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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
MARCEL PERRY,
Defendant and Appellant.

A130484

(Alameda County
Super. Ct. No. C-162408)

This is an appeal from judgment after a jury convicted defendant Marcel Perry of first degree murder, shooting at an occupied vehicle and felony gun possession with various gun- and gang-related enhancements. The trial court thereafter sentenced defendant to 55 years and eight months to life in prison. Defendant challenges the judgment on the grounds that the prosecutor’s excusal for cause of two African-American female prospective jurors violated his right to a fair and impartial jury, and that the prosecutor’s insinuation of facts not in evidence during his cross-examination rendered his trial fundamentally unfair. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are not in dispute. On November 20, 2008, at about 5:00 p.m., Vincent Scott, a.k.a. “Pooh,” was shot to death while driving his vehicle near the intersection of San Pablo Avenue and Myrtle Street in West Oakland. Witnesses, including Shalom Bower, Deborah Sherman and Daniel Ramos, heard about 20 gunshots. Bower and Sherman saw a silver van with a vanity license plate driving away from the scene with its tires squealing. Ramos saw an African-American man in his early 20s

holding a large rifle pointed in the direction of San Pablo and then running down Myrtle. Ramos then saw another car crash into a roll-up door. The driver of this vehicle was later identified as Scott, a member of the Ghost Town gang with a reputation in Oakland for violence who was killed by gunshots to the back of his head.

A police investigation ensued, yielding the following evidence. A cell phone was found at the crime scene containing numerous photos of defendant (including photos he took of himself) and DNA on the earpiece and mouthpiece that matched his DNA. In addition, 27 gun casings were found that criminalists later determined were mostly fired from the same weapon. Finally, police recovered the silver van with vanity plates identified by eyewitnesses Bower and Sherman, which was traced to owner Oscar Harper. While Harper was confirmed to be out of town on the day in question, his nephew, Jamie Wallace (a.k.a. "J-Dub"), was seen driving the van at about 2 p.m.

On January 6, 2009, Oakland Police Officer Steve Valle went to the Acorn Housing Complex to investigate a report from a confidential informant that defendant and a man named Houston Nathaniel were in the area in possession of firearms. Officer Valle observed defendant in video footage from a surveillance camera handing a suspected firearm to Nathaniel, who then placed the item in his waistband. Officer Valle thus had the two men arrested, at which time two firearms were found on Nathaniel.

On April 7, 2009, defendant was interviewed in connection with Scott's murder for about five hours by Oakland Police Inspector Gus Galindo. During this interview defendant confessed to shooting Scott. The next day, defendant was interviewed by Deputy District Attorney Colleen McMahon, for whom he drew a diagram showing his location during the shooting.

Trial began July 21, 2010. Among other witnesses, Officer Valle testified for the prosecution as an expert on Oakland gang activities. Officer Valle identified defendant as a member of the Acorn gang, an "informal" gang with about 50 to 75 members. In addition to sharing common symbols and signs, the Acorn gang engaged in a wide variety of criminal activity, including murder, shootings, narcotics and firearm possession, and robbery. Officer Valle further explained that Acorn had been a rival

gang to Ghost Town, Scott's gang, since June 2006. The territories of these two gangs were just blocks apart in Oakland.

In identifying defendant as an Acorn member, Officer Valle pointed to defendant's tattoo, his gang moniker ("Woodah"), the names of fellow gang members found on his cell phone call list, and photographs found on his cell phone and at his home that included photographs of individuals flashing Acorn's gang sign. Officer Valle believed the murder in this case was gang-related based upon Scott's presence in Acorn territory, which would have been perceived as a showing of disrespect to Acorn by Ghost Town; the use of a high-powered assault weapon, a commonly used Acorn weapon; and the crime's highly visible location in a major West Oakland thoroughfare, which would have enhanced Acorn's violent reputation.

Defendant, testifying on his own behalf, claimed Acorn was a housing project rather than a gang. Defendant also claimed that, in the Acorn area at about noon on the day of the shooting, he saw an acquaintance, Warren Ingram, walking around with an assault rifle, and saw Scott circling the block a few times. Defendant insisted that, in the evening, when he learned of the shooting, he was at his sister's house. Ingram later told defendant that he shot Scott. According to defendant, he nonetheless falsely confessed shooting Scott to Inspector Galindo because he feared what would happen to his family if he snitched on Ingram (who is now dead, so no longer a threat). Defendant acknowledged also telling Inspector Galindo that Jamie Wallace, who was still alive, was the van's driver, and could not explain why this disclosure was not "snitching." Nor could defendant explain why his cell phone was found at the crime scene.

Corroborating defendant's alibi was 17-year-old T.B., who testified that he saw two people in a Buick car shoot Scott on the day in question. T.B. did not know the shooters' identities, but confirmed defendant was not one of them. T.B. acknowledged on cross-examination that he was arrested for robbery on December 4, 2008 and that, on the same day, he gave a statement to Inspector Galindo about witnessing Scott's murder.

On August 24, 2010, a jury convicted defendant of first degree murder (Pen. Code, § 187, subd. (a)), shooting at an occupied motor vehicle (§ 246), and being a felon in

possession of a firearm (§ 12021, subd. (a)(1)).¹ The jury also found true various enhancements for personal use and intentional discharge of a firearm (§ 12022.53, subds. (b), (c), (d), (g); § 12022.7, subd. (a); § 12022.5, subd. (a)), and committing the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)). Following a sentencing hearing held on November 19, 2010, the trial court imprisoned defendant for 55 years and eight months to life. This timely appeal followed.

DISCUSSION

Defendant raises two primary issues for our review. First, defendant contends the prosecutor violated his constitutional rights to equal protection and to a trial by jury by using the People’s peremptory challenges to exclude a cognizable group of African-American women. Second, he contends the prosecutor engaged in prejudicial misconduct in violation of his constitutional right to due process when questioning him regarding his meeting with prospective defense witness, Dr. Ron Minagawa, an expert on Bay Area gang activities, by suggesting facts not in evidence. We address each issue in turn.

I. The Prosecutor’s Use of Peremptory Challenges.

The first issue relates to the trial court’s denial of defendant’s motion challenging the prosecutor’s use of peremptory challenges to exclude from the jury two prospective jurors, Gloria Johnson and Rhonda White-Warner, who are both African-American and female.² The relevant law is not in dispute. “[U]se of peremptory challenges to strike prospective jurors 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 “the defendant’s right to equal protection under the Fourteenth Amendment to the United

¹ Unless otherwise stated, all statutory citations herein are to the Penal Code.

² Two African-Americans remained on the jury, one as second alternate and one as juror number 12. A third African-American was subject to a peremptory challenge by the prosecutor, however defendant has not challenged this strike.

States Constitution.” (*People v. Avila* (2006) 38 Cal.4th 491, 541, citing *Batson v. Kentucky* (1986) 476 U.S. 79, 88 [*Batson*]; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 [“remov[ing] prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution”] [*Wheeler*].)

When, as here, a defendant challenges the prosecution’s use of peremptory strikes by way of a so-called *Wheeler/Batson* motion, he or she must comply with the following procedures. 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.’ [Citation.]” (*People v. Williams* (2013) 56 Cal.4th 630, 649.) Second, if the defendant succeeds in making this prima facie case, “the ‘burden shifts to the State to explain adequately the racial exclusion’ by offering permissible race-neutral justifications for the strikes. [Citations.] Third, “[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.” [Citation.]” (*Johnson v. California* (2005) 545 U.S. 162, 168 [162 L.Ed.2d 129, 125 S.Ct. 2410], fn. omitted.)” (*People v. Williams, supra*, 56 Cal.4th at p. 649; see also *People v. Johnson* (1989) 47 Cal.3d 1194, 1216.)

“The existence or nonexistence of purposeful racial discrimination is a question of fact.” (*People v. Lewis* (2008) 43 Cal.4th 415, 469.) As such, on appeal, we must uphold the trial court’s denial of a *Wheeler/Batson* motion “if the ruling is fairly supported by substantial evidence in the record, *giving deference to the trial court which had the opportunity to observe . . . the juror.*” (*People v. Holt* (1997) 15 Cal.4th 619, 651; see also *People v. Williams, supra*, 56 Cal.4th at p. 649.) “ ‘We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses.’ [Citation.] As long as the court ‘makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.’ [Citation.]” (*People v. Williams, supra*, 56 Cal.4th at p. 650.)

Here, the trial court denied defendant's *Wheeler/Batson* motion at the first stage, finding that he failed to make a prima facie showing that the totality of the relevant facts gave rise to an inference of discriminatory purpose.³ Nonetheless, even in the absence of burden shifting, the prosecutor chose to go forward with an offer of permissible race-neutral justifications for the challenged strikes, which the trial court accepted as proof of the lack of purposeful racial discrimination. (See *People v. Williams, supra*, 56 Cal.4th at p. 649.) Putting aside this particular nuance of the *Wheeler/Batson* process in this case, we find no grounds for disturbing the trial court's decision to deny defendant's motion given the substantial evidence supporting the prosecutor's race-neutral justifications for striking prospective jurors Ms. Johnson and Ms. White-Warner.

Specifically, with respect to Ms. Johnson, the prosecutor explained that he excused her from the jury pool based upon the following facts: her cousin was incarcerated on drug charges in North Carolina and she had visited him there; she expressed on a jury questionnaire her beliefs that African-Americans are subject to different treatment and that "without money there is no justice;" and she stated during voir dire her belief that prisons are not good places and that, should defendant end up incarcerated, two lives would be lost rather than one (the victim's and defendant's), a fact that will likely remain on her mind should she be on the jury.⁴ Given these circumstances, the prosecutor explained, he was concerned about Ms. Johnson's expressions of sympathy and her dislike of prisons. The record of Ms. Johnson's voir dire is in all significant regards consistent with the prosecutor's explanation. As such, because the prosecutor's stated reasons for excusing Ms. Johnson are reasonably grounded, not in purposeful discrimination, but rather in the common trial strategy of avoiding jurors who might

³ Defense counsel's prima facie showing was, first, that the prosecutor's challenges came "at the end of the jury selection process when I had few, if any, challenges left myself," and, second, that Ms. Johnson and Ms. White-Warner were "consistent in their statements that they could be objective and listen to the evidence, notwithstanding the fact they might have some sympathy or feelings of concern for Mr. Perry."

⁴ Ms. Johnson also stated that, if "[y]ou do the crime, you do the time," and that her "decision will be based on the evidence that is presented to me."

improperly decide a defendant's guilt based on sympathy or aversion to imprisonment, there are no grounds for reversal in her case. (*People v. Lewis, supra*, 43 Cal.4th at p. 469 ["The credibility of a prosecutor's stated reasons for exercising a peremptory challenge 'can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy' "].)

Moreover, we reach a similar conclusion with respect to the challenge to Ms. White-Warner, a program manager for the HIV/AIDS Ministry Project at the Allen Temple who had conducted creative writing workshops for female inmates at Santa Rita. The prosecutor explained his decision to excuse Ms. White-Warner as follows. First, he noted that Ms. White-Warner described herself as "an activist of sorts," who saw the need for "radical healing" and "increased dialogue" between the police and the African-American community in Oakland. Second, he pointed to "[w]hat she does for a living, she is a minister" with a degree in restorative justice.⁵ According to the prosecutor, based on these facts, "I don't think there could be potentially a juror who would be more sympathetic towards a defendant." Again, the record supports the adequacy of the prosecutor's explanation. No more is required.⁶ (*People v. Reynoso* (2003) 31 Cal.4th

⁵ We note that the prosecutor was not entirely accurate on these points, as it appears Ms. White-Warner was studying to be a minister and while it is clear she had taken classes in restorative justice, it is unclear whether she had a masters degree. In addition, similar to Ms. Johnson, Ms. White-Warner stated her intent to work together with the judge and other jurors to make sure justice was achieved. These facts, however, do not affect our ultimate conclusion that no discriminatory purpose in Ms. White-Warner's excusal has been established on this record.

⁶ Defendant contends the prosecutor's discriminatory purpose is reflected in the fact that the prosecutor responded to his *Wheeler/Batson* motion, first, by justifying his striking of Ms. Wayne, a third African-American prospective juror whose excusal was never challenged. Ms. Wayne, among other things, lived near the Acorn housing project and had relatives serving time for manslaughter. Defendant reasons that "the prosecutor's argument implied that Ms. Johnson and Ms. Wade-Warner might be undesirable because they were members of the same ethnic group as the clearly undesirable Ms. Wayne, which is also evidence of a discriminatory intent." We decline to so interpret the prosecutor's conduct given the substantial evidence, set forth above,

903, 924 [“ ‘All that matters is that the prosecutor’s reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.

“[A] ‘legitimate reason’ is not a reason that makes sense, but a reason that does not deny equal protection’ ”]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1101 [same].)

Accordingly, because defendant has again failed to provide any ground for reversing the trial court’s denial of his *Wheeler/Batson* motion, we proceed to the final issue.

II. The Prosecutor’s Conduct during Defendant’s Cross-Examination.

Defendant’s second contention is that the prosecutor engaged in prejudicial misconduct when questioning him regarding his pre-trial interview with prospective defense witness, Dr. Minagawa, an expert on Bay Area gang activities. The relevant facts are as follows.

During defendant’s cross-examination, the following colloquy occurred with the prosecutor regarding an interview he had in prison with Dr. Minagawa:

PROSECUTOR: Now, Mr. Perry, I want to show you a photograph of some guy.

I think you met with him about a month ago, a guy named Ron Minagawa; is that right?

DEFENDANT: Yeah.

[¶] . . . [¶]

PROSECUTOR: Interviewed you in jail?

DEFENDANT: Yep.

PROSECUTOR: Talked about you and your life?

DEFENSE COUNSEL: Objection. May we approach?

COURT: Sure. [Discussion held off the record.]

PROSECUTOR: Mr. Perry, with respect to the questions about your meeting with Ron Minagawa, I don’t want to hear about the content of your conversations, okay?

supporting his race-neutral purpose. “As a reviewing court, we presume the advocate uses peremptory challenges in a constitutional manner, and defer to the trial court’s ability ‘to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.’ (*Wheeler, supra*, 22 Cal.3d at p. 282.)” (*People v. Lenix* (2008) 44 Cal.4th 602, 626.)

COURT: You said you don't?

PROSECUTOR: I do not.

PROSECUTOR: You know he was hired as a gang expert, correct?

DEFENDANT: Yes.

PROSECUTOR: You know that Officer Valle was a gang expert for the Prosecution, right?

DEFENDANT: Yes.

[¶] . . . [¶]

PROSECUTOR: You talked to him, right?

DEFENDANT: Yes.

PROSECUTOR: How long did you talk to him for? A couple of hours?

DEFENDANT: No. Probably about an hour.

PROSECUTOR: He was hired to provide an opinion that you are not part of a gang. You understand that, right?

DEFENDANT: Right.

PROSECUTOR: He was hired, after he talked to you, to come in and testify to that. Do you understand that?

DEFENDANT: Yep.

PROSECUTOR: You know he is not coming in here to testify, right?

DEFENDANT: Right.

PROSECUTOR: You know what perjury is?

DEFENDANT: No.

PROSECUTOR: Lying under oath?

DEFENDANT: (No response.)

PROSECUTOR: Do you understand that Dr. – I think he is a doctor – Dr. Minagawa would not come in here and perjure himself? Do you understand that?

DEFENDANT: Yes.

PROSECUTOR: He wasn't going to come in here, your expert hired by your attorney to come in here and say you are not in a gang. Do you understand that?

DEFENDANT: Yep.

Later, after defendant was excused as a witness and the jury dismissed for the day, defense counsel approached the bench and requested a limiting instruction “to the effect that any testimony regarding Dr. Minagawa should not be considered evidence in the case.”⁷ In doing so, defense counsel described himself as “somewhat offended by the reference to Dr. Minagawa, because, to me, if the Court allows that kind of evidence to come in, it has a very chilling effect on me in terms of hiring an expert in the future, because I must consider when I hire an expert, is the hiring of the expert, all by itself, likely to be used in some fashion as evidence which is contrary to the interest of my client.” Defense counsel also explained that, contrary to the prosecutor’s implication, counsel declined to use Dr. Minagawa as an expert witness because his opinions were “very vague, opinions, very generalized,” and thus of limited value. The prosecutor’s implication that Dr. Minagawa’s opinions would have been unfavorable to the defense was therefore unfair, “whether it is or isn’t [true].”

The prosecutor responded that his questioning regarding Dr. Minagawa was proper as relevant to defendant’s state of mind and to his credibility in denying gang membership. The prosecutor also noted that Dr. Minagawa was a hired defense expert, not defendant’s treating psychologist, rendering any claim of privilege invalid.

The trial court, in ruling on the proposed limiting instruction, first pointed out to defense counsel “you didn’t even object.” The trial court also rejected any claim that a psychotherapist privilege was violated, or that the hearsay rule was implicated, noting the prosecutor did not ask about the substance of defendant’s conversation with Dr. Minagawa. The trial court then ultimately declined to give the proposed instruction based upon the absence of prosecutorial misconduct or any other legal ground requiring it.

⁷ Defense counsel subsequently submitted a proposed jury instruction stating as follows: “You are not to draw any inference or reach any conclusion regarding the testimony that [defendant] consulted with Dr. Minagawa.”

Putting aside defendant's apparent waiver of this issue by failing to provide a timely objection setting forth relevant grounds for his request (*People v. Green* (1980) 27 Cal.3d 1, 27), we affirm the trial court's decision to reject the limiting instruction for the following reason. Given the overwhelming evidence in the record of defendant's guilt and the relative insignificance of the Dr. Minagawa-related evidence, even if the trial court erred by refusing to give the proposed limiting instruction, any such error must be deemed harmless. In particular, as the People note, defendant was subjected to a lengthy cross-examination, with the challenged portion constituting a relatively small percentage of his total time on the stand. Second, there was a wealth of other evidence in the record proving Acorn was a criminal gang to which defendant belonged, including photographs of defendant and other gang members flashing Acorn's gang sign found on his cell phone recovered from the murder scene and at his home. Third, and more importantly, the jury was instructed prior to deliberations that attorneys' statements and questions are "not evidence," and that the jury must not "assume to be true any insinuation suggested by a question asked a witness." We presume the jury followed these clear instructions and, accordingly, conclude any misconduct was not prejudicial. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.)

Finally, with respect to defendant's related claim that the prosecutor's questions rendered his trial fundamentally unfair by introducing before the jury facts not in evidence, we note that prosecutorial misconduct must rise to the level of reprehensibility or deception to warrant reversal on appeal. (*People v. Hill* (1998) 17 Cal.4th 800, 822-823.) Here, while we agree with defendant the prosecutor's questions were inappropriate given their dubious relevance to the purported issue of defendant's state of mind, we nonetheless conclude there is no such reprehensibility or deception reflected in the record.⁸ Defense counsel advised the court before trial that Dr. Minagawa would testify about defendant's relationship with the Acorn gang (which defendant denied was a gang), based on his prison interview with defendant. However, defense counsel later decided

⁸ We do not condone the prosecutor's conduct in questioning defendant regarding Dr. Minagawa's absence at trial.

not to call Dr. Minagawa as a witness. These circumstances gave the prosecutor a good faith basis to draw the conclusion that Dr. Minagawa was not able to provide under oath an opinion favorable to defendant's case.⁹ Accordingly, the trial court's denial of defendant's request for a limiting instruction must stand. (See *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1233-1234 [no prejudicial prosecutorial misconduct where the prosecutor had a good faith belief that a factual basis existed for his insinuations to an adverse witness on the stand, even though there was no actual basis in the record]. Cf. *People v. Daggett* (1990) 225 Cal.App.3d 751, 757-758 [prosecutor engaged in prejudicial misconduct by suggesting a child sexual abuse victim must have learned about certain sexual activities from defendant after the prosecutor successfully moved to exclude contrary evidence that the victim had been molested by another]; *People v. Varona* (1983) 143 Cal.App.3d 566, 570 [prosecutor engaged in prejudicial misconduct where "the prosecutor not only argued the 'lack' of evidence where the defense was ready and

⁹ In arguing that the prosecutor's questioning was in fact wholly permissible, the People point to California Supreme Court authority holding that "[t]he failure of a defendant to call an available witness whom he could be expected to call if that witness testimony would be favorable is itself relevant evidence." (*People v. Ford* (1988) 45 Cal.3d 431, 448.) As such, "[prosecutorial] comment inviting the jury to draw a logical inference based on the state of the evidence, including comment on the failure to call available witnesses, is permissible except as limited by [Evidence Code] section 913 and *Griffin v. California* [(1965)] 380 U.S. 609 [Citations] . . ." (*People v. Ford*, *supra*, 45 Cal.3d at p. 449.) According to the People, neither Evidence Code section 913 nor the above-referenced case law limits the scope of this rule to non-expert witnesses. Thus, the People continue, the rule should apply here and support the trial court's finding that no error occurred with respect to the prosecutor's Dr. Minagawa-related questioning. (See also *People v. Mendias* (1993) 17 Cal.App.4th 195, 203 ["Although a prosecutor may not comment, directly or indirectly, on a defendant's exercise of his privilege not to testify (*Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229]), comment is permitted when a defendant fails 'to call an available witness whose testimony would naturally be expected to be favorable' "].)

Having considered this argument, we are compelled to note that none of the cases relied upon by the People involves prosecutorial commenting on the absence of an expert witness like Dr. Minagawa. As such, we question whether the People's authority is controlling in this case. In any event, we need not delve more deeply into this legal issue given our conclusion that any error on this record was harmless.

willing to produce it, but he compounded that tactic by actually arguing that the woman was not a prostitute although he had seen the official records and knew that he was arguing a falsehood”].)

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Siggins, J.