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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.

CARLOS BARAJAS, JR.,

Defendant and Appellant.

A137263

**(Contra Costa County
Super. Ct. No. 51204999)**

Carlos Barajas, Jr., appeals from a judgment sentencing him to three years in prison after a jury convicted him of assault with a semiautomatic firearm and possessing an unregistered loaded firearm and ammunition. (Pen. Code, §§ 245, subd. (b), 25850, subd. (a) & (c)(6).) He contends the judgment must be reversed because the prosecutor used a peremptory challenge to excuse two Latino/Hispanic jurors in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). We affirm.

DISCUSSION¹

Batson/Wheeler Motion

I. *General Legal Principles*

As discussed in *Batson* and *Wheeler*, both the state and the federal Constitutions bar peremptory challenges that are based on a juror's race, ethnicity or membership in a similar cognizable class. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*)). A defendant who suspects a juror has been challenged for a discriminatory reason must bring a motion under *Batson/Wheeler*, at which point the trial court will analyze the claim using a familiar three-prong test. First, the court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race, ethnicity or some other impermissible ground. Second, if the showing is made, the burden then shifts to the prosecutor to demonstrate the challenge was exercised for a neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. (*Lenix*, at p. 612.) A prima facie case of discrimination may sometimes be based on the physical appearance of the juror, without the need to establish the precise racial or ethnic identity of the juror. (*People v. Bell* (2007) 40 Cal.4th 582, 599; *People v. Motton* (1985) 39 Cal.3d 596, 604.)

II. *Voir Dire Proceedings*

The *Batson/Wheeler* issue in this case arises from the prosecutor's peremptory challenges to two prospective jurors who appeared to be Latino/Hispanic, Jurors O. and V.

Juror O., who the prosecutor indicated was "probably Latino in origin," was a retired computer systems engineer and librarian. He had sat on a jury as an alternate some 10 years before but had never deliberated. Asked by the court whether he had any concerns about sitting as a juror, he mentioned he was under medical care for a back problem and was taking heavy medication, though he did not think it would affect his ability to listen to the evidence.

¹ Because the only issue on appeal is the trial court's denial of a *Batson/Wheeler* motion, we do not describe the underlying facts or trial evidence.

The prosecutor used his fourth peremptory challenge to excuse Juror O. Defense counsel made a *Batson/Wheeler* motion, stating Juror O. was “the first juror who is Hispanic to be challenged” and nothing about him “seems to me any significantly different than any other of the jurors who are presently still seated” The prosecutor disputed that defense counsel had made a prima facie case of discrimination, but offered his reasons for the challenge: “So my reasons are that Mr. [O.] caught my attention immediately when he walked in and sat in the first panel, and that’s because he has a very large hoop—I guess it’s not a hoop, a large earring. He also has a goatee. And he was a computer engineer but then switched to being a librarian. I spoke with him a little and didn’t get anything too strange from him, but there were some warning flags that popped up to me as somebody who’s leading a somewhat alternative lifestyle. [¶] Let me give you an example of where I’ve done this as well. It’s consistent with my other challenges. [Juror S.] I challenged. She is a retired teacher. She taught disabled children in Ghana—children with severe disabilities in Ghana. She worked with troubled teens. That’s a type of juror who I think will feel sympathy for the defendant and has a type of lifestyle—or appears to live in a type of lifestyle that would be sympathetic to a criminal defendant, the same type of lifestyle, I think, Mr. [O.] is engaged in. Given my choice as a juror, it’s not my first choice.” Defense counsel stated the comparison with Juror S. was “too broad to be able to say that that is an articulable basis for having someone excused for a peremptory.”

The trial court denied the *Batson/Wheeler* motion: “I don’t find there’s been a prima facie case made of a systematic exclusion of Latinos. And notwithstanding that even if there were, I think that [the prosecutor] has stated good-faith and ethnicity-neutral reasons for excusing this juror to distinguish him from other jurors. So I’m going to deny the request.”

The second juror at issue, Juror V., was a software engineer who responded as follows to the court’s questions during voir dire: “Q: Mr. [V.], there’s nothing in particular that jumps out at me from your questionnaire. Is there anything that we discussed that gives you any concerns? A: No. Q: Anything else that you think the

lawyers or I need to know? A: No. Q: Do you think you can be a fair and impartial juror in this case? A: Yes.”

Juror V. also had the following exchange with the prosecutor: “Q: Finally, Mr. [V.], you’re a software engineer? A: Yes. Q: Can you tell me a little bit about what you do as a software engineer? A: I’m currently between companies. I was most recently a CTO for a small company in South San Francisco. Q: CTO, chief technical officer? A: Chief technical officer. Q: Anything we talked about brings to mind anything at all, any ideas? A: No. Q: Feel comfortable with what we’ve discussed? A: Yes.” Defense counsel asked a single question of Juror V.: “Sir, so if you were—you heard some evidence that somebody was under the influence of alcohol, you’ve heard evidence of what that person did or said or said over time, your job, if you were to be in seat No. 12, would be to make witness credibility decisions. Would you be able to do that if you were to hear evidence that somebody was drunk or tipsy? A: Yes.”

The prosecutor used his sixth peremptory challenge to excuse Juror V. and defense counsel again objected on *Batson/Wheeler* grounds. Defense counsel noted Juror V. appeared to be Hispanic and observed the prosecutor had left other engineers on the jury. The prosecutor pointed out that two Latino jurors remained in the jury box and stated he was not exercising his challenges to exclude Latinos. He explained, “Mr. [V.] caught my attention immediately when he walked in the courtroom with his hair. He has extremely long, curly hair. I really didn’t know who he was, so I thought, Okay, let’s talk to him. I tried to speak with him in my round of voir dire, and his answers were extremely clip [*sic*] and short. I thought they were actually clipped and short with [defense counsel] as well. [¶] The Court: And with me.

“[The prosecutor]: Right. I couldn’t get a read on the guy. He’s a software engineer. He didn’t crack a smile. It’s not a juror I want to take a risk on. [¶] Let me go through and I’ll show you another juror who I kicked for similar reasons. Mr. [K.], who I just kicked, he’s a data analyst. And as you remember, I had a conversation with him about do you work with other people, do you think you could work with other folks? And he was pretty clipped as well. And he wasn’t really giving me a lot of room to work,

and that's the type of juror that scares me; how they're going to interact with 11 other people when they get back there and have a conversation. [¶] And I'll address [defense counsel]. [Seated Juror 1] in juror seat No. 1, is an engineer for 40 years with Bechtel Engineering. And he seemed hard of hearing but he smiled, and he made everyone laugh when you sort of asked him some questions and he, I don't know, seemed more friendly. [¶] The same with [seated Juror 5]. When [defense counsel] questioned [seated Juror 5], . . . whom I didn't have a chance to question, he was sociable and he smiled and he answered questions affably. [¶] So in terms of other—[seated Juror 11] is an engineer. He's been with Caltrans for 20 years. He has expressed himself pretty well. He said he worked for the CHP and he could be fair and impartial. [¶] So, you know, it's not solely the issue of engineer, but it's a red flag. And coupled with his hair, which, I don't know, draws my attention for the same reason Mr. [O.]'s goatee and earring does, I'm concerned. And finally with the clipped answers.”

The trial court stated it was “starting to get a little bit concerned about the prima facie case at issue,” noting it was not sure of Juror V.'s ethnicity but he “could be Latino.” The court continued, “[E]ven if I were to find a prima facie case at this point, I think [the prosecutor] has stated reasons grounded in the—in the record, good-faith reasons that are ethnicity neutral for excluding this juror. And I also got the sense that he was very clip [*sic*] in his responses to both counsel. It wasn't just to [the prosecutor], but it was to both. And, frankly, to me as well. I couldn't get him to say much. [¶] So—but I am a little concerned about this, so I'm hopeful that this is not going to recur. So I will overrule—or deny the *Batson/Wheeler* challenge.”

The seated jury included two Latino/Hispanic jurors.

III. Analysis

Because the prosecutor in this case offered his reasons for challenging Jurors O. and V., we proceed to the second and third steps of the *Batson/Wheeler* analysis to determine whether the record supports the trial court's ultimate conclusion that the challenge was not made for a discriminatory purpose. (*People v. Lewis* (2008) 43 Cal.4th 415, 471.) We review the trial court's ruling for substantial evidence, presuming the

prosecutor used his or her peremptory challenges in a constitutional manner and “giv[ing] great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) The reason for a challenge does not need to be well-founded so long as it is not discriminatory. (*Purkett v. Elem* (1995) 514 U.S. 765, 768 (*Purkett*)). “ [E]valuation of the prosecutor’s state of mind based on demeanor and credibility lies “peculiarly within a trial judge’s province.” ’ ’ ” (*People v. Stevens* (2007) 41 Cal.4th 182, 198.)

Substantial evidence supports the trial court’s conclusion Juror O. was not excused for a discriminatory reason. The prosecutor explained she excused Juror O. because his professional history and aspects of his physical appearance suggested he led a “somewhat alternative lifestyle” and might be sympathetic to the defense. Our function as a reviewing court is not to determine whether this premise is valid, but whether it was genuine. (*Purkett, supra*, 514 U.S. at p. 769 [if prosecutor sincerely believes prospective juror with long, unkempt hair, mustache and beard would not make a good juror, this is a valid and nondiscriminatory reason]; *People v. Reynoso* (2003) 31 Cal.4th 903, 924 [upholding peremptory challenge based on juror’s occupation as a customer service representative and presumed lack of educational experience, though assumption as a general matter was of “questionable persuasiveness”].) “[T]he issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible.” (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.)

Nor did the court err in denying the *Batson/Wheeler* motion as to Juror V. The prosecutor explained he had found this juror, an engineer by profession, to be “clipped” in his responses to counsel and the court. The court agreed with this characterization and the record bears it out. Although defense counsel noted other engineers had not been excused, the prosecutor explained it was the juror’s manner during questioning, not his profession per se, that supplied the reason for the challenge. The prosecutor was also concerned about Juror V.’s very long hair, a reason consistent with the explanation for his peremptory challenge to Juror O.

Finally, the record reflects the jury that was finally accepted by the prosecutor included two Latino/Hispanic jurors. While not conclusive, this is an indication of the prosecutor's good faith. (*People v. Streeter* (2012) 54 Cal.4th 205, 224-225.)

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P.J.

BRUINIERS, J.