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

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THE PEOPLE,

Plaintiff and Respondent,

v.

DWAYNE ORLANDO THOMAS,

Defendant and Appellant.

C068672

(Super. Ct. No. 10F07767)

Defendant Dwayne Thomas appeals his convictions of first degree residential burglary and possession of stolen property. He contends there is not sufficient evidence to uphold his burglary conviction and the trial court erred in failing to grant his mistrial and *Wheeler/Batson*<sup>1</sup> motions. Finding these contentions to be without merit, we affirm.

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<sup>1</sup> *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69].

## FACTUAL AND PROCEDURAL BACKGROUND

During the afternoon of November 26, 2010, Marcus Tucker left his house to go to the mall. As he was leaving, he saw several African-American young people walking in the direction of his house.

Upon his return, Tucker discovered his house had been ransacked. Many items had been taken from the house, including an Xbox console. Tucker called the police to report the incident.

During the police investigation, several footprints were found on either side of Tucker's fence. A photograph of one of the footprints was taken.

Citrus Heights Police Officer William Dunning then spoke with Tucker's neighbor Sergey Perepelitsin. Perepelitsin told the officer he had seen two African-Americans running through his backyard, coming from the direction of Tucker's yard. At one point, one of the two stopped and gestured toward Tucker's house, and two more African-Americans ran through his yard. Perepelitsin referred Officer Dunning to a nearby apartment complex where he suspected the intruders might have gone.

Officer Deborah Bayer responded to the apartment complex and detained Dorain Craig, who had left apartment No. 10 with an Xbox console in his hand. While Officer Bayer was detaining Craig, Officer David Smith noticed three males peeking out the door of apartment No. 10. When they realized Officer Smith saw them, they shut the door. Officer Smith knocked on the door. Although he heard people moving inside, nobody answered. Officer Smith continued to knock. Five minutes after the initial knocking, Stephanie Elliot answered. As he spoke with Elliot, Officer Smith recognized defendant, Benjamin Bailey, and Brian Bailey inside the apartment from prior contacts. After getting Elliot's consent to search the apartment, officers found items that Tucker had described as missing from his house. Craig, the Baileys, Anthony Daniels, and defendant were arrested.

Tucker was then called to the apartment to see if he could identify any of the items as his. He identified many of the items that had been stolen.

Several hours later, Detective Chad Rothwell interviewed Daniels. Initially, Daniels lied to Detective Rothwell and said he had awakened that day and had gone straight to Elliot's apartment. However, he later changed his story and told Detective Rothwell that he, the Baileys, and defendant had seen Tucker leave his house and "they" went to the house. Daniels said three of the subjects then went to the backyard, while he stayed out front as a lookout. Although Daniels would not confirm he was with defendant, he implied that he was with the people who were arrested. Daniels eventually admitted he had entered Tucker's house through the back window with the rest and he was the first one to leave and go to Elliot's apartment.<sup>2</sup>

Detective Rothwell also interviewed Craig. Craig told the detective that he had gone to Elliot's apartment after receiving a call from defendant. Craig did not recall what was said on the phone, but he did recall that he knew an Xbox would be available for purchase at the apartment. He said he purchased the Xbox from someone with twisted dreads. Brian Bailey and Daniels both had twisted dreads.

Brian and Benjamin Bailey were placed in the same cell on the night they were arrested. Benjamin told Brian that he and defendant "would be sentenced to whatever they could get," and that they should say "something to the effect about [defendant] running into us."<sup>3</sup>

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<sup>2</sup> At trial, Daniels again changed his story. He said he did not know if the other suspects had entered Tucker's house and claimed he had lied to Detective Rothwell during the interrogation.

<sup>3</sup> At trial, Benjamin Bailey testified that he, Brian, and Daniels had been hanging out at Elliot's with defendant, and that they went for a walk and committed the burglary while defendant remained at Elliot's apartment.

Defendant told Detective Rothwell that he had not been involved in the burglary, and that he had arrived at Elliot's apartment after the other four suspects had arrived.

When they were arrested, both Daniels and defendant were wearing Vans shoes. The footprint discovered in Perepelitsin's yard bore similar markings to both Daniels's and defendant's shoes.<sup>4</sup>

Before trial, the court granted defendant's motion in limine and ordered that the prosecutor not elicit any reference to the fact that Officer Smith had had prior contact with defendant. However, after Officer Smith testified that he recognized three of the suspects, the prosecutor asked, "Without stating how you recognized those individuals, who did you recognize?" Defense counsel moved for a mistrial on the grounds that the prosecutor's question violated the court's order and prejudiced the jury. The court denied defendant's motion, stating, "I don't think the testimony was directly in violation of the order on that. I understand your point and why you're making the motion. [¶] I think it does not rise to the level of prejudice that would require a mistrial." Defendant denied the court's offer to give the jury a curative admonition.

During jury voir dire, defense counsel made a *Wheeler/Batson* motion, stating the prosecutor had peremptorily "challenged what appears to be the only African[-]American person on the entire venire, and it would appear to me that the basis for her challenging is nothing more than he was, in fact, an African[-]American person."

The court found a prima facie case and asked the prosecutor to express her reasons for making the challenge. The prosecutor responded, saying, "The mode in which the juror presented himself first drew my attention to him. He projected himself as a young urban youth; specifically . . . this person has cornrows in his hair and the fact he is dressed in an all-black leather jacket and black hoodie and black jacket. He had dark

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<sup>4</sup> At trial, Detective Rothwell opined that Daniels's shoes had too much wear to leave the print.

blue or dark black saggy pants with Nikes, all manners in which young urban youth employ; a lot of times, their statement pieces, but it was the first thing that drew my attention to him.

“In addition, sticking with dress, he also had a baseball cap with the price tag attached to it, also another common manner in which young urban youth dress. It’s kind of a stylistic statement piece to leave the price tags on, and I happened to be so close to him I noticed it was 34.99. He has a tattoo on his right arm in Old English.

“[¶] . . . [¶]

“I’m always aware of people who are trying to draw attention to themselves, either through manner of dress, the way they vocalize, the way they present themselves either through earrings, nose rings, eyebrow rings, things of this sort, tattoos being one of them.

“[¶] . . . [¶]

“Further, one of my biggest concerns was the fact that he was one of the three people who did raise their hands when I asked the question have you visited someone who has been incarcerated. He’s visited not only one person. He’s visited two persons, two persons who are very close to him, being his siblings. That gives me the impression that he is empathetic to the criminally accused.

“[¶] . . . [¶]

“Finally I will say [the prospective juror] is the father of three young children. He is not married. It does not fall in line with the type of person I felt has an investment in society and is willing to take steps that could indicate, in fact, he’s willing to buy into the institutions.”

When the court asked the prosecutor to elaborate on some of her statements, the prosecutor responded “Oftentimes, young urban youth will -- there are stores that have particular styles and modes of dress. It could be skater stores, like Ocean Pacific, or there can be stores that are specifically for shoes such as large athletic shoes that oftentimes young urban youth will wear.

“It’s places like Zumiez, for example, Z-u-m-i-e-z. They sell clothes such as hip-hop wear, saggy pants, long T-shirts. They’re just a different style and mode that are catered to inner-city youth that have a hip-hop culture, and that’s the type of clothing I recognized on this young individual.”

“I would make the identification in this case our defendant appears to be an accurate description of someone who is a young urban youthful person, and I would worry that both [the prospective juror], -- excuse me -- that [the prospective juror] would unduly identify with the defendant in such a way that he wouldn’t be able to judge the case fairly.”

When asked to elaborate specifically on what she meant by urban youth, the prosecutor stated, “the context under which I’m using it is with the assumption that young inner-city youth are often overrepresented by poor African[-]American and/or Latino and/or Southeast Asian descent.

“Oftentimes, the culture of hip hop is also associated, hip on being saggy pants, long shirts, long jackets, cornrows, tattoos, a lot of clothing that is counter to the mainstream, being, of course, closer-fitting clothing, hairstyles that are cleaner and shorter cut, not tattooed, and things that like.”

The court denied defendant’s *Batson/Wheeler* motion, stating, “I think that based on the case law, body language is an acceptable basis under *People v. Turner*, 8 Cal.4th 137. It’s also been established that a race-neutral reason, even if trivial, illogical or weak, is sufficient under *People v. Reyes*.

“And I’m not even suggesting that these reasons are trivial or weak, but if that’s the standard that I’m to hold this conduct up against, that’s a standard that I feel has been met here.

“The People have articulated a number of reasons that have to do with the attitude of the potential juror -- his body language, his statements, short responses, his dress, and the tattoos -- which indicated to the People some potential that he might be empathetic to a certain attitude of not being part of the mainstream system; also, that having two brothers in the criminal justice system, you might be empathetic to those who are criminally accused. I might not have been completely forthcoming about that.

“I don’t, by any means, mean to say I can really personally tell whether he would have been a good impartial juror or not, but I think there’s enough here for me to decide, and to rule, that the People have met their burden, so I’ll deny the motion.”

## DISCUSSION

### I

#### *The Jury’s Verdicts Are Supported By Sufficient Evidence*

Defendant contends there is insufficient evidence to support his conviction for first degree residential burglary. He is wrong.

For claims of insufficient evidence, “ ‘The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572.) “ ‘An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.’ [Citation.] ‘Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].’ ” (*Id.* at p. 1573.)

“ ‘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, it is the jury, not the appellate court which must be convinced of

the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' ” (*People v. Perez* (1992) 2 Cal.4th 1117, 1124, quoting *People v. Bean* (1988) 46 Cal.3d 919, 932-933; see *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

To prove defendant was guilty of burglary in the first degree, the prosecutor had to prove beyond a reasonable doubt that defendant entered an inhabited building with the intent to commit theft. (CALCRIM Nos. 1700, 1701.)

Defendant contends “while there was sufficient evidence to support a conviction for having helped Brian Bailey sell the stolen Xbox, there was insufficient evidence to prove defendant participated in the burglary or aided and abetted the burglary.” He is wrong.

Reviewing the record most favorably to the judgment, defendant's burglary conviction must stand. When Tucker left to go to the mall, he saw several African-Americans walking in the direction of his house. Later, Perepelitsin saw a total of four or five African-Americans running from Tucker's house. Taking their testimony together, it was reasonable for the jury to infer that at least four African-Americans participated in the burglary. Since Craig later purchased one of the stolen items, the jury could reasonably infer he was not one of the burglars. Considering defendant was one of the four remaining suspects, a reasonable jury could have found that he participated in the burglary.

Further, a shoe print that matched defendant's shoe was found at the scene. The jury heard testimony that Daniels, the only other suspect wearing Vans shoes, could not have left the print. Thus, it was reasonable for the jury to infer that defendant's shoe left the print, and therefore he was one of the burglars.

Daniels's testimony also suggests that defendant was one of the burglars. He told Detective Rothwell that he, the Baileys, and defendant had seen Tucker leave his house

and “they” went to the house. Daniels indicated three of the subjects then went to the backyard, while he (Daniels) stayed out front as a lookout. Although Daniels would not confirm he was with defendant, he implied that he was with the people who were later arrested. Daniels eventually admitted that he had entered Tucker’s house through the back window with the rest and that he was the first one to leave and go to Elliot’s apartment. All of these statements, considered with the fact that defendant was one of the suspects arrested, give rise to the reasonable inference that defendant was one of the burglars.

Craig testified that after he spoke with defendant on the phone, he was left with the impression that a stolen Xbox was for sale at Elliot’s apartment. Although by itself this does not prove that defendant was one of the burglars, it is yet another piece of information that is relevant to coming to that determination.

While Benjamin and Brian Bailey were in the same jail cell, Benjamin told Brian that he and defendant “would be sentenced to whatever they could get” and that they should say “something to the effect about [defendant] running into us.” These statements suggest that Benjamin Bailey considered defendant to be one of the burglars.

Lastly, Benjamin Bailey testified that defendant was with the group at Elliot’s apartment *before* the burglary. However, defendant testified that he did not go to Elliot’s apartment until *after* the burglary. This inconsistent testimony is more evidence of defendant’s guilt.

Although each of these facts, considered by itself, might not be sufficient to uphold defendant’s conviction, there is certainly sufficient evidence that defendant was one of the burglars when all of the evidence is considered together. It is not our job to determine whether defendant is guilty beyond a reasonable doubt. (*People v. Perez, supra*, 2 Cal.4th at p. 1124.) Rather, we must determine whether, in the light most favorable to the judgment below, there is sufficient evidence to uphold defendant’s

convictions. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We are satisfied there is enough evidence in this case.

## II

### *The Court Properly Denied Defendant's Motion For Mistrial*

Defendant contends the trial court erred in failing to grant his motion for a mistrial. He is wrong.

“On appeal, we review the trial court’s denial of a motion for mistrial under the deferential abuse of discretion standard.” (*People v. Maury* (2003) 30 Cal.4th 342, 434.) The trial judge has considerable discretion and “his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

“ ‘ “A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.” ’ ” (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

Here, defendant contends he was prejudiced when the prosecutor asked Officer Smith, “Without stating how you recognized those individuals, who did you recognize?” He is wrong. When he moved for a mistrial, defense counsel stated, “if this officer had prior contacts with my client, it had to have been for some prior criminal activity on the part of my client.” This statement is not true. There are many noncriminal reasons why an officer might recognize a person. While it is possible that Officer Smith’s prior contacts with defendant were for prior criminal activity, that is only one of many possible reasons. Without more, we cannot say the jury assumed Officer Smith’s prior contact with defendant was from previous criminal activity, and therefore we are unwilling to

accept defendant's contention that the jury was prejudiced. The trial court did not abuse its discretion in this instance.

### III

#### *The Court Properly Denied Defendant's Wheeler/Batson Motion*

Defendant contends the court erred in failing to grant his *Wheeler/Batson* motion. He is wrong.

“Prospective jurors may not be excluded from jury service based solely on the presumption that they are biased because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds.” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122.) When the defendant objects to the prosecutor's use of a peremptory challenge under *Wheeler/Batson*, the following standards apply: “ ‘First, the defendant must make out a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” [Citations.] Second, once the defendant has made out a prima facie case, the “burden shifts to the State to explain adequately the racial exclusion” by offering permissible race-neutral justifications for the strikes. [Citations.] Third, “[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.” ’ ” (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

After the trial court found a prima facie case, the prosecutor provided a plethora of legitimate, race-neutral reasons to justify why she had excused the juror. Defendant contends that though there were permissible reasons, the prosecutor also used an impermissible reason for excusing the potential juror because he was a “young urban youth.” Defendant is wrong.

When explaining what she meant by “young urban youth,” the prosecutor emphasized she was concerned about the prospective juror’s style of dress, and her belief that the juror may have identified with defendant because of his appearance. Specifically, she stated “It’s places like Zumiez, for example, Z-u-m-i-e-z. They sell clothes such as hip-hop wear, saggy pants, long T-shirts. They’re just a different style and mode that are catered to inner-city youth that have a hip-hop culture, and that’s the type of clothing I recognized on this young individual.”

“I would make the identification in this case our defendant appears to be an accurate description of someone who is a young urban youthful person, and I would worry that [the prospective juror] would unduly identify with the defendant in such a way that he wouldn’t be able to judge the case fairly.

“[¶] . . . [¶]

“Oftentimes, the culture of hip hop is also associated, hip on being saggy pants, long shirts, long jackets, cornrows, tattoos, a lot of clothing that is counter to the mainstream, being, of course, closer-fitting clothing, hairstyles that are cleaner and shorter cut, not tattooed, and things that like.”

Defendant contends that by challenging the potential juror because he was a “young urban youth,” the prosecutor had challenged him because she considered him a poor African-American youth. This is not so. The prosecutor explained that “young inner-city youth are often overrepresented by poor African[-]American and/or Latino and/or Southeast Asian descent.” In other words, “urban youth” is not a proxy for young and African-American; rather, it encompasses a number of races, including Latinos and Asians, and presumably, even whites. Her explanation made clear that what was of concern to her was not race, but other factors common to “urban youth.”

Therefore, the court acted within its discretion in denying defendant’s *Wheeler/Batson* motion.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

MAURO, J.

HOCH, J.