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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY D. HALL,

Defendant and Appellant.

A140033

(Solano County
Super. Ct. No. VCR211177)

Defendant Anthony D. Hall was convicted, following a jury trial, of first degree murder and attempted robbery, the latter crime accompanied by a firearm use allegation. Following a court trial on prior convictions, defendant was sentenced to 25 years to life for the murder conviction, doubled pursuant to the “Three Strikes” law, plus 16 years for the attempted robbery.

Defendant appeals, asserting that the trial court erred in three ways: (1) mishandling a conflict of interest issue caused by the public defender’s representation of defendant and the victim; (2) denying his *Batson/Wheeler* claim; and (3) admitting testimony from the mother of a key witness. We conclude there was no error, certainly not prejudicial error, and we affirm.

BACKGROUND

The Killing

Early in the morning of April 30, 2011, Everett Brown was shot dead at point blank range by a person in the passenger seat as Brown slowly drove his car in Vallejo. Two witnesses testified in vivid detail as to the circumstances surrounding the killing:

(1) Omri Williams, Brown's friend, who was in the car until moments before Brown was killed, and (2) Kevin Cooper, defendant's cousin who was in the backseat, who testified that as Brown started to drive after Williams got out of the car, defendant "pulled out his gun and shot Everett Brown in his head."

Defendant's three arguments on appeal hardly implicate the facts at trial, so we need not recite them in detail. The salient facts are these:

Williams testified that on the evening of April 29, 2011, he, Brown, and their girlfriends were socializing at his house in Vallejo. Brown and his girlfriend got into an argument, and Brown went out to his car. A few minutes later, Williams went out to talk to him, and Brown said he wanted to stay the night. They drove in Brown's car to his grandmother's house to get his clothes. The car was a blue Oldsmobile.

Brown and Williams then drove to a Valero gas station to get gas. As Brown got out of the car, Williams noticed another car parked at the station, a car that had "Rest in Peace Ether" painted on the back window. Two men, later identified as defendant and Cooper, got out of that car, and stood behind Brown at the cashier's window.

Brown, Cooper, and defendant walked back to the Oldsmobile and got in, Cooper behind Brown in the driver's seat and defendant behind Williams in the passenger's seat. After a couple of seconds of silence, Williams asked Brown, "What is going on? Who are they?" Brown did not respond, and defendant said they were going around the corner. Williams again asked Brown, "What is going on?"; again, he did not answer. At this point, defendant asked Williams if he had a gun on him, and then pulled out a gun, put it to Williams's neck, and said he was robbing them: "[I]t's a jack move and give me everything out your pockets." Williams said he wasn't giving him anything, and defendant said, "You don't think I will kill you?" Defendant told Brown to start the car, and make a left turn out of the parking lot, still holding the gun to Williams's neck.

As they were driving along slowly, Williams told defendant he knew who "Little 'E' " was, the person whose name was spray painted on the back of the car. At that point, defendant said, "Okay. Okay. I'm not going to rob you." Williams was suspicious and

said to Brown they should either drop them off right there, or he and Brown should get out and let them have the car. Brown disagreed and said everything would be all right.

As Williams described it, Brown “told me ‘It’s okay. We’re going to drop them off.’ [¶] And I told him, ‘No. I’m not dropping them off. We can let them out right here, or we can both get out and let them have the car, but we’re not dropping them off.’ ” Brown and Williams continued “going back and forth,” “kind of like arguing,” as Brown continued to slowly drive the car. Williams opened the door and put his foot out, and said to Brown: “I’m getting out. I’m not driving down here. You can get out with me.” Brown replied, “No. It’s all right. It’s all right. I’m going to drop them off. They’re just going to go home.” Williams got out and started walking back to the Valero station. He looked back, and saw Brown’s car make a right turn onto Taper Street.

Williams called his girlfriend, Arianna Guillory, who described Williams as upset and yelling. She and a friend drove to the Valero station, and picked up Williams. They saw police cars, and followed them to Taper Street, where they saw Brown’s body lying in the street. Shortly thereafter, Williams went to the Vallejo police station, where he gave a statement.

Cooper’s testimony was similar, confirming much of Williams’s testimony, and the killing itself. Specifically:

On the evening of April 29, Cooper and defendant went to a party at Montrell Austin’s house in Vallejo. They stayed a few hours, and left sometime after midnight, along with Austin and James Bondoc. They drove in Bondoc’s car, a white Pontiac Bonneville with “RIP Little Ether” painted on the back window, to the Valero station. As Bondoc pulled up to the pump, Cooper and defendant got out of the car and walked to the pay window, where they came upon two men Cooper had never seen before. Cooper recalled he was wearing a green “Polo” baseball cap, defendant a bright turquoise t-shirt.

After two or three minutes, Brown returned to the Oldsmobile, joining Williams, who had already returned and was sitting in the passenger’s seat. Defendant and Cooper followed and got into the Oldsmobile, Cooper behind Brown in the driver’s seat and defendant behind Williams. Defendant told Brown to “[d]rive,” “[t]ake us around the

corner.” And the next thing that happened was that defendant pulled out a gun and said, “Let’s rob these niggas.”¹

Apparently attempting to diffuse the situation, Williams said, “We know Montrell Austin.” Also apparently attempting to ease the tension, Brown said, “Okay,” he would drive around the corner, as defendant had said. Brown continued driving, and he and Williams got into an “argument.” Brown stopped the car and Williams got out and walked away, at which point defendant moved from the back seat to the passenger seat. Then, in Cooper’s words, as Brown began to drive defendant “pulled out his gun and shot Everett Brown in his head.” There was no conversation between defendant and Brown. And Brown did nothing aggressive to defendant: his hands were on the steering wheel.

Cooper jumped out and took off running, and his green Polo baseball cap fell off. Defendant joined him and they ran into somebody’s backyard, where Cooper saw defendant put the gun in a garbage can. They then made their way back to Austin’s house. Sometime later, Austin gave defendant and Cooper a ride to defendant’s apartment. There, Cooper “tripped out on [defendant] lightweight,” i.e., remonstrated with him for the shooting, upset to have been involved in the incident. Cooper stayed with defendant that night, and the next day got a ride back to Oakland.²

The Investigation

Just before 3:00 a.m. on April 30, Vallejo police officer Steven Cheatham responded to a shots fired call with a subject down, and saw a body lying face down on the street. A blue Oldsmobile was stopped in the middle of the street, with its engine running, its headlights on, and the passenger side door open. There were bullet holes in

¹ Cooper knew defendant had a gun, as he had shown it to him at his apartment in Fairfield.

² Cooper was arrested and, after initially refusing to speak to the police, ultimately entered a plea agreement to voluntary manslaughter.

the interior of the driver's side door.³ Cheatham also found a green baseball cap, with an orange "Polo" logo, lying on the street between the car and the body.

Vallejo police detective Jason Potts arrived on the scene at approximately 4:00 a.m. He observed Brown's body lying on the street with a gunshot wound on his right cheek, with stippling near the wound, indicating the shot had been fired at close range. He also observed a gunshot wound to Brown's back.

Williams was first interviewed by police in the early morning hours of April 30, and told them that he was not familiar with the men who got into the Oldsmobile. Later, perhaps the next day, he remembered he had seen defendant at a bar, and that he believed he was known as "Ant" or "Flea."

Detective Potts knew that defendant was known as "Ant" and prepared a lineup with defendant's photograph in it. He took the lineup to Williams (who was at Brown's grandmother's house), and Williams immediately identified defendant as the gunman.

As will be developed, this lineup became the subject of much examination at trial, as the photo of defendant in the lineup had no facial tattoos—and defendant did. This discrepancy is at the heart of defendant's third argument concerning the admissibility of testimony from Williams's mother, as discussed in detail below.

Detective Potts obtained the video surveillance footage from the Valero station. It showed two cars at the station at 2:45 a.m., a blue Oldsmobile and a white Pontiac with "RIP Little Ether" on the back window. The video was enhanced by the FBI laboratory, and it showed a man matching defendant's description wearing a turquoise blue shirt in the back passenger seat of the Oldsmobile as it drove away from the gas station, who appeared to be leaning forward toward the person in the front passenger seat. The video also showed a man wearing a green hat getting into the Oldsmobile.

³ Forensic examination revealed three bullets in the driver's side door, one in the door pillar, and two in the interior of the door.

The police also obtained defendant's cell phone records showing multiple calls placed between 1:27 a.m. and 3:17 a.m., one of which was placed at 2:59 a.m., moments after police received a report of shots being fired.

The Defense Case

Defendant called Robert Shomer, Ph.D, an expert in eyewitness identification and perception, who summarized the difficulties in eyewitness identification. As particularly pertinent here, he emphasized how the existence of unusual details in an initial description such as “[s]cars, marks, tattoos, damage to the face” make for reliability. And, if a witness observed any type of tattoos or facial markings on a suspect, this would be the type of information that would make a strong impression, something the witness would be most likely to mention when describing the suspect.

Defendant also recalled two Vallejo police officers, Detective Potts and Officer Matthew Meredith. Detective Potts was questioned in detail about the photo lineup, and why the lineup used a photo of defendant without tattoos. Officer Meredith testified about his participation in the interview with Williams early in the morning of April 30.

The Charges and the Conviction

By information filed July 21, 2011, the Solano County District Attorney charged defendant with two felonies occurring on April 30: in count one, murder of Brown, accompanied by a personal firearm use allegation (Pen. Code, § 12022.53, subs. (b), (c), (d)); in count two, attempted second degree robbery of Williams, accompanied by personal firearm use allegations. An amended information added allegations of two prior convictions. (*Id.*, §§ 1170.12, subd. (a); 667, subd. (b).)

The jury found defendant guilty of first degree murder and found not true the personal firearm use allegation. The jury also found him guilty of attempted robbery, and found true the personal firearm use allegation. Defendant waived jury trial on the prior convictions, and they were found true. The trial court sentenced defendant to 25 years to life on count one, doubled pursuant to the Three Strikes law, plus five years for the section 667, subdivision (a)(1) enhancement, for a total of 55 years to life. Defendant was sentenced to 16 years consecutive on count two.

DISCUSSION

There Was No Error in Connection with the Conflict of Interest Analysis

Defendant's first argument is that he was denied due process and his Sixth Amendment right to counsel "by the trial court's erroneous failure to detect and remedy the conflict of interest on the part of Deputy Public Defender Mendenhall."

By way of background, the People filed a list of proposed motions in limine, item 6 of which was "to determine if the public defender has a conflict of interest." As the trial court described, the issue was whether the public defender's office had a conflict of interest because it "represented Everett Brown, who is the deceased victim in this case." Deputy Public Defender Mendenhall said that "the matter has been analyzed by my office, prior to the time I even began the case," and "[m]y office has determined that there is no conflict of interest." He explained, "[t]here are policies and procedures in place, which, under the law, to my understanding, means that there is no conflict of interest" And he went on, under those policies he is "prohibited from reviewing files that are—that were created in the representation of Mr. Brown." Finally, Mr. Mendenhall had not in fact reviewed any of those files.

Asked to comment, the prosecutor stated that he was "not familiar with . . . these areas of conflicts and dealing with defense attorneys," but that "[i]t just struck me as strange that the homicide victim in this case was represented by the Public Defender's Officer," and "[t]hat's why I actually invited the Court to maybe address that and explore that."

The trial court cited to *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 (*Rhaburn*), and then stated that it should "not presume there's a conflict when appoint[ed] counsel represents a current defendant, and previously represents someone who was a victim." The court went on to note that it had "to evaluate the totality of the circumstances here and decide whether there was any reasonable possibility that any confidential information from the—about the witness—in this case, Mr. Brown—might be collected or inadvertently acquired through file review office conversations, et cetera." The court then asked Mr. Mendenhall when the representation of Brown had occurred,

and he answered he did not know whether the public defender's office had represented him at the time of his death. The court then confirmed that Mr. Mendenhall had not acquired any information about Brown's case, "nor do you intend to, and there are policies in place which prevent you from doing that." Mr. Mendenhall stated that "[t]he only information that I have about Mr. Brown, I obtained via discovery, from Mr. Charm [the prosecutor]." The court then concluded: "With those comments, I'm satisfied that there is not a conflict of interest, and I will accept the representation of counsel, as well."

The conclusion there was no conflict of interest was correct, but not for the reason stated. The decision was correct because any attorney-client privilege ended with the death of Brown and the conclusion of any subsequent estate administration. (Evid. Code, §§ 953, 954; see *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 65–66.) In light of this, as framed, defendant's argument cannot succeed, as there was no conflict of interest that the trial court had to "remedy."

That said, defendant's argument indicates that his real claim is that the trial court failed to conduct an adequate inquiry, specifically that while the trial court "adequately (and unnecessarily . . .) determined that Mendenhall's representation of Hall would not have an adverse impact on *Brown*," "the trial court made no inquiry or finding as to whether Mendenhall's representation of *appellant* would be adversely affected because of the public defender's prior representation of Brown." More specifically, defendant asserts that *Rhaburn* emphasized that the trial court was obligated to determine not only whether the prior representation would redound to the detriment of the *former* client, but also "whether the prior representation would redound to the detriment of the *current* client by the failure or reluctance of counsel to aggressively investigate, attack, impeach, or otherwise impugn the former client" And defendant goes on, "The trial court should have been particularly concerned about compromised representation based on the public defender's representations that he had not acquired any knowledge about Brown's prior case, *nor did he intend to*. [Citation.] That should have alerted the court to the possibility that attorney Mendenhall was erring on the side of protecting the interests such as they were of former client Brown (which were in fact non-existent . . . at

appellant's expense. [¶] The trial court had an obligation to inquire whether counsel's investigation of Brown's background, character, and charges as reflected in facts of the previously pending case as highly relevant to appellant's any self-defense or imperfect self-defense theory, would be comprised or hampered."

The Attorney General responds that as defendant acknowledges there was no conflict of interest, the issue must be treated as one of ineffective assistance of counsel, and analyzed under the settled principles of *Strickland v. Washington* (1984) 466 U.S. 668, 687–688.)

We conclude that, even if the court (and, for that matter, the parties) did not appreciate the actual issue below, assuming the court was required to make some analysis beyond what it did, any failure to make such analysis could not have resulted in any error prejudicial to defendant, not in light of the actual facts here, some of which are understated by defendant—and many of which are ignored.

Relying on *People v. Shoemaker* (1982) 135 Cal.App.3d 442, the essence of defendant's position begins with the contention that Brown's character could be in issue. In defendant's words, "in a prosecution for a homicide or an assaultive crime where self-defense is raised, evidence of a violent character of the victim is admissible to show that the victim was the aggressor." While recognizing that *Shoemaker* found any error harmless, defendant asserts claimed error because, "Here, there was no independent evidence that Brown was an aggressive, violent or gun-toting kind of person, any or all of which would have supported defense counsel's request for manslaughter instructions." Defendant then alludes to the brief colloquy at the instruction conference where Mr. Mendenhall apparently requested manslaughter instructions that the court refused. Defendant's opening brief then sums up his argument in these two paragraphs:

"[D]efense counsel was unable to present any affirmative evidence to support lesser-included manslaughter instructions as he wanted; nor did counsel present any evidence as to Brown's background, character, or history of violence or aggressive conduct, which could have supplied the missing foundation for instructions on lesser-included offenses.

“That failure can be at least partially attributed to counsel’s express disavowal of any intent to look at Brown’s public defender file. That file would almost certainly contain not only the pending charges against Brown, but also his rap sheet including any prior convictions. That would have been a prime source for information about Brown’s character trait for violence, and would clearly have been admissible under Evidence Code section 1103, subd. (a)(1).”

So, the claimed reason for defendant’s predicament was Mr. Mendenhall’s failure to review the public defender’s files which would have disclosed the two things defendant asserts were critical—Brown’s rap sheet and the record of his prior conviction on the gun possession charge. The argument fails, belied by the record as to what was in fact produced to Mr. Mendenhall, as acknowledged by defendant’s own brief here, which describes what was produced in discovery: “A criminal history (RAP sheet) for the victim Everett Brown has been provided to the defense. The people also provided the defense with prior police reports involving Everett Brown. Included was a police report from a prior gun possession case for which Mr. Brown was convicted of a felony. Interestingly, the public defender’s office still represents Mr. Brown on his gun possession case. Despite this ongoing representation the public defender is requesting further discovery on the gun possession charge case. The people do not intend to provide any further discovery regarding this prior gun possession case.”

In sum, Mr. Mendenhall in fact had Brown’s rap sheet. He also had “police reports,” included among which was a police report from a gun possession case in which Brown was convicted of a felony. All the prosecutor did not turn over was the gun possession charge apparently extant at the time Brown was killed.

The record also demonstrates that not only did Mr. Mendenhall have all this, he was aware of the contents of what he had. Thus, for example, he referred to possible issues that might involve Brown’s prior gun and drug possession cases. Later, in connection with the argument on a motion in limine, Mr. Mendenhall noted that “What I do know is in the past, Mr. Williams and the decedent Mr. Brown—in the relatively recent past in 2010, was stopped in a car containing marijuana and containing a

.38-caliber revolver” Mr. Mendenhall was apparently also aware that Brown was seen with a gun two to four weeks prior to his murder.

Succinctly put, defendant’s contention comes down to the fact that Mr. Mendenhall did not look at the public defender’s file vis-à-vis the gun charge apparently extant at the time of Brown’s murder. How that would have assisted defendant’s position is difficult to discern. Certainly defendant’s brief does not demonstrate it. And whatever might have been in it necessarily pales in comparison to what Mr. Mendenhall in fact had—the rap sheet and the police reports, inclusive of the prior conviction. Those records apparently showed nothing that could assist defendant, as manifest by the fact that Brown’s name was hardly mentioned in Mr. Mendenhall’s closing argument.

In sum, defendant does not demonstrate how any claimed error—if error there be, an issue we need not decide—could be prejudicial, not in the face of the evidence here, no reasonable probability that the outcome would have been different. As indicated from the factual recitation above, there was convincing evidence of defendant’s killing of Brown from two witnesses whose testimony foreclosed any possible claim of self-defense or heat of passion. To the contrary, as Williams testified in detail, a calm Brown took issue with Williams, convinced that all would be well and he would let defendant and Cooper out of his car. And as Cooper expressly stated—testimony about which there was no meaningful cross-examination—Brown did absolutely nothing to provoke defendant. He said nothing. He did nothing. His hands were on the steering wheel. And he was unprovokingly shot in the head.

Denial of the *Batson/Wheeler* Motion Was Correct

Background and Setting for the Issue

On the second day of voir dire, the prosecutor exercised his thirteenth peremptory challenge, excusing Juror Stephens. This resulted in Mr. Mendenhall “moving . . . under *Batson/Wheeler*” based on challenges to “Ms. Hall, Mr. Stephens, and Mr. Adams.” The trial court found a prima facie case. The prosecutor stated his reasons. And lengthy colloquy followed, in the course of which the trial court questioned counsel. At the

conclusion of all that, the trial court denied the motion, accepting the prosecutor's representations as to the reasons for the challenges. Defendant contends this was error.

We review the contention under well settled principles, set forth, for example, in *People v. Manibusan* (2013) 58 Cal.4th 40, 75:

“A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*)). ‘The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant].’ (*Id.* at pp. 612–613.)

“On appeal, we review the trial court's determination deferentially, ‘examining only whether substantial evidence supports its conclusions. [Citation.]’ (*Lenix, supra*, 44 Cal.4th at p. 613.) ‘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.]’ (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)” (Accord, *People v. Williams* (2013) 56 Cal.4th 630, 650 (*Williams*)).

Lenix expressed it this way: “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.’ (*Miller-Ell I, supra*, 537 U.S. at p. 339.) 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. (See *Wheeler, supra*, 22 Cal.3d at p. 281 [fn. omitted].)

“Review of a trial court’s denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. (*People v. Bonilla, supra*, 41 Cal.4th at pp. 341–342.) ‘We review a trial court’s determination regarding the sufficiency of a prosecutor’s justifications for exercising peremptory challenges “ ‘with great restraint.’ ” (*Lenix, supra*, 44 Cal.4th at p. 613.)

In his claimed “applicable standard of review,” defendant cites only *Williams*, discussing the case in detail, including the dissenting opinion of Justice Liu. Then, after setting out the lengthy colloquy at trial, defendant asserts as follows: “The trial court’s acceptance of the prosecutor’s reasons without any comment or evaluation of the evidence of discrimination highlighted by defense counsel precludes this Court from giving the trial court’s ruling deference, for all the reasons set forth in *People v. Williams, supra*, 56 Cal.4th at 715–716. Therefore, this Court should proceed to engage in ‘[a] proper analysis at *Batson*’s third step,’ as Justice Liu did in his *Williams* dissent. 56 Cal.4th at 718–727.”

As will be seen, defendant’s claimed characterization of the trial court’s “acceptance . . . without any comment or evaluation” is a less than an accurate description of the record. It is also an inaccurate representation of the law, as the Supreme Court has “made clear that ‘the trial court is not required to explain on the record its ruling on a *Batson/Wheeler* motion. (*People v. Reynoso, supra*, 31 Cal.4th [903,] 919.) ‘When the prosecutor’s stated reasons . . . are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings.’ (*People v. Silva* (2001) 25 Cal.4th 345, 386.)’ (*Vines, supra*, 51 Cal.4th 830, 849.)” (*People v. Mai* (2013) 57 Cal.4th 986, 1054; accord, *People v. Hensley* (2014) 59 Cal.4th 788, 803.) In short, it appears that defendant is conceding the issue, unless we apply Justice Liu’s dissent in *Williams*.

We, of course, are bound by the majority opinion in *Williams (Auto Equity Sales, Inc. v. Superior Court)* (1962) 57 Cal.2d 450, 455), and that would end the issue. But we would affirm the ruling even under Justice Liu’s approach, as a de novo review leads to the conclusion the trial court was correct.

To put the issue in context, defendant was African-American. So was the victim. And the two key witnesses, Cooper and Williams. Indeed, as the prosecutor put it, “virtually all my witnesses are African American, as well.” When Mr. Stephens was challenged and removed, three African-American jurors remained. And three African-Americans remained on the jury that in fact convicted defendant.

It is against that background we conduct our review, a review that demonstrates there was no error.

The Trial Court Was Right

As indicated, the trial court found a prima facie case and requested the prosecutor to respond. The prosecutor began that there were “multiple reasons that are non-racial in any way. They were completely race-neutral.” And then he went on, juror by juror, to elaborate why. We quote the essence of his explanation:

“As to Ms. Hall, she had—and what is a major concern of mine was that a relative who had an armed robbery case—this particular case that Mr. Hall is charged with involved an armed attempted robbery. She testified—or she mentioned that.

“She also, as to Ms. Hall, said some comments that were not provoked by Mr. Mendenhall but were brought up on her own, where she threw out there that she felt someone’s freedom was in her hands, and put great emphasis on that. And when I asked her whether or not she could be able to—if I prove my case, be able to find the defendant guilty, and not hesitate with that, she then proceeded to give a—about a 10-second explanation about, ‘well—’ she hesitated and then said, ‘Well, yeah, I guess, assuming that you are able to prove your case.’

“So it seemed to me that she was more concerned about having the freedom—Mr. Hall’s freedom in her hands than actually possible, holding him responsible for this crime. I also think that it’s pretty obvious that someone that has a relative who has a

same exact similar case as here could certainly show extra sympathy towards Mr. Hall that would be unfair to the People. So as to Mrs. Hall, those are the reasons for her.

“As for Mr. Adams, he knows James Bondoc.

“James Bondoc was a high school friend of his. He—this was all on the record but outside the presence of the jury, so it should be on the record. James Bondoc’s fingerprints were found in the suspect car in this case. He is actually the driver of the car that Mr. Hall got out of before he attempted to rob Omri Williams and Everett Brown, and then, shortly thereafter, killed Everett Brown.

“I cannot imagine a prosecutor, that should even be prosecuting cases, would actually consider keeping a person on the jury panel that actually is friends or has been friends with and has just recently spoken with a person who is connected, in some way, with the defendant. He was looked at as an accessory, after the fact, in this particular case.

“I know that they’re associates. I have seen photographs with Mr. Hall and Mr. Bondoc, together. Again, both their prints were found in the suspect car together. It would be pure negligence for me to actually keep that juror, Mr. Adams, on this pool. It’s actually unfortunate, because I actually think Mr. Adams had some very fine qualities, seemed like a pretty educated person. And actually, I think, overall, would have been a pretty good juror, but for that major factor.

“I would also point out as to Mr. Adams, although I don’t put as much stock in it as I think the relationship to Mr. Bondoc, but I mean, I did note that when he came in here for both days, and what he was wearing, which, in my view is—aside of a little bit of disrespect to the Court, and, then, perhaps, maybe an indicator of how, maybe, that he would not follow the rules well. But he came in to court yesterday with a shirt on that said, ‘I’m drinking’ shirt. . . . And today, he had a shirt on that said, ‘Fly high.’ Now, interesting shirts; probably, in my opinion, not appropriate for court. I just don’t think that’s something appropriate to wear.

“But again, I don’t think that—that, certainly, was not a major factor; it was one factor. But clearly, the relationship with Mr. Bondoc, in the potential to, I point out, for

Mr. Hall or one of his associates to somehow influence that person because of that connection is a real possibility and something that any prosecutor would consider, and I'll obviously exercise a challenge on."

And as to Mr. Stephens: "Again, same issues I had with Ms. Hall. He has a son that served prison time for carjacking. This was essentially a similar, again, offense to what happened in this particular case. This was, in essence, an attempted robbery, and, really, actually, a carjacking. And I know that there are some other people that had mention of some criminal behavior and relatives, but it is—I think any prosecutor, again, having a person—it's not just that someone has a relative or someone that they're close to or that maybe has suffered a criminal act like a DUI or something.

"But when that person actually has a crime that was committed, and is similar to the crime for which Mr. Hall is being charged here, I think that is a completely legitimate reason for any prosecutor to—even if the person says they can be fair, I don't have to accept that representation. Clearly, that surpasses any challenge for cause, but I don't, as a prosecutor, have to accept—accepting a juror who has that potential bias or potential to relate more to Mr. Hall's situation and unfairly give Mr. Hall a leg up, and effect [*sic*] the prosecution's case."

Defense counsel pointed out that it was Mr. Stephens's grandson, not his son, who had been in prison,⁴ and, moreover, this had not been a reason for the prosecutor to exercise a peremptory challenge until a fourth African-American juror had been seated in the jury box. The trial court asked the prosecutor to "respond to the one allegation that Mr. Stephens was only excused after [Juror no. 7], who was seated in seat 7." The prosecutor said, "I don't even know—I don't even get—I don't even understand what that—the inference is there. What I do know is that there are—on my count, there are still three—three people that appear to me—and I don't even know—but it seems to me that there are three people that are sitting on this jury that are African American. ¶ I don't get the connection that now (Juror No. 7, name redacted), who is African

⁴ The record reflects that Mr. Stephens initially said that his son, rather than his grandson, suffered the conviction. He corrected himself upon further questioning.

American, is sitting on this jury pool. He is a person that, for example, had someone that he knew that had a criminal past, but it was a theft offense. So I much rather would prefer to have (Juror No. 7, named redacted), who seems like a pretty solid individual, and who had this issue with a relative that actually had a criminal case, but it was a theft case, as opposed to the issue that I raised with the carjacking. That was the concern that I had, and I think (Juror No. 7, name redacted) is a better fit with the rest of the pool. So that's what I would say about (Juror No. 7, named redacted). ¶ And I'd also point out that—we now have three people that are still sitting in the pool—or in the box, that are African American.”

The trial court heard argument, in fact taking issue with Mr. Mendenhall's representation that Mr. Adams's interaction with Bondoc was a “few minutes,” commenting that it was “about 30 minutes.” The argument went on for several pages, and the trial court held that “the race-neutral explanations that have been offered, I'm going to accept those. There are non race-neutral [*sic*] reasons offered by the People. They are supported in the record.” And the court added for good measure, “I would simply note, as to Mr. Adams, I did notice the ‘I'm drinking’ shirt yesterday that caught me by—it was different to have a shirt like that in court. I did not notice his shirt today. [¶] Mr. Bondoc—we did discuss that at sidebar; it was on the record. But I do accept the prosecutor's representations as to the nonrace-neutral reasons, so [*Batson*] motion is denied at this point.”

That is hardly a trial court that sat idly by and “accept[ed] . . . without any comment or evaluation” what the prosecutor said. And the court's decision was correct.

Defendant uses words like “speciousness” and “ruse” to describe the prosecutor's reasons for challenging Ms. Hall. We disagree. As to the prosecutor's first reason, Ms. Hall had a relative who confessed to armed robbery, though it was in the early 1970s, a “[l]ong time ago,” as the trial court noted. And, as defendant points out, it is accurate that the only real question about the significance of this time was her response to Mr. Mendenhall's question as to her thoughts about this, where she replied as follows:

“I thought that, ‘this is very serious because I might have someone’s future in my hands, someone’s freedoms, or possibly losing one’s freedom.’ ”

But Ms. Hall did more than just answer that question, going on to volunteer that she “would like to be on this trial,” and that she thought she was “well-suited” for it. When it was the prosecutor’s turn to question, he asked Ms. Hall what made her feel she was “well-suited.” She responded as follows:

“[MS.] HALL: I am a high school teacher, and I teach government. And we are just finishing the Constitution, the Court System, the Bill of Rights, the Jury System, the whole thing. So I’ve worked with young people for 26 years. I definitely support the Constitution. I definitely also believe in individual rights. So I would like to be on this case.

“MR. CHARM: Okay. And you had mentioned about that, that someone’s freedom is in your hands, right?

“[MS.] HALL: Yes.”

In sum, Ms. Hall was apparently eager to serve, perhaps too eager for the prosecutor, and maybe overly sympathetic to the defendant, especially some of her answers. Furthermore, when the prosecutor inquired further about whether she would be able to vote to convict defendant if the evidence proved his guilt, Ms. Hall gave a lengthy answer highlighting her role as a high school civics teacher and the importance she places on the Constitution and individual rights.

Defendant contends that the prosecutor’s assertion that Ms. Hall’s hesitation when asked if she would hesitate to convict was a sham excuse, because the hesitation was not dramatic enough to have been recorded in the transcript. However, there is much more to communication than a transcript can portray, and “Both court and counsel bear responsibility for creating a record that allows for meaningful review.” (*Lenix, supra*, 44 Cal.4th at p. 621.) A cold transcript does not provide for subtle nuances in speech, facial expressions, body language, or different tones. (*Id.* at p. 622.) However, trial judges are able to observe all these subtleties, and “the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his

words. That is seen below, but cannot always be spread upon the record.” (*Reynolds v. United States* (1878) 98 U.S. 145, 156–157.)

As to Mr. Adams, to put the challenge of him in context, it must be recalled that it was Bondoc who drove defendant and Cooper to the Valero gas station. And the voir dire revealed that Mr. Adams and Bondoc had gone to high school together, and that Mr. Adams had run across Bondoc and had a 30-minute conversation with him some time ago.

Defendant asserts that “The speciousness of the prosecutor’s reasons for striking juror Adams are (1) that the prosecutor mischaracterized Adams’ statement about his last contact with Bondoc as ‘recent’ when Adams clearly stated that it had occurred some five years earlier; and (2) that he struck Adams without ascertaining that the James Bondoc he went to high school with was the same James Bondoc who was a witness.”

As to the “recent,” it might be said that this is in the eye of the beholder. But even if the prosecutor’s description was off, a “single aberration” fails to establish pretext. (*People v. Riccardi* (2012) 54 Cal.4th 758, 793 (*Riccardi*.)

As to the second claim of speciousness, it disregards the actual record here, which includes this colloquy:

“THE COURT: Do you know if it’s the same James Bondoc in any way?

“MR. MENDENHALL: Do you know how it’s spelled?

“[MR.] ADAMS: B-o-n-d-o-c. Little short dude got curly hair, short tapper fade, tattoos all over, about yay high, mixed. I don’t know—never really new [*sic*] his ethnicity, but black and something else. But I’ve known him for a while, but I haven’t seen him in five years.”

Following that, the trial court then asked counsel:

“THE COURT: Do you know if this is the same James Bondoc or not?

“MR. CHARM: I’m not entirely sure but they’re certainly similarity. [*sic*]

“MR. MENDENHALL: I’m not sure either, but I think it is.

“[MR.] ADAMS: We went to Hogan High School, Vallejo, California. If it’s him, that is him ‘cause there’s only one of them.”

Adding to the relationship was Mr. Adams's clothing, first the t-shirt that said, "I'm drinking," and the second day the shirt that said, "Fly high."

As to Mr. Stephens, defendant contends that the People's explanation that Juror No. 7 "was a better fit" "is just as illogical and untenable as was the trial prosecutors [*sic*]." We are not persuaded.

Mr. Stephens was a retired elementary school teacher. His age is not in the record, but he was old enough to be retired and have a grandson who was convicted of a crime. Mr. Stephens had previously served on a jury that convicted the defendant. Thus, he could be said to be a good juror for the People, perhaps a leader on the jury.

Then along came Juror No. 7. His age, too, is not in the record, but he was a lawyer 25 years or more out of law school, who did defense-side worker's compensation for the National Football League. Juror No. 7 had also been a juror on a criminal case that resulted in a conviction. Juror No. 7, too, could be seen as a good juror for the prosecution, and also a leader-type juror—which, it developed, he was, becoming the foreperson.

Again, *Lenix* is apt: "[T]he selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled. As we noted in *People v. Johnson* (1989) 47 Cal.3d 1194: "[T]he particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training,

employment, prior jury service, and experience of the prospective jurors.’ (*Id.* at p. 1220.)

“Ultimately, an advocate picking a jury is selecting a committee to decide the case. In addition to each panelist’s individual characteristics, the group must be able to work together with courtesy and dispassion to reach a complex result with substantial consequences. An advocate is entitled to consider a panelist’s willingness to consider competing views, openness to different opinions and experiences, and acceptance of responsibility for making weighty decisions.” (*Lenix, supra*, 44 Cal.4th at p. 623.)

Defendant observes that the prosecution passed on a jury that had Mr. Stephens on it before challenging him. We do not understand defendant’s focus on this, as the fact would seem to favor the People. “Although this is not a conclusive factor, we have stated that ‘the passing of certain jurors may be an indication of the prosecutor’s good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.’ (*People v. Snow* (1987) 44 Cal.3d 216, 225.)” (*Williams, supra*, 56 Cal.4th at p. 659.)

Finally, we note that at the time the trial court ruled on the motion, three African-American jurors were on the jury, to remain there at trial, with the prosecutor having several peremptory challenges remaining. The jury in *Williams* had five African-Americans on it, prompting this observation from the Supreme Court: while “ ‘ “the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.” ’ ” (*Williams, supra*, 56 Cal.4th at p. 663, quoting *People v. Stanley* (2006) 39 Cal.4th 913, 938, fn. 7.)

In the words of *Lenix*: “The prosecutor’s acceptance of the panel containing a Black juror strongly suggests that race was not a motive in his challenge” (*Lenix, supra*, 44 Cal.4th at p. 629, citing *People v. Kelly* (2007) 42 Cal.4th 763, 780 (*Kelly*), and *People v. Cornwell* (2005) 37 Cal.4th 50, 69–70 (*Cornwell*).) In *Kelly*, the prosecution passed on a jury with one African-American, later dismissed by the defense. In *Cornwell*, the final jury had one African-American.

Ms. Lohr's Testimony Was Properly Admitted

Defendant's last argument is that the trial court erred in admitting the testimony of Aimee Lohr, Williams's mother, that she heard her son tell the police officers that the suspect who held him at gunpoint had facial tattoos. The argument contends that the statements were hearsay, and thus inadmissible because they did not meet the requirements for admissions as a prior consistent statement under Evidence Code sections 791 and 1236, or as a prior inconsistent statement under Evidence Code section 1235. The argument fails.

The issue arises against the background, noted above, that the picture in the lineup Detective Potts showed to Williams did not show defendant with facial tattoos. Williams testified that he remembered telling the officers at the first interview at the police station that the person who held him at gunpoint had facial tattoos. And when Detective Potts showed him the lineup with defendant's picture without tattoos, he asked the detective why the person did not have any tattoos in the photo. Detective Potts replied that Williams had not mentioned any.

Mr. Mendenhall cross-examined Williams at length about this discrepancy, to suggest that Williams only mentioned the facial tattoos (as well as the fact that he believed the gunman was known by the nickname "Ant" or "Flea") after he spoke with Brown's girlfriend, Cierra Powers, and she was the one who told him this information.

In response, the prosecutor sought to introduce testimony from Aimee Lohr, Williams's mother, that she overheard Williams telling the police officers that the gunman had facial tattoos. This resulted in an Evidence Code section 402 hearing on the issue, following which the trial court ruled he would allow the evidence, explaining his ruling as follows:

"I'm going to allow the statement for the following reasons: As I think about it, . . . the charge—the allegation of Mr. Williams is that he never made a statement to the police, about tattoos—or he never really saw a guy with tattoos, is kind of the premise. He testified that he did make a statement to the police. And if I recall right, it was before

looking at the lineup, according to his testimony. I think that's the inference to be drawn from it.

“The allegation, though, is that, one, from the very statement he made to the officer, ‘she told me about it,’ suggests he’s—there’s an allegation, ‘no, you never did make a statement, because your statement to the officer is, “she told me about it.” ’

“This statement from Ms. Lohr, his mother, is not—I’m not allowing it for the truth of the matter, that, in fact, the suspect he saw had a tattoo over his eyebrow, but it’s offered solely for the purpose that the statement was, in fact, made, that he did make the statement to officers. And while we don’t know the timing of it, that is correct, I think there is other evidence. When you look at it, the entirety of the evidence, Mr. Williams’ statement is that he did make it before the lineup. This corroborates a portion of that, in fact, he did make a statement. So if they believe Mr. Williams or not on whether it was before or after the lineup, then that’s up to the jury.

“So that’s how I see it. I’m not going to allow it for the element of prior consistent statements [S]o I’m going to allow it for that limited purpose only, of the fact that this statement was made. [¶] . . . [¶]

“So that’s my analysis on it. I appreciate counsel’s arguments on both sides; they’re very well thought-out arguments. But I’m going to allow it for that limited purpose.

“If you want a—some sort of limiting instruction on how to consider that, I will give that, as well.”

Ms. Lohr then testified that around 7:00 a.m. on April 30, she received a telephone call at work in which Williams told her that Brown had been killed. She left work, picked up her sons, and went to the home of Brown’s grandmother, where family and friends had gathered. Two police officers arrived and asked questions of family members, and left after 5 or 10 minutes. Sometime later, around 9:30 a.m., two different officers arrived. Her son walked over to talk to the two officers, and she followed. One of the officers asked Williams, “[D]oes the person have any tattoos or any markings that

they could identify”?, and he said, “[T]he individual had a tattoo—tattoos above his eyebrow.”

Immediately following Ms. Lohr’s testimony, the court gave this limiting instruction: “The statement that Omri Williams made to the officers, of seeing a tattoo above the eye, it’s not being offered for the truth of the matter asserted, meaning it’s not being offered to prove, in fact, the suspect that was seen had a tattoo over the eye. It’s simply being offered for a limited purpose, to show that Omri Williams did, in fact, make the statement to the officer. So it’s offered for that purpose, not for whether or not the suspect actually had a tattoo, because that was the hearsay statement.”

Evidence of an out-of-court statement by a nonparty is admissible if it is “offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay purpose is relevant to an issue in dispute. [Citations.]” (*People v. Davis* (2005) 36 Cal.4th 510, 535–536.)

As to this, we apply the “abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question.” (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) We find no abuse.⁵

Here, the issue in dispute is whether Williams made the statement. Thus, his mother’s testimony that he did is not hearsay. As Justice Simons’s treatise succinctly puts it, “When evidence that certain words were spoken or written is admitted to prove that the words were uttered and not to prove their truth, the evidence is not hearsay. (*People v. Smith*, 179 Cal.App.4th 986, 1003 (2d Dist. 2009).)” (Simons, California Evidence Manual (2016) § 2.5, p. 82.)

Additionally, though the trial court was under no duty to do so, it did give a limiting instruction as to the use of the evidence. (See *Riccardi, supra*, 54 Cal.4th at p. 824 [“Generally speaking, absent a request, the trial court has no duty to give an

⁵ While the trial court ruled as it did, Ms. Lohr’s testimony might well have been admissible as a prior consistent statement. (Evid. Code, §§ 791, 1236; *People v. Hillhouse* (2002) 27 Cal.4th 469, 491.)

instruction limiting the purpose for which evidence may be considered.”]; see also *People v. Smith* (2007) 40 Cal.4th 483, 516 [“Even assuming that defendant is correct in noting that the evidence should only have been admitted for a limited purpose, the trial court had no sua sponte duty to give a limiting instruction”].)

But, even if there were error, it was necessarily harmless.

To begin with, the issue of what Williams told the officers about tattoos, and when, was explored at length at trial. Mr. Mendenhall cross-examined Williams about it on several occasions, cross-examination that was relentless, suggesting that the person Williams saw did not have facial tattoos, and that his recollection was tainted by his conversation with Brown’s girlfriend after the shooting. Mr. Mendenhall also called Detective Potts as a witness to confirm Potts’s recollection that Williams did not initially mention the tattoos. Finally, he also called Dr. Shomer, an expert in eyewitness identification issues, who testified that if a witness observed facial tattoos on a suspect, it would likely be one of the first things he or she recalled when giving a description to investigators.

Moreover, there was convincing evidence linking defendant to the crime. He was observed on the gas station’s surveillance video getting into the victim’s car. Cell phone records placed him at the scene of the shooting. And Cooper—who was well acquainted with defendant and was present throughout—gave a detailed, first-hand account of the shooting, one that was corroborated by physical evidence. Thus, even if the court had excluded Ms. Lohr’s statement, there is no reasonable probability that defendant would have been acquitted. (*People v. Samuels* (2005) 36 Cal.4th 96, 121–122 [applying the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].)

DISPOSITION

The judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

Stewart, J.

A140033; *People v. Hall*