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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MATHEW RUBEN MANZANO,

Defendant and Appellant.

D058661

(Super. Ct. No. FSB049630)

In re MATHEW RUBEN MANZANO on
Habeas Corpus.

D060795

ORDER MODIFYING OPINION AND
DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 13, 2012, be modified as follows:

1. On page 5, the first full paragraph of part II.A., beginning "After Regalado reported," which includes footnote 1, is deleted and the following paragraph and footnote are inserted in its place:

In May 2005, the People charged Manzano with the murders of Holguin (count 1) and Gurule (count 2) (Pen. Code, § 187, subd. (a))¹ and the attempted murder of Holguin's son (count 3) (§§ 187, subd. (a), 664). After Regalado contacted the sheriff's department to report that Manzano had admitted shooting Gurule and Holguin, the People filed a second amended information charging him with the same crimes.

1 Undesignated section references are to the Penal Code.

2. In the paragraph commencing at the bottom of page 21 and continuing onto page 22, after the sentence ending " *supra*, 43 Cal.4th at p. 480.," add as footnote 8 the following footnote, which will require renumbering of all subsequent footnotes:

In a petition for rehearing, Manzano objects to our reliance on the inclusion of two Hispanic men in the jury as an additional factor indicating the prosecutor did not engage in prohibited discrimination when he peremptorily challenged other Hispanic men. Manzano points out that the two Hispanic men who served on the jury were accepted after he had renewed his *Batson/Wheeler* motion. Then, quoting from *Miller-El v. Dretke* (2005) 545 U.S. 231, 250 (*Miller-El*), he argues "that a decision by a prosecutor to accept a minority group juror late in the jury selection process, after opposing counsel has made a *Batson*[/*Wheeler*] motion, does

¹ Undesignated section references are to the Penal Code.

not support a finding that the prosecutor's previous strikes of minority jurors were lawful. Rather, the prosecutor may have permitted the minority juror to be seated late in the process to 'obscure the otherwise consistent pattern of opposition to seating one.'" We disagree.

In *Miller-El*, the high court did not hold that a prosecutor's acceptance of a member of a racial group onto the jury cannot, as a matter of law, support denial of a *Batson/Wheeler* motion if that juror was accepted after the motion was made. The high court held only that a prosecutor's late-stage acceptance of a member of a racial group onto the jury "weaken[s] any suggestion that . . . race was not in play" and does not "neutralize the early-stage decision to challenge" other members of that racial group. (*Miller-El, supra*, 545 U.S. at pp. 249, 250, italics added.) Thus, the timing of the prosecutor's acceptance of a member of a racial group onto the jury affects the weight to be given such acceptance in the *Batson/Wheeler* analysis; the acceptance of the juror after the motion was made does not preclude its consideration.

Moreover, the California Supreme Court has held that "[t]he fundamental inquiry remains the same after *Miller-El* as before: Is there substantial evidence to support the trial court's ruling that the prosecutor's reasons for excusing prospective jurors were based on proper grounds, and not because of the prospective jurors' membership in a protected group?" (*People v. Huggins* (2006) 38 Cal.4th 175, 233 (*Huggins*)). As part of that

inquiry, the court considered the fact that the prosecutor accepted jurors who were members of the protected group and found it "to be 'an indication of the prosecutor's good faith in exercising his peremptories.'" (*Id.* at p. 236.) As we indicated earlier in the opinion, however, although the prosecutor's acceptance of members of the protected group onto the jury is "an appropriate factor for the trial judge to consider in ruling on a [*Batson*]/*Wheeler* objection, it is not a *conclusive* factor." (*People v. Snow* (1987) 44 Cal.3d 216, 225, first italics added; accord, *Clark, supra*, 52 Cal.4th at p. 906.)

3. On page 28, line 6, delete the parenthetical case citation and replace it with the following:

(*Huggins, supra*, 38 Cal.4th at p. 206.)

4. In the first paragraph on page 32, after the sentence ending "claims of ineffective assistance of counsel," add the following final footnote:

In his petition for rehearing, Manzano contends that in rejecting his claims of ineffective assistance of counsel, we may have relied too heavily on Regalado's testimony and failed to consider certain statements by the prosecutor during closing argument. We reject these contentions.

First, Manzano asserts our statement in part II.A., *ante*, that he was charged "[a]fter Regalado reported that Manzano had admitted shooting Gurule and Holguin" is "incorrect, because Regalado made his first report to police four full years after charges had been filed." Manzano speculates:

"If this Court reached its decision mistakenly, believing Regalado made his initial report to law enforcement before charges were filed against [Manzano], the Court likely gave too much credence to his testimony." We have modified the opinion to make clear the People initially charged Manzano in 2005 and filed the operative second amended information after Regalado contacted the sheriff's department. The timing of these events had no effect on our evaluation of Regalado's testimony.

Second, Manzano asserts that in concluding the DNA evidence was not a significant component of the evidence establishing his guilt, we "overlook[ed] that the prosecutor also said: [¶] 'And that evidence that was found on that article of clothing, which I believe are the pants, okay, matches [Holguin's] blood type which he shares with one out of 97 Hispanics. So, approximately a 1 percent match. Now, ladies and gentlemen, that may seem very high mathematically, but in terms of DNA it's very low.'" Based on the underlined phrase, Manzano contends that "[b]y saying the match was 'very high mathematically,' the prosecutor claimed DNA evidence was a significant part of his case." We disagree.

We did not overlook the statement quoted by Manzano. It appears in full in part II.B.1, *ante*. Further, the prosecutor *never* said "the match was 'very high mathematically.'" (Italics added.) He told the jury that it "*may seem very high mathematically, but in terms of DNA it's very low.*" (Italics added.) Thus, the prosecutor minimized the importance of the DNA

evidence. He did not, as Manzano erroneously contends, "claim[] DNA evidence was a significant part of his case."

There is no change in the judgment. The petition for rehearing is denied.

NARES, Acting P. J.

Copies to: All parties