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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**MOHAMMAD KATTAN,**

**Defendant and Appellant.**

**A132395**

**(Solano County  
Super. Ct. No. FCR268259)**

Defendant and appellant Mohammad Kattan (appellant) appeals following his convictions for false imprisonment and committing a lewd act upon a child under the age of 14. He contends the trial court erred in rejecting his challenge to the prosecutor’s allegedly race-based peremptory challenge of a juror. We affirm.

**BACKGROUND**

In June 2010, the District Attorney for the County of Solano filed an information charging appellant with kidnapping for the purpose of committing a lewd act upon a child (Pen. Code, § 209, subd. (b)(1))<sup>1</sup> (count 1) and committing a lewd act upon a child under the age of 14 (§ 288, subd. (a)) (count 2). It was further alleged as to count 2 that appellant kidnapped the victim (§§ 209, 667.61, subd. (b)).

Underlying both counts was a July 2009 incident during which appellant allegedly made a six-year-old girl touch his penis.

<sup>1</sup> All undesignated section references are to the Penal Code.

In March 2011, a jury convicted appellant on count 1 of the lesser included offense of felony false imprisonment (§ 237) and found appellant guilty as charged on count 2. The jury found not true the special allegation that appellant kidnapped the victim.

In May 2011, the trial court sentenced appellant to state prison for the upper term of eight years for count 2 and stayed the sentence for count 1 under section 654. This appeal followed.

## DISCUSSION

Appellant contends the prosecutor violated appellant's state and federal constitutional rights by using a peremptory challenge to excuse a minority juror. (*People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162; *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); see also *People v. Mills* (2010) 48 Cal.4th 158, 173 (*Mills*).

### I. *Factual Background*

Appellant's claim on appeal relates to the prosecutor's peremptory challenge of a prospective juror identified in the record as SLC. SLC filled out a juror questionnaire that indicated, among other things, she had a child who was three years old, was employed at Sleep Train as a sales associate, had a spouse or significant other employed by the United States Air Force, had a close friend or relative employed by Fresno State Prison, and did not have opinions or feelings which would make it difficult to judge someone's guilt.

During voir dire by the court, SLC did not indicate: she had heard anything about the case, she knew any of the potential witnesses, it would be impossible for her to objectively and fairly evaluate the evidence, she knew anybody accused of a similar crime or who had been a victim or witness of a similar crime, or she would automatically believe or disbelieve a police officer witness. Upon further questioning by the court, she said she had an open mind and could be fair. In response to questions from defense counsel, SLC stated that the fact she has a young child would not affect her ability to be

open-minded and that she is not close to the cousin who works at a prison. The prosecutor did not ask specific questions of SLC.

The prosecutor's first peremptory challenge was to prospective juror CFC, a physician who expressed concern about the effect of jury service on his business and patients. The prosecutor's second peremptory challenge was to prospective juror SLC. Defense counsel moved pursuant to *Batson* and *Wheeler* to have SLC reinstated. Defense counsel explained that SLC "appears to be either Hispanic or some heritage, some group of a minority class. [Appellant] is of a minority class, and he's entitled to a jury of his peers. And I'd make that motion and ask that she be reinstated." The prosecutor responded that defense counsel had not made a prima facie showing. Defense counsel further argued that SLC "has a child who's three years old, indicated that she can be fair. She has a relative who works at the state prison. There was no questioning of her that would indicate that she would be unfair, and based [on] that she [is in] a protected class, and so is [appellant], and I could ask that the motion be granted."

The trial court stated, "The court does not believe that a prima facie case has been made yet, however, I'm going to at this time invite the district attorney for the record to cite her reason for excusing that particular juror. [¶] I will indicate, I also cannot tell by the name or her appearance of her nationality, but it does appear to be some minority. It's just without asking if she has mixed lineage, I just have no idea." In explaining the peremptory challenge, the prosecutor stated, "The reason why I chose to excuse her is during questioning, she was not all that forthcoming. In fact, she was very quick to answer. I didn't feel like I got enough information from her, either with the court's questioning, [defense counsel's] questioning, or my questioning. [¶] The other issue that I had is she works for Sleep Train, and I'm very well-aware that they work on commission only, and I would be concerned that she would want to rush through the process." The court responded and ruled as follows: "There were no questions on that. But in any event, I will take the prosecutor at her word that there was not an impermissible reason for the excusing of that particular juror in making a sufficient record. However, obviously we're clearly on notice of [defense counsel]'s concerns. But

in any event, we'll get the jurors back here. The motion is denied. And we will excuse [SLC] when she comes back in.”

## II. *Legal Analysis*

As the Supreme Court has explained, “ ‘In [*Wheeler*] . . . we held that the use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership 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. Subsequently, in [*Batson*] . . . the United States Supreme Court held that such a practice violates, inter alia, the defendant’s right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. . . .’ [Citation.]” (*People v. Catlin* (2001) 26 Cal.4th 81, 116.)

“Procedures governing motions alleging the discriminatory use of peremptory challenges are settled. ‘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.] Second, once the defendant has made out a 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.]’ [Citation.]” (*People v. Riccardi* (2012) 54 Cal.4th 758, 786 (*Riccardi*)). However, where the trial court both rules that the defendant “failed to make a prima facie showing of group bias (the first stage of a *Batson* inquiry), and also passed judgment on the prosecutor’s actual reasons for the peremptory challenges (the third stage of a *Batson* inquiry),” then the case is considered to be a “first stage/third stage *Batson* hybrid.” (*Mills, supra*, 48 Cal.4th at p. 174.) In such a circumstance, where the reviewing court has “both the prosecutor’s actual reasons and the trial court’s evaluation of those reasons,” “ ‘the question of whether defendant established a prima facie case is moot.’ [Citation.]” (*Ibid.*) The reviewing court need not address the question of whether the defense counsel established a prima facie case of discrimination; instead, the court should “skip to *Batson*’s third

stage to evaluate the prosecutor’s reasons” for the peremptory challenge at issue. (*Mills*, at p. 174; see also *Riccardi*, at pp. 786-787.)<sup>2</sup>

“At the third stage of the *Wheeler/Batson* inquiry, ‘the issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.’ [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court’s own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.] [¶] Review of a trial court’s denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] ‘We review a trial court’s determination regarding the sufficiency of a prosecutor’s justifications for exercising peremptory challenges “ ‘with great restraint.’ ” [Citation.] 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.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]’ [Citation.]” (*People v. Lenix* (2008) 44 Cal.4th 602, 613-614, fns. omitted (*Lenix*); see also *Riccardi, supra*, 54 Cal.4th at p. 787.) “[B]ecause the trial court is ‘well positioned’ to ascertain the credibility of the prosecutor’s explanations and a reviewing court only has transcripts at its disposal, on appeal ‘ ‘the trial court’s decision on the ultimate question of discriminatory intent represents a finding of fact of the sort

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<sup>2</sup> On the other hand, a reviewing court need not skip to the third stage where a trial court finds a defendant failed to make a prima facie case and then elicits a prosecutor’s reasons for the peremptory challenge for the purpose of making a complete record, where the court does not rule on whether the prosecutor’s explanation is credible. (See *People v. Taylor* (2010) 48 Cal.4th 574, 612-613.)

accorded great deference on appeal” and will not be overturned unless clearly erroneous.’ [Citation.]” (*Riccardi*, at p. 787.)<sup>3</sup>

Appellant argues the trial court erred in accepting the prosecutor’s race-neutral explanation because SLC “was likely to be pro-prosecution, as the mother of a young child and relative of a prison employee.” Furthermore, the prosecutor’s claim to be concerned about the lack of information about SLC and the economic impact of jury service on SLC are belied by the prosecutor’s failure to ask SLC any questions. As appellant points out, “ ‘implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.’ [Citation.]” (*Riccardi, supra*, 54 Cal.4th at p. 787.) However, “[i]n that instance the issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible.” (*Ibid.*)

The bare record on appeal provides some basis to be skeptical of the reasons offered by the prosecutor, but we, unlike the trial court, do not have the benefit of observing the prosecutor’s demeanor or the demeanor of SLC. Moreover, it is well established that “ ‘[t]he justification need not support a challenge for *cause*, and even a “trivial” reason, if genuine and neutral, will suffice.’ [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.]” (*Lenix, supra*, 44 Cal.4th at p. 613.) In the present case, the trial court recognized that the prosecutor had not developed a record on whether SLC would suffer an adverse economic impact by serving on the jury, but the court apparently accepted the prosecutor’s other explanation, which was based on the demeanor of the juror. The court presumably based its ruling on the court’s observations of the demeanor of the prosecutor and SLC. Although the explanations presented by the prosecutor were not very persuasive, they were not fantastical or contradicted by other information in the record. The trial court’s ruling was not “clearly erroneous.” (*Riccardi, supra*, 54 Cal.4th at p. 787.) Giving due deference to the court, we conclude

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<sup>3</sup> We reject appellant’s contention that we should review the issue *de novo*; the record does not show that the trial court applied an incorrect legal standard.

substantial evidence supports the court's assessment of the prosecutor's stated reasons for the peremptory challenge. (See *Lenix*, at pp. 613-614.)

DISPOSITION

The judgment is affirmed.

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SIMONS, J.

We concur.

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JONES, P.J.

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BRUINIERS, J.