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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ARGENIS CHRISTOPHER
HERNANDEZ et al.,

Defendants and Appellants.

E053487

(Super.Ct.No. RIF150377)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez,
Judge. Affirmed.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and
Appellant Argenis Christopher Hernandez.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and
Appellant Renee Michelle Bird.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia, Lynne McGinnis and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Argenis Christopher Hernandez of first degree murder (count 1—Pen. Code § 187, subd. (a))¹ and found true an allegation he willfully discharged a firearm causing death in his commission of the count 1 offense (§ 12022.53, subd. (d)). Another jury found defendant and appellant Renee Michelle Bird guilty of second degree murder (count 2—§ 187, subd. (a)) in the same incident involved in Hernandez’s conviction and found true an allegation Bird knew Hernandez was armed with a firearm (§ 12022, subd. (a)(1)).² The court sentenced Hernandez to an indeterminate term of imprisonment of 50 years to life. The court denied Bird probation and sentenced her to a determinate term of one year imprisonment followed by an indeterminate term of 15 years to life.

On appeal, Hernandez contends the court erred in denying his *Wheeler/Batson*³ motion for the prosecutor’s alleged pretextual excusal of two African-American members of the venire. Bird maintains the court abused its discretion in declining to grant her probation. We affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendants were tried contemporaneously, with the exception of certain witnesses and closing arguments, to two separate juries.

³ *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

FACTUAL AND PROCEDURAL HISTORY

On May 5, 2009, around 8:00 p.m., Riverside County Deputy Sheriff Myling Bordeau was dispatched in response to a reported shooting in Moreno Valley. Deputy Bordeau discovered two bullet holes in a white vehicle and another above the garage of an adjacent residence. One individual had sustained a bullet wound to his upper thigh. After interviewing several witnesses, Deputy Bordeau was given a lead on a potential suspect with whom he wished to speak; it was the victim in the instant case.

Speaking with the victim made Deputy Bordeau aware of Hernandez as another potential suspect. Hernandez lived just around the corner from the location of the shooting. Deputy Bordeau and a colleague went to speak with Hernandez, who falsely identified himself and denied any knowledge of someone by the victim's name. Hernandez testified the officers told him the victim had reported that Hernandez was involved in the shooting; Hernandez was mad he had been so implicated.

On May 8, 2009, the victim and Robert Peters were walking down the street. Bird, Hernandez's ex-girlfriend, neighbor, and continuing intimate, pulled over and told the victim, "That was fucked up what you did"; she was angry and upset at the victim. Bird and the victim ended up yelling at each other and arguing for several minutes until she drove off.

Bird picked Hernandez up and drove him to where she had just seen the victim. When they saw the victim, Bird pulled across the center of the street quickly. Hernandez exited the vehicle with a gun. Hernandez chambered a round in the gun as he walked toward the victim. Hernandez asked the victim why he had snitched. Hernandez then

fired multiple gunshots at the victim; he kept firing even after the victim fell to the ground. Hernandez got back into the car and Bird drove off; she drove them back to her house.

Walter Mendez, an investigator from the Riverside County Sheriff's Department, was dispatched to the site of the shooting. He found the victim laying on his back, suffering from apparent gunshot wounds to his upper torso. The victim was in extreme pain, gasping for air, crying, and scratching the ground around him. Investigator Mendez received information at the site regarding the possible location of the suspects.

At Bird's home, officers found a car matching the description of the one that fled the scene of the murder. Bird and Hernandez lived across the street from one another. The police established a perimeter around defendants' homes and asked via a public address system that the residents exit the respective residences. Defendants exited their homes; they were taken into custody.

During an interview at the police station, Bird told Sheriff's Detective Lance Colmer he should have officers look for the gun on the side of her home. Detective Colmer relayed the information to a deputy at the home, who saw what appeared to be the barrel of a semi-automatic gun through a grate in the outside wall of the garage. He secured the yard until Sheriff's Detective Randall Thomas collected, secured, processed, and photographed the black semi-automatic Smith and Wesson handgun into evidence. A magazine was found with the gun, but it was empty of ammunition.

Mark Fajardo, Chief Forensic Pathologist and Coroner, examined the photographs, notes, diagrams, and medical records of the autopsy of the victim. Fajardo concluded

there were 10 separate gunshot wounds to the victim's body. One by his right armpit, three in the left flank, one to his back, three to his hands, one to his leg, and one to his right buttock. He testified the cause of the victim's death was multiple gunshot wounds.

Kristen Wilson, a forensic technician, took photographs and collected shell casings and a bullet fragment from the scene. In all, she recovered 11 nine-millimeter shell casings. She photographed and collected the gun obtained at Bird's residence; it was the same caliber as the shell casings found at the scene of the shooting.

James Hall, a retired forensic scientist, test fired rounds from the gun found at Bird's residence and microscopically compared the cartridge casings from both the May 5, 2009, and May 8, 2009, shootings, and the test firings. He determined the markings on two of the shell casings collected from the May 5 shooting matched those from the test firings. Likewise, he determined that two of the shell casings collected from the scene of the May 8 shooting matched those test fired from the weapon collected from Bird's residence.

DISCUSSION

A. BATSON/WHEELER MOTION

Hernandez contends the court erred in denying his motion alleging the People had improperly excused two prospective jurors from the venire based on their race. We disagree.

During voir dire, African-American prospective juror Emery Hicks related he was retired from the Air Force. He had four relatives who worked for the Los Angeles Police Department. Hicks's cousin had been murdered 20 years earlier; the murderer was never

found. Hicks's son had been convicted for stabbing and killing his uncle. He had been released from prison for that crime, but had been returned after apparently incurring another conviction for assault. Regardless, Hicks relayed that he harbored no negative feelings toward the justice system; he believed his son was treated fairly and that he could remain fair. African-American prospective juror Michelle Pickney harbored no doubt about her ability to judge the credibility of witnesses.

The People accepted the panel as constituted. Hernandez excused a prospective juror, an African-American. The People then peremptorily excused Pickney. Hernandez then excused another prospective juror. The People accepted the panel as constituted. Hernandez then excused two more prospective jurors; in its turn, the People excused one. The People then excused Hicks.

Hernandez requested a sidebar to move for *Wheeler/Batson* relief. Hernandez argued that in excusing Pickney and Hicks, the People had excused two African-Americans with no apparent reason. The court responded, "Well, you kicked the first [B]lack person off. You kicked number 5 off. He was [B]lack; you kicked him." The court further observed the People "accepted those people. And it wasn't until you kicked other people and changed the mix of the jury that he kicked them off. [¶] I don't see any prima facie case here." Hernandez then accepted the panel as constituted.

The People responded, "I assume the Court made no prima facie finding; and I appreciate that. I'd also like to elucidate my reasons for excusing those jurors for the record." The court replied, "Go ahead. You may do so." The prosecutor then expounded his reasons for excusing Hicks and Pickney: "Thank you very much, your Honor. [¶] I

just wanted to make it clear that I did, as the Court indicated, accept both of those jurors.

[¶] When the balance of the jury changed, I thought that each of them at a different stage became problematic for me. I spoke to them both during voir dire. I didn't feel a strong connection with either. [¶] Mr. Hicks had a son who has killed a man and is also doing time in prison. Verbally, he said he would not feel sympathy toward the defendant. I didn't feel that was a strong commitment from him. And so after the balance of the jury changed, I no longer felt comfortable with him on the jury. [¶] A similar issue with Ms. Pickney. I spoke to her, and she seemed acceptable as a juror, but there was not—I didn't get a strong sense of her dedication to following the law when she disagreed with it, and just her general demeanor when I spoke with her led me to believe that she would not be a suitable juror.”

“Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias. [Citations.]” (*People v. Watson* (2008) 43 Cal.4th 652, 670.) “There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. [Citations.] To do so, a defendant must first ‘make out a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” [Citation.] 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 strike[.] [Citations.] Third, “[i]f a race-neutral . . . justification is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful . . .

discrimination.” [Citation.]’ [Citation.]” (*People v. Bonilla* (2007) 41 Cal.4th 313, 341, quoting *Johnson v. California* (2005) 545 U.S. 162, 168.)

“[W]e review the record independently to ‘. . . resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror’ on a prohibited discriminatory basis. [Citations.]” (*People v. Bell* (2007) 40 Cal.4th 582, 597.) “Though proof of a prima facie case may be made from any information in the record available to the trial court, . . . ‘certain types of evidence . . . will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court’s attention.’ [Citations.]” (*Ibid.*)

Hernandez maintains that because the prosecutor presented an exegesis of his reasons for excusing the prospective jurors, this automatically took the matter to the third stage of a *Wheeler/Batson* analysis, requiring that both the trial court and this court

determine the legitimacy of the People’s stated reasons. We disagree. (*People v. Carasai* (2008) 44 Cal.4th 1263, 1292 [The trial court is not required to evaluate reasons for the exclusion of jurors unless and until a prima facie case is made.]) Hernandez cites *Hernandez v. New York* (1991) 500 U.S. 352, 359 in support of this contention; however, in that case, the trial court ruled on the ultimate question of intentional discrimination; thus, implicitly finding a prima facie case had been made. (*Ibid*; *People v. Elliott* (2012) 53 Cal.4th 535, 560-561.)

Here, the court never ruled on the issue of the validity of the People’s reasons for excusing the prospective jurors. Rather, the court ruled Hernandez had failed to make a prima facie case of discriminatory challenges and simply permitted the People to exposit their reasons *after* having already issued that ruling. When “the trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for purposes of completing the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied. [Citation.]” (*People v. Welch* (1999) 20 Cal.4th 701, 745-746.) “We have found it proper for trial courts to request and consider a prosecutor’s stated reasons for excusing a prospective juror even when they find no prima facie case of discrimination; indeed, we have encouraged this practice. [Citations.] However, the trial court is not *required* to do this at the first stage of a *Wheeler/Batson* analysis, and the trial court’s invitation here to the prosecutor to state her reasons for excusing [a prospective juror] did ‘not convert [this] first-stage *Wheeler/Batson* case into a third-stage case.’ [Citations.]” (*People v. Taylor* (2010) 48 Cal.4th 574, 616.) In the instant case, the trial

court did not request the prosecutor's reasons, but allowed him to state those reasons after he requested that it do so. Thus, the issue on appeal is solely whether defendant made a prima facie showing of impermissible discrimination.

Here, Hernandez failed to make a prima facie showing the People exercised their peremptory challenges in an impermissible manner. First, defendant failed to preserve a record adequate to even make such a determination. From the record we know only that Hernandez excused one Black prospective juror and the People excused two. We have no idea regarding the racial makeup of the remaining venire or the ultimate juror panel. (*People v. Morris* (2003) 107 Cal.App.4th 402, 409 [failure to make adequate record for appellate review of *Wheeler* motion forfeits any error].) Second, the People initially accepted the panel with at least two African-American prospective jurors, one of which they later excused after Hernandez had excused the other with his first challenge. Twice, the People accepted the panel with Hicks as a prospective juror. (*People v. Streeter* (2012) 54 Cal.4th 205, 223-224 [fact that prosecutor accepted panel with later-excused prospective jurors is appropriate factor to consider in determining whether there was a prima facie showing of discrimination].)

Third, the People did not simply excuse Hicks and Pickney, but questioned them beforehand. (*People v. Farnam* (2002) 28 Cal.4th 107, 137 [defendant's failure to show that prosecutor failed to engage peremptorily-excused prospective jurors in any questioning warranted against finding of discriminatory purpose]; *People v. Bell, supra*, 40 Cal.4th at p. 597 [same].) Fourth, "Although circumstances may be imagined in which a prima facie case could be shown on the basis of a single excusal, in the ordinary

case . . . to make a prima facie case after the excusal of only one or two members of a group is very difficult. [Citation.]” (*Id.* at p. 598, fn. 3; *People v. Streeter, supra*, 54 Cal.4th at p. 223 [three of five peremptory challenges against African-Americans not prima facie showing of discrimination].) Finally, neither Hernandez nor the victim, as Hispanics, were members of the group allegedly excluded, African-Americans. (*Bell*, at pp. 598-599.) Hernandez failed his burden to show a prima facie case of discriminatory challenges.

B. DENIAL OF PROBATION

Bird maintains the sentencing court abused its discretion in declining to grant her probation. We disagree.

The sentencing court has broad discretion in determining whether a defendant is suitable for probation. (*People v. Welch* (1993) 5 Cal.4th 228, 233.) “All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise.’ [Citation.] ‘The grant or denial of probation is within the trial court’s discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.] [Citation.] ‘In reviewing [a trial court’s determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court’s order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.’ [Citation.] [¶] ‘The decision to grant or deny probation requires consideration of all the facts and circumstances of the case. [Citation.] [Citation.]” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311-

1312.) “[O]ne factor in aggravation is sufficient to justify a sentencing choice [Citation.]” (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved of on another ground in *People v. Scott* (1994) 9 Cal.331, 353.)

Here, although there were certainly factors favorable to Bird, which the court could have used to support a decision granting probation, there were numerous factors that supported its determination to deny probation. The court noted that it had heard trial and read and reviewed the probation officer’s report. The probation officer’s report recommended denying probation and sentencing Bird to prison. The court stated that although Bird had no criminal record, “she broke in really big. [¶] Ms. Bird, I’ve got to tell you like it is; you made this happen. You’re the one that got in the dead guy’s face, called him a snitch, and said, I’m going to go get my boyfriend; got the boyfriend knowing that he doesn’t like snitches, drove him right back to where the guy was, and no surprise at all—the boyfriend had a gun and killed him, shot him ten times. And said he would have killed the other guy too that was with him but he ran out of bullets. So but for you, this wouldn’t have happened.” It then denied her probation.

The evidence adduced at trial more than adequately supported the court’s decision to deny Bird probation. Bird knew defendant was a member of MS-13, a very large, extremely dangerous and violent gang. She had seen him with a gun on a previous occasion and knew he had a prior conviction involving gun and drug possession. Hernandez told Bird he had used the gun in the previous shooting. She knew Hernandez was mad at the victim for implicating him in the first shooting. Bird told a detective Hernandez had a really bad temper.

After her confrontation with the victim, she informed Hernandez she had seen the victim. Indeed, Hernandez told the police—and testified—that Bird had called to tell her she had seen the victim. Hernandez informed the police Bird told her to get his gun. When she arrived at his home, Hernandez asked her where the victim was; she immediately drove her to the victim’s location. Hernandez testified Bird had some culpability in the shooting. Bird agreed with an officer’s statement that the victim “had it coming.” She admitted the killing occurred because the victim snitched on Hernandez. She told an officer the shooting was her fault. Thus, the evidence was sufficient to establish that Bird played much more than a mere passive role in the killing of the victim. Therefore, the court’s order denying Bird probation was well within its discretion.

DISPOSITION

The judgments are affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.