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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.

LASALO LINDON TONGA,

Defendant and Appellant.

E054683

(Super.Ct.No. FCH1000458)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed with directions.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Lasalo Lindon Tonga, and a codefendant, Samiu Alo Latuhoi, were tried before the same jury and found guilty as charged of one count of second degree robbery. (Pen. Code, § 211.)¹ The evidence showed that, on September 19, 2010, Latuhoi took two 18-packs of Budweiser beer worth approximately \$30 from a Circle K store in Chino Hills, and defendant aided and abetted the robbery by directing Latuhoi to take the beer and by helping Latuhoi forcibly get the beer away from the store clerk, Adrian Reveles.²

In a bifurcated trial, the trial court found that defendant had a prior conviction for robbery in 2009, which constituted a prior strike and a prior serious felony conviction or “nickel” prior. (§ 667, subds. (a)-(i).) The prior robbery conviction was based on defendant’s act of forcibly taking an 18-pack of beer from a 7-Eleven store, without paying for it, or by driving the getaway vehicle. Defendant pled no contest to the 2009 robbery charge, and was sentenced to 180 days in jail plus three years’ formal probation on the conviction.

At the time of his sentencing on his current robbery conviction in September 2011, defendant was 24 years old. The court denied his *Romero*³ motion to strike his prior

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

² The jury also found that Latuhoi personally inflicted great bodily injury on Reveles during the commission of the robbery. (§ 12022.7, subd. (a).) Defendant was not alleged to have personally inflicted great bodily injury on Reveles.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

strike and sentenced him to 11 years in prison.⁴ Defendant was further ordered to pay \$4,369 in restitution to Reveles for a broken tooth he suffered during the robbery, and the order was made joint and several against defendant and Latuhoi. (§ 1202.4.)

On this appeal, defendant claims: (1) the prosecutor committed *Batson/Wheeler*⁵ error by peremptorily excusing six Hispanic persons from the venire based on their race or ethnicity; (2) the court prejudicially abused its discretion and denied him a fair trial in admitting detailed evidence of the 2009 robbery (Evid. Code, §§ 352, 1101, subd. (b)); (3) cumulative trial court errors deprived him of his due process right to a fair trial; (4) the court abused its discretion in denying his *Romero* motion to strike his prior strike; and, finally, (5) the abstract of judgment must be amended to show that defendant and Latuhoi are jointly and severally liable for the \$4,369 restitution order.

We order the abstract of judgment amended to reflect that defendant and Latuhoi are jointly and severally liable for the restitution order. We find defendant's other claims without merit, and affirm the judgment in all other respects.

⁴ The 11-year sentence consisted of the middle term of three years, doubled to six years based on the prior strike, plus five years for the prior serious felony conviction.

⁵ *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

II. FACTUAL BACKGROUND

A. *The Prosecution Evidence of the Charged Robbery at the Circle K Store*⁶

On September 19, 2010, Reveles was working as the cashier of a Circle K store in Chino Hills. At approximately 2:14 a.m., defendant walked into the store, proceeded directly to the beer coolers, picked up a pack of beer, and took it to the counter. Defendant offered to pay for the beer, but Reveles told him he could not sell beer after 2:00 a.m. and put the beer behind the counter. Defendant walked out of the store and made a hand gesture to Latuhoi, signifying ““come on.”” Latuhoi was standing next to a truck with a camper shell that he and defendant had just arrived in.

After defendant gestured toward him to “come on,” Latuhoi came into the store and walked to the beer coolers. Reveles also told Latuhoi, just as he told defendant, that he could not sell beer after 2:00 a.m., but Latuhoi disregarded Reveles and took three cases of beer from the beer coolers, two 18-packs and a 30-pack. Latuhoi quickly walked out of the store with the beer, and Reveles called 911. Latuhoi dropped one of the packs of beer in the parking lot, put the other two packs of beer into the camper shell of the truck, and got into the camper shell. The two 18-packs of beer were worth around \$30.

Reveles stepped out of the store through an emergency exit door and was around eight feet from the back of the truck when he began writing down its license plate number on a slip of paper. While Reveles was looking down and writing the license plate

⁶ The evidence presented concerning the prior, January 2009 robbery of the 7-Eleven store is described below in connection with our discussion of defendant’s claim that the prior crime evidence was erroneously admitted and deprived him of due process.

number, Latuhoi got out of the truck and punched Reveles in the face four times in an attempt to take the slip of paper from Reveles. As a result of the first punch Latuhoi threw, Reveles suffered a broken tooth.

As Latuhoi was punching him, Reveles heard defendant say: ““What are you doing?”” Defendant then began punching Reveles. Defendant got Reveles “in a bear hug,” and Latuhoi got the slip of paper out of Reveles’s hands. Latuhoi and defendant got back into the truck and the truck drove away. Apparently, a third person was driving the truck. As Reveles testified, a surveillance videotape of the robbery was played for the jury.

Reveles further testified that, earlier that night around 10:00 p.m., defendant was in the Circle K store and purchased beer and cigarettes from Reveles. At that time, defendant or someone with him mentioned that defendant and others were camping nearby at El Prado Park. Around 45 minutes after the robbery, police officers took Reveles to El Prado Park where he identified defendant and Latuhoi as the men who robbed him.

Defendant and Latuhoi were arrested, read their *Miranda*⁷ rights, and placed in the backseat of a patrol vehicle. Latuhoi admitted stealing the beer because it was after 2:00 a.m. and he was unable to buy it. Defendant admitted he was at the Circle K earlier that day, but denied being there after 2:00 a.m.

⁷ *Miranda v. Arizona* (1966) 386 U.S. 436.

B. *Defense Evidence*

Defendant did not testify. Several character witnesses testified that they had never known defendant to exhibit any aggressive or violent behavior, and the robbery was inconsistent with his good character for humility and helping people. Latuhoi did not present any affirmative evidence.

III. DISCUSSION

A. *The Trial Court Properly Denied Defendant's Batson/Wheeler Motions*

Defense counsel made two *Batson/Wheeler* motions challenging the prosecutor's peremptory excusal of eight persons with Hispanic surnames from the venire. The first motion was made after the prosecutor peremptorily excused Perez, Reyna, Gutierrez, and Trejo, and the second was made after the prosecutor excused Gonzales, Gomez, Vargas, and Morales.

On each motion, the trial court found that defendant's counsel stated a prima facie case of impermissible discrimination, and asked the prosecutor to explain his reasons for excusing the eight Hispanic prospective jurors. The court found that all of the prosecutor's reasons were race-neutral and genuine, and denied each motion.

On this appeal, defendant claims the prosecutor's stated reasons for excusing six of the eight Hispanic venire persons—all but Reyna and Gonzales—"were pretextual and reflected discrimination against Hispanics."⁸ (Capitalization and bolding omitted.) He

⁸ Defendant is not Hispanic. His ethnic heritage is the South Pacific island of Tonga. Nonetheless, in order to complain of the excusal he is not required to be a

[footnote continued on next page]

further claims the trial court did not make a sincere and reasoned effort to evaluate the prosecutor's reasons, and the record on appeal does not support the court's determination that the prosecutor's race-neutral reasons for the excusals were genuine. Thus he claims his *Batson/Wheeler* motions were erroneously denied.

We reject this claim. As we explain, the trial court fully analyzed the prosecutor's stated, race-neutral reasons for excusing the six Hispanics—the only excusals defendant challenges on this appeal. Substantial evidence either supports the court's determination that the prosecutor's stated reasons for each excusal were genuine, or the court's findings that the prosecutor's reasons were genuine are uncontradicted by any evidence in the record and are therefore entitled to deference.

1. Applicable Law and Standard of Review

The federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. (*Batson, supra*, 476 U.S. at p. 97; *Wheeler, supra*, 22 Cal.3d at pp. 276-277.) “Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.]” (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).

Batson establishes a three-step procedure for courts to follow when a party claims another party is impermissibly excusing prospective jurors. (*People v. Cornwell* (2005)

[footnote continued from previous page]

member of the racial or ethnic group in question. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193.)

37 Cal.4th 50, 66-67.) “First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination.” (*Lenix, supra*, 44 Cal.4th at p. 612.) There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden of demonstrating impermissible discrimination is on the party opposing the peremptory strike. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.)

“A prosecutor asked to explain his conduct must provide a “clear and reasonably specific” explanation of his “legitimate reasons” for exercising the challenges.’ (*Batson, supra*, 476 U.S. at p. 98, fn. 20.) ‘The justification need not support a challenge for *cause*, and even a “trivial” reason, if genuine and neutral, will suffice.’ (*People v. Arias* (1996) 13 Cal.4th 92, 136 . . . , italics added.) A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (See *People v. Turner* (1994) 8 Cal.4th 137, 165 . . . ; *Wheeler, supra*, 22 Cal.3d at p. 275.) Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. (*Purkett v. Elem* (1995) 514 U.S. 765, 769) Certainly a challenge based on racial prejudice [or ethnicity] would not be supported by a legitimate reason.” (*Lenix, supra*, 44 Cal.4th at p. 613.)

The question for the trial court on the third step is whether “the reason given for the peremptory challenge [was] a ‘legitimate reason,’ . . .” (*People v. Reynoso* (2003) 31 Cal.4th 903, 925.) “[T]he 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. [Citation.]” (*Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted.)

“The existence or nonexistence of purposeful racial discrimination is a question of fact.” (*People v. Hamilton* (2009) 45 Cal.4th 863, 900-901 & fn. 11, citing *Snyder v. Louisiana* (2008) 552 U.S. 477.) Thus, when the trial court has made a sincere and reasoned attempt to evaluate the credibility of each of the prosecutor’s justifications, we review the trial court’s determination regarding the sufficiency of a prosecutor’s justifications deferentially, considering only whether substantial evidence supports the court’s conclusions. (*People v. Hamilton, supra*, at pp. 900-901, fn. 11; *People v. Jurado* (2006) 38 Cal.4th 72, 104-105; *People v. Bonilla, supra*, 41 Cal.4th at p. 341.)

“The United States Supreme Court has also emphasized that a state trial court’s finding of no discriminatory intent is a factual determination accorded great deference.

[Citation.] ‘Step three of the *Batson* inquiry involves an evaluation of the prosecutor’s credibility, [citation], and “the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.” [Citation.] In addition, race-neutral reasons for peremptory challenges often invoke a juror’s demeanor (*e.g.*, nervousness, inattention), making the trial court’s first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor’s demeanor belies a discriminatory intent, but also whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie ““peculiarly within a trial judge’s province,”” [citations], and we have stated that “in the absence of exceptional circumstances, we would defer to [the trial court].” [Citation.]’ [Citation.]” (*Lenix, supra*, 44 Cal.4th at p. 614, citing *Snyder v. Louisiana, supra*, 552 U.S. at p. 477.)

2. Analysis—The First Motion

After the prosecutor used his first, second, third, and fourth peremptory challenges to excuse Perez, Gutierrez, Trejo, and Reyna, defendant’s trial counsel made her first *Batson/Wheeler* motion. Outside the presence of the jury, counsel acknowledged “there was a language issue with Ms. Reyna,” but argued there were apparently no legitimate reasons for excusing Perez, Gutierrez, or Trejo. The court found that the defense stated a *prima facie* case and asked the prosecutor to explain why he excused Perez, Gutierrez, and Trejo. We examine these excusals in turn.

(a) *Perez*

The prosecutor explained he excused Perez because she had two nephews serving life sentences for murder, and she believed they had been treated unfairly. He also said he excused her because she did not “want to judge people.” During voir dire, Perez said she was “very close” to her two nephews, she believed they had been treated unfairly, *and* she could not be fair and impartial. Later, when defendant’s counsel asked Perez how she would judge the credibility of witnesses whom she “obviously” did not know, Ms. Perez said it was “hard” for her to judge people, especially if she did not know them.

The court accepted the prosecutor’s race-neutral reasons for excusing Perez and implicitly found they were genuine. The court pointed out that Perez’s “statements that she could not judge people” caused it to “doubt her ability to perform her functions as a juror,” and her belief that her nephews were treated unfairly “normally carries with it the inference that they were not treated fairly by either the Court system in general or the prosecution in particular.”

Defendant does not dispute that the prosecutor offered two legitimate, race-neutral reasons for excusing Perez. Instead, he suggests that the prosecutor’s reasons were insincere and a mere pretext for excusing Perez based on her Hispanic ethnicity. He points out that the prosecutor did not excuse prospective Juror No. 31, who had a daughter convicted of possession of narcotics. Nor did the prosecutor excuse prospective Juror No. 71, who had a close cousin convicted of driving under the influence. This argument is unavailing.

Unlike Perez, prospective Juror Nos. 31 and 71 did not say that their convicted relatives were treated unfairly, and both said they could be fair. By contrast, Perez flatly said she could not be fair and impartial, given her belief that her two nephews were treated unfairly in being prosecuted for murder. The trial court made a sincere and reasoned effort to evaluate the prosecutor's two stated reasons for excusing Perez—her inability or unwillingness to be fair or to “judge people.” Given these circumstances, the court's finding that the prosecutor's stated reasons were genuine is entitled to deference. (*Lenix, supra*, 44 Cal.4th at pp. 613-614.) Thus, defendant has not shown that Perez was excused based on her Hispanic ethnicity, rather than for the prosecutor's stated, nondiscriminatory reasons.

(b) *Gutierrez*

During voir dire, defendant's counsel pointed out that Gutierrez was one of the youngest people among the first 18 venire persons questioned. Gutierrez said he would feel nervous if other jurors disagreed with his assessment of the case during deliberations. Still, he answered “no” when asked whether he was the type of person who would give in to peer pressure. And when asked whether he would have “any problems” listening to testimony and making his own decision about what the verdict should be, he answered, “I won't have no problems.”

The prosecutor said he excused Gutierrez because he “talked slow,” “looked like he was thinking slow,” and did not respond very well to the court's or counsel's

questions. The prosecutor said he “had to drag it out of him when I used him as my example about . . . changing his mind about his opinion [during deliberations].”

The court said it was “troubled by [Gutierrez]” throughout the questioning by the court and counsel, and agreed he was inappropriately slow and “labored” in responding to questions. The court also said that Gutierrez did not appear to be “particularly intelligent” and did not “articulate himself very well.” For these reasons, the court said it believed Gutierrez would have “a difficult time” assimilating the testimony of numerous witnesses, reaching a decision based on all of the evidence, and communicating effectively with other jurors.

Defendant argues that the prosecutor’s reasons for excusing Gutierrez “do not withstand scrutiny.” He points out that “not particularly intelligent” is not a ground for disqualifying a person to serve as juror. (Code Civ. Proc., § 203, subd. (a).) This, however, is not the proper standard. (*People v. Arias* (1996) 13 Cal.4th 92, 136 [reason for peremptory excusal need not support challenge for cause; it need only be genuine and race- or group-neutral].) The prosecutor’s reasons for excusing Gutierrez—his slowness and consequent inability to properly function as a juror—were plainly race- and group-neutral.

Defendant next argues that jury service is not limited to persons “whose education and demeanor reflects a middle or upper class status.” This argument is also unavailing. There is no indication that Gutierrez was excused because he did not have a “middle or

upper class status.” His apparent slowness, lack of intelligence, and inability to carry out his duties as a juror had nothing to do with socioeconomic status.

Lastly, defendant argues that Gutierrez’s responses to questions “seem no different than those of other jurors,” because he ultimately said he would “[f]ight for what [he] felt” was the right decision during deliberations but would change his mind if reasonably persuaded to do so. This argument also misses the mark. The prosecutor’s stated reasons for excusing Gutierrez—his slowness and inability to function as a juror—are race-neutral, plausible, were accepted as genuine by the trial court, and were uncontradicted by *anything* in the record. Given these circumstances, the court’s finding that the reasons were genuine is entitled to deference on appeal. (*People v. Reynoso, supra*, 31 Cal.4th at p. 929; see also *People v. Jones* (2011) 51 Cal.4th 346, 361.)

(c) *Trejo*

Trejo was a student, unmarried, and with no children. Four of her family members, a cousin, aunt, uncle, and grandmother, were murdered six years earlier in Los Angeles by someone the uncle knew. She denied the incident would affect her ability to be fair and impartial.

The prosecutor said he excused Trejo because he saw her “texting” on her cell phone during voir dire, and she was “very timid.” Defendant’s counsel did not see Trejo texting. The trial court did not specifically say whether it saw Trejo texting, but noted it was “misconduct” to text on a cell phone in court, and pointed out that if Trejo would text on her cell phone and be inattentive when she was subjected to questioning, she was

likely to be inattentive when she was “merely sitting there and being asked to pay attention to a variety of witnesses over a period of several days.”

Defendant argues that “[w]ithout verification of the prosecutor’s claim that [Trejo] was in fact texting, the prosecutor’s reason is pretextual.” He points out that Trejo’s responses to questions were “clear and articulate,” she said she could be fair, and the prosecutor did not excuse prospective Juror No. 7, who, like Trejo, had a relative (an aunt) who had been murdered.

As defendant concedes, however, Trejo’s act of texting on her cell phone and her consequent inattentiveness was the *sole* reason the prosecutor claimed to have excused her. The reason is race-neutral, plausible, the trial court accepted it as genuine, and it is uncontradicted by *anything* in the record. Given these circumstances, the court’s finding that the reason was genuine is entitled to deference on appeal. (*People v. Reynoso, supra*, 31 Cal.4th at p. 929.)

3. Analysis—The Second Motion

During the second and third phases of peremptory challenges, the prosecutor excused four more jurors with Hispanic surnames: Gonzales, Morales, Gomez, and Valdez. At that point, defense counsel collectively made a second *Batson/Wheeler* motion on the ground that young Hispanic persons were being discriminatorily excused. The court found that the defense stated a prima facie case of impermissible discrimination, and asked the prosecutor to explain why he excused Gonzales, Morales, Gomez, and Vargas.

On this appeal, defendant does not challenge the prosecutor’s excusal of any of the Hispanic prospective jurors based on their young ages. Nor does he challenge the excusal of Gonzales.⁹ Accordingly, we focus on the excusals of Morales, Vargas, and Gomez.

(a) *Morales and Vargas*

Morales and Vargas were both young, single, and employed. Morales’s aunt was a retired corrections officer for the Department of Corrections and Rehabilitation. Vargas had a cousin who worked as a law enforcement officer in Fullerton. The prosecutor said he excused both men for similar reasons, which echoed the reasons he excused Gonzales during the first round of peremptory challenges. Vargas did not appear to understand the questions being asked of him, did not appear “too bright” in his responses, was slow, and did not speak very loudly. Morales was “very timid,” also did not answer questions well, and also lacked intelligence.

The trial court agreed that Vargas appeared slow and was “easily confused” about the questions being asked of him. Given the complexity of the case, the court questioned whether Vargas would be able to “properly assimilate all the different testimony and the jury instructions.” Addressing the Morales excusal separately, the court said it was

⁹ Gonzales was young, had blonde hair, and did not appear to be Hispanic although she had an Hispanic surname. The prosecutor said he excused her because she believed counsel for Latuhoi had represented her father in a criminal matter. Counsel for Latuhoi did not recall the case, but the court accepted the excusal because, even if Latuhoi’s counsel did not represent Gonzales’s father, she thought he did.

“crystal clear” when Morales spoke that he was “incredibly timid” and did not appear to be very intelligent.

The court thus accepted the prosecutor’s race-neutral reasons for excusing both Vargas and Morales based on its own observations, and implicitly found that neither was excused based on his Hispanic ethnicity. This finding is entitled to deference on appeal, given that nothing in the record contradicts the prosecutor’s and the court’s agreed-upon observation that neither Vargas nor Morales appeared sufficiently intelligent or capable of serving on the jury. (*People v. Reynoso, supra*, 31 Cal.4th at p. 929.)

(b) *Gomez*

Gomez was also young, single, and worked as a barista at Starbucks. Her father and brother were probation officers. Two of her cousins had been convicted of some crime or crimes, but she knew little about the matter. She said she could be fair and impartial. The prosecutor’s cocounsel said he saw Gomez clench her fist and mouth the word “damn” when she realized that the person next to her, but not her, was being excused for cause, and this is why the prosecutor excused her. The court did not see Gomez mouth the word “damn” or clench her fist, but accepted the representation and, based on that representation, agreed that she was not the type of person “anybody would want” on a jury.

Relying on *People v. Long* (2010) 189 Cal.App.4th 826 (*Long*), defendant argues that the court erred in merely “[taking] the prosecutor’s word” for his unverifiable, demeanor-based reason for excusing Gomez. We disagree. In *Long*, the defense claimed

the prosecutor impermissibly excused three persons because they were Vietnamese. (*Id.* at p. 839.) The prosecutor said he excused T.N. because he did not participate in the discussion and did not make eye contact, and for this reason the prosecutor felt he would not engage in deliberations; he excused K.P. because she did not respond well to questions, and he excused C.H. because her sister was a defendant in a criminal fraud prosecution by the prosecutor’s office. (*Id.* at pp. 839-840, 843.) The court accepted the prosecutor’s nonrace-based explanations as “legitimate” and denied the motion. (*Id.* at pp. 840-841.)

In reversing the judgment, the *Long* court pointed out that the record was in direct conflict with the trial court’s “global finding” that the prosecutor excused the three Vietnamese persons for “legitimate” reasons. (*Long, supra*, 189 Cal.App.4th at pp. 843-845.) Specifically, the record showed that T.N. “twice volunteered information in response to general questions to the jury panel,” and therefore participated in the discussions—contrary to the prosecutor’s factual representation and the trial court’s implicit finding that she did not participate. (*Id.* at p. 843.)

The *Long* court reasoned: “Doubt may undermine deference . . . when the trial judge makes a general, global finding that the prosecutor’s stated reasons were all ‘legitimate,’ and at least one of those reasons is demonstrably false within the limitations of the appellate record.” (*Long, supra*, 184 Cal.App.4th at p. 845.) In addition, the court found nothing in the trial court’s remarks indicating that it was aware of or attached any significance to this “obvious gap” or discrepancy. (*Id.* at pp. 845-846.) Thus, the *Long*

court was unable to conclude that the trial court met its obligation to make ““a sincere and reasoned attempt to evaluate the prosecutor’s explanation’ [citation] and to clearly express its findings [citation].” (*Id.* at p. 846, citing *People v. Silva* (2001) 25 Cal.4th 345, 385.)

The present case is completely distinguishable from *Long*. Nothing in the record contradicts the trial court’s finding that the prosecutor’s stated, race-neutral reason for excusing Gomez—that she mouthed the word “damn,” indicating she did not want to be there and would not make a good juror—was genuine.

Nor, as indicated, does anything in the record indicate that the prosecutor’s race-neutral reasons for excusing any of the other Hispanic persons were disingenuous. The court thoroughly analyzed each of the prosecutor’s stated, race-neutral reasons for each of the challenged excusals, and nothing in the record contradicts the court’s findings, in each instance, that the reasons were genuine. (*People v. Silva, supra*, 25 Cal.4th at p. 385.) Thus here, defendant did not and has not met his burden of showing, on the third step of the *Batson/Wheeler* inquiry, that the prosecutor’s excusals of Perez, Gutierrez, Trejo, Morales, Vargas, or Gomez were to any degree based on their Hispanic race or ethnicity.

B. *The Evidence of the 2009 Robbery Was Properly Admitted*

Defendant claims the trial court abused its discretion and deprived him of his due process right to a fair trial in admitting detailed evidence of his participation in and conviction for the January 2009 robbery at the 7-Eleven store in Bellflower. (Evid. Code,

§§ 352, 1101, subds. (a), (b).) We conclude there was no abuse of discretion or due process violation in the admission of the evidence.

1. Background—The 2009 Robbery Evidence

As his first witness, the prosecutor called Joginder Singh, who was a cashier at a 7-Eleven store in Bellflower in January 2009. Defendant was “a regular customer” of the store and Singh had seen him there “many times.” Shortly before midnight on January 25, 2009, defendant walked into the store, went directly to the beer cooler, picked up two 18-packs of Budweiser Light beer and another case of beer, and took the beer to Singh at the checkout counter. After defendant told Singh he also wanted two packs of cigarettes, Singh told defendant he had to pay for the beer first before Singh would give him any cigarettes.

Defendant became angry and began throwing things at Singh, including the bar code scanner and some cookies. Defendant then grabbed one of the 18-packs of beer, and Singh and the store security guard, Cruz Guizar, tried to get it back from defendant. As Singh and Guizar pulled on one end of the beer carton, it tore and the cans of beer fell on the floor. Defendant then grabbed the other 18-pack of beer and ran out of the store. He got into the passenger side of a truck, and the truck immediately drove away. Only three to four minutes passed between the time defendant entered the store and the time he ran out with the 18-pack of beer.

As his second witness, the prosecutor called Guizar, the 7-Eleven store security guard. Guizar wrote down the license plate number of the getaway truck, and the police

were called. Guizar was then taken to a house where she identified defendant as the person who took the beer. She was unable to identify a second person as the driver of the getaway vehicle.

Later during the trial, after Reveles and others testified concerning the September 19, 2010 robbery of the Circle K store in Chino Hills, the prosecutor called Los Angeles County Sheriff's Deputy Randy Meyers. Deputy Meyers was on patrol in Bellflower on the night of January 25-26, 2009, and went to the 7-Eleven store shortly after midnight, in response to a dispatch call. Based on the license plate number of the alleged getaway truck, Deputy Meyers obtained the name and address of its registered owner, and went to the owner's house in Bellflower. As Deputy Meyers and his partners were walking to the house, they saw the truck parked next to a shed, and defendant and several other people came out of the shed. In and around the shed, the officers found two empty beer cans, along with the rest of the beer taken from the 7-Eleven store.

After defendant was arrested and advised of his *Miranda* rights, he told Deputy Meyers that he intentionally went to the 7-Eleven store to take beer and cigarettes without paying for them. Deputy Meyers also testified that when he took Guizar to the house in Bellflower, she identified defendant as the person who forcibly took the 18-pack of beer from the 7-Eleven store.

During the presentation of the defense case, a videotape of the robbery at the 7-Eleven store was played for the jury. The videotape indicated that defendant may have been the getaway driver and another person, Mr. Moya, entered the store and forcibly took

the beer from Singh and Guizar. Lastly, defendant's character witnesses were each asked whether they knew defendant was convicted of the January 2009 robbery—both on direct examination by defendant's counsel and on cross-examination by the prosecutor.

2. Analysis

Generally, the prosecution may not use a defendant's prior criminal act as evidence that the defendant was predisposed to commit a charged criminal act. (Evid. Code, § 1101, subd. (a).) But prior crimes evidence is admissible when, as here, it is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [the defendant's] disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

Following a pretrial Evidence Code section 402 hearing, the trial court ruled that the prosecution could present evidence of the January 2009 robbery in order to prove defendant's motive, opportunity, intent, preparation, plan, knowledge, and absence of mistake, but not his identity, in committing the September 2010 robbery at the Circle K store. (Evid. Code, § 1101, subd. (b).) The evidence was not offered to prove defendant's identity as the perpetrator in the September 2010 robbery. At the pretrial hearing, Singh, Guizar, and Deputy Meyers testified substantially as they did during trial.

On this appeal, defendant does not dispute that the evidence of the 2009 robbery was relevant and admissible, under Evidence Code section 1101, subdivision (b), to prove his intent to steal the beer from Reveles during the 2010 robbery, among other issues. Instead, he argues that the trial court abused its discretion and deprived him of his

due process right to a fair trial in allowing the evidence to be presented in such “excruciating detail.” (Capitalization and bolding omitted.)

Defendant faults the prosecutor for turning the trial into “a trial of two counts, the 2009 robbery and the current one by calling multiple witnesses to establish [his] guilt of the first one in order to prove his guilt of the second.” He also argues that “[t]he sheer volume of testimony in [tortuous] detail from multiple witnesses had an untoward and unduly prejudicial effect on [his] constitutional right to a fair trial on the charge for which he was being tried,” and the admission of the 2009 robbery evidence essentially “undid” the trial court’s order for a bifurcated court trial on the prior conviction allegation.

Because prior crimes evidence may be highly inflammatory, its admission ““must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.”” (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) Under Evidence Code section 352, the probative value of the prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

The trial court’s rulings on the relevancy of evidence and its admissibility under Evidence Code sections 1101 and 352 are reviewed for abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602.) The court has broad discretion to determine both the relevancy and admissibility of evidence, and we generally find reversible error only if the

court's exercise of discretion was arbitrary, capricious, and resulted in a miscarriage of justice. (*People v. Williams* (2009) 170 Cal.App.4th 587, 606 [Fourth Dist., Div. Two].)

Here, the trial court conducted an extremely thorough analysis of the admissibility of the 2009 robbery evidence under Evidence Code sections 1101, subdivision (b) and 352, and concluded it was highly relevant, admissible, and more probative than prejudicial on whether defendant intended to steal the beer during the September 2010 robbery—among other issues listed in Evidence Code section 1101, subdivision (b). The court found that the evidence had “incredible probative value” on the issue of intent, an element of the charged crime, and its probative value was not substantially outweighed by its potentially prejudicial impact. (Evid. Code, § 352.)

We disagree that the court abused its discretion in determining that the evidence of the 2009 robbery was not substantially more prejudicial than probative on the question of defendant's intent to commit the current robbery, among other issues. (Evid. Code, § 352.) We also disagree that the evidence of the 2009 robbery was presented in such “excruciating detail” that it deprived defendant of his due process right to a fair trial.

The collective testimony of Singh and Guizar was no more detailed than necessary to show that defendant was one of the persons who participated in the 2009 robbery at the 7-Eleven store. To the extent their testimony was detailed, the detail was necessary to show the numerous and striking similarities between the circumstances of the prior 2009 robbery and the circumstances of the charged robbery. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402 [“[T]o be admissible to prove intent, the uncharged misconduct must be

sufficiently similar to support the inference that the defendant “probably harbor[ed] the same intent in each instance.””].) Deputy Meyers’s testimony was also no more detailed than necessary to show that defendant admitted he intended to steal the beer and cigarettes from the 7-Eleven store, and to corroborate Guizar’s infield identity of defendant as one of the robbers.

Additionally, the testimony of Singh, Guizar, and Deputy Meyers consumed little trial time in comparison to the testimony of Reveles and the other witnesses who testified concerning the charged robbery. Reveles, the victim of the charged robbery, was the principal witness for the prosecution. His testimony and that of the other witnesses who testified concerning the charged crime consumed substantially more trial time than the collective testimony of Singh, Guizar, and Deputy Meyers.

Defendant also overstates the extent of the prosecutor’s use of the 2009 robbery evidence during his closing argument. The prosecutor briefly discussed the 2009 prior crime evidence near the end of his closing argument, and barely mentioned it during his rebuttal argument. The bulk of the argument emphasized the evidence of the current charge.

Lastly, the defense, not the prosecution, introduced the surveillance videotape of the 2009 robbery, in order to show that defendant may not have been the person who took the beer from Singh and Guizar, but was the person who drove the getaway truck. And the prosecution properly asked each of defendant’s character witnesses whether they knew he was convicted of a robbery in 2009.

C. *There Was No Individual or Cumulative Trial Error*

Defendant claims that the cumulative prejudicial effect of two errors, namely, the *Batson/Wheeler* errors and the admission of the 2009 robbery evidence deprived him of a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 844 [“a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.”].) This claim bears little discussion. For the reasons discussed, there was no individual error; hence there was no cumulative error. (*People v. Richardson* (2008) 43 Cal.4th 959, 1036.)

D. *Defendant’s Romero Motion Was Properly Denied*

Defendant claims the trial court abused its discretion in denying his *Romero* motion to strike his prior strike and prior serious felony conviction in the interests of justice. (*Romero, supra*, 13 Cal.4th at pp. 529-530; § 1385.) We find no abuse of discretion.

A trial court’s refusal to dismiss a prior strike conviction is reviewed for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) The court will abuse its discretion only if its refusal to dismiss the prior strike “is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) The defendant has the burden of demonstrating that the court’s decision was irrational or arbitrary. (*Id.* at p. 376.)

As explained in *Romero*, “the Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.” (*Romero, supra*, 13 Cal.4th at p. 528.) The trial court’s discretion to strike a

qualifying strike is therefore guided by “established stringent standards” designed to preserve the legislative intent behind the Three Strikes law. (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) “[T]he court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Defendant’s prior strike and prior serious felony conviction were based on his no contest plea and resulting conviction for the January 2009 robbery charge. He was 21 years old when he committed the January 2009 robbery, and he was sentenced to 180 days in jail plus three years’ formal probation for the prior robbery.

In April 2009, only three months after the January 2009 robbery and while that robbery charge was pending, defendant committed disorderly conduct, a misdemeanor (§ 647, subd. (b)), and was sentenced to 10 days in jail plus one year of probation. Defendant was 23 years old, and on both felony and misdemeanor probation when he committed the current robbery in September 2010. He was 24 years old at the time of sentencing in this case.

At the hearing on the *Romero* motion, defendant addressed the court and asked to be sentenced “on the merits” of his current crime “only.” He said he accepted responsibility for the 2009 robbery by pleading “guilty” to that charge, but the current

case was “not the same.” In opposition to the motion, the prosecutor argued that defendant had not accepted responsibility for his current robbery offense. Several character witnesses testified on defendant’s behalf at trial, and before sentencing numerous additional people wrote letters to the court attesting to defendant’s good character. Defendant had a strong reputation for helping others and for being very active in his church. Many of the letter writers said he “[went] out of his way” to help others and his family, was hard working, reliable, and trustworthy.

The trial court read portions of several of the letters aloud in court, and noted that they were “a sampling of what is definitely an outpouring” of support for defendant. The court also commented that it had “no doubt that in many ways [defendant] is a good person, and a religious person,” and that the letters “certainly indicate a strong character and that he certainly has good prospects for the future [both in] terms of employment and otherwise.”

The court went on to note, however, that defendant committed two robberies in less than two years, both were “strike” offenses, and the current robbery involved the use of force and great bodily injury. Even though defendant did not personally inflict great bodily injury on the victim, Reveles lost a tooth after Latuhoi punched him, and defendant and Latuhoi “jointly beat him up.” The court also said that defendant’s young age militated against striking the prior robbery conviction, because he was “a very young man who has picked up a robbery when he was on probation for another robbery. So he’s a very young man who hasn’t learned his lesson.”

The court thus concluded that defendant was a person who lay “within the spirit of the three-strikes law,” and denied the motion to strike his prior strike and prior serious felony conviction. The court then sentenced defendant to 11 years in prison, the middle term of three years, doubled to six years based on the prior strike, plus five years for the prior serious felony conviction.

In support of his claim that the court abused its discretion in denying the motion, defendant characterizes both robberies as “beer runs” where he or an accomplice simply ran into a store and ran out with beer without paying for it, and argues that “neither the Legislature nor the voters intended the three strikes law to be used as a nuisance statute to rid society of persons who commit minor offenses.” He argues that his punishment is “excessively harsh and out of proportion . . . to the gravity of [his] current and past offenses,” and emphasizes that his background, character, and prospects take him outside the spirit of the Three Strikes law.

Defendant has not shown, however, that the court’s refusal to grant the motion “is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.) As the court explained, defendant is a young man who committed two strike offenses, namely, two robberies—not “beer runs” involving no use of force or fear—within less than two years. He was on probation when he committed the current robbery, and failed to learn his lesson. Given these factors, the court did not abuse its discretion in denying the *Romero* motion.

E. The Abstract of Judgment Must Be Amended

The court ordered defendant to pay \$4,369 in restitution for a broken tooth that Reveles suffered during the September 2010 robbery, and \$60 to the Circle K.

(§ 1202.4.) In pronouncing judgment, the court made the restitution orders joint and several against defendant and Latuhoi, but the abstract of judgment does not reflect that the order is a joint and several liability. Defendant asks this court to direct the trial court to amend the abstract of judgment to reflect that the restitution order or orders are a joint and several liability against defendant and Latuhoi. The People agree that the abstract should be so amended. We also agree.

A trial court has authority to order that codefendants share joint and several liability for victim restitution. (*People v. Neely* (2009) 176 Cal.App.4th 787, 800.) This court has authority to correct clerical errors in court records. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) And when there is a discrepancy between the court's oral pronouncement of judgment and its records, the oral pronouncement controls. (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.) We therefore remand the matter with directions to correct the abstract of judgment, as defendant requests.

IV. DISPOSITION

The matter is remanded to the trial court with directions to prepare an amended abstract of judgment showing that the \$4,369 restitution order was made joint and several against defendant, Lasalo Lindon Tonga, and his codefendant, Samiu Alo Latuhoi, and to

forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.