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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

THEARA YEM,

Defendant and Appellant.

C063794

(Super. Ct. No.
SF101424A)

The jury did not believe defendant Theara Yem's testimony that he acted in self-defense when he shot and killed 19-year-old Kevin Nhep and then emptied his nine-millimeter magazine, spraying a total of fourteen bullets at Nhep and five others associated with an Oakland gang. Neither Nhep nor the others had a gun. Defendant was found guilty of second degree murder with the personal use of a firearm for the benefit of a criminal street gang, shooting at an occupied motor vehicle for the benefit of a criminal street gang, and active participation in a criminal street gang. He was found not guilty of the attempted

murder of any of the others sitting in the red Honda parked at the Discount Liquor Store where the shooting occurred. We conclude defendant failed to make a prima facie showing of discrimination when the prosecutor exercised her second peremptory challenge to excuse an African-American juror. We also reject his challenge to the sufficiency of the evidence and to two evidentiary rulings, and affirm the judgment.

FACTS

Most of the percipient witnesses to the shooting lied to the police during the initial investigation and were affiliated with different gangs, whether they were validated members or not. They all, including defendant, told the jury the same basic chronology of events, the details and various discrepancies of which are irrelevant to the issues before us. Because defendant admitted at trial that he shot Nhep and kept on shooting until his gun was empty, we begin with a synopsis of his testimony. The only issue before the jurors was whether they believed he had acted in self-defense.

Defendant testified he spent several nights a week with Chantha Bun, a leader of the Tiny Raskal Gang (TRG), because Bun lived closer to where defendant worked. Although his social life revolved around TRG and he was photographed with gang members giving gang signs, he told the jury he was not a member of a gang and the signs were neighborhood signs, not gang signs. The events on the night of August 17, 2006, would suggest otherwise, even according to defendant's own telling of the story.

On that summer night, he was hanging out with Bun and other TRG members at Bun's house. Defendant, as was his custom, was armed with a nine-millimeter gun. Although it is unclear if he had it with him in the car, defendant had borrowed an Uzi. Bun and his girlfriend left to buy beer, cigarettes, and snacks at the Discount Liquor Store located two blocks from Bun's house. They returned, however, without the cigarettes. Defendant and Bun went back to the liquor store in defendant's black Honda to get the cigarettes. Only defendant went inside.

Near the counter, defendant encountered David Suon, a former member of the Oak Town Crips from Oakland. Suon asked, "What's up, 'cuz?" and defendant responded, "What's up?" Defendant did not feel threatened and he bought his cigarettes without incident.

But when he left the store, he saw Nhep standing by the side of a red Honda with several other Cambodians inside the car. Nhep had his hands inside his pants and was staring at him. He asked Nhep, "Do you have a problem?" and Nhep repeated the inquiry, "Do you have a problem?" Defendant lifted up his shirt to show Nhep his gun, hoping that Nhep would back off. He was scared and thought Nhep would shoot him. Defendant pulled out his gun and "just shot." He kept on shooting until the magazine was empty, but he testified he did not intend to hit any of the people in the car.

Bun drove up in defendant's car and they fled the scene. Defendant threw away the gun and hid his car. He showered to remove the gunshot residue and drank beer with TRG members. The

next day he went to work, collected his wages, tried to borrow money from a coworker, and returned to Antioch, where he lived with family members. When later apprehended, he lied to the police. Although he told the police initially he was not the shooter, he testified the group of people did not display a gun and he admitted he was the shooter.

Nhep's five friends gave similar accounts of the events leading up to the shooting, with minor discrepancies. They all agreed that no one in their group had thrown any gang signs, no one was armed, and no one verbally challenged defendant. They denied "mean mugging" him, that is, staring at him in a threatening or menacing manner. According to a few in the group, Nhep was holding a cell phone. After they saw defendant's gun, they unsuccessfully encouraged Nhep to get back into the car. One of them yelled to defendant, "Hey, we got no problem." They saw defendant shoot Nhep. One of the girls was shot in the buttocks, another in the leg.

A gang expert testified to the sociology and psychology of gang members, particularly the Asian gangs operating in Stockton. He familiarized the jury with the leadership structure, customs and practices, and members identified with TRG, including the fact that because they claim "EBK" (everybody killer), they do not claim Blood or Crip gangs and will shoot anybody. The expert opined that defendant was an active member and committed the instant offenses for the benefit of the gang. He described the two predicate offenses committed by TRG members

to satisfy the elements of the gang enhancements. Defendant does not challenge the expert's testimony on appeal.

DISCUSSION

I

The prosecutor exercised her second peremptory challenge to excuse an African-American juror with an attitude and background defendant characterized as favorable to the prosecution: his mother was a police officer, he was a Marine with training as a Navy Seal and an Army Ranger, and his son served in the Army. He was familiar with gangs and adolescent behavior but, he explained, did not judge people based on stereotypes and realized that young people who participated in gangs could turn out to be good citizens or they could go astray and take a toll on a neighborhood. He had been to the Discount Liquor Store where the shooting occurred many times. The trial court found these circumstances did not give rise to a reasonable inference that the prospective juror had been challenged because of impermissible group bias. On appeal, defendant challenges the trial court's ruling that he failed to establish a prima facie case of discrimination.

The use of peremptory challenges to remove prospective jurors based solely on the basis of their race offends the equal protection clause of the United States Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 [90 L.Ed.2d 69, 79-83] (*Batson*)) and the right to a trial by a jury drawn from a representative cross-section of the community as expressed in the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d

258, 276-277 (*Wheeler*)). A criminal defendant must establish a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Batson, supra*, 476 U.S. at pp. 93-94.) "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

The trial court realized that the exclusion of even one juror based on race violated defendant's rights under the state and federal Constitutions. In this case, however, the court explained that defendant did not carry his burden of establishing a prima facie case of discrimination. The court stated: "Now, the Court is looking at the totality of the circumstances in this case, understanding that [Prospective Juror B.] is African-American. But all the principles in this case are Cambodian, the defendant and the victim, so there's no group association. [¶] The case doesn't have group overtones in the sense that it's a minority group versus victims from the dominant part of our culture, so there's not a factor that establishes prima facie showing. There hasn't been a pattern, although it's not required. It is a factor to be considered. [¶] That is not the case at this point in time, nor can I say anything about disproportionate use of challenges. I will not. He was not the first person the prosecution challenged. He was the second person the prosecution challenged. [¶] The questions that were asked by the prosecution were not

derogatory, they were probative. They were probing. And it wasn't as if there wasn't -- there was no intent to get any information from him."

There is a rebuttable presumption that the prosecution exercised its peremptory challenges in a constitutional manner. (*People v. Dement* (2011) 53 Cal.4th 1, 19.) Because the trial court found that defendant did not establish a prima facie showing of group bias, we must consider the entire record of voir dire. Admittedly, we are hampered somewhat by the prosecutor's refusal to offer a neutral explanation, at the court's invitation, for the exercise of her peremptory challenge. We must sustain the trial court if, after independently reviewing the record, we conclude the totality of relevant facts does not give rise to an inference of a discriminatory purpose. (*People v. Howard* (2008) 42 Cal.4th 1000, 1018.)

In *People v. Gray* (2001) 87 Cal.App.4th 781 (*Gray*), the prosecutor excused three prospective African-American male jurors from the trial of a defendant who was also African-American. (*Id.* at pp. 785-786.) The challenges were problematic on several levels. Most importantly, in that case the defendant was African-American and African-American males were being systematically excluded from the jury. (*Ibid.*) Thus, on appeal, the court was presented with a pattern of possible discrimination and no discernible reason why one of the three had been challenged at all. Defendant argues that the

finding of a prima facie showing in *Gray* is applicable in his case as well. Not so.

Defendant, as the trial court pointed out, is Cambodian, not African-American. While not the first person to be excused by the prosecution, Prospective Juror B. was the only African-American to be excused at the time defendant raised his *Wheeler* challenge. Unlike *Gray*, therefore, there was no pattern of discrimination and there was no systematic exclusion of defendant's racial group. Neither fact alone, of course, defeats a *Wheeler* challenge, but together they undercut the strength of the analogy to *Gray*.

Trial counsel expressed his ongoing frustration over the lack of diversity in the jury venire, a sentiment shared by the trial court. But the scarcity of African-Americans from jury venires in general does not give rise to a reasonable inference of purposeful discrimination any time an African-American prospective juror is excused. Defendant continues to fail to point to any evidence that gives rise to the requisite inference of group bias.

Defendant suggests that Prospective Juror B. had the markings of a juror favorable to the prosecution because of his familial association with the military. The Attorney General points out that in a case such as this, where the prosecutor needed jurors who would not discredit the testimony of important percipient witnesses due to their affiliation with gangs, the prosecutor would be looking for jurors more typically friendly to the defense. Either way, we do not find that the juror's

connections to law enforcement alone give rise to a reasonable inference that the prosecutor's motives are discriminatory.

Moreover, Prospective Juror B. was a patron of the store where the shooting occurred, as was defendant. The prosecutor might have wanted to avoid the possibility of any personal connections the juror could have had with the owners, clerks, or defendant himself. Such a connection might be speculative, but it would be enough to dispel a discriminatory motive. It is important to note, however, that the prosecutor was not obligated to demonstrate a nondiscriminatory basis for her challenges because defendant failed to meet his threshold burden to demonstrate a prima facie showing of group bias. We agree with the trial court that the record is simply devoid of any evidence from which to draw a reasonable inference of discrimination. In the absence of a prima facie showing, the *Wheeler* challenge was properly rejected.

II

Defendant challenges the sufficiency of the evidence by rearguing the inferences the jury might have drawn from the testimony of the percipient witnesses. In other words, he asks us to do the jury's job. There is ample evidence to support the jury's verdicts of second degree murder and shooting at an occupied motor vehicle.

On appeal, we must review the whole record to ascertain whether there is substantial evidence, that is, evidence of reasonable, credible, and solid value, from which a reasonable trier of fact could find defendant guilty beyond a reasonable

doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

“‘[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.’ [Citations.]” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “‘The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.]” “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt.” [Citation.]” (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

Defendant repeats several times that the only “objective” testimony by “objective” percipient witnesses raises the inference that the group of friends in and around the red Honda engaged in aggressive, gang-related behavior, inciting the confrontation and giving defendant good reason to fear for his life. He discredits the testimony proffered by all six of the young people who witnessed the shooting because they were self-interested gang members or affiliated with Oakland gangs. By contrast, he argues the employees’ testimony, who presumably were “objective” as he sees it, corroborated defendant’s testimony that members of the group stared at him. They also testified that they heard gang language from some in the group

when they were in the store, that there was loud arguing before the shooting, and that Nhep would not get back in the car.

Certainly, it was the jury's prerogative to accept the defense versions of the confrontation and to infer from his testimony, as well as from that of the liquor store employees, that defendant was in reasonable fear for his life. But there was compelling evidence he minimizes or ignores to support the jury's contrary conclusion.

Nhep was unarmed. Defendant never saw a gun on Nhep or on any of his friends. The jury reasonably could infer they posed no threat to him. Defendant, on the other hand, had admitted that he was always armed unless he was at work. The jury could have reasonably found that it was defendant, an armed and dangerous member of TRG, who either went to the store with the intent to assault the group his gang boss had observed a few minutes earlier or who provoked the confrontation by approaching Nhep, asking him if he had a problem, and pulling the gun on him. Moreover, defendant shot Nhep at close range, although he could have easily walked to his car where his friend Bun sat waiting to drive home.

Because defendant testified at trial, the jurors were able to assess his credibility first-hand. They watched his demeanor, listened to his explanations, and heard the candid story of how he armed himself, shot his victim three times, and then kept on shooting at the car until he ran out of bullets. They also had the opportunity to evaluate the credibility of the other percipient witnesses based on their testimony, their

backgrounds, their motives, and their demeanor. In other words, the trial was a classic credibility contest and it was the jury's task, not ours, to decide whom to believe.

Finally, the jurors could consider defendant's behavior following the shooting. They may have reasonably concluded that someone who shot in self-defense would not flee the scene, shower to wash off the gun residue, hide his gun, and then lie to the police. In short, there was more than sufficient evidence that defendant shot and killed his victim under circumstances that showed an abandoned and malignant heart to support a second degree murder conviction. Similarly, there was ample evidence that after defendant shot three bullets at Nhep he continued to fire eleven more shots at the red Honda, thus supporting the jury's finding that he fired at an occupied motor vehicle. Defendant's challenge to the sufficiency of the evidence is without merit.

III

Defendant objects to two evidentiary rulings that were so overshadowed by his own admission to killing the victim and the testimony of multiple witnesses the rulings were harmless, even if they were wrong. Moreover, the store clerk's testimony was not materially different from defendant's own account of what happened. The court, however, did not abuse its discretion by admitting the statements a clerk made to the police as prior inconsistent statements or by excluding evidence of prior juvenile adjudications to impeach a witness for the prosecution. In short, defendant makes much ado about nothing.

A. Prior Inconsistent Statements

Over defense objection, the trial court admitted the statement from store clerk Shannon Pemberton made to the police on August 18, 2006, just after the shooting. Pemberton is related to the owners of Discount Liquor Store. The court found that Pemberton's professed lack of memory on direct examination had been feigned and, in an exhaustive analysis, concluded the statement was admissible as a prior inconsistent statement pursuant to sections 1235 and 770 of the Evidence Code. Defendant argues the trial court erred because the record demonstrates Pemberton's loss of memory was genuine. The error, in defendant's view, violated his state and federal right to due process and a fair trial. We disagree.

Defendant acknowledges the deferential scope of appellate review of evidentiary rulings. A trial court's exercise of discretion will not be disturbed on appeal absent a demonstration that it was exercised in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jones* (1998) 17 Cal.4th 279, 304.) He falls far short of this high bar given the statutory framework for the admission of prior inconsistent statements and analogous cases admitting prior statements the witness selectively forgets at trial.

Evidence Code section 1235 sets forth the applicable exception to the hearsay rule by allowing admission of prior inconsistent statements. It provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule

if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770."

Evidence Code section 770 states: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

Defendant relies on the general rule that Evidence Code section 1235 does not apply where a witness merely does not remember the event that he has previously described. (*People v. Sapp* (2003) 31 Cal.4th 240, 296.) When a witness genuinely does not remember the event, the prior statement is not inconsistent and is not admissible under section 1235. (*People v. Gunder* (2007) 151 Cal.App.4th 412, 418; *People v. Sam* (1969) 71 Cal.2d 194, 208-210.)

The general rule of exclusion does not apply, however, when a trial witness is deliberately evasive or feigns a lack of memory. As the Supreme Court explained in *People v. Green* (1971) 3 Cal.3d 981, 988, "[J]ustice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness."

Thus, "the true rule under *Green* is that a witness' prior statements are admissible so long as there is a reasonable basis in the record for concluding that the witness' 'I don't remember' responses are evasive and untruthful." (*People v. O'Quinn* (1980) 109 Cal.App.3d 219, 225.)

The trial court methodically identified the inconsistencies between Pemberton's statements to the police and his later testimony at trial. While we need not reiterate those here, it should be noted that the overall impression created by Pemberton's statement to the police was more inculpatory than his testimony at trial. That is to say, many of the nuances of his statement that suggested defendant was the aggressor Pemberton claimed he could not remember at the time of trial. The court's 10-page analysis goes into the inconsistencies in precise detail.

We are satisfied, therefore, that the version he gave to the police was sufficiently inconsistent with his trial testimony to qualify as an inconsistent statement. The issue is whether there is a reasonable basis in the record for concluding that Pemberton's lack of memory of those details was equivocal and feigned.

The trial court provides us with far more than a reasonable basis. It explained: "On the issue of willful evasion, we have those last two statements and inconsistent with other testimony, but we also had detail that he remembered, which is odd in light of the detail that he did not remember. He remembered that there were two Honda Civics in the parking lot. He remembered

that one of the Honda Civics was black. He remembered that one Honda Civic was parked a couple stalls from the front door. He remembered that the black Honda Civic was parked two or three stalls away from his brother's truck when he testified. He remembered that the customers were Asian. He remembered that the customers bought soda and water. He said his brother-in-law made the sale while he was getting a mop ready, getting the mop and water ready. That's a detail that you wouldn't expect to remember. . . . [¶] . . . [¶]

"Looking now to the detail that he didn't remember that he should have remembered. He didn't remember the location of the man who was shot at the time of the shooting. That he had told the officers that that person was standing outside the passenger door, but in fact, he did remember where the shooter was located. He didn't remember the group exiting the red Honda and entering the store or that group going back to their car just before the shooting. He didn't remember the group was in the car at the time of the shooting. These were all facts that his brother-in-law was able to easily remember but somehow he forgot, and the -- all of these facts I think would be inculpatory in the sense that these individuals, if they were situated in the car, by the car, less likely to be aggressors in this event, making the defendant the aggressor. [¶] . . . [¶]

"Again, all of these are events that would make those people less likely to be aggressors but make the person who did the shooting an aggressor. I think it's noteworthy that these events are not part of the story that a person is likely to

forget in light of the parts of the story that he was able to remember and in light of the fact that he must have observed something occur that impressed him enough to tell his brother-in-law to call the police before any shots were fired.

"It's also noteworthy that all of these prior statements are inconsistent with his earlier testimony that he didn't care what was going on outside, that he was watching what was going on inside of [the] store, that three people from the red car were in the store at the time of the shooting, that he only heard arguing outside, that he heard only a loud voice, that he did not hear specific words, so the prior statements are admissible as prior inconsistent statements, notwithstanding his lack of recollection about what he told the police or his lack of recollection about the events that occurred. [¶] . . . [¶]

"So for all of those reasons, the Court looks to the answers where he said he didn't remember as being not an honest recollection of -- honest misrecollection by willful evasion. This is bolstered by the motive for not remembering any information that might not be inculpatory or make the defendant the aggressor in this.

"This event occurred at his family's business. He's married to, apparently, the daughter of the owner. Mr. Ratti is, in fact, his brother-in-law. There was testimony to that effect. I didn't remember that last week, but that was the testimony. And the event is gang-related. And the defendant was a regular customer in the store, which might lead one associated with that store to be of concern about saying

anything of an inculpatory nature that might expose his family or the store to gang retribution.

"So in light of that additional motive, the Court finds that his lack of recollection was not genuine, but rather, willful evasion."

There is little we could add to the court's comprehensive evaluation of Pemberton's prior statement and whether his loss of memory at trial was feigned. Defendant insists the witness's memory loss was genuine. But that is a determination for the trial court to make. We agree with the court that given the plethora of insignificant details he was able to recall, it was indeed odd that he was unable to remember some of the more salient facts he would be more likely to recall and those which his brother-in-law described without difficulty. In any event, the court's recitation of the inconsistencies, the equivocation, and the possible motive provided a reasonable basis for its finding that the witness's loss of memory was feigned. As a result, the court properly admitted Pemberton's prior inconsistent statement to the police as set forth in sections 1235 and 770 of the Evidence Code.

B. Impeachment

At trial, defendant sought to impeach one of the prosecution's witnesses, Nina F., with evidence she had been involved in a robbery when she was 14 years old. There was evidence that Nina F. had been arrested and dispositioned to juvenile hall, but there was no evidence about the outcome of the case. Nina F. was one of the six young people gathered at

the red Honda in the parking lot of the Discount Liquor Store who observed the events surrounding the shooting. The trial court excluded evidence of the robbery, finding the probative value was diminished since the outcome of the case was unknown. As a result, the court believed that an examination into Nina F.'s role in the robbery would require a minitrial and involve an undue consumption of time. More importantly, the court found the probative value was further diminished by the remoteness of the alleged offense. The witness, who was only 20 years old at the time of trial, had been involved in the offense 6 years earlier when she was only 14 years old.

Defendant insists the trial court's exclusion of the evidence was an abuse of discretion and a violation of his right to confrontation under the Sixth Amendment to the United States Constitution. He argues there is no evidence that Nina F. was honorably discharged from a juvenile facility, there is no evidence she has led a crime-free life in the intervening six years, and there is no evidence that the impeachment evidence would have consumed an undue amount of time. In defendant's view, the evidence was to the contrary since Nina F. was dressed in blue, hung out with young men with gang affiliations, and might readily have answered defense counsel's questions about the robbery.

The trial court, as defendant recognizes, retains wide latitude to restrict cross-examination that is repetitive, prejudicial, confusing, or of marginal relevance. (*People v. Belmontes* (1988) 45 Cal.3d 744, 780.) To offend the

confrontation clause, the defendant must demonstrate that the prohibited cross-examination would have produced "a significantly different impression of [the witness's] credibility." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674, 684] (*Van Arsdall*)).

On this record, we can find no abuse of discretion. The court properly excluded impeachment evidence that was of marginal relevance. We agree with the trial court that a 14 year old's involvement in a robbery would not have produced a significantly different impression of Nina F., who at 20, as defendant points out, was wearing gang colors and associating with gang members. Because the outcome of the juvenile offense was unknown, it was also true that the cross-examination might have consumed an undue amount of time and devolved into a minitrial about an old offense by one of many witnesses who testified to the same basic story line. As the trial court "retain[s] wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination" (*Van Arsdall, supra*, 475 U.S. at p. 679), we conclude the trial court reasonably restricted impeachment of Nina F. and, in so doing, did not deny defendant his right to confrontation under the Sixth Amendment.

IV

The Attorney General concedes the court erred by imposing a consecutive 10-year gang enhancement to a life term for second degree murder with a 15-year minimum parole eligibility period.

(*People v. Sok* (2010) 181 Cal.App.4th 88, 95-96.) The unauthorized 10-year consecutive sentence is stricken.

DISPOSITION

We strike the consecutive 10-year gang enhancement imposed in connection with the life term for second degree murder. The trial court is directed to amend the abstract of judgment accordingly and to forward a certified copy of said abstract to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____ RAYE _____, P. J.

We concur:

_____ BUTZ _____, J.

_____ HOCH _____, J.