IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-250382 TRIAL NO. 24/CRB/4719/B
Plaintiff-Appellee,	:	
vs.	:	
FERNANDO TREVINO,	:	*JUDGMENT ENTRY*
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

For the reasons set forth in the Opinion filed this date, the judgment of the trial court is reversed and the cause is remanded.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs be taxed under App.R. 24.

The court further orders that (1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and (2) the mandate be sent to the trial court for execution under App.R. 27.

To the clerk:

Enter upon the journal of the court on 9/9/2026.

Pursuant to App.R. 30, the clerk is directed to send all parties, or their counsel if represented, a copy of the court's judgment and note such action on the docket.

By: Jennifer Hensley
Administrative Judge

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vs.	:	
FERNANDO TREVINO,	:	*O P I N I O N*
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: September 9, 2026

Emily Smart Woerner, City Solicitor, *Susan Zurface*, Chief Prosecuting Attorney, and *Joseph M. Cossins*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Angela Chang, Hamilton County Public Defender, and *Joshua A. Thompson*, Assistant Public Defender, for Defendant-Appellant.

KINSLEY, Presiding Judge.

{¶1} Defendant-appellant Fernando Trevino appeals the judgment of the Hamilton County Municipal Court finding him guilty of soliciting, a misdemeanor of the third degree. Trevino raises four assignments of error. In the first, he argues under *Batson v. Kentucky*, 476 U.S. 79 (1976), that the prosecutor improperly excluded two prospective jurors from serving on the jury on the basis of their race. In the second, third, and fourth, he contends that the trial court erred in allowing a police officer to testify after the State failed to disclose her as a witness, that the prosecutor improperly vouched for the State's witness during closing arguments, and that his conviction was against the manifest weight of the evidence.

{¶2} We agree with Trevino that the trial court erred by overruling his *Batson* challenge. Even affording the trial court's decision substantial deference, as we are required to do on appeal, the record before us reveals that the State's explanation for its decision to remove at least one of the identified prospective jurors was pretextual rather than race-neutral. When asked to provide her rationale for using the majority of the State's peremptory strikes to excuse the only two African-American females from the jury, the prosecutor proffered a plausible reason—that a relative of one of the African-American jurors had served time in prison. But a similarly-situated white prospective juror, who also had a family member with ties to the criminal legal system was not stricken, even though that prospective juror expressed hostility towards law enforcement and the African-American juror did not. Defense counsel pointed to this comparator juror as evidence of pretext.

{¶3} Faced with this factual landscape, the trial court improperly truncated its analysis of Trevino's *Batson* challenge. It accepted the State's proffered race-neutral explanation without considering the impact of the State's decision not to strike

the white prospective juror. As we explain in this opinion, and based on the well-settled precedent of the United States Supreme Court, this was error. We accordingly reverse Trevino's conviction and remand the cause to the trial court.

Background

{¶4} On March 6, 2024, the Cincinnati Police Department employed Officer Sarah Cronin to pose as an undercover sex worker. While standing on a corner, she greeted Trevino and chatted with him, introducing herself as "Sidney." At the end of their conversation, Trevino gave Cronin his phone number, which Cronin then gave to Officer Josh Espitia. Posing as "Sidney," Espitia texted Trevino that evening, and the two exchanged text messages for several days. On March 21, 2024, Trevino sent "Sidney" a text message offering ten suboxone pills in exchange for sex. They planned to meet that afternoon. When he arrived at the agreed-upon location, Trevino was arrested and charged with solicitation and possession of criminal tools, both misdemeanors.

{¶5} Trevino elected to try his case to a jury. During jury selection, the State used two of its three peremptory challenges to excuse the venire's only two African-American women, Juror 7 and Juror 10. After the State excused Juror 10, Trevino's attorney lodged a *Batson* challenge, noting "So far, both individuals who have been excused via peremptory challenges by the City have been black women, racial minorities. My client is also a racial minority . . . ."

{¶6} The trial court asked the prosecutor to explain the State's rationale. As to Juror 10, the prosecutor referenced the juror's disclosure in voir dire that her son had recently been convicted of burglary and sentenced to three years in prison. This led the prosecutor to fear that Juror 10 would be biased against prosecutors or police or would feel sympathy towards Trevino. The prosecutor made this argument even

though Juror 10 herself had dispelled the exact concerns the State expressed. More specifically, when asked by the prosecutor in voir dire whether there was "anything about [her] involvement in [her son's case] that would affect [her] ability to be fair and impartial and in making [her] decision here today," Juror 10 said, "No." She also denied that "anything about that experience would affect [her] and [her] decision if [she] were to sit on a jury here today." When asked more specifically whether she had any feelings about police officers to share and whether she had any "bad feelings about the prosecutor or police officers" in her son's case, she also said, "No."

{¶7} As to Juror 7, the prosecutor recounted that she "kind of routinely said she did not trust the police" and that she had concerns about officers who falsify evidence. But this was not exactly what Juror 7 had said in voir dire. In response to being asked her thoughts about undercover officers, she said, "I don't have any negative thoughts. They serve a purpose, to investigate." Juror 7 did suggest, however, that police might not always be truthful. When asked by the prosecutor, "Is there anything about the work [police officers] do that would lead you to think a crime hadn't been committed if somebody was dealing or interacting with an undercover police officer?," she responded, "No, unless they falsified any evidence." She further indicated that, in her view, police can "sometimes . . . be biased against people of color." But the only example she gave of this bias was in the use of excessive force, a situation the prosecutor was clear did not exist in this case. Juror 7 also said that she would follow the law even if she thought the police were being unfair. After the prosecutor argued that Juror 7 routinely said she did not trust police, the trial court reviewed Juror 7's jury questionnaire, on which she wrote, "I lack confidence in police officers."

{¶8} Defense counsel then attempted to rebut the prosecution's race-neutral

explanations for both prospective jurors. As to Juror 10, defense counsel pointed to two specific facts that rendered the State's explanation unsatisfactory. First, defense counsel highlighted that Juror 10 was directly asked whether she would be biased against the prosecution and indicated that she would not. Thus, in the defense's view, Juror 10 had directly dispelled the concern that the State raised that she might be motivated against the prosecution or for the defense based on her son's experience. Second, defense counsel argued that there were other prospective jurors whose family members had been charged or convicted of crimes who were not the subject of peremptory challenges by the State—in particular a white female juror, Juror 14, whose sister had been charged with a crime. This other juror differed from Juror 10 only by race. That being the case, the defense argued, the potential for bias arising from a family member's conviction could not be the real reason for Juror 10's strike. Rather, the State's use of a peremptory challenge had to be racially motivated. Responding to the difference in the two jurors, the State pointed to the fact that the conviction of Juror 10's son was recent and that the sister's criminal charge was a "wrong place/wrong time" situation.

{¶9} Addressing Juror 7 and the statement about police officers on her questionnaire, defense counsel argued that the State had rehabilitated the juror's statement in voir dire. In questioning the juror, the prosecutor elicited comments that the juror did in fact trust police and was only skeptical in situations where officers planted evidence, which she described as an "egregious, rare circumstance." For this reason, defense counsel argued that the State had been inaccurate in describing the basis for its race-neutral explanation.

{¶10} After hearing defense counsel's arguments, the trial court denied the *Batson* challenge. In doing so, it said, "[The prosecutor] has at least identified two

areas that she has grounds or finds she has or believes she has grounds to exclude, so I'm going to deny the *Batson* motion." In relying solely on the prosecutor's belief, the trial court did not expressly resolve the question of whether the prosecutor's arguments were pretextual, particularly as they applied to Juror 10 and the white female juror whose sister had been criminally charged.

{¶11} A jury was then empaneled and sworn that included no female African-American jurors.

{¶12} Following the presentation of evidence, the jury found Trevino guilty of solicitation and not guilty of possession of criminal tools. Trevino appealed. [1]

Analysis

{¶13} We begin with Trevino's first assignment of error, in which he contends that the trial court erred in denying his *Batson* challenge as to Jurors 7 and 10.

A. The Batson *Standards*

{¶14} Ordinarily, a prosecutor may exercise a peremptory challenge "for any reason, or no reason at all." *Hernandez v. New York*, 500 U.S. 352, 374 (1991). But a defendant has "the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Batson*, 476 U.S. at 85-86. Therefore, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 588 U.S. 284, 303 (2019). In *Batson*, the Supreme Court established a three-step procedure for evaluating claims of racial discrimination in peremptory strikes: "First, the opponent of the strike must make a prima facia

[1] The trial court sentenced Trevino to a $250 fine and ordered him to pay $130 in court costs and a $25 public defender fee. Trevino paid the fine and court costs but has not paid the $25 public defender fee. On October 6, 2025, that amount was sent to collections and still remains unpaid. The appeal of a misdemeanor conviction is not moot when a defendant's fines, fees, or costs remain unpaid. *See State v. Henderson*, 2024-Ohio-2312, ¶ 18-19 (1st Dist.). Because Trevino's $25 public defender fee remains outstanding, this appeal is not moot; however, payment of that fee would have rendered this appeal moot.

showing of discrimination. Second, the proponent must give a race-neutral explanation for the challenge. Third, the trial court must determine whether, under all the circumstances, the opponent has proven purposeful racial discrimination." *State v. White*, 85 Ohio St.3d 433, 436 (1999), citing *Batson* at 96-98.

{¶15} To meet the first prong of *Batson*, a challenger must demonstrate that (1) the prosecution used a peremptory challenge to excuse a member of a cognizable racial group, and (2) the facts and any other relevant circumstances raise an inference that the prosecution used the peremptory challenge to exclude a juror on account of race. *Ohio v. Williams*, 2021-Ohio-3491, ¶ 25 (10th Dist.). Whether a defendant satisfied these standards is a moot question if the trial court moves to the second step of *Batson*. *Hernandez* at 359; *State v. Akins*, 2024-Ohio-1491, ¶ 14 (1st Dist.).

{¶16} At step two of *Batson*, the proponent of the peremptory challenge is required to provide a race-neutral explanation for the strike. *White* at 436. To do so, the prosecution must "give a clear and reasonably specific explanation of [its] legitimate reasons for exercising the challenge." *State v. Berry*, 2019-Ohio-3902, ¶ 13 (10th Dist.). The explanation, however, need not rise to the level of a challenge for cause. *Id.* But prosecutors must nonetheless "be scrupulous in building a record which legitimately demonstrates their articulated concern." *State v. Manns*, 2006-Ohio-5802, ¶ 50 (2d Dist.).

{¶17} Finally, step three of *Batson* involves two components. First, the trial court must afford defense counsel "a sufficient opportunity to rebut the prosecutor's proffered race-neutral reasons for striking" the challenged jurors. *Pitchford v. Cain*, ___ U.S. ___, 146 S.Ct. 1345, 1351-1352 (2026). Then, after hearing the defendant's arguments, the trial court must itself "determine[] whether the prosecutor's stated reasons were pretextual." *Id.* at 1352. In doing so, the trial court must consider all of

the circumstances to assess whether the party opposing the peremptory challenge has proved purposed racial discrimination. *State v. Adams*, 2015-Ohio-3954, ¶ 160. In determining pretext, a pattern of using multiple peremptories against racial minorities might give rise to an inference of discrimination. *Flowers*, 588 U.S. at 307, citing *Batson*, 476 U.S. at 97. Pattern or not, the trial court must decide at step three whether the reason the prosecutor offered at step two is credible. *State v. Thompson*, 2014-Ohio-4751, ¶ 62. It cannot "simply accept a proffered race-neutral reason at face value, but must examine the prosecutor's challenges in context to ensure that the reason is not merely pretextual." *State v. Frazier*, 2007-Ohio-5048, ¶ 65.

{¶18} The trial court need not make specific factual findings in resolving the third step of *Batson*. *Id.* at ¶ 98. Rather, it may deny a *Batson* challenge in summary form, by clearly rejecting the challenge, such as by stating on the record that the prosecutor offered a "racially-neutral reason" for the strike. *Adams* at ¶ 160-161. "The trial court's finding at step three is entitled to deference, since it turns largely on evaluation of credibility." (Cleaned up.) *Thompson* at ¶ 53.

{¶19} In determining at the third step whether a prosecutor's explanation is sufficiently race-neutral or is instead a pretext for racial discrimination, courts consider a range of factors that may individually or collectively establish pretext. *See State v. Singer*, 2019-Ohio-1922, ¶ 24 (6th Dist.), citing *Ex parte Branch*, 526 So.2d 609 (Ala. 1987). These include:

(1) Whether the prosecutor's proffered reasons for the peremptory strike are not related to the facts of the case. *Id.* This occurs when the prosecution's proffered reason for striking a juror is factually contradicted by the record. *See, e.g., Snyder v. Louisiana*, 552 U.S. 472, 479-483 (2008) (finding a *Batson* violation, even under a highly deferential standard of review, where the prosecution based its strike

on a juror's absence from his student teaching obligation, despite the fact that the dean of the student's school had reported the absence not to be a problem and the student had expressed no further concerns about jury service).

(2) Whether the prosecutor failed to ask questions in voir dire of the challenged juror or did not ask meaningful questions. *Singer* at ¶ 24.

(3) Whether the prosecutor did not strike members of the venire with the same or similar characteristics of the challenged juror, signaling disparate treatment. *Id.* As the United States Supreme Court has held, a trial court's denial of a *Batson* challenge is clearly erroneous when it does not take into account a prosecutor's dissimilar treatment of white jurors who also present the same concerns that precipitate the challenged strike. *Snyder* at 474, 483 ("The implausibility of the prosecutor's explanation is reinforced by his acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the challenged juror's]."); *see Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not.").

(4) Whether members of the venire were examined in a disparate fashion during voir dire, e.g., whether the prosecutor asked a question designed to provoke a disqualifying response to black jurors but not white jurors. *See Flowers*, 588 U.S. at 308. The United States Supreme Court considered the relevance of this factor in *Flowers*, noting that prosecutors asked 29 questions in voir dire per black juror but only one question per white juror. *Id.* While it held that this criterion alone was not enough to constitute a *Batson* violation, it credited the prosecutor's disparate

treatment of black and white jurors in voir dire as a basis for finding racial discrimination in combination with other factors. *Id.* at 310.

(5) Whether the prosecutor's use of peremptory challenges eliminates all remaining racial minorities on the jury. *Singer* at ¶ 24. A prosecutor need not strike all of the racial minorities from the venire for this criterion to support a finding of discrimination. As the Supreme Court noted in *Flowers*, striking five of six black jurors from the venire raised an inference that the prosecution violated *Batson*. *Flowers* at 315.

(6) Whether the prosecutor offers an explanation based on group bias where the group trait is not shown to apply to the challenged juror specifically, e.g., assuming teachers as a class are "too liberal" without directing any specific questions to the individual juror to show the juror's "potentially liberal nature." *Singer* at ¶ 24.

{¶20} The Sixth District applied these factors to the prosecutor's use of a peremptory strike to excuse the venire's sole African-American juror in *Singer*. *Id.* at ¶ 5. The trial court had permitted the strike on the basis of the prosecutor's proffered race-neutral reasons, which included the juror's youth, hair color, lack of education, and employment as a custodian. *Id.* But on appeal, the Sixth District reversed, finding the prosecutor's explanation to be pretextual. *Id.* at ¶ 40-41. As to the first and sixth factors, the court highlighted the absence of any information that connected the juror's youth and educational status to an inability to serve as a juror, specifically faulting the State for "fail[ing] to provide any explanation as to why this case required a juror with a certain degree of education or maturity." *Id.* at ¶ 29-31. As to the second factor, the court noted that the State asked the challenged juror a single question in voir dire which was unrelated to its ultimate reasons for striking her. *Id.* at ¶ 32-33. In considering whether similarly-situated white jurors were also subject to challenge, the

court found it "peculiar" that the State did not strike at least four other white jurors with educational levels comparable to the challenged juror's. *Id.* at ¶ 34. As to the fifth factor, the court acknowledged that the State used only one of its four peremptory challenges to strike an African-American juror. *Id.* at ¶ 37. But as to the fourth factor, it concluded that the prosecutor had not disparately questioned the prospective jurors and had not attempted to provoke disqualifying responses as a result. *Id.* at ¶ 36. Even though not all of the factors weighed in favor of pretext, the Sixth District still concluded that the trial court erred in denying the *Batson* challenge and reversed the defendant's conviction. *Id.* at ¶ 40-41.

{¶21} *Singer*'s holding is consistent with a litany of United States Supreme Court cases that find *Batson* violations by employing robust step-three analysis. For example, in *Snyder*, 552 U.S. at 479-483, the Supreme Court found the trial court's *Batson* challenge denial clearly erroneous when it implicitly relied upon an explanation by the prosecutor that was belied by the factual record. As one rationale for its peremptory strike, the prosecution cited the challenged juror's statement during voir dire that he was a college student participating in student teaching as part of his course of study. *Id.* at 478. He shared a concern that missing class would cause him not to complete this degree requirement. *Id.* at 480. But the trial court then had its law clerk contact the student's college dean, who relayed to the student and the trial court that the student could serve on the jury without compromising his student teaching obligation. *Id.* at 481. After that, the student never brought up the concern again. *Id.* Against this backdrop, the Supreme Court considered the prosecutor's concern to be "implausible" and therefore a pretext. *Id.* at 483-484. And because it was pretextual, it gave rise to an inference that it was discriminatory. *Id.* at 485.

{¶22} Similarly, in *State v. Kirk*, 2019-Ohio-3887, ¶ 51 (8th Dist.), the Eighth

District reversed the trial court's denial of a defendant's *Batson* challenge where the prosecutor advanced unsupported assumptions about an African-American juror's fitness to serve on the jury. When asked about his occupation, the juror indicated that he worked as an engineer at a hotel, performing maintenance tasks like repairing the air conditioning and fixing the lights. *Id.* at ¶ 40. The prosecutor took issue with the juror's use of the term "engineer" to describe this work, characterizing his response as "up stating" and not "fully honest." *Id.* The prosecutor also contended that the juror displayed inattentive body language which, in combination which his dishonest response, justified excusing the juror from service. *Id.* The court of appeals disagreed. *Id.* at ¶ 51. It noted that the juror responded truthfully, articulately, and appropriately to the prosecutor's voluminous questions in voir dire, which was at odds with the prosecutor's characterization of the juror. *Id.* In finding pretext, the appellate court weighed the fact that the juror himself expressed no reservations about his ability to serve against the prosecutor's unfounded assumption that the juror was dishonest. *Id.*

{¶23} We find *Singer*, *Snyder*, and *Kirk* particularly instructive in resolving Trevino's claim of pretext in this case.

B. Trevino's Argument on Appeal

{¶24} Turning to Trevino's argument, he contends the trial court improperly denied his *Batson* challenge because the State's explanations for striking Jurors 7 and 10 were pretextual rather than race-neutral. We agree, at least as to Juror 10. And because the improper exclusion of even a single juror violates *Batson*, we focus our analysis on the circumstances of Juror 10's peremptory strike. *See Flowers,* 588 U.S. at 303.

{¶25} To begin, we address the level of deference owed to the trial court's findings. A trial court's finding of nondiscrimination at step three of *Batson* is entitled

to deference because it is essentially an evaluation of the prosecutor's credibility. *Akins*, 2024-Ohio-1491, at ¶ 13 (1st Dist.). But here we are unable to discern whether the trial court actually reached step three. Rather than denying Trevino's *Batson* challenge outright, which would permit us to presume the trial court considered all of the circumstances Trevino raised as pretext, the trial court instead ruled on the basis of what the prosecutor *believed*: "[The prosecutor] has at least identified two areas that she has grounds or finds she has or believes she has grounds to exclude, so I'm going to deny the *Batson* motion." This sounds more like a finding under step two, which tests the neutrality of the prosecutor's explanation on its face. And we do not defer to the trial court's legal conclusions at step two. *See, e.g., United States v. Kimbrel*, 532 F.3d 461, 467-468 (6th Cir. 2008).

{¶26} But even affording deference to the trial court's *Batson* challenge denial as if it were a step-three finding, the record reveals that prosecutor's explanation as to Juror 10 was in fact pretextual. This conclusion arises from the Supreme Court's determinations in *Snyder*, 552 U.S. 472, and *Flowers*, 588 U.S. 284, as well as the Sixth District's holding in *Singer*, 2019-Ohio-1922 (6th Dist.). In all three cases, a similar combination of factors resulted in a finding of clear error—(1) the contradiction of the prosecutor's explanation to the actual facts of the case, (2) the lack of meaningful questions by the prosecutor connected to one basis for the strike, (3) the prosecutor's failure to strike a prospective white juror with the same characteristic giving rise to the concern, (4) the prosecutor's use of multiple peremptory challenges to strike nearly all African-American jurors from the jury, and (5) the prosecutor's reliance on an explanation based on group bias in the absence of any evidence that the group trait applied to the challenged juror. *See Snyder* at 479-485; *Flowers* at 302; *Singer* at ¶ 24-41. In all three cases, the trial court's denial of a *Batson* challenge was reversed.

1. Disconnect between the Prosecutor's Explanation and the Facts of the Case

{¶27} The prosecutor claimed to strike Juror 10 because her son's criminal conviction might bias her against the State and police. But Juror 10 answered numerous questions in voir dire indicating the opposite. In response to the prosecutor's inquiry, she indicated that she held no such bias and that her son's case would not affect her ability to serve.

{¶28} This case is similar to *Snyder*, in that the factual record conflicts with the prosecutor's proffered explanation. In *Snyder*, the prosecutor offered the juror's student teaching obligation as one basis to justify striking him from the jury. *Snyder*, 552 U.S. at 479. But the record did not support that the juror in fact had such an obligation that would conflict with his ability to fulfill his jury service, which rendered the prosecutor's explanation "suspicious." *Id.* at 479-483. As in *Snyder*, the prosecutor's explanation in Trevino's case was similarly "implausib[le]" and, by inference, discriminatory. *See id.* at 483; *see also Foster v. Chatman*, 578 U.S. 488, 506-507 (2016) (describing a prosecutor's proffered explanation for a race-based peremptory strike as "difficult to credit" when it was factually contradicted by the record). This factor is suggestive of pretext.

2. Lack of Meaningful Questions to Support the Prosecutor's Explanation

{¶29} In addition to explaining that its strike was based on a concern that Juror 10 would be biased against the State, the prosecution also argued that Juror 10's experience with her son might cause her to be biased in favor of Trevino. But it asked no meaningful questions to ferret out this concern. At most, it asked whether "anything about that experience would affect [her] and [her] decision if [she] were to sit on a jury here today." But it never asked how she felt about Trevino in particular

or if she harbored any particular sympathy for him.

{¶30} In *Singer*, the Sixth District held that a prosecutor's failure to ask meaningful questions about the basis of his concern—a prospective juror's lack of education—was indicative of pretext. *Singer*, 2019-Ohio-1922, at ¶ 32-33 (6th Dist.). The juror's questionnaire indicated that she was employed as a custodian, which perhaps implied a lack of advanced education, but did not otherwise indicate how much education the juror had completed. *Id.* at ¶ 32. The court noted that if the prosecutor were in fact so concerned about the juror's education level, he would have asked additional questions to learn the answers. *Id.* at ¶ 33.

{¶31} Like in *Singer*, the prosecutor's failure to ask questions about how Juror 10's experience with her son may have affected her view of Trevino suggests pretext. Juror 10's questionnaire merely disclosed that her son had been convicted of a crime and was serving a three-year sentence. It did not contain any indication of how that situation may have evoked sympathy for Trevino, if at all. If the prosecutor truly felt this was a risk, she could and should have asked. The lack of meaningful questions in this area suggests pretext.

3. Similarly-Situated White Juror

{¶32} The prosecution struck Juror 10 because of her son's criminal case but did not exercise a peremptory to strike Juror 14, a white female juror with an arguably more prejudicial circumstance. Like Juror 10, Juror 14 also had a family member charged with a crime—her sister. But unlike Juror 10, Juror 14 disclosed that she had some "mixed feelings" about police. In response to questioning from the prosecutor, she said she would put them aside if she were called to serve on the case. Notably, however, the prosecutor never asked her to describe what the "mixed feelings" were, a question that would have been relevant if the prosecutor were actually seeking to

unearth potential jury bias.

{¶33} The prosecutor's use of peremptory strikes to exclusively excuse African-American jurors who present the same concerns as similarly-situated white jurors has been the most consistent basis on which courts find clear error in a trial court's *Batson* challenge denial.[2] This was the case in *Snyder*, 552 U.S. at 479-483, where several prospective white jurors presented the same types of scheduling concerns that the challenged black juror raised but were left on the jury; in *Flowers*, 588 U.S. at 313-315, where prosecutors struck a prospective black juror on the basis that she might know the defendant's family while not striking prospective white jurors who had similar connections to the defendant; in *Singer*, 2019-Ohio-1922, ¶ 34 (6th Dist.), where the prosecutor struck a black custodian on the basis of a perceived lack of education while not striking white jurors also employed in menial jobs; and a host of other cases presenting similar fact patterns. *See, e.g., Foster*, 578 U.S. at 512-513; *Miller-El*, 545 U.S. 231.

{¶34} When a prosecutor's "proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Foster* at 512. Given that Juror 14 expressed "mixed feelings" about police and Juror 10 did not, the prosecutor's basis for striking Juror 10 rather than Juror 14 appeared to be racially motivated. This is yet another factor that weighs in favor of pretext.

4. Using Multiple Peremptory Challenges to Strike Nearly All Black Jurors

{¶35} The prosecution used two of its three peremptory challenges to remove

[2] A defendant is not required to identify an identical white comparator juror. *Flowers*, 588 U.S. at 311-312. Merely a similar counterpart will do.

the only two African-American women from the jury. In *Flowers*, the Supreme Court found that the fact the prosecution excused five of six black prospective jurors implied discrimination. *Flowers*, 588 U.S. at 307 (noting that a pattern of using peremptories to strike venire members of a particular race can create an inference of racial discrimination); *see also Miller-El*, 545 U.S. at 250 (holding that the State's decision to retain a single black juror does not negate the inference of discrimination created by a pattern of race-based peremptory strikes). Applying *Flowers*, this pattern of excusing jurors gives rise to an inference of pretext.

5. Group Bias

{¶36} Finally, the prosecutor based the explanation for striking Juror 10 on assumptions about how people whose loved ones have been convicted of a crime might react. The prosecutor assumed that such a family member would harbor negative sentiments about prosecutors and police and applied that perspective to Juror 10. But there was no evidence that Juror 10 actually felt this way, much less that any critical number of family members of those with criminal convictions do.

{¶37} The Ohio Supreme Court has held that the potential bias that may result when the family member of a potential juror has experience "with the criminal justice system *may* be a legitimate, racially-neutral reason for exercising a peremptory challenge against the prospective juror." (Emphasis added.) *State v. Garrett*, 2022-Ohio-4218, ¶ 84, citing *State v. May*, 2015-Ohio-4275, ¶ 51 (8th Dist.). The Court made this observation in a case that solely challenged *Batson's* second step, as defense counsel mounted no argument or evidence to demonstrate pretext at the third step. *Id.* at ¶ 72. Thus, this observation is of little utility in resolving arguments of pretext at *Batson*'s final step. After all, as the United States Supreme Court has observed, a peremptory challenge based on a "family history of criminality" "might [be] selective

and based on racial considerations" even though it appears at first blush to be race-neutral. *Miller-El*, 537 U.S. at 344.

{¶38} That is the circumstance here. It is true that Juror 10's son was involved in the criminal legal system, but so was Juror 14's sister. Juror 14 was permitted by the State to serve on the jury, and Juror 10 was not. This discrepancy indicates that the State's proffered reason "might have been selective and based on racial considerations." *See id*.

{¶39} Adding these five factors together, as the Supreme Court has instructed, and considering the totality of the circumstances, leads to the conclusion that the State's use of a peremptory challenge to excuse Juror 10 was substantially motivated by discriminatory intent. *See Flowers*, 588 U.S. at 315-316 ("We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of [a] black prospective juror . . . was not motivated in substantial part by discriminatory intent."). We therefore sustain Trevino's first assignment of error as to Juror 10, reverse the judgment of conviction, and remand the cause to the trial court.

Conclusion

{¶40} We afford substantial deference to the trial court in the weight it afforded the prosecutor's explanation for striking Juror 10. But we cannot ignore the facts of this record and the clear authority indicating that the combination of factors present here points to the racialized use of peremptory strikes in jury selection. We accordingly sustain Trevino's first assignment of error and reverse the trial court's judgment, which renders Trevino's remaining assignments of error moot. We remand

the cause to the trial court for a new trial.

Judgment reversed and cause remanded.

MOORE, J., concurs.
ZAYAS, J., dissents.

ZAYAS, J., dissenting.

{¶41} "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87. "[P]urposefully exclud[ing] black persons from juries undermines public confidence in the fairness of our system of justice." *Id.* However, that did not happen here, and the defendant is not entitled to a new trial. The following comparison of the jurors demonstrates they were not similarly situated.

	Arrested	Charged	Prosecuted	Convicted	Sentenced	Participated in Court Proceedings
Juror 10's son	Yes	Yes	Yes	Yes burglary	Yes 3 years Prison	Yes
Juror 14's sister	Yes	No	No	No	No	No

{¶42} A juror whose sister was arrested in the past is not factually comparable to a juror whose son was recently convicted of a felony and sentenced to prison for three years, especially where the juror admittedly participated in her son's court proceedings. I must respectfully dissent. This determination misstates the record, advances arguments not raised on appeal or in the trial court, and most critically, disregards the trial court's credibility determinations to justify its conclusion. Only the trial court observes the demeanor of the prosecutor and potential juror. *See Snyder*, 552 U.S. at 477 (trial court's firsthand observations are critically important in determining the credibility and demeanor of the prosecutor and potential juror). Our

review is limited to the "cold record," mere words on paper. *Davis v. Ayala*, 576 U.S. 257, 274 (2015), citing *Rice v. Collins*, 546 U.S. 333, 343 (Breyer J., concurring).

The Batson Challenge

1. *Challenge to Juror 10*

{¶43} A prosecutor may exercise a peremptory challenge "for any reason or no reason at all," *Hernandez*, 500 U.S. at 374 (O'Connor J., concurring), as long as the challenge is not purposefully used to exclude jurors on the basis of race. *See Batson* at 89. "A trial court's finding of lack of discriminatory intent will not be reversed unless it is clearly erroneous." *Frazier*, 2007-Ohio-5048, at ¶ 64. This deferential standard arises from the fact that step three of the *Batson* inquiry turns largely on the evaluation of credibility by the trial court. *See Batson* at 98.

{¶44} Trevino raised a *Batson* challenge regarding Juror 10, who disclosed on her questionnaire that her son was "recently convicted of burglary – sentenced to 3 yrs." Juror 10 was the sole potential juror with a close family member recently convicted of a crime and incarcerated. The prosecutor responded,

> So, for example, [Juror 10] -- and correct me if I'm wrong -- she has the son who was recently convicted. So my concern for [Juror 10] is that in the back of her mind, she's going to be saying, 'I don't like prosecutors; I don't trust police; I feel bad for the defendant because my son is defendant,' you know, that kind of situation.

{¶45} The court correctly found the prosecutor's explanation to be race-neutral. "[C]ourts have 'recognized that the potential bias that may result from a prospective juror's or his or her family's experiences with the criminal justice system may be a legitimate, racially-neutral reason for exercising a peremptory challenge against the prospective juror.'" *Garrett*, 2022-Ohio-4218, at ¶ 83, citing *State v. May*,

2015-Ohio-4275 ¶ 51 (8th Dist.); *State v. King*, 2007-Ohio-4879, ¶ 30 (1st Dist.).

{¶46} Trevino argued the explanation was pretextual because Juror 10 said she had no "issues with any prosecutors" and no "grudges towards police, towards any prosecutors." These statements were not accurate. Juror 10's responses were limited to the prosecutor or the police officers in her son's case, not any prosecutors or police. Notably, Juror 10 declined to disclose her general feelings about police officers on two occassions. When asked her feelings about police officers on her questionnaire, Juror 10 did not answer the question. During voir dire, when asked if she had "any feelings about police officers that [she] can share?" Juror 10 responded, "No."

{¶47} When the court pointed out that Juror 10 may identify with the defendant, Trevino argued that Juror 10 "said on the record that [she] wouldn't." But that representation was also inaccurate. Juror 10 did not state on the record that she would not identify with the defendant. More importantly, the court acknowledged that the prosecutor's concern was legitimate.

{¶48} In response to the pretextual allegation, the prosecutor responded,

> If you want to hear me continue to argue, I will continue to argue, but in order to find what [defense counsel] is saying, you have to find that I'm purposely discriminating, and that is frankly not the case. The fact that she said I don't have a problem; I can be neutral, that's the basis for me not to for-cause her, but the fact that I think she might have an implicit bias is enough for me to peremptory.

{¶49} Although Juror 10 claimed that her participation in her son's criminal proceedings would not affect her ability to be fair, Juror 10 declined to express her feelings about police officers on two occasions. Notably, Trevino did not argue that the prosecutor's rejection of Juror 10's claim that her son's proceedings would impact

her was pretextual.

{¶50} Despite Juror 10's assertions, the prosecutor expressed continued concerns about Juror 10's ability to be fair and impartial. At this point, step three of the *Batson* analysis, the trial court was required to evaluate the prosecutor's credibility. *See Akins*, 2024-Ohio-1491, at ¶ 13 (1st Dist.). After assessing the credibility and genuineness of the prosecutor's concern, the trial court, Judge Ted Berry,[3] concluded the explanation was not a pretext for racial discrimination by overruling the *Batson* challenge.

{¶51} Critically, this finding "is entitled to deference, since it turns largely 'on evaluation of credibility.'" *Garrett*, 2022-Ohio-4218, ¶ 70, citing *State v. White*, 85 Ohio St.3d 433, 437 (1999), quoting *Batson*, 476 U.S. at 98. "The trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor," and the court's "firsthand observations are entitled to deference." *Garrett* at ¶ 87, citing *Snyder*, 552 U.S. at 477.

{¶52} Although Juror 10 asserted she could be fair, a trial court is not required to believe or accept a juror's claims of fairness. *See, e.g., State v. Harris*, 2006-Ohio-3520, ¶ 18 (7th Dist.) (State's peremptory strike was not racially motivated where prosecutor did not believe potential juror's assurance that her children's convictions would not affect her ability to decide the case.); *King*, 2007-Ohio-4879, at ¶ 29-30 (1st Dist.) (finding peremptory challenge was race-neutral where the potential juror said

[3] In 2011, Judge Berry's father, "a pioneer in civil rights" and Cincinnati's "first African American mayor," was inducted to the Ohio Civil Rights Hall of Fame, where Judge Berry spoke on behalf of his father. *See* Maj. Dan Dalrymple, *Article: An Extraordinary Life Span: A Summary and Analysis of an Oral History of the Honorable William A. McClain: United States Army (1943-1946)*, 218 Mil.L.Rev. 196 (2013), Reller, T.M. Berry Project: A Fond Farewell, University of Cincinnati Libraries, LiBlog, https://libapps.libraries.uc.edu/liblog/2011/11/page/2/ (accessed Aug. 17, 2026).

"she could be fair to both sides.").

{¶53} The majority opinion claims there was a "disconnect between the prosecutor's explanation and the facts of the case" because the prosecutor believed Juror 10 may harbor bias against the State even though Juror 10 said she could be fair. Notably, Trevino did not make this argument to the trial court, but he did raise it on appeal. Thus, Trevino waived the issue except for plain-error review. *See State v. Jones*, 2011-Ohio-4440, ¶ 61 (5th Dist.). However, as previously discussed, credibility determinations lie solely within the trial court's purview as it was in the best position to judge the prosecutor's and the potential juror's credibility. *See State v. Gowdy*, 2000-Ohio-355, ¶ 23 (the third prong of the *Batson* analysis "essentially boils down to the credibility of the proponent of the peremptory challenge's race-neutral explanation"). And that is exactly what the judge did when, after observing the prosecutor's and Juror 10's demeanor, the court found the prosecutor's concern to be credible.

{¶54} A prosecutor's doubts about the veracity of a juror's response do not create a "disconnect" in the record. Rather, the question is whether the record established that the court's finding that the prosecutor's explanation was race-neutral and credible was clearly erroneous. To find error, the majority assumes that Juror 10's assertion definitively proved that she could be fair by making its own credibility determination that her assertion was to be believed, and therefore, dispositive that the juror would be fair and impartial. However, the law requires the trial court to determine the prosecutor's credibility and whether the prosecutor's belief was genuine.

{¶55} *State v. Greene*, 2011-Ohio-4541 (2d Dist.), is instructive. In *Greene*, the prosecutor did not believe a prospective juror "was being frank when he responded

to their question as to whether he would hold the conviction of his brother against the State." *Id.* at ¶ 13. Although the trial court did not share the prosecutor's concern, the trial court overruled the *Batson* objection because "the trial court did not doubt the sincerity or genuineness of the prosecutor's race-neutral explanation." *Id.* at ¶ 14. In concluding the court did not err, the Second District explained, "The issue for the court in a *Batson* challenge is not so much the reasonableness of the prosecutor's concern about a juror's view of the case . . . but the genuineness of the prosecutor's explanation." *Id.*

{¶56} Similarly, here, the prosecutor shared her concerns about Juror 10's ability to be fair and impartial due to her son's recent conviction. And the trial court found the prosecutor's explanation to be race-neutral in the third step of the *Batson* analysis. Because the court's finding in this step "largely turn[s] on evaluation of credibility" the finding is entitled to "great deference." *Gowdy*, 2000-Ohio-355, at ¶ 24.

2. ***Challenge to Juror 10***

{¶57} After the trial court found the prosecutor's explanation to be race-neutral, defense counsel changed tactics and the following discussion occurred,

> DEFENSE COUNSEL: Judge, there are other members of the jury that have family members that have been charged or convicted with crimes that have not been peremptoried.[4] It is the one black woman who has been peremptoried for allegedly that reason.
>
> [Juror 14], for example – her daughter -- I believe it was [Juror 14] --

[4] Notably, no other juror disclosed a criminal charge or a family member charged with a crime. One juror disclosed that he or a family member had been charged with a minor misdemeanor possession, which is not "a criminal record" and need not be reported in response to any inquiry. *See* R.C. 2925.11(D).

> her daughter was charged with a crime, but she is a white woman, and she was not selected for that same reason. And, Judge, the only difference between the two women is their race.

{¶58} However, defense counsel's factual representation was incorrect. The jury questionnaire asked whether the juror or a family member had ever been "charged with a crime." No other potential juror had a family member who was charged with a crime. Juror 14 volunteered that her sister had been arrested, but not charged, prosecuted, or convicted. And the prosecutor responded and corrected the record.

> PROSECUTOR: And Judge, if I may, I understand what [defense counsel] is saying, but I think the two are distinguishable. So if you look at this one, there's no indication of time frame here. It says arrested, but I think when you look at [Juror 10], it says recently convicted of burglary and sentenced to three years. So, I mean, he's gone to the Department of Correction at this point, and we have a very recent sentencing that's happened in a case in proximity to this trial. I think that's different from [Juror 14] where we have no indication of the time frame, anything like that. We simply have an arrest. We don't have a trial; we don't have a conviction, anything like that.

{¶59} After hearing the explanations, the trial court denied the *Batson* challenge. The majority asserts that the trial court "improperly truncated its analysis" and "accepted the State's proffered race-neutral explanation without considering the impact of the State's decision not to strike the white prospective juror." However, a trial court "may express its opinion of the State's race-neutral justification in the form of a clear rejection of the *Batson* challenge, without offering detailed findings, 'as long as the trial judge affords the parties a reasonable opportunity to make their respective

records.'" *Adams*, 2015-Ohio-3954, at ¶ 161.

{¶60} That is precisely what happened here. The court allowed both parties to argue their positions and determined, based on all the circumstances, that the defense did not prove purposeful discrimination as required by the third prong of *Batson*. *See Williams*, 2021-Ohio-3491, at ¶ 38 (10th Dist.), citing *Adams* at ¶ 38. "The trial court was in the best position to evaluate the statements of the prosecutor and also those made by the juror during voir dire. The trial court's decision was based on the prosecutor's credibility, the juror's answers, and the totality of the circumstances." *State v. Prieto*, 2016-Ohio-8480, ¶ 55 (7th Dist.). Ultimately, the court found the prosecutor's concern to be genuine, and the record fails to establish that the court clearly erred in concluding the prosecutor's decision was not racially motivated. *See id.*

{¶61} Moreover, because the family members of Juror 10 and Juror 14 had significantly different levels of involvement with the legal system, the trial court did not err in concluding the prosecutor's explanation was genuine and credible. Juror 10's son was recently convicted of burglary and sentenced to a three-year prison term. Not just a mere arrest. Rather, her son was recently arrested, charged, convicted, and sentenced to prison. Additionally, Juror 10 was "present for [her son's] court hearings" and involved in the criminal process.

{¶62} On the other hand, Juror 14 had a sister who was arrested at an undetermined time in the past. The juror wrote on her questionnaire, that her "younger sister was arrested for being there when a check cashing place was robbed by her then boyfriend. She was on drugs and in an abusive relationship." Juror 14's sister was not charged, tried, convicted or sentenced to prison. Her sister was arrested sometime in the past, and, unlike Juror 10, she had no involvement with her sister's

circumstances. There is no evidence that Juror 14's sister was "involved in the criminal justice system" as stated in the opinion because she was never charged with a criminal offense.

{¶63} The opinion relies heavily on cases where the record established that the prosecutor's reasons for striking jurors were "factually contradicted by the record." For example, in *Miller-El*, the prosecutor stated that he struck a black juror due to his family member's conviction. *Miller-El*, 537 U.S. at 343. The Court found this stated reason may be "selective and based on racial considerations" because four white jurors had family members with criminal histories. *Id.* In *Snyder*, the prosecutor's stated reason for striking the juror, he could not miss class, was contradicted by the record because the student's dean had assured the court that missing class was not an issue. *Snyder*, 552 U.S. at 478-481.

{¶64} Those cases are inapplicable here because the prosecutor's reasons for striking Juror 10 were not "factually contradicted by the record." As previously discussed, a trial court is not required to believe a juror's claim of fairness and impartiality when evaluating a race-neutral explanation, and Jurors 10 and 14 were not similarly situated. The majority erroneously recasts the court's credibility determinations as factual disputes to justify its holding that the court clearly erred. But, a "reviewing court must defer to the trial court's credibility decision." *Prieto*, 2016-Ohio- 8480, at ¶ 47 (7th Dist.), citing *State v. Bryan*, 2004-Ohio-971, ¶ 110.

3. *Juror 7*

{¶65} With respect to Juror 7, I first note that Trevino did not raise a *Batson* challenge regarding Juror 7. The opinion claims that Juror 7 was rehabilitated because "the prosecutor elicited comments that the juror did in fact trust police and was only skeptical in situations where officers planted evidence, which she described as an

'egregious, rare circumstance.'"

{¶66} Juror 7 did not state that she trusted police officers. The defense attorney, not Juror 7, argued that Juror 7's remarks about fabricated evidence "wasn't her saying that she had this belief that police always fabricate evidence or there's some kind of evidence with police. Judge, she was saying, 'I have no issue with police unless there were to be this egregious, rare circumstance,' Judge."

{¶67} Juror 7 wrote on her questionnaire, "I lack confidence in police officers at this time." When asked her thoughts on undercover police, she responded, "I don't have any negative thoughts. They serve a purpose to investigate. . . . unless they falsify evidence." She also stated that sometimes police officers "can be biased toward people of color." In explaining the peremptory challenge to Juror 7, the prosecutor stated, Juror 7 "kind of routinely said that she did not trust police, and that concerned me as the fact that this is two undercover police officers. She also discussed officers who falsify evidence. That is a concern to me." The State's explanation for excusing Juror 7 was race-neutral and supported by the record. Because Trevino did not raise a *Batson* challenge with respect to Juror 7, and the record supports the peremptory strike, I cannot hold that the trial court erred.

4. *Arguments Raised Sua Sponte*

{¶68} The majority advances arguments not raised by Trevino in his brief or in the trial court. Generally, "'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" *State v. Quarterman*, 2014-Ohio-4034, ¶ 15, citing *State v. Awan*, 22 Ohio St.3d 120, 122 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56 (1968). "The burden is on the appellant, not the appellate court, to construct the

legal arguments necessary to support an appellant's assignment of error. Appellate courts are not advocates." *Doe v. Cuyahoga Cty. Community College*, 2022-Ohio-527, ¶ 26 (8th Dist.).

{¶69} The majority holds that the prosecutor did not meaningfully question Juror 10 to "ferret out" any potential bias. Trevino did not raise this issue in the trial court or on appeal. Thus, the majority raises and adjudicates an issue not argued or briefed by the parties.

{¶70} And the record reveals that the State asked Juror 10 several questions that did not allay its concerns, and twice, Juror 10 declined to disclose her feelings about police officers. Again, after assessing the credibility of the prosecutor and Juror 10, the court found the State's explanation to be credible.

{¶71} Additionally, the majority claims that Juror 14 "expressed hostility towards law enforcement." Trevino never argued in the trial court or on appeal that Juror 14 "expressed hostility" toward police officers. Again, the majority raises and determines an issue not addressed or briefed by the parties. Notably, that issue is not supported by the record. Juror 14 acknowledged that she wrote on her questionnaire "that [she had] some mixed feelings about police officers." The prosecutor responded,

> PROSECUTOR: I totally understand that. Are you able to kind of put that aside listen to Officer Espitia and Officer Cronin as they testify and kind of weigh that without any personal look back into, right, bad officers good off[ic]ers?
>
> PROSPECTIVE JUROR 14: Yes.

{¶72} The majority concludes that "the prosecutor never asked her to describe what the 'mixed feelings' were, a question that would have been relevant if the prosecutor were actually seeking to unearth potential jury bias." However, the record

reflects that Juror 14 wrote about her "mixed feelings" on the questionnaire. Specifically, regarding police officers, she wrote, "I have mixed feelings. Some abuse their power and some are truly here to serve." Based on the prosecutor's question, the prosecutor read and understood the juror's reasoning, dispensing with any need to ask for an explanation.

{¶73} Finally, the majority further relies on a theory of "group bias," which was not raised in the appellate brief or discussed in the trial court. Trevino did not challenge the peremptory strike on the basis of "group bias" in the trial court or argue the issue in his brief.

{¶74} Here, the prosecutor expressed a concern with Juror 10's ability to be fair, despite her claim that she could be fair, and the fact that she recently participated in her son's court proceedings which ultimately led to his conviction and incarceration. As previously discussed, the prosecutor provided a valid racially-neutral reason for exercising a peremptory strike. The record reflects that the trial court assessed the prosecutor's explanations, evaluated the credibility, and found the explanations to be credible. Applying a "highly deferential standard of review," as we are required to employ, I cannot say that trial court's decision to allow the State to exercise its peremptory challenge was clearly erroneous. *See Snyder*, 552 U.S. at 477-479.

{¶75} Accordingly, I would overrule the first assignment of error.

Discovery Violation

{¶76} In his second assignment of error, Trevino contends that the "court abused its discretion in allowing [the female undercover officer] to testify after the State's willful and prejudicial late disclosure of her as a witness." Trevino claims that the failure to disclose the officer's name deprived him of an opportunity to prepare his defense.

{¶77} The State's discovery response provided two videos, a body-worn-camera video, and video, with no audio, depicting the undercover female officer engaged in conversation with Trevino. In addition to the video, the State provided the audio recording of the conversation between the undercover officer and Trevino, and the text messages the two exchanged. The State's witness list encompassed a statement that, "All witnesses included in the materials provided in this or in any prior or subsequent discovery response." The undercover officer is prevalent in the materials, although the State omitted the undercover officer's name from its response.

{¶78} Six months after receiving discovery, Trevino filed a motion to dismiss arguing that the case should be dismissed due to police entrapment. The motion acknowledged that after conversing with a female undercover Cincinnati police officer, Trevino exchanged numbers with her, and that over two weeks, Trevino communicated with the female officer via text messages. On June 2, the day the trial began, Trevino filed a motion in limine seeking to exclude certain highlighted text messages between Trevino and the undercover officer. That afternoon, prior to voir dire, the parties had a hearing and resolved the text-message issue. Then Trevino sought to exclude the testimony of the undercover officer, alleging that the defense "just learned" the name of the officer.

{¶79} The prosecutor responded that the parties had discussed this issue in chambers, and defense counsel was offered a continuance to speak with the undercover officer. Defense counsel did not want a continuance, so the State made the undercover officer available to speak with counsel, and the two engaged in conversation. Defense counsel asked the court "to note our continuing objection to [the undercover officer's] testimony." The court noted the objection, the need to impose the least drastic measure for the failure to disclose the officer's name, and that

defense counsel had the opportunity to interview the undercover officer.

{¶80} Then, the following morning, after jeopardy attached, Trevino asked the court to reconsider its ruling on the motion to exclude the officer from testifying. This time, counsel represented that the defense strategy was predicated on the State calling only one officer, the male officer who filed the charge, and the undercover officer was a "new witness." Defense counsel requested that the State proffer the undercover officer's testimony and claimed that the defense had no body-camera footage that included the undercover officer.

{¶81} The prosecutor reminded the defense that body-worn-camera and undercover surveillance, depicting the undercover officer, had been provided over a year prior. The audio recording between the undercover officer and Trevino had also been provided the previous year. The court again declined the request to exclude the undercover officer as a witness, explaining that the least severe sanction would not be witness exclusion. The court offered counsel another opportunity to speak with the undercover officer and a continuance if necessary.

{¶82} Now Trevino argues that the trial court abused its discretion in allowing the officer to testify and by failing to engage in the appropriate analysis when a discovery violation has occurred. "The decision of whether to exclude a witness's testimony based on a failure to disclose the witness's name lies within the trial court's sole discretion." *State v. Valdez*, 2017-Ohio-241, ¶ 114 (3d Dist.). Thus, we review a trial court's decision regarding a Crim.R. 16 discovery sanction for an abuse of discretion. *State v. Holcombe*, 2012-Ohio-5948, ¶ 12 (3d Dist.). An abuse of discretion suggests that a decision is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶83} Crim.R. 16 governs discovery matters in a criminal proceeding. The

purpose of Crim.R. 16 is, among other things, "to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts." Crim.R. 16(A). In furtherance of this purpose, Crim.R. 16(I) mandates that "[e]ach party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal."

{¶84} In situations where the prosecution fails to disclose a witness prior to trial, "a trial court does not abuse its discretion when admitting the testimony of an undisclosed witness if (1) 'the failure to provide discovery was not willful,' (2) 'foreknowledge of the statement would not have benefitted the defendant in the preparation of the defense,' and (3) 'the defendant was not prejudiced by the admission of the evidence.'" *State v. Terry*, 130 Ohio App.3d 253, 260 (3d Dist. 1998), quoting *State v. Heinish*, 50 Ohio St.3d 231, 236 (1990); *see State v. Rankin*, 2014-Ohio-3104, ¶ 17-19 (5th Dist.) (concluding that the trial court did not abuse its discretion by admitting the testimony of an undisclosed witness when the discovery violation was not willful, did not affect the defendant's ability to prepare a defense, and the defendant was not prejudiced).

{¶85} Trevino contends that the court failed to determine whether the failure to disclose was willful. However, the late discovery issue was initially addressed in chambers, and Trevino did not supplement the record with a summary of that discussion pursuant to App.R. 9(C). Accordingly, we must presume the regularity of the proceedings and conclude the court engaged in the appropriate analysis, and any error is waived. *See, e.g., State v. Keenan*, 81 Ohio St.3d 133, 139 (1998) (Keenan did not attempt to use App.R. 9 to reconstruct the unrecorded sidebars, and the error may be considered waived). Nonetheless, as discussed below, the record reflects that the

violation was not willful.

{¶86} *State v. Rankin*, 2014-Ohio-3104 (5th Dist.), is instructive. In *Rankin*, appellant argued the trial court erred in allowing witness Jane to testify because her name was not included on the witness list. *Id.* at ¶ 13. The Fifth District held there was no willful discovery violation because "[d]efense counsel was put on notice that Jane was a potential witness when her name was listed in the police report and, in response to appellant's discovery request, appellee stated that 'any names contained on the attached police or accident reports, whether listed as witnesses, passengers, or investigators, should be considered as potential witnesses at trial of this matter.'" *Id.* at ¶ 17. The court further noted that "the prosecution, as part of the discovery process, turned the statement of Jane over to the defense prior to her testimony at trial." *Id.*

{¶87} Trevino has not shown that the State's failure to include the name of the disclosed undercover officer was a willful discovery violation. *See id.* at 17; *State v. Buckner*, 2024-Ohio-2615, ¶ 12 (3d Dist.) (concluding that the record did not establish a willful violation where the State's pretrial statement listed the 9-1-1 call as an exhibit, placing Buckner on notice that the recording would be in issue at trial).

{¶88} Trevino was apprised of the undercover officer and her role in the case. Similar to *Rankin*, the State provided audio and video recordings that included the undercover officer. The State's discovery response included on its witness list a notice that, "All witnesses included in the materials provided in this or any prior or subsequent discovery response." Moreover, the complaint mentioned the undercover officer, and Trevino's motion to dismiss and motion in limine acknowledged the involvement of the female, undercover officer. Thus, Trevino failed to establish a willful failure to disclose the officer's name where the State provided audio and videos featuring the undercover officer. *See Buckner* at ¶ 12; *Rankin* at ¶ 17.

{¶89} Because the record demonstrates that Trevino was aware of the undercover officer's existence and role in the case at least one year prior to trial, he cannot establish that the omission of her name affected his ability to prepare a defense or otherwise prejudiced him. Accordingly, the trial court did not abuse its discretion in allowing the witness to testify. I would overrule the second assignment of error.

Prosecutorial Misconduct

{¶90} Next, Trevino contends the State committed misconduct by vouching for the credibility of two of its witnesses in closing remarks by stating,

> So based on both the evidence that's presented, the evidence that you're going to review, as well as the credibility of Officer Espitia and Officer Cronin – they were on the stand; they testified credibly. They've both been doing this for a while; they've worked in vice squad for a while; and they testified very credibly; answered the prosecutor's questions honestly; answered defense counsel's questions honestly.

{¶91} After Trevino objected, the prosecutor further stated,

> You all decide credibility, not me. But I'm saying when it came to answering questions, there wasn't a backtracking or a [sic] "oops I'm caught in a lie moment." That's what I'm saying. But [defense counsel's] right. You determine the credibility, but I'm saying there's no arguing. There is no outbursts, things like that. There was a clean communication between both prosecution and defense counsel. So ultimately, you all determine the credibility.

{¶92} The test for prosecutorial misconduct is "whether the remarks were improper, and if so, whether they prejudicially affected the accused's substantial rights." *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). "Misconduct does not affect the

defendant's substantial rights unless it denied the defendant a fair trial." *State v. Morrissette*, 2018-Ohio-3917, ¶ 30 (1st Dist.).

{¶93} Assuming without deciding that the remarks constituted misconduct, Trevino cannot establish his substantial rights were prejudiced or that he was denied a fair trial. After Trevino objected, the prosecutor emphasized that the jury determined witness credibility. Additionally, the trial court provided a curative instruction and instructed the jurors that, "Now, you as jurors are the exclusive judge of the credibility or believability of the witnesses and the weight to be given to that evidence." The court further stated, "Neither party may vouch for the credibility of any witness." We must presume the jurors followed the instructions given by the trial court. *State v. Savage*, 2019-Ohio-4859, ¶ 26. In light of the evidence before the jury, I cannot conclude that a reasonable probability exists that, absent the remarks by the prosecutor, the jury would have found Trevino not guilty. Consequently, I would overrule the third assignment of error.

Manifest Weight

{¶94} In his fourth assignment of error, Trevino argues that his conviction is against the weight of the evidence because he demonstrated, by a preponderance of the evidence, that the government induced him to commit the offense.

{¶95} Under a manifest-weight review, an appellate court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Citations omitted.) *State v. Reillo*, Slip Opinion No. 2026-Ohio-2701, ¶ 26. Although an appellate court may disagree with the factfinder's resolution of conflicting evidence, a reviewing court "must defer to the fact-finder's

witness-credibility determinations." *Id.* at ¶ 27, 38.

{¶96} Under R.C. 2907.24(A), "no person shall knowingly solicit another to engage in sexual activity for hire in exchange for the person receiving anything of value from the other person." When a person raises the defense of entrapment, he admits to the offense but "seeks to avoid criminal liability by maintaining that the government induced him to commit an offense that he was not predisposed to commit." *State v. Doran*, 5 Ohio St.3d 187, 193 (1983).

{¶97} Here, Trevino argues that the undercover officer induced him to solicit her, and he was not predisposed to commit the crime. Trevino does not point to any conflicts in the evidence that the jury incorrectly resolved. Rather, he argues that the undercover officer texted him first and that typically in a solicitation case, the accused is in a vehicle, and he was on foot, he did not ask if she was a prostitute, his motivation was a date, and although he offered pills for sex, he possessed no pills when he was arrested.

{¶98} As the Ohio Supreme Court recently explained, "[A]n appellate court sits as the thirteenth juror only when evidence contradicts a fact-finder's findings." *Reillo* at ¶ 3. Without conflicting evidence, an appellate court has nothing to weigh, and a conviction will not be reversed as against the manifest weight. *See id.* Additionally, we "must defer to the fact-finder's witness-credibility determinations." *Id.* at ¶ 27, 38. Because Trevino points to no conflicting evidence and appears to challenge the credibility of the State's witnesses, I cannot say that the jury lost its way and created a manifest miscarriage of justice.

{¶99} Moreover, Cronin testified that she was working in an area known to have many "prostitutes that walk around from day to day." Although Cronin initially greeted Trevino, she testified that he approached her. Within two minutes of

conversing with the officer, Trevino suggested going to McDonalds "real quick," and the following conversation occurred,

OFFICER: I'm good.

TREVINO: Why?

OFFICER: Because I'm out here trying to make some money, do my thing.

TREVINO: I know, I'm saying, but where we gonna go?

OFFICER: I'm trying to make some money.

TREVINO: I know. I'm trying to give you some money

OFFICER: [after saying hello to a man passing by] If you ain't gonna give me, I'm good. [In the video, the officer starts walking away from Trevino at this point.]

TREVINO: [walking after Cronin] How much you trying to get?

OFFICER: Depends on what you want.

{¶100} The exchange reflects that Trevino was willing to give her money. Based on that exchange, a jury could easily conclude Trevino was predisposed to commit the offense. Accordingly, I would overrule the fourth assignment of error.

Conclusion

{¶101} I would overrule all of Trevino's assignments of error and affirm the judgment of the trial court.