

NOT TO BE PUBLISHED

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

THE PEOPLE,

Plaintiff and Respondent,

v.

COSME EDUARDO GIL,

Defendant and Appellant.

C070069

(Super. Ct. No. SF103132A)

This case comes to us on appeal for the second time. Again, we remand. In the first appeal, we found defendant Cosme Eduardo Gil had made a prima facie showing that the prosecutor had excused two potential jurors with Spanish surnames for discriminatory purposes. We remanded the case so that the trial court could conduct the remainder of the proceedings required by *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] to determine if the prosecutor had exercised his peremptory challenges for some reason other than group bias.

In this second appeal, we conclude the trial court failed to make a “sincere and reasoned effort to evaluate each of the [prosecutor’s] stated reasons” for challenging the two jurors (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1126), instead stating, “I still don’t believe that there was a pattern shown here based upon any discriminatory use of

the challenges by the D.A., but the appellate court has found otherwise.” The trial court’s job is to follow the law -- not pay it lip service. Accordingly, we must remand the case again.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2007, defendant, armed with a rifle, robbed JCPenney, where he was an employee. He bound the hands of three employees with duct tape, threatened to kill two of them, and then stole \$25,000 in cash and \$1.7 million in jewelry.

A jury found defendant guilty of robbery, criminal threats, and three counts of false imprisonment.

Defendant’s first appeal claimed the trial court erred in concluding that no prima facie case of unlawful discrimination had been shown after the prosecutor exercised two peremptory challenges against two prospective jurors with Spanish surnames. We found that a prima facie case had been made and remanded the case for the trial court to conduct further proceedings required by *Batson*.

Thereafter, the trial court conducted a hearing to determine the prosecutor’s reasons for using his peremptory strikes against prospective jurors Avila and Miramontes. The court’s ruling in that hearing is at issue in this current appeal.

After generally noting that, from his point of view, “all the witnesses needed Spanish interpreters, they [the witnesses] were Hispanic, [so] there was no reason in my mind to be going out looking to kick Hispanic jurors in this case,” the prosecutor stated his reasons for striking Avila and Miramontes from the panel. For Avila, the prosecutor stated his reasons as follows: “As to Mr. Avila, he had a cousin who was currently charged with murder in Modesto, he did state that he wasn’t familiar with him or wasn’t close to him; however, the fact that he had a close relative in a case that was pending at the time that this case was going was of great concern to me. In addition, from my notes, it shows that he came into court, he had long hair, was wearing baggy pants, which was also an additional concern to me. For those reasons, he was excused.”

For Miramontes, the prosecutor stated his reasons as follows: “Now, as to Miramontes . . . she stated that she was a student, she was a housewife, she was not working at the time, she had a husband who was a contractor, or a trucker, my notes said truck, I think it said contractor in the transcript, and that she traveled with him all over the state when he was traveling around. That shows somewhat of a transient lifestyle, although she did have four children here, they were older.

“My main reason for kicking her, as I think back on it and look at my notes, she was an older mother of four, the defense in this case was going to be duress, that somehow he was coerced, and the defense’s family was threatened as to the reason why the defendant was involved in the robbery in the first place, and I thought she may be more sympathetic to his cause. That’s one of the main reasons she was kicked.”

The prosecutor then argued that defense counsel had “kicked at least two Hispanic jurors off of the panel after my challenge” and “I think that at the end there were no fewer than four Hispanics or Hispanic surnamed jurors left on the panel. (Jn. 05), (Jn. 02), (Jn. 11), (Jn. 09), and I’m not sure on (Jn. 08), and I could not find the information for Juror No. 1” As to the alternate jurors, the prosecutor asserted that “there was at least one Hispanic, (Alt. 02). (Alt. 03), I don’t recall if she was Hispanic or not, the first name -- she could be.” The prosecutor summed up by saying, “Based on the overall impression, I don’t see how we can make a pattern for purposeful discrimination. I think there was a reason for each peremptory that was exercised in this case, and they were valid reasons”

Defense counsel responded by saying that “the Court of Appeals [*sic*] specifically said they wanted to hear from Mr. -- that the Court should hear from [the prosecutor] on Mr. Avila and Ms. Miramontes.” Defense counsel then explained at length why he thought the prosecutor’s stated reasons for striking Avila and Miramontes were suspect.

As to Avila, defense counsel asserted that he did not have long hair and was a law student. As for his cousin facing a murder charge, Avila “knew nothing about it, didn’t

have any thoughts about it, never asked any details about it.” Defense counsel also observed that the prosecutor questioned Avila about his cousin. Defense counsel then pointed out that there was another juror who was presumably Caucasian based on his surname (Bennett) whose daughter “had just been convicted of something” and who “had just gotten out of prison or was still in prison,” but the prosecutor had not asked that prospective juror any questions and did not strike that prospective juror at his first opportunity. In defense counsel’s estimation, given this comparison, the prosecutor’s explanation for striking Avila “doesn’t add up.”

As to Miramontes, defense counsel found the prosecutor’s explanation “a little more troubling.” Defense counsel noted that she was a student and a housewife; she had worked for a school district for 13 years; she had four children who were all students; and her spare time activities included traveling with her husband, who was a general contractor who goes all over California. Defense counsel then noted the problem with the prosecutor relying on how she might be sympathetic to defendant on the issue of duress was that defense counsel did not “even know if [the prosecutor] knew about the duress defense at the time.” Defense counsel also noted that Juror No. 3 was a woman who retired from a career in education and had three children; Juror No. 4 was a woman who was a retired teacher (but with no children); Juror No. 6 was a woman who worked in special education and had an adult son; Juror No. 7 was an older woman with two children; Juror No. 10 was a woman who was a middle school teacher and had a seven-month-old child; and Juror No. 11 was an older woman. Defense counsel summed up his view by stating that the prosecutor’s objection to Miramontes “applies to four or five other jurors, almost identical” and thus the prosecutor was “failing to explain himself adequately.”

In reply, the prosecutor noted that he had used his first peremptory challenge to strike a juror who appeared to be biased against law enforcement because of prior domestic violence charges against him (McBee), and defense counsel had then used his

first peremptory to strike Bennett. “As to the other women, some had sat on prior juries, some had not, some were working at the time, some were not. Picking of a jury is a fluid motion. I don’t see how it can be said that because Ms. Miramontes was the first one kicked off, that somehow it was discriminatory in nature when I provided a valid reason for doing so.”

The court responded as follows: “First of all, I still don’t believe that there was a pattern shown here based upon any discriminatory use of the challenges by the D.A., but the appellate court has found otherwise, so the Court has considered the explanations given by the D.A. here and I find them to be a neutral, non-racially based basis for exercising those two challenges.”

The court continued: “And the fact that the D.A. was not using them in a discriminatory manner is further corroborated by the makeup of the jury that resulted here. On this particular jury, six -- and again, I’m using names here, by the way, as well as appearances, because I still believe that it is impossible to tell by merely a person’s name what their ethnic background is, but nevertheless, I was surprised to see in this opinion that apparently the courts have held otherwise.

“You look at a person’s name, decide whether they are -- what their ethnic background is, so I did that, I went through this panel and looked at it, and sure enough, out of the twelve jurors [who] sat on the main panel, exactly half of them were Hispanic. That’s the Court’s finding, they were Hispanic, half of them were Hispanic, and in addition to that, of the three alternates, two of them were Hispanic, so out of the total fifteen, eight of them were Hispanic, of Hispanic background.

“That’s going to be my finding here. That doesn’t necessarily prove it, because we didn’t know it at the time, at the time that Miramontes and Avila were excused, but nevertheless, if you look at the big picture here, it confirms that the D.A. was not using his challenges in a discriminatory or racially biased manner, so the Court is going to accept, regardless of that, the Court accepts the D.A.’s explanation given for the two

challenges he did make. He only challenged three people, as a matter of fact, of the first panel, it was McBee, Miramontes and Avila, that we noticed, and of course the defense challenged Hispanic people, too.”

When defense counsel asked which Hispanic juror he had challenged, the court responded, “It has nothing whatsoever to do with whether or not the D.A. used his challenges improperly, nothing to do with it. I’m merely noting it for the record.”

At defense counsel’s request, the court identified the six jurors that it found were “Hispanic.” The court then stated, “Now, frankly, you can argue until the cows come home whether or not those people or maybe (Jn. 06), for example, had some Hispanic background, but the appellate court, thankfully, has made my job easier. They have ruled that I can look at the names, so that’s what I’m doing. Half of that jury, including the foreperson, was Hispanic, and certainly Mr. Baysinger had lots of opportunity to excuse them and he didn’t.”

The court then emphasized “that is really not that important. Clearly the issue was, when he excused Miramontes and Avila, did he have a racially neutral reason in mind, and I’m finding he did, period.” Defendant timely appealed.

DISCUSSION

I

Law Regarding Batson

Defendant’s current appellate claim is the trial court erred in concluding that the prosecutor exercised his peremptory challenges for legitimate, race-neutral reasons. As we explain, we agree.

“A prosecutor’s use of peremptory challenges to strike prospective jurors on the basis of group bias--that is, bias against ‘members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds’--violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution,” and “also violates the defendant’s

right to equal protection under the Fourteenth Amendment to the United States Constitution.” (*People v. Avila* (2006) 38 Cal.4th 491, 541.)

The United States Supreme Court has reaffirmed the three-prong *Batson* test to be used by trial courts when motions are made challenging peremptory strikes: “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.’ ” (*Johnson v. California* (2005) 545 U.S. 162, 168 [162 L.Ed.2d 129, 138].) The same three-prong test has been endorsed by our Supreme Court for proof of state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596.)

A person with a Spanish surname is a member of a cognizable group where it is unknown at the time of the challenge whether he or she is Hispanic. (*People v. Trevino* (1985) 39 Cal.3d 667, 686.)

After a prima facie case has been shown, “the prosecutor need only identify facially valid race-neutral reasons why the prospective jurors were excused. [Citations.] The explanations need not justify a challenge for cause. [Citation.] ‘Jurors may be excused based on “hunches” and even “arbitrary” exclusion is permissible, so long as the reasons are not based on impermissible group bias.’ ” (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1122.) “Once a trial court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror, we accord great deference to its conclusion.” (*Id.* at p. 1126.)

“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.’ [Citation.] 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.” (*People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. omitted.) “ ‘[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity *must* be consulted.’ [Citation.] Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons.” (*Id.* at p. 622.)

II

The Trial Court Did Not Make A Sincere And Reasoned Effort To Evaluate The Stated Reasons For The Challenges To Prospective Jurors Avila And Miramontes

Defendant contends the trial court erred in its failure to evaluate the stated reasons for the challenges to prospective jurors Avila and Miramontes. He is correct.

As we have just stated, the court must make a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror. (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1126.) The court here did not make such an effort. After the prosecutor stated his reasons for challenging Avila and Miramontes, and after defense counsel offered detailed explanations of why it appeared the prosecutor’s stated reasons were pretextual, the court made no overt effort to evaluate the stated reasons or defense counsel’s assault on them. Instead, the court first expressed its disagreement with this court’s determination in the prior appeal that defendant had made a prima facie showing of unlawful discrimination, stating that it did not “believe that there was a pattern shown here based upon any discriminatory use of challenges by the D.A., but the

appellate court has found otherwise.” Then, without pausing to assess the prosecutor’s reasons or defense counsel’s arguments, the court simply stated that it found the prosecutor’s reasons to be “neutral” and “non-racially based.” The court then proceeded to give an analysis about the makeup of the jury and concluded, based on the fact that six of the jurors had Spanish surnames, that those six jurors were Hispanic. The court initially said that this analysis of the makeup of the jury “further corroborated” “the fact that the D.A. was not using [his peremptory challenges] in a discriminatory manner.” Ultimately, however, the court “emphasize[d]” that this analysis was “really not that important.” In the midst of the analysis, the court observed that defense counsel “challenged Hispanic people, too,” and when counsel challenged the court on that point, the court asserted that “[i]t doesn’t matter” and “[i]t has nothing whatsoever to do with whether or not the D.A. used his challenges improperly, nothing to do with it. I’m merely noting it for the record.” In the end, the court concluded by emphatically finding (“period”) that the prosecutor “did . . . have a racially neutral reason in mind,” but again did so without offering any response to or analysis of defense counsel’s arguments that the prosecutor’s reasons were pretextual.

Given the foregoing, we have no choice but to find that the trial court’s determination of whether defendant proved purposeful unlawful discrimination in the prosecutor’s challenges to Avila and/or Miramontes fell far short of what the law requires: a reasonable and sincere effort to evaluate each of the stated reasons for a challenge to a particular juror. “[A] truly ‘reasoned attempt’ to evaluate the prosecutor’s explanations [citation] requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor’s exercise of the particular peremptory challenge.” (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.)

Here, from what appears on the record, the court made *no* real effort to evaluate the prosecutor's stated reasons for challenging the two prospective jurors. Instead, the trial court stated its disagreement with our decision in defendant's prior appeal, even though that ruling was the law of the case (see *Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893); made observations about defense counsel's use of peremptory challenges, which even the court admitted had "nothing whatsoever to do" with the issue presented; and engaged in a flawed analysis of the makeup of the jury, at first claiming the analysis corroborated that the prosecutor's challenges were neutral and nonracial but ultimately asserting that the analysis was "really not that important,"

The reason the trial court's analysis of the makeup of the jury was flawed is because the court misconstrued our prior opinion, and the case law underlying it, on the relevance of Spanish surnames. As we have noted, under the case law the fact that particular prospective jurors have Spanish surnames can give rise to the inference that they are Hispanic for purposes of *Batson* if, at the time of the challenge, it is unknown whether they are members of a cognizable group. (*People v. Trevino, supra*, 39 Cal.3d at p. 686.) That does not mean, however, that a juror's Spanish surname is *conclusive* as to whether the juror is part of a cognizable group, as the trial court concluded here. For example, a woman with no Hispanic ancestry may have a Spanish surname through marriage. (See *People v. Cruz* (2008) 44 Cal.4th 636, 656-657.) That appears to have been the case here with at least three of the jurors whom the trial court identified as being Hispanic because of their surnames. Specifically, in challenging the prosecutor's reason for striking prospective juror Miramontes, defense counsel identified Jurors Nos. 4, 8, and 12 as women; the court later identified those same three jurors as among those the court found were Hispanic because of their surnames.

The point is that the trial court's analysis of the jurors actually selected, which was the only real analysis the court conducted in assessing the prosecutor's stated reasons for challenging Avila and Miramontes, was a largely unreliable basis for making the

determination the trial court needed to make. It is important to note that “a constitutional violation may arise even when only one of several members of a ‘cognizable’ group was improperly excluded.” (*People v. Montiel* (1993) 5 Cal.4th 877, 909.) Thus, even to the extent the trial court could reliably determine how many Hispanics actually served on the jury, the fact that the prosecutor may have passed other Hispanic jurors does not necessarily establish that his reasons for challenging Avila and Miramontes were neutral and not based on their race. To fulfill its obligation under the third step of the *Batson* process, the court should have done more. For example, the court should have addressed the comparative juror analyses defense counsel proposed in questioning the sincerity of the prosecutor’s stated reasons. In the absence of such a sincere and reasoned effort to evaluate whether the prosecutor challenged the two jurors based on group bias, we cannot uphold the trial court’s denial of defendant’s motion challenging the prosecutor’s use of his peremptory strikes. Accordingly, we will remand for further proceedings on defendant’s *Batson* motion.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court to conduct the third *Batson* step. In doing so, the trial court must make a sincere and reasoned effort to evaluate the prosecutor’s explanation and decide whether defendant has proved purposeful racial discrimination. This includes conducting a comparative juror analysis, if possible.

If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it is ordered to set the case for a new trial.

If it finds the prosecutor exercised his peremptory challenges in a permissible fashion, it is ordered to reinstate the judgment.

 ROBIE , Acting P. J.

We concur:

 BUTZ , J.

 DUARTE , J.