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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE JACKSON et al.,

Defendants and Appellants.

A130009

(Alameda County Super. Ct.  
No. 159972)

Defendants Keith Millet and Tyrone Jackson, who are African-American, were charged with kidnapping, robbing, and raping Jane Doe, who is white. During voir dire of the jury panel, the prosecutor exercised peremptory challenges to excuse two prospective jurors who were African-Americans. On appeal from their conviction following the jury trial, Millet and Jackson claim the prosecutor violated their state and federal rights to due process, equal protection, and trial by jury as articulated in *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*), and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). They contend the prosecutor improperly used a peremptory challenge against one of the two African-American prospective jurors. We conclude that the record supports the trial court's finding the prospective juror was not excused for a discriminatory purpose, and affirm the judgment.

## BACKGROUND

An information filed May 20, 2009 charged both Millet and Jackson with three felony violations allegedly committed against the female victim on or around October 10, 2008, kidnapping to commit rape or robbery (Pen. Code, § 209, subd. (b)(1)),<sup>1</sup> forcible rape (§ 261, subd. (a)(2)), and robbery (§ 211). Both defendants were further charged with kidnapping enhancement allegations under section 667.61, subdivisions (d)(2) and (e)(1). Additional enhancement allegations, for inflicting great bodily injury on the victim during the rape, were stated against Millet alone. (§§ 12022.7, subd. (a), 12022.8; see § 667.61, subd. (d)(6).)

During jury selection, in July 2010, the prosecutor used peremptory challenges to excuse three prospective jurors. The first was A.J., an African-American woman, and the third A.T., an African-American man. Defense counsel then made a motion under *Wheeler, supra*, 22 Cal.3d 258, to strike the jury panel, noting that both defendants were African-American.<sup>2</sup> The trial court, noting there were no African-American jurors seated in the jury box and only one African-American prospective juror seated in the remaining panel, found there was a prima facie showing of systematic exclusion based on race, and invited the prosecutor to state his reasons for using peremptory challenges as to A.J. and A.T. The prosecutor stated several reasons for these peremptory challenges. The court found the prosecutor's stated reasons to be credible and race neutral, and denied the *Wheeler* motion.

At the conclusion of the trial in August 2010, the jury found both defendants guilty of forcible rape and robbery, and found true the kidnapping enhancement allegations. Its verdicts also found Jackson guilty of kidnapping for the purpose of rape, and found Millet guilty of kidnapping for the purposes of robbery and of inflicting great

<sup>1</sup> Further statutory references are to the Penal Code.

<sup>2</sup> As defendants point out, their motion under *Wheeler, supra*, 22 Cal.3d 258, is deemed to include a challenge under *Batson, supra*, 476 U.S. 79, that the opposed use of a peremptory challenge violated not only their state constitutional right to a jury trial by a representative cross-section of the community, but also their federal constitutional rights to trial by jury and equal protection. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117–118.)

bodily injury during the rape. In October 2010, the trial court sentenced Millet to imprisonment for 27 years to life, and sentenced Jackson to imprisonment for 30 years to life. Defendants appealed. (See § 1237, subd. (a).)

## **DISCUSSION**

### **A. *The Three-Step Analysis of Batson/Wheeler***

A prosecutor’s use of a peremptory challenge to strike a prospective juror on the basis of group bias—that is, bias against “members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds”—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution, and also violates the defendant’s right to equal protection under the Fourteenth Amendment to the United States Constitution. (*People v. Hamilton* (2009) 45 Cal.4th 863, 898 (*Hamilton*); see also *People v. Avila* (2006) 38 Cal.4th 491, 541 (*Avila*).)

In *Johnson v. California* (2005) 545 U.S. 162 (*Johnson*), the United States Supreme Court “reaffirmed that *Batson* states the procedure and standard to be employed by trial courts” when a defendant opposes the prosecutor’s use of peremptory challenges on the basis of group bias. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66–67, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.) First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, if the defendant has made out a prima facie case, the burden then shifts to the State to explain adequately the actual racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if the state tenders a race-neutral explanation, the trial court must then decide whether the defendant has proved purposeful racial discrimination. (*Johnson, supra*, at p. 168.)

### **B. *The First and Second Steps***

In this instance, it is unnecessary to consider the first step of the *Batson/Wheeler* inquiry because the trial court—by asking the prosecutor to explain the reasons for his

peremptory challenge excusing prospective juror A.J. from the panel—implicitly found defendants made a prima facie case of a possibility of discriminatory exclusion.<sup>3</sup> (See *People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Sims* (1993) 5 Cal.4th 405, 428.)

As for the second step of the inquiry, we note that a prosecutor, when asked to state his or her reasons for exercising a peremptory challenge, must provide a clear and reasonably specific explanation of legitimate reasons for exercising the challenges. The justification need not support a challenge for cause, and even a “trivial” reason, if genuine and neutral, is sufficient. (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*).) Even a reason that may make no sense is nonetheless “sincere and legitimate” as long as it does not deny equal protection. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1101 (*Guerra*), disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Here, the prosecutor first expressed a concern over A.J.’s familiarity with the primary crime scene in Oakland. “She said she was from West Oakland. In fact, she talked about the fact that she goes by the crime scene every single day; that she knows it well; that it would be impossible for her not to continue to go by it every single day.” Second, the prosecutor expressed a concern about A.J.’s potential distrust of the criminal justice system. Specifically, she had been employed at a transitional housing facility for parolees, and while there had been “the victim of a crime and didn’t report that.” Such failure to report “seemed to indicate her level of trust of the justice system or at least her willingness to speak up.” Third, and also indicating a distrust of the criminal justice system, the prosecutor said A.J. had “agreed that [a friend] committed . . . manslaughter and still felt that the justice system had treated [him] unfairly.”

We observe none of these reasons are inherently discriminatory and may thus be deemed race neutral for purposes of the second step of the *Batson/Wheeler* analysis. (See *People v. Adanandus* (2007) 157 Cal.App.4th 496, 505, fn. 3 (*Adanandus*).)

<sup>3</sup> In order to make a prima facie showing, a litigant must raise the issue in a timely fashion, make as complete a record as feasible, and establish that the persons excluded are members of a cognizable class. A defendant satisfies the requirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

### **C. *The Third Step of the Batson/Wheeler Analysis***

#### **1. *Introduction***

This leads us to the final step of the *Batson/Wheeler* analysis, in which we review the trial court's finding of no purposeful discrimination. At this stage, the proper focus is on the *subjective genuineness* of the race-neutral reasons given for the peremptory challenge, not on the *objective reasonableness* of those reasons. (*Adanandus, supra*, 157 Cal.App.4th at pp. 505–506.) The critical question in determining whether a defendant has proved purposeful discrimination is the persuasiveness of the prosecutor's justification for his or her peremptory strike. (*Hamilton, supra*, 45 Cal.4th at p. 900.) Thus, at the third stage of the *Wheeler/Batson* inquiry, the issue is whether the court found the prosecutor's race-neutral explanations to be credible.

Three significant factors for measuring the prosecutor's credibility are the prosecutor's demeanor, how reasonable, or improbable, his or her explanations are, and the extent to which the stated reasons have some basis in accepted trial strategy. (*Lenix, supra*, 44 Cal.4th at p. 613.) In assessing credibility, the court may draw on its own contemporaneous observations of the voir dire, and may also rely on his or her own experiences as a lawyer and bench officer in the community, as well as the common practices of the prosecutor's and his or her office. (*Ibid.*)

In this case, the trial court took the matter under submission after the prosecutor stated his reasons for the peremptory challenge, to review the voir dire transcripts and the relevant case law. A.J.'s voir dire transcripts, beginning with the court's initial voir dire, indicate, in relevant part, that she previously worked for about one year as a monitor at a transitional housing facility for parolees. About two years before being called as a prospective juror, A.J. had visited a "very close" friend incarcerated in the county's Santa Rita Jail, whom she said was currently still awaiting trial on a charge of manslaughter. When asked if she felt her friend had been treated fairly or unfairly by the police, the district attorney's office, and the court, she said she thought the process had "been fair." Later, when the prosecutor questioned her, she said her friend had since been transferred

from the Santa Rita Jail to another facility. The prosecutor asked again if she felt he was “being treated fairly by the system,” and this time she responded by saying, “I really don’t know,” elaborating that “when he was arrested, they were saying that he had a gun on him, but he . . . said that he didn’t[; so] everyone is confused[,] we don’t know.” The prosecutor then noted she mentioned being familiar with the area around the Oakland intersection of 45th Street and Martin Luther King Jr. Way, and asked her “how familiar” she was with the location. She said it was her “mailing address.” She answered in the affirmative when asked if it was “a place [she] would drive by often,” and one with which she was “very familiar.” When asked to describe her familiarity with the area, she said she “kn[ew] it well,” went “there often,” and described it as a “busy area.” When asked if it was a place she “would have difficulty avoiding” during the trial, A.J. said, “Well, I have to go there to pick up my mail[.]” She went on to say she believed she could separate any testimony about this area from her own experience, and would not attempt any investigation of the area on her own. When the prosecutor asked about A.J.’s experience at the transitional housing facility, she said she “was always around [parolees, s]o, yeah,” she had developed relationships with them. When asked if she had had “problems” with any of the parolees, A.J. said she had, with “one individual.” The prosecutor then asked if that had led to “filing any kind of a report or anything like that,” and she replied, “No.” She answered affirmatively when he asked if she had “handle[d]” the problem herself.

After reviewing the voir dire transcript summarized above, the trial court summarized on the record those portions relating to A.J.’s “very close friend” awaiting trial for manslaughter, and those relating to her experience as a monitor of parolees. The court then stated, correctly, that under the law the justification for a peremptory challenge need not equal that necessary to support a challenge for cause, and it might even be “a trivial reason” so long as it was “[g]enuine and neutral.” (*Lenix, supra*, 44 Cal.4th at p. 613.) Citing several cases, the court also said, correctly, that nondiscriminatory justifications for use of a peremptory challenge include: a juror who has a “close

relative” who “has had a negative experience with the criminal justice system” (see, e.g., *Avila, supra*, 38 Cal.4th at pp. 554–555); a juror who has had “life experiences that would make [him or her] overly sympathetic to or biased to a defendant’s position” (see, e.g., *People v. Salcido* (2008) 44 Cal.4th 93, 140); and a juror who has been “employed in a job or engaged in activities that reflect an orientation toward rehabilitation and sympathy towards defendants” (see, e.g., *People v. Neuman* (2009) 176 Cal.App.4th 571, 586). The court then stated that the case law was “fairly clear” that when “some reasons given by the [prosecutor] are not well supported by the record does not mean a challenge . . . was motivated by race,” as the challenge “could sometimes involve a mixture of strong and weak reasons.”

The trial court then found the prosecutor had “provided neutral explanations for exercise of the peremptory challenge[] as to [A.J.]” The court did “not believe” the challenge had been exercised based on “purposeful racial discrimination,” keeping in mind that its proper focus in making that determination was “subjective genuineness” of the race-neutral reasons given by the prosecutor, rather than “any objective reasonableness of [those] reasons.” The court found the prosecutor’s “race-neutral explanations [were] credible . . . not only . . . on the basis of [its] contemporaneous observation of voir dire but, also, on a comparative analysis involving the [other] panelists” who had so far been excused or allowed to remain by both parties. On these bases, the court was “satisfied that the specifics offered by the [p]rosecutor [were] consistent with the answers [it had so far] heard and the overall behavior of the panelists.”

## ***2. Lack of Support in the Record***

Defendants contend the trial court erred when it determined the prosecutor’s specified reasons were race neutral and credible. They first compare, at some length, the specific reasons articulated by the prosecutor with A.J.’s actual voir dire testimony. In defendants’ view, the prosecutor misstated or mischaracterized the prospective juror’s actual testimony to such an extent that we must regard his reasons as impermissibly

pretextual. They claim the offer of three such pretextual reasons is sufficient to establish a *Batson/Wheeler* violation.

The existence or nonexistence of purposeful racial discrimination is a question of fact. We review the trial court's determination of that question under the substantial evidence standard, according deference to its ruling when the court has made a sincere and reasoned effort to evaluate the stated reasons for a challenge to a particular juror. (*Hamilton, supra*, 45 Cal.4th at pp. 900–901.) We exercise due restraint when reviewing that court's determination. We presume the prosecutor exercised peremptory challenges in a constitutional manner, and give great deference to the court's ability to distinguish valid reasons from sham. So long as the trial court makes a sincere and reasoned effort to evaluate the prosecutor's stated reasons, its determination is entitled to deference on appeal. (*Lenix, supra*, 44 Cal.4th at pp. 613–614.)

We observe A.J. did not say she went by the identified intersection “every day,” as the prosecutor put it, but she did say she went there “often,” “to pick up [her] mail,” and was “very familiar” with the area. These differences are minimal. A.J. also did not say she had been the “victim of a crime” that she “didn't report,” as the prosecutor stated, but she did say, “No” when asked if she had reported the “problem” she said she had had with one of the parolees, and she said, “Yes” when asked if she had “handle[d]” the matter herself. While A.J.'s testimony did not indicate whether the “problem” was criminal in nature, it is reasonable to infer that, as a monitor at the facility, it would have been her duty to report any significant “problem” with one of the parolees whatever its nature. Finally, A.J. did not say she “agreed” that her friend awaiting trial had “committed . . . manslaughter” yet “still felt the criminal justice system had treated [him] unfairly,” as the prosecutor told the court. She did, however, express doubt about whether he had been treated fairly because her friend had denied having a gun, whereas “they” had said he did. It is reasonable to infer her uncertainty arose from the regard she had for a “very close friend,” as opposed to the “system.”

After the prosecutor stated his reasons for the peremptory challenge of A.J., Jackson’s trial counsel argued that her statements had not, in fact, been exactly as the prosecutor had characterized them. Moreover, as noted above, the trial court reviewed A.J.’s actual voir dire testimony immediately afterwards. The court was thus fully aware of the discrepancies between A.J.’s actual testimony and the prosecutor’s characterization of that testimony at the time it made its determination that the prosecutor’s stated reasons were subjectively genuine. The court also expressly based its determination on its own observations. The best evidence of whether a race-neutral reason is credible is often the demeanor of the attorney who exercises the challenge, and an evaluation of that attorney’s state of mind, based on demeanor and credibility, lies particularly within the trial court’s province. (*People v. Stevens* (2007) 41 Cal.4th 182, 198.) Under the deferential standard of review applicable here, we are not persuaded that the prosecutor’s characterization of A.J.’s voir dire testimony deviates so greatly from her actual testimony as to require that we reject the trial court’s finding—made with full awareness of their distinctions—that the reasons were nonetheless not pretextual, but race neutral and credible. We conclude the stated reasons are adequately supported by the record.

### **3. *Comparison With Juror No. 8***

Defendants claim that the prosecutor’s first stated reason—concerning A.J.’s familiarity with the primary area near the primary crime scene—was also pretextual because the prosecutor posed similar questions to Juror No. 8, but did not challenge him. Specifically, the prosecutor asked Juror No. 8 if he had gone to a particular bookstore in Oakland “[a] lot,” and the juror replied, “I wouldn’t say ‘a lot’ [but] once in a while.” Defendants assert this was the location where Jackson had said he had picked Millet up on the night of the crimes—hence Juror No. 8 was, like prospective juror A.J., familiar with a location about which evidence would be produced. They reason that, when a prosecutor challenges a minority juror for a reason, but accepts a nonminority juror to whom that reason applies, pretext is established.

Whereas the trial court based its determination, in part, on its own comparison of the voir dire of A.J. with that of other panelists, we note its determination occurred before Juror No. 8 was seated and questioned. We note further, when a comparative juror analysis is undertaken for the first time on appeal, the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers. (*Lenix, supra*, 44 Cal.4th at p. 623.) In addition, two prospective jurors “might give a similar answer on a given point . . . [y]et the risk posed by one [prospective juror] might be offset by other answers, behavior, attitudes or experiences that make one [prospective] juror, on balance, more or less desirable[, and t]hese realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn [the] trial court’s factual finding.” (*Id.* at p. 624.)

In this instance, defendants’ claim of similar answers is a strained comparison. Juror No. 8 did not visit the location where the crimes primarily occurred, but a location where Jackson claimed to have picked Millet up earlier in the evening, before the crimes occurred. In addition, Juror No. 8 did not visit the location “a lot,” but only “once in a while.” After reviewing the whole of Juror No. 8’s voir dire testimony in comparison with the whole of A.J.’s, and viewing that comparative evidence in light of the totality of evidence relevant to defendants’ claim, we conclude the comparative answers do not demonstrate purposeful discrimination. (*cf. People v. Cruz* (2008) 44 Cal.4th 636, 659.)

#### **4. *The Trial Court’s Stated Reasons***

As we have noted, the trial court, in making its determination, summarized the relevant case law and in so doing mentioned three established race-neutral grounds for using a peremptory strike: when a juror has a “close relative” who “has had a negative experience with the criminal justice system”; when a juror has had “life experiences” that would make the juror overly sympathetic to a defendant; and when a juror has been engaged in activities that reflect an orientation toward rehabilitation and sympathy towards defendants. Defendants argue that the court erred in its determination because none of these established grounds match the prosecutor’s stated reasons for excusing A.J.

We see no merit to this claim. As we have noted, a stated reason for a challenge need not fall squarely within one of the race-neutral grounds established by case law. The reason may be trivial, or even nonsensical, so long as it is genuine and neutral. (*Lenix, supra*, 44 Cal.4th at p. 613; *Guerra, supra*, 37 Cal.4th at p. 1101.) The fact the trial court mentioned three of the established grounds—in connection with evaluating not only the stated reasons for excusing A.J., but also the reasons for excusing A.T.—does not necessarily mean that the court found each of the reasons given as to A.J. to fall within one of these established grounds. It appears, on the contrary, the court mentioned these grounds because they appeared more or less analogous to some of the prosecutor’s stated reasons as to both A.J. and A.T.

### **5. *Statistical Analysis***

Defendants point out the prosecutor excused both of the only two African-American prospective jurors who made it into the jury box, leaving no African-American jurors on the jury; and yet excused only one of 29 nonAfrican-American prospective jurors. They suggest the court erred in finding that the peremptory challenge of A.J. was not pretextual, but race neutral and credible, based on these statistics. This argument, however, is more relevant to whether a defendant has made a prima facie showing satisfying the first step of the *Batson/Wheeler* analysis, and is of lesser importance when evaluating whether the prosecutor’s stated reasons were pretextual. (*People v. Mills* (2010) 48 Cal.4th 158, 174, fn. 4.) These statistics based on a small number of challenged African-American prospective jurors do not in themselves require us to overturn the trial court’s finding when viewed with the reasons given for excusal.

### **6. *Challenge “Motivated in Substantial Part” by Discriminatory Intent***

As we have noted, the trial court, in making its determination, commented that the case law was “fairly clear” that the fact “some reasons given by the [prosecutor] are not well supported by the record does not mean a challenge . . . was motivated by race,” as the challenge “could sometimes involve a mixture of strong and weak reasons.” This comment, according to defendants, shows the court acknowledged that some of the

prosecutor's stated reasons lacked sufficient support. They reason this demonstrates that the court improperly relied only on the stated reasons it believed were supported by record, and ignored those that were not. In defendants' view, the court thus erred by failing to apply the proper standard under *Snyder v. Louisiana* (2008) 552 U.S. 472, 485 (*Snyder*).

In *Snyder* the U.S. Supreme Court reviewed a prosecutor's stated reasons for using a peremptory challenge to excuse an African-American prospective juror. The first was the prospective juror's demeanor, while the second was a concern that, because the prospective juror had stated a concern about missing classes if he served on the jury, he would, in order " "to go home quickly, come back with guilty of a lesser verdict [than first-degree murder] so there wouldn't be a penalty phase.' " (*Snyder, supra*, 552 U.S. at p. 478.) The court found the second stated reason to be pretextual and, hence, discriminatory "even under the highly deferential standard of review" that was applicable. (*Id.* at p. 479.) The court further noted it could not be determined from the record whether the trial court, in allowing the challenge, relied on the first, permissible reason or the second, impermissible reason, or both. (*Ibid.*) The court held the peremptory strike could not be sustained under *Batson* because it was shown to have been "motivated in substantial part by discriminatory intent," and the record did not show the prosecution would have used the peremptory challenge based on the permissible reason alone. (*Id.* at p. 485.)<sup>4</sup>

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<sup>4</sup> In a related argument, defendants argue that, because the trial court failed to apply the proper standard of *Snyder*, which applies when some stated reasons are found to be permissible but others are not, its determination is not entitled to deference, and we should conduct a de novo review rather than a review under the deferential standard of review previously summarized. We decline to do so, noting that the Ninth Circuit, at least, has continued to apply the deferential standard of review when applying the holding in *Snyder*. That court has stated that, where the trial court, as here, "consider[ed] the prosecutor's proffered justifications and the relevant facts . . . discussed the justifications and indicated that [it] found them persuasive," it effectively made the finding required under the third step of the *Batson* analysis, and its decision is "entitled to appropriate deference." (*Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, 815.)

We find this argument unpersuasive in the context of the explanation given in this case. The comment on which defendants rely does not establish the trial court found some of the prosecutor's stated reasons to be pretextual and, hence, discriminatory, particularly in light of its express finding, made moments later, that *all* the prosecutor's stated reasons were race neutral and credible. It is much more reasonable to infer from this comment the court regarded some of the stated reasons to be "weak," although still race neutral and credible. When the court summarized portions of A.J.'s voir dire testimony, it referred only to her statements made in connection with her "problem" with the parolee, and those she made in connection with her "very close friend" in jail. We may infer from this that the court regarded these as having some tendency to show a distrust of the criminal justice system, whereas the third reason—A.J.'s familiarity with the crime scene—was "weak" by comparison because it had less basis in accepted trial strategy. (See *Lenix, supra*, 44 Cal.4th at p. 613.)

As discussed above, we have not otherwise found the prosecutor's stated reasons to be pretextual and discriminatory. We conclude the stated reasons were not "motivated in substantial part by discriminatory intent" so as to fall within the holding in *Snyder, supra*, 552 U.S. at page 485. The central justifications for excusing the juror were permissible.

## **7. Conclusion**

Our review of the trial court's stated reasons for its determination, overall, persuades us that the court understood its role and made a sincere and reasoned effort to evaluate the stated reasons for the peremptory challenge of A.J, and its determination is entitled to deference. (*Lenix, supra*, 44 Cal.4th at pp. 613–614.) We conclude the court's determination is supported by substantial evidence.

**DISPOSITION**

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Dondero, J.