder,* we hold today that when confronted with a *pattern* of strikes against minority jurors, the trial court must determine expressly that the racially disproportionate impact of the pattern is justified by *genuine*, not pretextual, race-neutral reasons. We recognize that this holding, though consistent with precedent, is more granular than this court's past *Batson* decisions. But to hold otherwise would be to transform deference to willful blindness. And though in *Canez* our state supreme court accepted an implicit step-three analysis for a *Batson* challenge when the state struck five of seven Hispanic panelists in a capital case, *Canez* predated *Snyder* and did not present a situation in which *all* prospective jurors of the same race as the defendant were stricken. *See* 202 Ariz. at 145–47, ¶¶ 16–28. We therefore do not read *Canez*—or the similar unpublished decisions cited by the dissent, *see infra* ¶ 39—as controlling in this case.

¶21 Here, the defendant is black. The state struck Prospective Jurors 2 and 20, the only two black panelists, and attempted unsuccessfully to strike for cause Prospective Juror 10, the only other person of color on the panel. There cannot be a more stark pattern for *Batson* purposes than when the state attempts to remove *all* minorities from the jury. The state offered two facially race-neutral explanations for striking Prospective Juror 2: her brother's conviction for aggravated assault and the fact that "[s]he did not seem to be very sure with her responses to the State whether how [sic] that impacted her or not." The transcript reveals, however, that Prospective Juror 2 unambiguously stated that her brother's conviction would have no impact on her ability to serve as a juror. Accordingly, the uncertainty the prosecutor asserted was present in the juror's responses either must have been manifested in her demeanor or the assertion was pretextual. The trial court, however, made *no* finding concerning the juror's

demeanor. Without such a finding, the court's conclusory statement that there was no purposeful discrimination was not sufficient. We cannot presume that the court found that the state's pattern of strikes and attempted strikes against minority panelists was merely a race-neutral coincidence, and we see nothing in the record to suggest that it proceeded past step two of the *Batson* analysis. The dissent emphasizes that in "exceptional circumstances," including "where the court abandons its responsibilities under *Batson*, this court must not hesitate to act." *See infra* ¶ 31. On this point, we agree with the dissent. If the pattern in this case does not raise concern, then *Batson* is a dead letter.[3]

¶22 Were we to defer to "implicit" findings that uphold a pattern of challenges to every minority juror, we would tacitly contribute to the perception that *Batson* is merely aspirational and can easily be sidestepped. We refuse to do so. In *Batson,* the United States Supreme Court set out to eliminate racial discrimination by the government, and it has unwaveringly confirmed its seriousness about that aim ever since. We agree with the dissent that our state supreme court could (and should) improve the *Batson* framework to promote the Supreme Court's purpose. But we hold in this case that existing Supreme Court precedent entitles Porter to a remand so that the trial court may apply *Batson* in the rigorous, unflinching manner that its authors intended. If the passage of time has made it impossible for the trial court to make reliable, fully informed findings under the *Batson* framework, the court must vacate Porter's conviction and hold a new trial.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY INSTRUCTING THE JURY ON RESISTING ARREST UNDER A.R.S. § 13-2508(A)(1).

¶23 In the interest of judicial efficiency in the event of a retrial on the merits, we address Porter's second argument on appeal.

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[3] The dissent finds the record in this case "troubling" and shares our "misgivings" about the lack of support in the transcript for the prosecutor's explanation of the strike of Juror 2. *See infra* ¶ 29. The panel is therefore united in the view that this case presents the specter of racial discrimination. To a citizen who has been deprived of liberty based on a trial before a jury that may have been infused with racial discrimination, this is more than an academic concern that can wait for the next case. And we owe the public a duty to ensure that the courts will lead by example in purging discrimination from the justice system. We therefore do not hesitate to act.

¶24 Porter was charged with resisting arrest. Under A.R.S. § 13-2508,

> A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:
>
> 1. Using or threatening to use physical force against the peace officer or another.
>
> 2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

The direct complaint and information referenced only § 13-2508(A)(2). Before trial, however, the state requested a preliminary jury instruction that defined resisting arrest under both § 13–2508(A)(1) and (2). Over Porter's objection, the superior court granted the state's request and instructed the jury accordingly.

¶25 Porter contends that the jury instruction effectively altered the elements of the resisting arrest charge, thereby impermissibly constituting "a change in the nature of the offense" without notice. *State v. Freeney*, 223 Ariz. 110, 113, ¶ 17 (2009). We review for abuse of discretion. *State v. Johnson*, 198 Ariz. 245, 247, ¶ 4 (App. 2000).

¶26 To enable preparation of a defense, a defendant has a constitutional right to notice of the nature of the charged offenses. *State v. Sanders*, 205 Ariz. 208, 213, ¶ 16 (App. 2003), *overruled on other ground by Freeney*, 223 Ariz. 114. Ariz. R. Crim. P. 13.1(a) therefore requires that a charging document be "a plain, concise statement of the facts sufficiently definite to inform the defendant of a charged offense." Amending a charge is constitutionally permitted without the defendant's consent if it does not change the nature of the offense or prejudice the defendant. *Sanders*, 205 Ariz. at 214, ¶ 19. "The charging document is deemed amended to conform to the evidence admitted during any court proceeding." Ariz. R. Crim. P. 13.5(b); *see Freeney*, 223 Ariz. at 114, ¶ 24 ("[C]ourts look beyond the indictment to determine whether defendants received actual notice of charges, and the notice requirement can be satisfied even when a charge was not included in the indictment.").

¶27 We hold that the trial court did not abuse its discretion because the jury instruction did not change the nature of the offense. The direct complaint and information alleged that Porter created a substantial

risk of causing physical injury to the police officer, an allegation that encompassed Porter's using, or threatening to use, physical force against him. Further, Porter cannot show prejudice. At the preliminary hearing, eyewitness testimony established that Porter swung at the officer, scuffled with him, and tried to bite his arm. Porter, therefore, knew well before trial that § 13-2508(A)(1) was a basis for the resisting arrest charge, and she had a full and fair opportunity to prepare her defense. *See State v. Barber*, 133 Ariz. 572, 577 (App. 1982) (noting propriety of amendment to an indictment hinges on whether the amendment violated the defendant's right to "notice of the charges against him with an ample opportunity to prepare to defend against them"); *see also Johnson*, 198 Ariz. at 249, ¶ 13 ("To be meaningful, an 'ample opportunity to prepare to defend' against amended charges generally must occur before the state has rested its case." (citation omitted)).

CONCLUSION

¶28 We remand for further proceedings regarding Porter's *Batson* challenge.

M c M U R D I E, Judge, dissenting:

¶29 Because I would affirm the superior court's ruling on Porter's objection to the strikes of Prospective Jurors 2 and 20, disagree with the majority's interpretation of *Snyder v. Louisiana*, 552 U.S. 472 (2008), and find that the majority's holding elevates form over substance in a manner that will do little to advance the purposes of *Batson v. Kentucky*, 476 U.S. 79 (1986), I dissent.

A. Under Arizona's Current *Batson* Jurisprudence, the Superior Court Did Not "Clearly Err" by Overruling Porter's Objection to the State's Strikes.

¶30 I do not disagree with the majority that the circumstances surrounding the strikes and the State's explanation for striking Prospective Juror 2 are troubling. The State's alleged concerns about Prospective Juror 2's ability to be impartial because of her brother's conviction for aggravated assault cannot be readily discerned from the transcript of the jury selection. I also believe, in line with the majority, that we should not blind ourselves to the result of the State's strikes in this case, which was to ensure that the jury seated to decide the criminal charges against Porter, an African-American, did not contain a single African-American juror.

Consequently, I share the majority's misgivings with the State's explanation for striking Prospective Juror 2.

¶31 However, the operative question before us in this case under the traditional *Batson* analysis—which, as the majority acknowledges, *supra* ¶ 15, remains unaltered in Arizona—is whether the superior court *clearly erred* by failing to find the striking party was "motivated in substantial part by discriminatory intent." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019); *see also State v. Medina*, 232 Ariz. 391, 404, ¶ 43 (2013). From the beginning, the *Batson* court recognized the trial court's unique role in deciding this question and the deference that must be accorded to its findings as a result. *See Batson*, 476 U.S. at 98, n.21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."). In the years following *Batson*, both the United States Supreme Court and our supreme court have continuously reaffirmed this principle. *See, e.g.*, *Flowers*, 139 S. Ct. at 2244 ("The Court has described the appellate standard of review of the trial court's factual determinations in a *Batson* hearing as 'highly deferential.'" (quoting *Snyder*, 552 U.S. at 479)); *Hernandez v. New York*, 500 U.S. 352, 369 (1991) ("In *Batson,* we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal . . . ."); *State v. Escalante-Orozco*, 241 Ariz. 254, 272, ¶ 36 (2017) ("[W]e defer to the trial court's assessment of the prosecutor's credibility in explaining his strikes."), *abrogated in part on other grounds by State v. Escalante*, 245 Ariz. 135, 140, ¶¶ 15–16 (2018); *State v. Newell*, 212 Ariz. 389, 401, ¶ 54 (2006) ("[T]he trial court's finding at this step is due much deference.").

¶32 Of course, the deferential standard of review we usually apply to the superior court's findings does not obviate its duty to meaningfully evaluate the striking party's proffered explanations for each strike. Indeed, it makes that obligation more pressing. *Flowers*, 139 S. Ct. at 2243 ("In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process."). Thus, when the superior court's findings are unsupported by the record so that we are left with a "definite and firm conviction that a mistake has been committed," *Hernandez*, 500 U.S. at 370 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)), or where the court abandons its responsibilities under *Batson*, this court must not hesitate to act. Such situations present the types of "exceptional circumstances" that override the deference we would generally afford a superior court's ruling. *Snyder*, 552 U.S. at 477 (quoting *Hernandez*, 500 U.S. at 366).

¶33 But no such exceptional circumstances exist in this case. In my view, the superior court here did exactly as was required under Arizona's current *Batson* jurisprudence; it considered the State's explanations and Porter's arguments, found one of the State's proffered reasons for striking Prospective Juror 2 credible—and, in fact, reasonable—and concluded Porter had not met her burden of showing the State was motivated by discriminatory intent. Striking jurors whose perspectives might be influenced by the experiences of their family members has been recognized as an accepted and permissible trial strategy. *See, e.g.*, *Medina*, 232 Ariz. at 404–05, ¶¶ 47–50 (upholding strike in part based on the similarity between mental-health conditions of juror's husband and defendant); *State v. Hardy*, 230 Ariz. 281, 286, ¶¶ 13–15 (2012) (juror struck because brother's drug addiction might make her sympathetic to mitigating evidence of the defendant's familial drug abuse); *State v. Reyes*, 163 Ariz. 488, 491 (App. 1989) (struck because juror's sister's conviction for one of the same charges raised against the defendant); *see also Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) ("Credibility can be measured by, among other factors . . . whether the proffered rationale has some basis in accepted trial strategy.").

¶34 The fact that the superior court did not expressly credit the State's second proffered reason for striking Prospective Juror 2 is of no consequence. The superior court is "presumed to know the law and apply it in making [its] decisions," *State v. Lee*, 189 Ariz. 608, 616 (1997) (quoting *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609 (2002)), including its obligation to consider "all of the circumstances that bear upon the issue of racial animosity," *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (quoting *Snyder*, 552 U.S. at 479). By finding the State did not engage in purposeful discrimination by striking Prospective Juror 2, the court necessarily accepted the State's asserted perception of Prospective Juror 2's uncertainty about whether she would be influenced by her brother's conviction and found no other circumstance of discriminatory intent. To upset the court's conclusion based solely on our interpretation of statements within a cold transcript would be an unjustified invasion of the superior court's "pivotal role" in evaluating *Batson* challenges. *State v. Urrea*, 244 Ariz. 443, 447, ¶ 16 (2018) (quoting *Snyder*, 552 U.S. at 477); *see also Hernandez*, 500 U.S. at 365 ("As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985))).

¶35 Accordingly, under Arizona's current *Batson* jurisprudence, I do not believe we can say the superior court took an impermissible view of the evidence in reaching its conclusion that the State did not engage in

purposeful racial discrimination by striking Prospective Juror 2. *Hernandez*, 500 U.S. at 369 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (quoting *Anderson v. Bessemer*, 470 U.S. 564, 574 (1985))). I would, therefore, affirm the judgment, including the superior court's ruling on Porter's *Batson* challenges.[4]

B. *Snyder v. Louisiana* Does Not Require Trial Courts to Make Express Findings Crediting Demeanor-Based Explanations While Reviewing a *Batson* Challenge, and Arizona Courts Have Never Interpreted It as Holding So.

¶36 The majority holds the United States Supreme Court's decision in *Snyder* requires us to remand the case to the superior court for it to expressly find whether it believed the State's demeanor-based explanation for striking Prospective Juror 2—that she seemed uncertain when she denied that her brother's conviction would affect her as a juror. As I noted above, I see little ambiguity in the superior court's ruling. The court explicitly stated that it found no purposeful discrimination as to the State's strike of Prospective Juror 2. Our different readings of the superior

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[4] Although not discussed by the majority, I briefly address Porter's arguments on appeal with respect to the State's strikes of both Prospective Jurors 2 and 20. Porter contends the depth of the prosecution's questioning regarding the prospective jurors' prior jury service and comparisons between the nonminority jurors similarly situated to Prospective Juror 2 reveals the State's explanations for striking Prospective Jurors 2 and 20 were pretextual. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (approving comparative-juror and depth-of-questioning analysis). But it was unnecessary for the State to follow up with any potential juror about prior jury service because the standard jury-selection questions provided all the information needed to form a legitimate basis to strike Prospective Juror 20—specifically, that she had served as a foreperson on a prior acquitting jury. *State v. Trostle*, 191 Ariz. 4, 12 (1997) ("participation on a prior acquitting jury" can be a valid, race-neutral reason for striking potential juror). Porter also did not raise a comparative-juror analysis issue regarding Prospective Juror 2 with the superior court, and our supreme court has specifically warned appellate courts from engaging in "a retrospective comparison of jurors based on a cold appellate record . . . when alleged similarities were not raised at trial." *Medina*, 232 Ariz. at 404-05, ¶ 48 (quoting *Snyder*, 552 U.S. at 483). Thus, these arguments do not alter my conclusion.

court's ruling aside, the majority and I part ways on a more significant ground here: its interpretation of *Snyder*.[5]

¶37 In *Snyder*, the Court found that it could not "presume that the trial judge credited the prosecutor's assertion" concerning a juror's nervousness because the trial court upheld the strikes without explanation and that the prosecutor's second proffered reason failed to survive scrutiny "even under the high deferential standard of review that is applicable here." *Snyder*, 552 U.S. at 479. Because the prosecutor's pretextual second explanation gave rise to an inference of discriminatory intent, and because there was nothing in the record "showing that the trial judge credited the claim that [the juror] was nervous," the Court concluded the prosecutor had engaged in purposeful racial discrimination and reversed. *Id.* at 485–86. Nothing in the Court's decision purported to require a trial judge to make express findings crediting demeanor-based explanations whenever they are raised. The Court only held that it would not ignore a pretextual explanation in favor of a demeanor-based explanation when the trial judge's ruling did not make it clear which explanation it found credible. *See id.* One wonders why the Court would have engaged in an exhaustive analysis of the second reason proffered by the prosecutor if the trial judge's

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[5] It must be noted that before a court adopts such a sweeping new rule, it would be better to do so in a case where the argument concerning it *has actually been raised at trial and on appeal*. Porter did not request that the superior court make specific findings regarding the demeanor-based explanation offered by the State and made no argument in that court or this court that the superior court erred by failing to do so. Absent fundamental error, a party in a criminal matter waives any argument not raised below or on appeal. *See State v. Bible*, 175 Ariz. 549, 572 (1993) ("Absent fundamental error, a party usually cannot raise error on appeal unless a proper objection was made at trial."); *State v. Moody*, 208 Ariz. 424, 452, ¶ 101, n.9 (2004) ("Failure to argue a claim [on appeal] usually constitutes abandonment and waiver of that claim." (quoting *State v. Carver*, 160 Ariz. 167, 175 (1989)). Waiver principles apply to our review of *Batson* challenges. *See State v. Garza*, 215 Ariz. 56, 65, ¶ 31 (2007) (defendant waives *Batson* challenges by failing to object at trial); *Medina*, 232 Ariz. at 404–05, ¶ 48 (defendant waives a comparative-juror argument by not raising it at trial). It is troubling that the majority *sua sponte* raises an issue and resolves it without any discussion whether the *error* they have found is fundamental. *State v. Escalante*, 245 Ariz. at 142, ¶ 21.

failure to credit the demeanor-based reason alone expressly was enough to justify relief. *See id.* at 479–85.

¶38 The Supreme Court itself has since confirmed that it did not intend *Snyder* to establish a definitive rule regarding the findings a trial judge must make when reviewing a demeanor-based explanation. *Thaler v. Haynes*, 559 U.S. 43, 47–49 (2010) (per curiam). In *Haynes*, the Court rejected the argument that *Snyder* established such a rule, explaining that "in light of the particular circumstances of the case, we held that the peremptory challenge could not be sustained on the demeanor-based ground, which might not have figured in the trial judge's unexplained ruling." *Id.* at 49 (citing *Snyder*, 552 U.S. at 479–86). The Court also noted that *Snyder*'s discussion of the trial judge's ruling in that case "[did] not suggest that, in the absence of a personal recollection of the juror's demeanor, the judge could not have accepted the prosecutor's explanation." *Id.*

¶39 Most federal circuits to consider this issue in the wake of *Snyder* and *Haynes* have held that *Snyder* did not establish a rule requiring express findings concerning demeanor-based explanations. *See, e.g.*, *Sifuentes v. Brazelton*, 825 F.3d 506, 530 (9th Cir. 2016) (citing *Haynes* and finding no unreasonable determination of facts where trial court failed to credit demeanor-based explanation); *United States v. Thompson*, 735 F.3d 291, 300–01 (5th Cir. 2013); *United States v. Moore*, 651 F.3d 30, 42 (D.C. Cir. 2011), *aff'd in part on other grounds sub nom. Smith v. United States*, 568 U.S. 106 (2013); *Smulls v. Roper*, 535 F.3d 853, 860–61 (8th Cir. 2008) (en banc). *But see United States v. Rutledge*, 648 F.3d 555, 559–62 (7th Cir. 2011) (explaining Seventh Circuit's interpretation of *Snyder* and distinguishing *Haynes* on the basis that it was "restricted by the standards of review appropriate in *habeas corpus* proceedings"). Several states' supreme courts have also found that *Snyder* did not create such a rule. *See, e.g.*, *People v. Beauvais*, 393 P.3d 509, 521 (Colo. 2017) ("We agree with the courts that confine *Snyder* to its facts."); *State v. Jacobs*, 32 So. 3d 227, 235 (La. 2010) ("Applying the rule of *Thaler v. Haynes* to this case, the trial court's failure to comment on the prosecutor's demeanor-based reason does not mean the peremptory challenge should automatically be rejected."); *Davis v. State*, 76 So. 3d 659, 663–64 (Miss. 2011) (upholding strike when the only reason offered was demeanor-based even without a specific finding of credibility because the court "must have credited" it by denying the *Batson* challenge).

¶40 Likewise, no court in *Arizona* has held that *Snyder* mandates express findings by the superior court, regardless of whether the proffered explanation at issue is based on demeanor. A search for Arizona appellate decisions referencing *Snyder* returns 37 results. Of these 37 cases, not one

interprets *Snyder* as creating an express findings requirement. Indeed, some explicitly reject that argument. *See, e.g.*, *State v. Ybarra*, 2 CA-CR 2017-0286, 2019 WL 2233299, at *6, ¶ 25 (App. May 22, 2019) (mem. decision) ("Neither [*Foster v. Chatman* nor *Snyder*] require[] a court to make explicit findings as to intent, demeanor, or credibility in the third step."); *State v. Palafox*, 2 CA-CR 2012-0101, 2013 WL 709624, at *4, ¶ 17 (App. Feb. 26, 2013) (mem. decision) (citing *Haynes*, 559 U.S. at 47–48) ("And we can rely upon the court's independent evaluation of jurors' demeanors when it assesses a prosecutor's stated justifications on such grounds, even absent specific findings on the record.").

¶41 Moreover, in a recent case, our supreme court found no clear error in a superior court's finding of no purposeful discrimination, even though one of the State's proffered explanations was demeanor-based and the superior court specifically found it could not verify the juror's alleged demeanor. *Escalante-Orozco*, 241 Ariz. at 272, ¶¶ 36–37. And contrary to the majority's assertion, *supra* ¶¶ 19–20, our supreme court has also continued to find no clear error in the superior court's finding of no purposeful discrimination at the third step of the *Batson* framework, even when that finding is only implicit. *See State v. Lynch*, 238 Ariz. 84, 104, ¶ 70 (2015) ("The trial court found that the State's proffered reasons for the strikes were race neutral, implicitly ruling that Lynch did not carry his burden of proving purposeful racial discrimination."), *rev'd on other grounds*, 136 S. Ct. 1818 (2016). In sum, the great weight of authority, both within Arizona and outside of it, establishes that *Snyder* does not require the rule the majority imposes here.

¶42 This is not to say that Arizona may not adopt a requirement that the superior court must make an express finding regarding a demeanor-based explanation when it is raised. *Johnson v. California*, 545 U.S. 162, 168 (2005) (States "have flexibility in formulating appropriate procedures to comply with *Batson*"). But in my view, such a rule does little to ensure that *Batson* is meaningfully enforced. The problems surrounding *Batson* are not solved by heaping technical requirements upon the superior court. That does little more than create a trap for superior court judges that, once triggered, might require a remand even in situations where it is clear from the record that no discrimination occurred. And in the face of clearly established precedent declining to impose such a requirement on the superior court, the decision to adopt such a rule must be left to our supreme court. *See State v. Smyers*, 207 Ariz. 314, 318, ¶ 15, n.4 (2004) ("The courts of this state are bound by the decisions of [the Arizona Supreme Court] and do not have the authority to modify or disregard [its] rulings."); *State v. Gentry*, 247 Ariz. 381, 385, ¶ 13 (App. 2019) (request to adopt Washington's

Batson framework rejected in the face of "well-established Arizona legal precedent").

¶43 Accordingly, because the majority's interpretation of *Snyder* is incorrect, creates a rule that falls within the province of our supreme court, and goes outside the scope of this appeal, its holding cannot stand.

C. Although the Superior Court's Ruling Should Be Affirmed, Our Supreme Court Should Consider Whether Arizona's *Batson* Framework Should be Altered to Increase Its Effectiveness.

¶44 At its core, I believe what the majority truly takes issue with in this case is not the superior court's findings, but *Batson* itself. I share their frustration. From its inception, *Batson*'s framework has been criticized as a well-intentioned but ultimately ineffective means of ending the discriminatory use of peremptory strikes. *See, e.g.*, *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process."); *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) ("[T]he use of race- and gender-based stereotypes in the jury-selection process seems better and more systematized than ever before."); *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013) ("Twenty-six years later it is evident that *Batson* . . . is failing us.").[6] Several states' supreme courts have also recently called for studies to examine the *Batson* framework's ability to guard against impermissible discrimination in jury selection. *See State v. Holmes*, 221 A.3d 407, 436–37 (Conn. 2019) (announcing the creation of a jury selection task force to study and propose solutions to the jury selection process in Connecticut); *Supreme Court Announces Jury Selection Work Group*,

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[6] The *Batson* framework has also been heavily criticized by legal scholars. *See, e.g.*, Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 Colum. L. Rev. 713, 717–23 (2018) (collecting scholarly critiques of *Batson*); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 156 (2005) (asserting *Batson*'s framework is "woefully ill-suited to address the problem of race and gender discrimination in jury selection" in part because of its inability to address the impact of "unconscious bias on jury selection"); Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1417–18, 1426–27 (2018) (describing past jury-selection studies and, after an empirical study of jury selection in 1306 felony trials held in North Carolina in 2011, concluding race still plays a significant role in the removal of jurors in that state).

California Courts Newsroom, https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group (last visited Mar. 25, 2020). Despite this persistent criticism and the widespread desire for more effective measures, the traditional *Batson* framework remains the primary tool by which state courts resolve challenges to allegedly discriminatory peremptory strikes, including in Arizona. *See, e.g.*, *Escalante-Orozco*, 241 Ariz. at 267, ¶¶ 13–14; *Medina*, 232 Ariz. at 404–05, ¶¶ 48–50.

¶45 *Batson* was not intended to preclude efforts by states to provide more robust bulwarks against discrimination during the jury-selection process. *Johnson*, 545 U.S. at 168. The Court has long said that states have "wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 528 U.S. 259, 273 (2000). In line with this principle, several state courts have attempted to correct the deficiencies of *Batson* by modifying or outright eliminating components of the *Batson* framework. *See, e.g.*, *People v. Gutierrez*, 395 P.3d 186, 201–02 (Cal. 2017) (reaffirming requirement that comparative-juror analysis be conducted, where the record permits, even if raised for the first time on appeal); *State v. Edwards*, 102 A.3d 52, 67, n.16 (Conn. 2014) (eliminating *Batson*'s *prima facie* case of discrimination requirement); *Truehill v. State*, 211 So. 3d 930, 942 (Fla. 2017) (same); *Conner v. State*, 327 P.3d 503, 509 (Nev. 2014) (charging trial courts with thoroughly reviewing *Batson* challenge and creating an inclusive record). However, no state has engaged in more intense efforts to reform and strengthen the *Batson* framework than Washington.

¶46 In 2013, the Washington Supreme Court held that the continued impact of race in Washington's jury-selection process required it to strengthen *Batson*'s existing protections and "to begin the task of formulating a new, functional method to prevent racial bias in jury selection." *Saintcalle*, 309 P.3d at 338–39. This call to action led the court to adopt Washington General Rule 37 in April 2018, which aims to "eliminate the unfair exclusion of potential jurors based on race or ethnicity." Wash. Gen. R. 37.[7] Later that same year, in *State v. Jefferson*, 429 P.3d 467, 480

[7] Rule 37 attempts to accomplish this goal in several ways. First, it removes the requirement that the challenging party prove purposeful discrimination. Instead, the court must determine only whether "an objective observer could view race or ethnicity as [a] factor in the use of the peremptory challenge." Wash. Gen. R. 37(e). It also provides a list of circumstances the court should consider when evaluating a strike under this test. Wash. Gen. R. 37(g). Second, the rule lists several presumptively

(Wash. 2018), the court took the extra step of declaring that the proper question at the third step of Washington's *Batson* framework "is not whether the proponent of the peremptory is acting out of purposeful discrimination," but whether "an objective observer could view race and ethnicity as a factor in the use of the peremptory challenge." Unlike the original third step of *Batson*, Washington's "objective observer" standard permits *de novo* review of the trial court's findings and conclusions. *Id.* These developments have already gained recognition, although not yet adoption, in other states' courts. *See, e.g.*, *People v. Bryant*, 253 Cal. Rptr. 3d 289, 310 (Ct. App. 2019) (Humes, P.J., concurring) (citing the objective observer test with approval in advocating for reform to California's *Batson* framework); *State v. Veal*, 930 N.W.2d 319, 361–62 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) (advocating, in line with Washington's reforms, for "a revision of [Iowa's] approach when the last African-American is removed from the jury with a peremptory strike"); *Tennyson v. State*, ___ S.W.3d ___, 2018 WL 6332331, at *6, n.6, *7 (Tex. Dec. 5, 2018) (Alcala, J., dissenting from refusal for discretionary review) ("[I]t is time for courts to enact alternatives to the current *Batson* scheme to better effectuate its underlying purpose.").

¶47 Arizona has continued to apply the *Batson* framework with little reevaluation or alteration. I believe the time has come for us to discuss reformulating our structure to meaningfully further *Batson*'s purpose, but such a review cannot be accomplished in an appeal. *See Holmes*, 221 A.3d at 407, 434 (finding it necessary to "uphold under existing law the trial court's finding that the prosecutor had not acted with purposeful discrimination in exercising a peremptory challenge," but also to take the opportunity to convene a working group to "study the problem and resolve it via the state's rule-making process"). A rule change petition was recently submitted advocating for our supreme court to adopt a new procedural rule governing jury selection modeled after Washington General Rule 37. Central Arizona National Lawyers Guild, *R-20-009 Petition to Amend the Rules of the Supreme Court by Adopting a New Rule: Rule 24 – Jury Selection*, https://www.azcourts.gov/Rules-Forum/aft/1081 (last visited Mar. 25, 2020). Indeed, the rule-making process may be the ideal forum to engage in this much-needed discussion. *See Holmes*, 221 A.3d at 436–37, 437, n.25

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invalid reasons for exercising a peremptory strike, such as "having prior contact with law enforcement officers" or "living in a high-crime neighborhood." Wash. Gen. R. 37(h). Finally, it requires that any party intending to strike a juror due to demeanor, attitude, or behavior must "provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner." Wash. Gen. R. 37(i).

(concerning *Batson* reform, a rule-making process is "better suited to consider the array of relevant studies and data in this area, along with the interests of the stakeholders"). But whatever path reform of the *Batson* framework takes within Arizona, I find merit in the state of Washington's "objective observer" test.

¶48 Under Washington's reformulation of *Batson*'s third stage, the superior court could protect the integrity of the jury-selection process from both purposeful and unconscious discrimination. In turn, appellate courts would benefit from the ability to engage in meaningful review of the superior court's decision under a *de novo* standard of review. The lingering menace of racial discrimination within our justice system requires nothing less. And the need for such a test is particularly pressing where, as in this case, the State strikes every potential juror of a criminal defendant's racial group and nearly removes every other minority juror. However, I do not believe this court has the authority to announce such a radical change to our state's implementation of the *Batson* framework; that is a task left to our supreme court. I respectfully implore the court to take up that task.

CONCLUSION

¶49 Until our supreme court changes our approach to *Batson* issues, we must apply the law that exists—the majority did not do that in this case. On this issue, I dissent.

AMY M. WOOD • Clerk of the Court
FILED: AA

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Appellee,	)	Court of Appeals
	)	Division One
vs.	)	No. 1 CA-CR 18-0301
	)	
	)	
KEYAIRA PORTER,	)	
	)	Maricopa County
	)	Superior Court No.
Appellant.	)	CR2017-137407-001

Phoenix, Arizona

March 27, 2018

BEFORE: THE HONORABLE MONICA GARFINKEL
COMMISSIONER OF THE SUPERIOR COURT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL
Jury Selection
Day 1 (One)

Prepared for:
Court of Appeals

ORIGINAL

LINDA C. LOPEZ, CR, RPR
Certified Reporter
Certificate No. 50539

Excerpt from Jury Selection Transcript

Page 14: Prospective Jurors sworn in.

come up, I apologize, that caused you to wait out there in the hallway. We will try to avoid that in the future, but unfortunately things do occasionally come up.

This is the time set for trial in criminal cause number, CR2017-137470-001, State of Arizona versus Keyaira Porter.

Is the State ready to proceed?

MS. TIRRELL: Yes, your Honor.

THE COURT: Thank you.

Is the defense ready to proceed?

MS. DAVISON: We are. Thank you.

THE COURT: Would all of the prospective jurors please stand to be sworn.

(Whereupon, the prospective members of the jury panel were duly sworn by the Clerk of the Court.)

THE COURT: Thank you. Please be seated.

All right. Well, ladies and gentlemen, we are now going to begin the jury selection process. You are going to be asked some questions about yourself.

These questions are not designed to pry unnecessarily into your personal lives or affairs, and I hope that they will not.

But before we go any further, is there

Excerpt from Jury Selection Transcript

Pages 54-56: Trial court questions Prospective Jurors 2 and 22.

PROSPECTIVE JUROR: No.
THE COURT: Sir, is there anything about that experience that would interfere with your ability to be fair and impartial in this case?
PROSPECTIVE JUROR: No.
THE COURT: Thank you, juror number 38.
Anybody else?
Juror number 1.
PROSPECTIVE JUROR: Yes. I've owned a 7-Eleven for 18 years and I have been robbed numerous times. And twice policemen have come to my aid; exactly when -- one officer has come across the -- when the man was pointing a rifle at me, shotgun. He came across the counter and hit the man and put holes in our walls, but saved my life. So I'm very partial to policemen, and how they're treated.
THE COURT: I'm glad you had a positive experience out of a negative one. But would you be able to judge the evidence in this case and be fair and impartial to both sides?
PROSPECTIVE JUROR: I personally think so.
THE COURT: Thank you, juror number 1.
Anybody else?
All right. Have any of you, or any close family members ever been arrested, charged with, or convicted of a crime, other than the ones that we've

already talked about?

Juror number 2?

Anybody else?

19, 22, 27, 31, 36, 41, 43, 44.

And we're talking about other than a minor traffic offense.

So is there anything about the experience that -- the relationship or any of the information that you've learned that would affect your ability to be fair and impartial in this case?

All right. So juror number 2?

PROSPECTIVE JUROR: Oh well --

THE COURT: Did you want to discuss your situation?

PROSPECTIVE JUROR: Okay.

THE COURT: Did you want to discuss it outside the presence of the other jurors, or do you not want to discuss it?

PROSPECTIVE JUROR: I'm just answering your question.

THE COURT: Okay. So you or a family member has been arrested?

PROSPECTIVE JUROR: Yes.

THE COURT: Okay. But you feel you could be fair and impartial?

PROSPECTIVE JUROR: Yes, ma'am.
THE COURT: Okay. Thank you.
Juror number 19.
PROSPECTIVE JUROR: Yes. I believe I could be impartial.
THE COURT: All right. Juror number 22.
PROSPECTIVE JUROR: I believe I could be impartial.
THE COURT: Number 27.
PROSPECTIVE JUROR: I can be impartial.
THE COURT: Okay. Number 31.
PROSPECTIVE JUROR: I can be impartial.
THE COURT: 36.
PROSPECTIVE JUROR: I can be impartial.
THE COURT: 41.
PROSPECTIVE JUROR: I can be impartial.
THE COURT: 43.
PROSPECTIVE JUROR: I can be impartial.
THE COURT: And 44.
PROSPECTIVE JUROR: Yes, I can be impartial.
THE COURT: And of those of you who answered, did any of those involve the Mesa Police Department?
Juror number 31.
PROSPECTIVE JUROR: Ah-hum.
THE COURT: Your experience has?

Excerpt from Jury Selection Transcript

Pages 94-97: Prosecutor questions Prospective Jurors 2 and 22.

If there is a problem with that, I probably don't qualify.

THE COURT: Okay. Well thank you. I'll check into that for you.

Thank you.

Anybody else?

All right. Ms. Tirrell, does the State have any questions for the panel?

MS. TIRRELL: Yes, your Honor. Thank you.

Good afternoon, everyone.

Now is the time that we're going to ask some follow-up questions. Please don't be concerned if I don't ask you a question, there are just some follow-up questions I'm going to ask of some of the jurors, okay.

Juror number 2, I note previously you mentioned -- and you don't need to go into any details about whom it was -- but when the judge asked about if any -- you or any family member was arrested of any kind -- and I believe you had raised your number for that.

PROSPECTIVE JUROR: Yes.

MS. TIRRELL: What kind of situation was it?

PROSPECTIVE JUROR: Aggravated assault.

MS. TIRRELL: And was that a family member?

PROSPECTIVE JUROR: Yes. It was my brother.

Are you saying what were the charges, or

what were they arrested for --

MS. TIRRELL: Either or. I just asked if they were arrested?

PROSPECTIVE JUROR: Oh. Yeah, aggravated assault and kidnap. But he was only charged with aggravated assault.

MS. TIRRELL: Okay. And was he prosecuted? Did he go to court on it?

PROSPECTIVE JUROR: Yes.

MS. TIRRELL: Did it get resolved?

PROSPECTIVE JUROR: Yeah. He was found guilty for aggravated assault.

MS. TIRRELL: And when did that occur?

PROSPECTIVE JUROR: 2014. Oh, wait -- I think it was 2012.

MS. TIRRELL: And is there anything with regard to that incident, how your brother was treated, or how the matter was handled that causes you concern one way or another about the legal system?

Do you believe he was treated fairly during the process?

PROSPECTIVE JUROR: Yes.

MS. TIRRELL: And is there anything about that experience that your family went through with your brother that would influence your decision in any way in regards

to hearing the matter?

PROSPECTIVE JUROR: No.

MS. TIRRELL: You'd be able to listen to the instructions by the judge, and follow the rules provided?

PROSPECTIVE JUROR: Yes, ma'am.

MS. TIRRELL: Thank you.

PROSPECTIVE JUROR: You're welcome.

MS. TIRRELL: Juror number 14. You stated that you had some friends who practice law. What types of law do they practice?

PROSPECTIVE JUROR: One is a family attorney, and then one works for the city of Mesa.

MS. TIRRELL: And is there anything about your friends who practice law that would influence your decision one way or another in a case?

PROSPECTIVE JUROR: No.

MS. TIRRELL: Okay. And juror number 19.

PROSPECTIVE JUROR: Yes.

MS. TIRRELL: You also had answered the question with regards to a family member or yourself arrested?

PROSPECTIVE JUROR: Yes.

MS. TIRRELL: What type of situation was it?

PROSPECTIVE JUROR: I was arrested.

MS. TIRRELL: And if you don't feel comfortable about speaking about it, we can come back at a later time?

PROSPECTIVE JUROR: That's fine.
MS. TIRRELL: Okay. And what was the arrest for?
PROSPECTIVE JUROR: DUI.
MS. TIRRELL: And during that process, do you feel like you were treated fairly?
PROSPECTIVE JUROR: Yeah.
MS. TIRRELL: And is there anything about that that would make you feel one way or another in regards to a criminal matter?
PROSPECTIVE JUROR: No.
MS. TIRRELL: Thank you.
Juror number 22, you also had stated that either yourself or someone you knew had been arrested. Could you expand on that a little bit?
PROSPECTIVE JUROR: My son served eight years for breaking and entering and receiving stolen property for sale.
MS. TIRRELL: Okay. Is there anything about that process that would make you lean one way or another in the case?
PROSPECTIVE JUROR: No.
MS. TIRRELL: Do you think the matter was handled fairly and accurately?
PROSPECTIVE JUROR: I do.
MS. TIRRELL: Thank you, ma'am.

Excerpt from Jury Selection Transcript

Page 105: Trial court sends Prospective Jurors out for break.

MS. DAVISON: Okay. Thank you very much. I don't have anything further.

THE COURT: Thank you.

All right. Ladies and gentlemen, we will now take a short recess to give the lawyers an opportunity to complete the jury process.

There are many reasons why are a juror is selected, or not selected, so don't take it personally if you're not chosen. And only a set number of you can be on the jury.

Place wait outside the courtroom during the recess. When you're called back into the courtroom, please sit in the back of the courtroom. You can sit back there in any order.

During the recess do not talk about the case amongst yourselves, or with anyone else, and hopefully we can get this done in about 30 minutes.

Counsel, do you think that's reasonable?

MS. TIRRELL: Yeah.

MS. DAVISON: Yes, judge.

THE COURT: So make sure that you're ready to come back here in 30 minutes. Thank you.

(Whereupon, the prospective members of the jury panel exited the courtroom.)

Excerpt from Jury Selection Transcript

Pages 112-119: Parties argue the *Batson* objection.

MS. TIRRELL: Yes, your Honor.
THE COURT: And does the defense pass the panel for cause -- we will get into the other issues later, but just the cause issue?
MS. DAVISON: Yes, your Honor.
THE COURT: Okay. Thank you.
Okay. And the parties have completed their preemptory strikes?
MS. DAVISON: Yes.
MS. TIRRELL: Yes, your Honor.
THE COURT: All right. Is there anything we need to address?
MS. DAVISON: There is, your Honor.
Your Honor, I would like to make a Batson challenge. The purpose of my Batson challenge is that of the 29 that were available to us of which to pick, three were of color as noted in their questionnaires; two of which were African American. Both of the African Americans were stricken by the State.
I would request for a reason to be given and for that to be a reasonable and legitimate reason to be given for those strikes.
The third person that was of color that I mentioned that was available to us -- all the rest marked white on their questionnaire -- but the third one that was

available that was not struck was number 10.

Number 10 marked other and as Hispanic. That individual was also attempted to be struck for cause by the State on an earlier argument.

There was a fourth, that was number 27, that marked other, and not white, not Hispanic, not African American. That was number 27, who also announced that all children are his children and et cetera.

So he did appear to be white, but I don't know if his marking of his survey was another clever response as we all heard him give during his responses. So I'm not qualifying number 27 as an actual "other," although it's marked that way on his survey.

Other numbers -- 2, 20, and 10 -- did.

2 and 20 have both been struck by the State. 10 was attempted to be struck, but is still on the panel. And 10 was Hispanic.

Thank you.

THE COURT: All right. Ms. Tirrell.

MS. TIRRELL: Yes, your Honor.

I'll first address with respect to juror number 10. As the Court is aware, juror 10 had a lot of emotional things going on with her, considering her daughter had just been killed not even a year ago, which is why the State had recommended her being struck for

cause, because she seemed to be very upset.

She even seemed upset later on when we were going through the information background that's on the back of their card; she was tearing up again. That is why the State had suggested to strike her for cause, because this seemed to impact her emotionally greatly.

With respect to juror number 2, the State had struck her due to the fact that her brother was convicted of a crime that is of the same nature as this matter, aggravated assault, where he was found guilty.

She did not seem to be very sure with her responses to the State whether how that impacted her or not. So the State had great concerns due to her impartiality based upon her brother's conviction of aggravated assault, which this is an aggravated assault case.

So the State thought it was fair and quite within its right to strike someone who could possibly be impartial due to their response that they gave during voir dire.

With respect to juror number 20, the State had great concerns that that juror had -- potential juror had been on a criminal jury in the past which had found an individual not guilty. She had also been the foreperson of that jury, that caused the State also great pause for

consideration of having her on a jury.

The State looks at all of the individuals without respect to what they -- information they give us. And that is what the State bases their decisions on, not anything to do with anyone's color or nationality.

And, again, with respect to number -- juror number 27, the State presumes that he picked other because he seems to be an individual who has different opinions of what everyone is or should be.

Thank you, your Honor.

THE COURT: Thank you.

Ms. Davison.

MS. DAVISON: Your Honor, just with regard to number 2, that was a person that the State did follow up with. During the follow up, the State did ask about whether she was treated fairly. Her response was yes.

The State asked whether that experience would cause her to be influenced, she answered no, or at least her response was she would not be influenced by that experience in making a determination in this case.

And then when asked can she follow the rules, she stated that she can.

So, while I recognize the State is concerned about her brother being arrested and charged and found guilty of an assault, which is the same situation here as

far as assault, she stated that he was treated fairly, she won't be influenced, and she could follow the rules.

So because of her responses, I certainly believe that their might have been other motivations. I recognize this is a delicate argument to be made but, regardless, I do need to make the argument, particularly because now there literally is no African American jurors that even remain. And I guess that's the gist of my argument.

Thank you.

THE COURT: Thank you.

Was juror number 28 stricken?

MS. TIRRELL: No, your Honor.

THE COURT: All right. The defense has made a challenge indicating that it was their belief that the State exercised its challenges in a way that demonstrated purposeful discrimination by striking two -- possibly three minority jurors in this case.

And the State has articulated what it believes to be race-neutral explanations for their strikes.

The Court has reviewed the other strikes by both parties in this case, as well as the Court's notes. The Court does note that the State also struck jurors 19 and 20, who rendered not guilty verdicts in prior jury

cases that they were involved in. Even though juror 19 specifically said she could -- or that she believed that she had been treated fairly in a situation that she was questioned -- or he was questioned about -- excuse me.

Juror 20 is one of the ones that's at issue here, excuse me. But juror 19 had rendered a not guilty verdict and was stricken by the State.

Juror 25 served as a foreperson on a prior jury, and juror 25 was stricken by the State.

The Court does find that it's reasonable that the State would want to eliminate a juror that had an experience where their close family member was arrested for a similar charge to that which is involved in this case, and to strike jurors who may be stronger personalities or are willing to acquit based on the evidence presented to them.

So the Court does find that the explanation given by the State is race neutral, and the strikes will be allowed for jurors 20 -- excuse me -- 2 and 20.

And juror number 10, the Court had even expressed some concern about the juror's concern about her ability to focus on this case based upon her daughter's recent death, killed in a car accident.

So the Court does not find any purposefulness discrimination as to the three identified

jurors.

All right. Anything further?

MS. DAVISON: No, judge.

MS. TIRRELL: Nothing from the State, your Honor.

THE COURT: All right. Thank you.

(Whereupon, the prospective members of the jury panel entered the courtroom.)

THE COURT: Welcome back, everybody. Please be seated. Is there room for all of you back there?

Katrina, it looks like a couple of our jurors don't have a place to sit.

THE BAILIFF: This is usually pretty quick.

THE COURT: Okay. All right. Sorry about that.

The record will reflect the presence of the parties, counsel, and the jury panel.

Before the Clerk reads the numbers of who has been selected, I need to let everybody know that Maricopa County Superior Court is doing an evaluation of its court commissioners, and we would like to have your help. We want to know about your experience at court today. We're not asking you about the general legal system, or about other experiences with the court.

The survey is short, and the results are

anonymous. You may complete the paper survey being distributed or take it online.

If you choose to take it online, please visit the court's website; choose resources, and then select JPR for commissioners.

The attorneys will complete the survey online.

And thank you for taking the time to complete the survey.

If the clerk will now read the numbers of the jurors that have been selected in this case.

THE CLERK: Juror number 6, you are now juror number 1.

Juror number 7, you are now juror number 2.

Juror number 8, you are now juror number 3.

Juror number 9, you are now juror number 4.

Juror number 10, you are now juror number 5.

Juror number 13, you are now juror number 6.

Juror number 15, you are now juror number 7.

Juror number 22, you are now juror number 8.

Juror number 24, you are now juror number 9.

Juror number 28, you are now juror number 10.

THE COURT: Thank you, ladies and gentlemen.

Those of you who are not selected to serve

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

STATE OF ARIZONA, Plaintiff,	
vs.	1 CA-CR 18-0301
KEYAIRA PORTER, Defendant.	CR 2017-137-407-001 SE

BEFORE THE HONORABLE MONICA GARFINKEL, COMMISSIONER

Phoenix, Arizona
March 29, 2018

JURY TRIAL - DAY 3

TRANSCRIPT OF PROCEEDINGS

Reported by:
Miguel A. Benitez:
Certified Reporter 50713

ORIGINAL

Excerpt from Keyaira Porter's Direct Examination

Page 13: Ms. Porter is sworn in.

KEYAIRA PORTER,

having been first duly sworn, was examined and testified as follows.

DIRECT EXAMINATION

BY MS. DAVISON:

Q. Hello.

A. Hello.

Q. I know who you are, but would you please introduce yourself to the jury?

A. Keyaira Porter. Basically from Mississippi. I'm currently working in the restaurant industry called the Dressing Room. So I'm a line cook, and I really just love to cook. So I'm not really just too familiar with Arizona and everything that goes on out here. So --

Q. Keyaira, how old are you?

A. I'm 28.

Q. Okay. And you said that you were from Mississippi?

A. Yes, ma'am.

Q. When did you move here?

A. Last -- let's see, June of 2017.

Q. Of --

A. June or July, somewhere around there.

Q. Okay. So it was just a couple of months before

Excerpt from Keyaira Porter's Direct Examination

Page 27: Ms. Porter explains she had received permission to remove items from her car.

Q. Yeah, before the call.

A. Before the call?

Q. Like how long were you sitting around in the car?

A. For at least a good -- I give it like a good 20, 30 minutes. I was sitting in there for a while, because I was kind of wondering what was going on outside of the front of the truck.

Q. Okay. All right. So eventually you're able to make the call. And then you said your in-laws arrived?

A. Yes, ma'am.

Q. And what happened next?

A. After my in-laws had arrived and everything, I went over there to their car. They got out of their car to go speak to some officers. And when they were there speaking to the officers, I saw them walking back from the officers as they gave us permission to go get things out the truck.

Q. Okay. Now, when you say they were speaking to the officers, was that what was depicted in the photo?

A. Yes, ma'am, that picture right there.

Q. Okay. And while they were having that conversation, where were you?

A. In the -- behind the car, the white car.

Q. Okay. So again, I'm just going to put up what

Excerpt from Keyaira Porter's Direct Examination

Pages 31-37: Ms. Porter describes the incident.

it appears in the picture, and are speaking to officers.

A. Yes, ma'am.

Q. Okay. When they're done, where did they go?

A. After they got done conversating with the officer, they proceeded to go to the truck and proceeded to take things out of the truck.

Q. Did you assist them?

A. Probably a couple of seconds later. They went over to get like a couple of things out. I popped the trunk of their truck -- not the truck, but popped the trunk of their car and opened the doors where we could take things out and had already access of getting things in. And when I went over there, I went to the truck to start taking things out.

Q. Can you repeat that last thing?

A. That's when I went over to the truck to help take things out.

Q. Okay. And so did you actually remove things from the vehicle?

A. Yes, ma'am.

Q. And from where in the vehicle did you remove these things?

A. I started from like the trunk area of the car, because we had like a hitch back there, and he has like a whole bunch of tools. And I also moved to like -- well,

his truck is a GMC truck, so he had like a front seat and a back seat. And he had a lot of things in the back seat, so I started like going here and there.

But once it started getting to the very heavy things, like his tool chest and all that stuff, and I couldn't really just carry that, so I left most of that in there. But at the end, that's when I was going back to get the blanket and my glasses.

Q. Okay. And when you said "at the end," please describe what you mean by "at the end."

A. At the end, once -- probably like I would say a good five or 10 minutes of getting -- of all of us getting things inside and out of the truck, my mother-in-law, she was on the driver side of the truck, and I was on the passenger side of the truck, and that's when I reached inside the window to proceed to get the blanket and my glasses.

Q. Okay. And are they the glasses you're wearing now?

A. No, ma'am.

Q. Okay. Did you ever get those glasses?

A. No, ma'am.

Q. Did you ever get the blanket?

A. No, ma'am.

Q. Well, why were you going back for those things?

A. My glasses, I really need them because I can't quite just see, because they prescription. And my blanket, that's the only blanket that we had at the time, because we were staying in the trailer.

Q. Okay. And you didn't -- you didn't get either one, you said?

A. No, ma'am.

Q. Okay. Why didn't you get either one?

A. At the time, I was inside the window, and I had everything inside my hands to come outside the window, but I was being yelled at. And next thing you know, I'm getting pushed and like frontwards back into the -- the window -- where the rear view mirror on the outside of the truck, I'm being pushed. And I'm like, Why are you -- why are you putting your hands on me, like why are you touching me?

Q. Okay. You're making us smile. And you're saying, Why are you putting -- is that how you reacted? Is that how you reacted to the officer?

A. No. I was like scared, kind of like I'm nervous and scared right now.

Q. Okay. So you put your hands up. You said, Why are you putting your hands on me? Why are you touching me?

A. Yes, ma'am.

Q. Is that what you said?

A. At the time while he was doing that, I was like, Why have you got your hands on me? Why are you touching me?

I had my hands in the air, and that's when he grabbed my right arm, kind of did like a twirl. You know how officers will grab your arm I guess to put the cuffs on you? But at the time, he also had me in a head lock, where he was trying to like toss me down on the ground. And I guess in a way, from the curb and the rocks and everything, we just fell straight forward.

When I fell straight forward, I already had one arm already on my back, and he had my other arm like cuffed like this with his arm -- not his arm, but his leg -- his leg was on my arm like this, and his head -- his hand was like holding my head down like this.

Q. Okay.

A. So I'm like really just a pretzel -- crumpled up pretzel-like. I'm not really not down on the ground.

Q. Okay. So you fell down on the ground, not against the wall or against the truck?

A. No, ma'am. It was on the ground.

Q. Okay. And what was on the ground that you were laying on?

A. Rocks.

Q. Okay. And was this -- you said on the driver side, or the passenger side?

A. Passenger side. All this happened on the passenger side.

Q. Okay. And this is the side where there's the wall?

A. The wall, the bushes, the tree, the rock gravel, the -- the sidewalk -- not the sidewalk, but the -- the end of the --

Q. Curb?

A. Curb, yes, ma'am.

Q. You stated that earlier.

A. I know. I'm sorry.

Q. Okay. So you already described how he touched you, how you guys went down. Was that the only officer that you had physical contact with during that time?

A. No, ma'am.

Q. Okay. Will you describe what else happened?

A. After Officer Hermes had me on the ground, that's when the female officer had came right to his aid. And she actually had my arm in the cuff already on my back while he still had his pressure and stuff on my arm.

And I say probably like a good five seconds after that, that's when Officer Leon came, and that's when Officer Hermes took his hand off my head. Officer

Leon actually put his hand on my head. And in a way, to me, it felt like my head was being turned. And when I opened up my eyes and looked, I seen Officer Hermes just give me two good strikes to the eye.

Q. When you said he gave you two good strikes to the face, what did he use to --

A. He punched me.

Q. Okay. Do you use the word "strike," or do you usually you had use the word "punch" when you're describing somebody using a fist?

A. Punch.

Q. Okay. And you said that there were two?

A. Yes, ma'am.

Q. Were they both to the same location?

A. Yes, ma'am.

Q. And you said your eye?

A. Yes, ma'am, my left eye.

Q. Your what?

A. My left eye.

Q. Left eye, okay.

And did you end up receiving an injury as a result of those punches?

A. Yes, ma'am.

Q. Did you receive any other injuries?

A. Yes, ma'am.

Q. What other injuries did you receive?

A. I received like some swelling in my neck and some scratches on my leg. And my wrists was like really, really swollen and tight from the cuffs.

MS. DAVISON: Okay. I'm going to hand you what was marked as Exhibit number 8.

Okay. May I approach, Your Honor?

THE COURT: Yes.

MS. DAVISON: I neglected that earlier.

BY MS. DAVISON:

Q. Now, do you -- go ahead and flip through each of those pages. Let me know if you recognize what's in Exhibit 8.

And do you recognize what's in Exhibit 8?

A. Yes, ma'am.

Q. And what is in those photos for Exhibit 8?

A. The photos of me scratched up and abused -- well, not abused. Scratched up, and a bad eye, big fat black eye.

Q. And do those photos depict how you looked at the end of that night?

A. Yes, ma'am.

MS. DAVISON: Okay. And I'm also going to show you what was --

Well, I'd like to move to admit Exhibit 8 into

Excerpt from Keyaira Porter's Direct Examination

Pages 42-49: Ms. Porter describes the incident, her injuries, and being taken to the hospital.

A. I mean, he was like -- not on my arm, but on my head, right on top.

Q. Okay. Now, could you feel those officers?

A. Yes.

Q. And when I asked could you feel, how did you feel, like what were you feeling?

A. Basically what I was feeling, I might as well just had a stomach full of rocks and a chest full of rocks, because I was like flat down on rocks. And I also said once before, I have a hernia, so most likely the rocks was really just pushing everything inside. And that's not a good feeling at all.

Q. Okay. What of the officers did you feel? Did you feel --

A. I felt most of the pressure up on my upper part than my lower part.

Q. Okay. And could you feel any of their weight?

A. I felt all of their weight, especially on my -- like my head and my shoulder and my arm being like this, I mean, it was just -- I couldn't move. I couldn't do anything. Only thing I'm feeling is rocks. And like I said, my face being moved, you could literally just see rocks. I mean, I'm just laying on a bed of rocks.

Q. Okay. Were you -- were you being given -- I'm not asking what the commands were, but were you given any

commands during that time?

A. No, ma'am. Commands as in -- I'm guessing you're being under arrest or -- well, for -- okay. I'm just going to go by how we do things back in Mississippi. If we're given a command or anything, either -- when they proceed to arrest you, either they've already got their hands on you and got you in a cuff and let you know that you're fittin' to be arrested and being tooken to jail, and I -- and they read you your rights and everything. But here, it really wasn't too much of anything being said at all.

Q. Okay. So when they -- you were down on the ground with them, you don't recall any kind of command given to you.

A. Besides just yelling, Stop biting.

Q. Stop what?

A. Stop biting.

Q. Biting, okay.

And did you bite?

A. No, ma'am.

Q. Okay. Do you know where that conversation -- that question came from -- or that statement came from?

A. No, ma'am.

Q. So after all this weight is on you, is it from all of the officers, one officer?

A. No, ma'am. It's only just from Officer Leon and Hermes.

Q. Okay. What about Rope? You said she was by your --

A. She was --already had my arm in cuffs and just really on my leg. I mean, that's the only part of my body she really was on.

Q. Okay. Could you feel her weight on your leg?

A. Not as much as all the other weight on the front.

Q. From the two men?

A. Yes, ma'am.

Q. Okay. And were you able -- you said that there was one arm underneath you?

A. Yes, ma'am.

Q. Okay. Did you say that Hermes' arm was with you?

A. No. Actually, his arm is actually holding my arm, like his leg -- like, okay. He got his whole leg -- his body pressure on me, but he got this one arm -- like his hand just like literally just holding my arm. And he's yelling out, Stop biting, stop biting.

And I'm like, How can I bite you? I'm not biting you. Because my face is actually turned the opposite way from him.

And that's when Officer Leon had came, and that's when he put all the pressure down on my head and on the other side of my shoulder. And that's why I was saying, he like took my head towards I was leaning, and that's where I got the couple of strikes to the eye or punch to the eye.

Q. Okay. So was your left side of your face exposed at that time so he could strike you?

A. Uh-uh.

Q. Okay.

A. I was like looking at the truck. When we fell down on the ground and everything, my whole face and everything was like turned towards the truck.

Q. How was he able to deliver a punch, two punches, you said? How was he able to deliver two punches to the left side of your face?

A. Like my head was -- like I was saying, my head was obviously -- Officer Leon, I felt Officer Leon turned my head towards Officer Hermes, and that's when I seen Officer Hermes -- like I said, we were lying down on the ground, and I see his elbow back and forth, which is like one, two punches to the face.

Q. Okay. And that was which officer?

A. Officer Hermes.

Q. Okay. Once those two punches happened, did it

have an effect on you?

A. Yeah. It kind of made me a little dizzy and kind of like, Whoa, did you really just punch me? And I kind of went back as in like, I can't believe this really is going on. This is really happening to me right now.

Q. Okay. You said you went a little bit dizzy?

A. Yeah.

Q. Okay. Did it -- describe your dizziness, just because it can vary for people.

A. Kind of like when you -- let's just say when you get a surprising -- I don't want to use that example.

Dizziness, I want to say dizziness, like kids spinning around, and they will get really, really dizzy, that kind of dizziness. It was more of like a dizzy, wake-up call, like, Whoa, did I just really get hit in my face type thing.

Q. Okay. Did it --

A. It was a shocker.

Q. Did it affect your vision at all?

A. Yes, ma'am.

Q. Okay. And in what way did it affect your vision?

A. My eye was blurry. I really couldn't see anything in my eye.

Q. Okay. And after the two punches that you took

to the face, what happened next?

A. After they done -- well, after he punched me in my face and everything, he finally got the cuff -- well, he finally got my arm and put it in the other cuff. That's when they lift me off the ground. And Officer Leon had took me over to the edge of the curb and sat me down, and that's when he tightened up the cuffs.

Q. Okay. And then once you were -- did you sit on the curb then --

A. Yes, ma'am.

Q. -- or did you stand on it?

A. I was sitting on the curb.

Q. And then what happened after that?

A. I requested to see an ambulance.

Q. And did you get an ambulance?

A. I got -- I think it was a fire truck, a fire marshal. They got there first. And then probably like some -- I'm going to say probably like a good 30 minutes or something, that's when the ambulance came, and the female officer went with me.

Q. Okay. So your recollection is, is that emergency fire personnel --

A. Uh-huh.

Q. -- arrived after you had already been punched twice in the face.

A. Yes, ma'am.

Q. After the body weight of the two officers was already on you.

A. Yes, ma'am.

Q. Okay. There wasn't a fire truck that was already there at the scene?

A. No, ma'am.

Q. Okay. And then you said that you got in the ambulance?

A. Yes, ma'am. Once the fire marshal -- once they got done looking at me and they said they was going to have an ambulance come, then once the ambulance came, me and the female officer, we rolled in the ambulance together. I wouldn't say me and the female officer was conversating up in there, like she was listening and giggling, but me and the paramedics, I guess that's what you call them, we was up in there and asking questions about the things that was inside the ambulance, and literally just going on our way to the hospital.

Q. Okay. So the female officer -- you said the female officer.

A. Yes, ma'am.

Q. Are you referring to a different female officer, or the female officer that was involved in the --

A. The female officer that was involved at the

scene.

Q. That was involved in?

A. In the incident.

Q. Okay. So one of the people that was there. I think you said she was on your leg?

A. She was the one that already had my cuffs on -- already had the cuffs on my arm and that was on my leg in the back.

Q. She went with you in the ambulance?

A. Yes, ma'am.

Q. And you went where in the ambulance?

A. Yes, ma'am.

Q. No. You went where?

A. I went to the hospital.

Q. And we saw the photos. Is that where those photos were taken?

A. Yes, ma'am.

MS. DAVISON: That's all the questions I have. Thank you very much, Keyaira.

THE COURT: Thank you.

Cross examination.

MS. TIRRELL: Yes, Your Honor.

(Next page)