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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH ANTHONY FARMER,

Defendant and Appellant.

B250695

(Los Angeles County
Super. Ct. No. MA057202)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Daviann L. Mitchell, Judge. Reversed.

Ann Krausz, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney
General, Chung Mar and Jessica C. Owen, Deputy Attorneys General, for Plaintiff and
Respondent.

Appellant Kenneth Anthony Farmer appeals from the judgment entered following his conviction by jury of petty theft with prior theft-related convictions, with admissions he suffered a prior felony conviction and five prior felony convictions for which he served separate prison terms. (Pen. Code, §§ 666, subd. (a), 667, subd. (d), & 667.5, subd. (b).) The court sentenced appellant to prison for seven years. We reverse.

FACTUAL SUMMARY

*1. Appellant's Wheeler Motion Based on Race, and Objection Based on Gender.*¹

During jury selection, the prosecutor's first five peremptory challenges to prospective jurors (hereafter, jurors) were to three women, i.e., to Jurors E3431, G0166, then C1613, then two men. After the challenge to the second of the two men (hereafter, the second man), appellant, outside the presence of the jury, objected to the challenges to Juror C1613, and the second man, on the ground they were challenged because they were African-Americans. The court, discussing Juror C1613 and the second man, noted, inter alia, both were African-Americans and Juror C1613 was "in family services at a funeral home."

The court concluded appellant had made a prima facie showing the prosecutor had challenged Juror C1613 and the second man based on group bias predicated on race. The court invited the prosecutor to tender race-neutral justifications for the challenges. The prosecutor, first discussing Juror C1613, indicated Juror C1613 was a counselor at a county funeral home and the prosecutor did not like jurors associated with social services, because such jurors might be sympathetic to the defense.

¹ The facts pertaining to the present offense are not pertinent to this appeal; we simply note the record reflects that on August 22, 2012, appellant committed the present offense.

The prosecutor then stated, “The second thing that went into it was a gender composition on the jury. You’ll notice that she’s not the only one, there have been a few at least three if not all four of my challenges have been to females^[2] that’s because I’m trying for my own reasons, I want to have a certain gender composition on the jury.” Appellant’s counsel then stated, “Raise new objection on that as well.” The court did not then comment, or rule, upon the objection and appellant did not secure a ruling on it.³

After appellant’s objection, the prosecutor stated, “I like to have a certain balance of jurors and, . . . whether it’s -- I’m not kicking her because she’s a female, but I like to have a certain breakdown of jurors as it relates to it. That’s one thing that went into it. [¶] And then timely [*sic*], there were just other jurors that I like better. And, . . . [another juror] was someone I liked better, and there’s a number of people within the pool that I like better, and that I may want to try to get for that reason.” The prosecutor then tendered a race-neutral justification as to the second man.

Based on the prosecutor’s tendered justifications, the court found the prosecutor did not challenge Juror C1613 or the second man on the ground of group bias. The court noted Juror C1613 was a counselor and, regardless of her capacity, counselors usually were more kind and sympathetic. The court treated appellant’s objection to the prosecutor’s challenges to Juror C1613 and the second man, on the ground of race, as a *Wheeler* motion and denied it.⁴

² As indicated, up to this point the prosecutor had exercised five, not four, challenges, only three of which were to women.

³ Appellant’s objection could be construed as a motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) based on gender. However, because the trial court did not rule on the objection and because this case can be resolved based on the later *Wheeler* motions based on gender that the trial court denied, we do not discuss the validity of appellant’s objection.

⁴ The validity of the trial court’s ruling on appellant’s *Wheeler* motion based on race is not at issue in this appeal.

2. *Appellant's First Wheeler Motion Based on Gender.*

Appellant later, still outside the presence of the jury, objected the prosecutor had challenged Juror C1613 on the basis of gender. The court then stated, “. . . that is now untimely because the last juror that was excused was a male^[5] and we only have two jurors that are excused, one male and one female.^[6] It may be more timely in the future, but at this point it's untimely as I see it on its face because of the composition of the two that were excused and the arguments that were made.”

The court later stated, “I'll accept the defense's arguments, I'll also accept the People's record. I have reviewed and denied the motion [i.e., the *Wheeler* motion based on race], and I'm going to find untimely the additional *Wheeler* motion on gender.” (Italics added.)

3. *Appellant's Second Wheeler Motion Based on Gender.*

The prosecutor subsequently, in open court, exercised peremptory challenges as to four jurors, i.e., two men, then two women. After the challenge to the first man but before the challenge to the second man, the prosecutor accepted the panel. The two women were Juror V9212, then Juror R3715.

After the prosecutor challenged Juror R3715, appellant, outside the presence of the jury, made a *Wheeler* motion and stated, “[the prosecutor] is kicking the women off in the panel. He did make a comment during our previous [*Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*)] objection, and with regards to getting rid of women on the panel. Since then I've paid attention to the jurors that were dismissed. One woman was dismissed, I made no objection. Then the last two witnesses [*sic*] that were dismissed were women.”

⁵ This was an apparent reference to the previously mentioned second man challenged by the prosecutor.

⁶ This comment by the trial court was unclear. As indicated, up to this point there were five (not two) jurors excused as a result of challenges by the prosecutor, i.e., three women and two men (not merely one man and one woman). One man (the second man) and one of the women (Juror C1613) were African-Americans.

The court noted 18 of the 36 jurors in the panel were women, and five of the nine persons challenged by the prosecutor were women, “[s]o it’s nearly a split between male and female.” The court also noted the prosecutor had accepted the panel once.

The court recounted background information as to each of the total of five women the prosecutor previously had challenged, i.e., Jurors E3431, G0166, C1613, V9212, and R3715. The court stated it did not find a prima facie case had been made. Fairly read, the record reflects the trial court concluded appellant had failed to show a “strong likelihood” the challenges were made because of group bias; therefore, appellant had failed to overcome the presumption the prosecutor’s challenges were constitutional. The court thus implicitly denied appellant’s second *Wheeler* motion based on gender.

The court indicated it was basing its above mentioned conclusion on the following factors as to the five women. Juror E3431 had prior criminal jury experience, but the court did not know how that affected matters. She was a nurse, which could cause the prosecutor to be concerned about her sympathies. Nurses tended to be more nurturing. Juror G0166’s father had been convicted of molestation and her husband was a law enforcement officer. One could conclude she had biases for and against law enforcement.

Juror C1613 was the previously discussed counselor who could be sympathetic to the defense. Juror V9212’s mother had been the victim of home invasion robbery.⁷ The court stated, “I think that would be a concern that she may have some animosity one way or another either towards law enforcement, even though she denied that, or because she’s [sic] been the victim of a crime, that may create a concern for the prosecution.” Juror R3715’s brother-in-law had been convicted of drug- and theft-related crimes, and Juror R3715 had been the victim of a crime similar to the present alleged offense, which could be a matter of concern.

⁷ During voir dire, Juror V9212 testified her mother was beaten and robbed in her home, her mother called law enforcement, and the culprits were caught and prosecuted. Juror V9212 also testified she thought law enforcement handled the matter appropriately and the system worked for her “as best [as] it was able.”

The court then indicated that, “even though I have made no prima facie showing,” and the court was not requesting the prosecutor to state his reasons for exercising the challenges at issue, the court would allow the prosecutor to state his reasons for them if the prosecutor voluntarily wanted to do so.

The prosecutor then indicated as follows. Juror C1613 (the counselor) already had been discussed. As to Juror E3431, “[a]ctually that one didn’t have anything to do with the RN, she just she looked like my son’s teacher that I didn’t like in preschool, and when I was looking at her, we were making eye contact, I never addressed her because there was something about her that I didn’t like from the very beginning. So I just kind of stayed away from her. I knew that I wasn’t going anywhere with her eventually.”

As to Juror G0166, the prosecutor stated, “she sat quietly, she didn’t really seem engaged in the proceedings, . . . I guess it’s kind of a [double-edged] sword. I don’t want someone raising their hand all the time either, but she kind of sat and where the questions were opened up to . . . the general audience, she just kind of sat there. And as I was looking at her, as I was scanning the jurors, there was just kind of nothing really registering with her as I was discussing it, so I didn’t have a good feeling about her.”

The prosecutor stated Juror V9212 “. . . from the very first moment she spoke showed a very loud voice and I didn’t even turn around, I heard her talking. It was almost like her voice projected, and even some of the things that she said which I did note at the time, I kind of quickly had the . . . feeling that this was a woman who I didn’t really feel a connection with. She was, . . . a homemaker, student, and again at her age I was a little concerned with that aspect of it, . . . but more it was kind of a general feeling from the moment she opened her mouth and started speaking, it was just kind of a piercing, grating voice, so I got rid of her because I thought it would not [be] a good mix with other jurors should it get to that level.”

As to Juror R3715, the prosecutor stated, “[t]hat was just simply based on the fact that her brother had been convicted of a theft-related conviction [*sic*]. And with this being the same situation, . . . I understand she said that he was treated fairly, but I didn’t want to keep her for that purpose.” The court later stated, “Record has been made. The *Wheeler* motion had been denied.” (Italics added.) Later, the parties accepted the panel and an alternate juror, and the jury and alternate juror were sworn.

ISSUE

Appellant claims the trial court erroneously denied his two *Wheeler* motions that alleged the prosecutor impermissibly exercised peremptory challenges to women based on gender.

DISCUSSION

The Trial Court Erred by Denying Appellant’s Wheeler Motions Challenging Prosecutorial Gender Bias.

1. Applicable Law.

In *Wheeler, supra*, 22 Cal.3d 258, our Supreme Court stated, “[w]e conclude that the use of peremptory challenges to remove 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*, at pp. 276-277.) *Batson* reached the same conclusion based on the federal equal protection clause. (*People v. Huggins* (2006) 38 Cal.4th 175, 226.)

When a defendant asserts at trial the prosecution’s use of peremptory challenges violates the federal Constitution because they are based on gender, the defendant must make out a prima facie case by showing the totality of the relevant facts gives rise to an inference of discriminatory purpose. The burden then shifts to the State to explain adequately the gender exclusion by offering permissible gender-neutral justifications for the challenges. Thereafter, if a gender-neutral explanation is tendered, the trial court must decide whether the opponent of the challenge has proven purposeful gender discrimination. The identical three-step procedure applies when the challenge is brought

under the California Constitution. (Cf. *People v. Cowan* (2010) 50 Cal.4th 401, 447.)⁸ Respondent concedes women are a cognizable group for purposes of *Wheeler* analysis. (*People v. Garceau* (1993) 6 Cal.4th 140, 171; *People v. Gray* (2001) 87 Cal.App.4th 781, 788.)

2. *Application of the Law to This Case.*

Appellant brought two *Wheeler* motions based on gender. The court denied the first as untimely. The court denied the second on the ground appellant did not pass the first step, i.e., he failed to make out a prima facie case.

a. *The Court Erred By Denying Appellant's First Wheeler Motion as Untimely.*

We initially address the trial court's denial of appellant's first *Wheeler* motion based on gender. In *People v. Gore* (1993) 18 Cal.App.4th 692 (*Gore*), the court stated, "Many cases have reiterated the statement that to be timely a *Wheeler* motion should be made before the jury has been sworn. [Citations.]" (*Gore*, at p. 701.) "[T]o be timely a *Wheeler* objection or motion must be made, at the latest, before jury selection is completed." (*Gore*, at p. 703.)

Appellant made his first *Wheeler* motion based on gender before the jury was sworn. Respondent concedes the trial court erred by concluding this motion was untimely. We accept the concession. We hold the trial court erred by concluding appellant's first *Wheeler* motion based on gender was untimely.

b. *The Court Erred by Denying Appellant's Second Wheeler Motion on the Ground Appellant Did Not Make a Prima Facie Showing.*

We next address the trial court's denial of appellant's second *Wheeler* motion based on gender. In the present case, on February 28, 2013, after the court invited the prosecutor to tender race-neutral justifications, the prosecutor began to do so by discussing Juror C1613. The prosecutor stated, inter alia, "The second thing that went into it was a gender composition on the jury. You'll notice that she's not the only one,

⁸ References to *Wheeler* below are to *Batson* as well.

there have been a few at least three if not all four of my challenges have been to females that's because I'm trying for my own reasons, I want to have a certain gender composition on the jury.” The prosecutor miscounted the total number of his peremptory challenges up to that point—there were (including men and women) five, not four. The prosecutor miscounted the total number of his challenges to women—there were three, not four. However, the prosecutor clearly indicated *all* of his challenges to women (Jurors E3431, G0166, and C1613) to that point were based on gender.

It is true the prosecutor stated, “I’m not kicking [Juror C1613] because she’s a female.” However, the prosecutor’s credibility in making that statement was undermined by the facts (1) he made that statement only after appellant “raise[d] [his] new objection” (presumably on the ground the prosecutor was impermissibly challenging the women based on gender), and (2) immediately after stating he was not kicking Juror C1613 because she was a female, the prosecutor stated, “I like to have a certain breakdown of jurors as it relates to it.” The fact the prosecutor challenged Juror C1613 on the ground of gender, not as an end in itself but to affect the jury composition not only does not change the fact he challenged her, at least in part, based on gender but demonstrates he did so, at least in part, to affect jury composition in a way that is constitutionally prohibited.

We note that, after the prosecutor indicated he had challenged the three women jurors based on gender, and after appellant “raise[d] [his] new objection” to that fact, the trial court did not then comment on the fact the prosecutor effectively stated he had challenged the women on an unconstitutional basis—gender. When appellant later made his first *Wheeler* motion based on gender, the trial court denied it as untimely but did not address the fact the prosecutor effectively stated he had challenged the three women on an unconstitutional basis. When appellant made his second *Wheeler* motion based on gender, the trial court discussed various factors leading to its decision appellant had not made a prima facie showing, but never discussed the fact the prosecutor effectively stated he had challenged the three women on an unconstitutional basis.

As discussed, as to appellant’s second *Wheeler* motion based on gender, the court resolved the motion based on the “first step” in *Wheeler* analysis, i.e., the court stated it did not find a prima facie case had been made. However, it later permitted the prosecutor to state his reasons for challenging the jurors at issue, and the prosecutor provided explanations. In this circumstance we independently review whether the totality of the relevant facts gave rise to an inference of discriminatory purpose. (Cf. *People v. Howard* 42 Cal.4th 1000, 1018.)

In the present case, the prosecutor effectively stated he had challenged Jurors E3431, G0166, and C1613 on an unconstitutional basis—gender. In other words, his challenge as to each of those three jurors was based expressly on group bias. (Cf. *People v. Johnson* (1978) 22 Cal.3d 296, 297-300.) We hold the trial court erred by concluding appellant did not make out a prima facie case and therefore denying appellant’s second *Wheeler* motion based on gender. We further hold appellant has made out a prima facie case by showing the totality of the relevant facts gives rise to an *inference* of discriminatory purpose. These holdings apply to appellant’s second *Wheeler* motion based on gender to the extent that motion was based on challenges to Jurors E3431, G0166, and C1613, i.e., jurors whom the prosecutor expressly challenged based on gender. There is no need to discuss further appellant’s first *Wheeler* motion based on gender.

c. Reversal is Required.

The remaining issue pertains to remedy. The exclusion by peremptory challenge of a single juror on the basis of group bias is an error of constitutional magnitude requiring reversal. (Cf. *People v. Silva* (2001) 25 Cal.4th 345, 386 (*Silva*.) For the reasons discussed below, we conclude the judgment must be reversed.

(1) *Reversal is Required Because The Prosecutor Challenged Jurors E3431 and G0166 Solely Based on Group Bias.*

(a) *Juror E3431.*

In the present case, the record reflects the prosecutor challenged Juror E3431 in part because, according to the prosecutor, “there was something about her that I didn’t

like from the very beginning.” The prosecutor did not further describe what in particular the prosecutor did not like (unless it was the fact Juror E3431 looked like the preschool teacher of the prosecutor’s son, an explanation we consider below). The above quoted explanation was simply too vague and too general to provide a basis for the trial court to evaluate the genuineness of the explanation. We conclude the prosecutor did not satisfy the second step in *Wheeler* analysis, i.e., the prosecutor did not meet his burden of explaining adequately the gender exclusion by offering a permissible gender-neutral justification for the challenge. (Cf. *People v. Allen* (2004) 115 Cal.App.4th 542, 551-553.)

Even if the prosecutor’s above quoted challenge to Juror E3431 satisfied the second-step of *Wheeler* analysis, this does not end the inquiry. “[O]nce the prosecutor produces a neutral explanation for the challenges, the trial court must *evaluate* the “persuasiveness of the justification” and “determine[] whether the opponent of the strike has carried his burden of proving purposeful discrimination.” [Citation.]’ [Citation.]” (*People v. Schmeck* (2005) 37 Cal.4th 240, 267 (*Schmeck*), italics added.) “ [T]he critical question in determining whether a [defendant] has proved purposeful discrimination’ at a third-stage inquiry ‘is the persuasiveness of the prosecutor’s justification for his peremptory strike. At this stage, “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.” [Citation.] In that instance the issue comes down to whether the trial court finds the prosecutor’s [group]-neutral explanations to be credible. . . .’ [Citation.]” (*People v. Riccardi* (2012) 54 Cal.4th 758, 787.)

Fairly read, the record reflects the prosecutor challenged Juror E3431 on the vague ground “there was something about her that I didn’t like from the very beginning” and on the arguably implausible and fantastic ground Juror E3431 looked like the preschool teacher of the prosecutor’s son. Moreover, we consider these two explanations in light of the indisputable fact Juror E3431 was one of the three jurors whom the prosecutor challenged expressly on the ground of group bias. We conclude there was no substantial evidence supporting the two explanations, they were pretextual, the prosecutor

challenged Juror E3431 solely on the ground of group bias, and the trial court erred by failing to conclude appellant proved purposeful gender discrimination by the prosecutor's challenge of Juror E3431. (Cf. *Silva, supra*, 25 Cal.4th at pp. 385-386; *People v. Long* (2010) 189 Cal.App.4th 826, 843-848; see *People v. Reynoso* (2003) 31 Cal.4th 903, 923, 929.)

(b) *Juror G0166.*

The record reflects the prosecutor challenged Juror G0166 in part because, according to the prosecutor, “she sat quietly, she didn’t really seem engaged in the proceedings, . . . I guess it’s kind of a [double-edged] sword. I don’t want someone raising their hand all the time either, but she kind of sat and *where the questions were opened up to . . . the general audience, she just kind of sat there.* And as I was looking at her, as I was scanning the jurors, there was just kind of nothing really registering with her as I was discussing it, so I didn’t have a good feeling about her.”

However, when, during voir dire, the court asked jurors if they, their relatives, or close friends were involved in law enforcement or worked with the court system, Juror G0166 was one of several jurors *who raised her hand.* The court later asked one of those jurors a question to the effect would the juror treat police like other witnesses, then asked if there were “any no answers” and observed no hands were raised. That is, in this instance (and in many similar instances), the court’s question did not call for affected jurors to answer by affirmative conduct if their answers were no. The court subsequently asked a question to the effect if the jurors or close relatives had been charged with a crime. Juror G0166 was one of several jurors who *raised her hand*, and she *later answered questions* by the court on the subject.

When we consider the previously quoted explanation as to Juror G0166, which itself is *contradicted* by the record, as well as the indisputable fact Juror G0166 was one of the three jurors whom the prosecutor challenged expressly on the ground of group bias, we conclude there was no substantial evidence supporting the explanation, it was pretextual, the prosecutor challenged Juror G0166 solely on the ground of group bias, and

the trial court erred by failing to conclude appellant proved purposeful gender discrimination by the prosecutor's challenge to Juror G0166. (Cf. *Silva, supra*, 25 Cal.4th at pp. 385-386; *Long, supra*, 189 Cal.App.4th at pp. 843-848; see *Reynoso, supra*, 31 Cal.4th at pp. 903, 923, 929.) The prosecutor's challenges to Jurors E3431 and G0166 violated *Wheeler*, and each violation independently mandates reversal of the judgment. There is no need to consider whether any other challenges of the prosecutor were pretextual in violation of *Wheeler*.

(2) *Reversal Is Required Even if The Prosecutor Did Not Challenge Jurors E3431 and G0166 Based Solely on Group Bias.*

Even if the prosecutor did not challenge Jurors E3431 and G0166 *solely* on the ground of group bias, it is indisputable that that was *one* of the prosecutor's grounds for challenging them. Indeed, as discussed, the prosecutor challenged each of Jurors C1613, E3431, and G0166, based on group bias *and* tendered *additional* explanations for challenging each of them. In other words, even if the prosecutor did not challenge each of these three jurors *solely* on the ground of group bias, the prosecutor challenged each of the three based on mixed motives, i.e., based on group bias *and* based on a group-neutral reason.

In *Snyder v. Louisiana* (2008) 552 U.S. 472 [170 L.Ed.2d 175] (*Snyder*), the high court concluded a challenge based on mixed motives was error where the prosecution failed to meet its burden of showing that the group-bias ground for the challenge was not determinative, i.e., where the prosecution failed to meet its burden of showing the prosecution *would* have challenged the juror based on the *group-neutral* factor *alone*. (*Id.* at p. 485.)⁹ In the present case, in which the prosecutor challenged each of Jurors C1613, E3431, and G0166, based on group bias, the People cannot meet their burden of showing the group-bias ground for each challenge was not determinative; therefore, reversal is required.

⁹ *People v. Hamilton* (2009) 45 Cal.4th 863, characterized *Snyder* as concluding discriminatory intent was at least a 'but-for' cause for the challenged strike." (*Id.* at p. 909, fn. 14.)

d. *There Is No Need to Remand for Further Wheeler Proceedings.*

In the present case, the trial court erroneously ruled appellant had not made out a prima facie case as to his second *Wheeler* motion based on gender. However, the court allowed the prosecutor to tender explanations for his challenges, and the prosecutor tendered same. Accordingly, there are no further proceedings to be conducted concerning the second step in *Wheeler* analysis. Moreover, a trial court, ruling on whether appellant proved purposeful gender discrimination in connection with that motion, would consider the same record and evidence before this court. Respondent simply argues the trial court properly denied appellant's *Wheeler* motions based on gender; respondent does not argue if reversal is required, remand is warranted for further *Wheeler* proceedings or that evidence before the trial court following remand would be any different than that before this court. There is no need to remand for further *Wheeler* proceedings. (Cf. *People v. Jordan* (2006) 146 Cal.App.4th 232, 252-253.)

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

EDMON, P. J.

ALDRICH, J.