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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO SOLIS GONZALEZ,

Defendant and Appellant.

F065110

(Super. Ct. No. F09905837)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Jr., Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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On November 4, 2011, following mistrial and retrial, defendant Sergio Solis Gonzalez was convicted of two counts of committing a lewd or lascivious act upon a child under the age of 14 (Pen. Code,¹ § 288, subd. (a); counts 1 & 2).² On June 7, 2012, he was sentenced to 15 years to life in state prison (§ 667.61, subd. (b)). Defendant contends on appeal that (1) the evidence did not sufficiently support his conviction on count 1; and (2) the prosecutor exercised peremptory challenges to remove two prospective jurors on the basis of race. In affirming the judgment, we conclude substantial evidence supported both the jury’s guilty verdict on count 1 and the trial court’s determination that the prosecutor’s peremptory challenges were not racially motivated.

STATEMENT OF FACTS³

On October 9, 2009, Mariah,⁴ then five years old, attended the Big Fresno Fair with her grandmother from approximately 1:00 p.m. to 8:00 p.m. The pair visited the carnival’s Kiddie Land area, where Mariah went on at least six rides unaccompanied. She rode “some rides twice ... [be]cause they were very fun.” At around 3:00 p.m. or 4:00 p.m., before the start of a “rollercoaster” that “looked like a caterpillar,” the male carnival worker who fastened Mariah’s seatbelt placed his right hand underneath her shorts and underwear and touched her vagina with his finger. Mariah was initially too embarrassed to tell anyone about what transpired. Later that night, at home, she told her

¹ Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

² As to both counts, the jury found that defendant committed a lewd or lascivious act against more than one victim (§ 667.61, former subd. (e)(5), now subd. (e)(4)).

³ Since defendant does not contest the merits of his conviction on count 2, we focus on those facts germane to his conviction on count 1.

⁴ In this opinion, certain persons are identified by their first name in accordance with our Supreme Court’s policy regarding protective nondisclosure. No disrespect is intended.

mother Kristy, “Mom, when I was at the fair, the rollercoaster guy touched me in the vagina.” Kristy stated, “Well, sometimes when they clip [the seatbelt] right there, you know, maybe they grazed it on accident.” Mariah replied, “No, mommy.” She then demonstrated how she was molested. Mariah described the culprit as a man with brown skin, brown eyes, and dark, spiky hair.

On October 10, 2009, Mariah returned to the fair with her parents and reported the incident to Detective Doug Kirkorian. The group proceeded to Kiddie Land and examined at least 20 rides. At retrial, Mariah testified that she pointed to the Little Cricket Express⁵ as the caterpillar ride after Kristy remarked, “I think it’s that one.” By contrast, Kirkorian testified that Mariah did not identify the caterpillar ride. In a subsequent interview on site, Mariah told Kirkorian that “the man who owns the [caterpillar] ride” put his right hand through the leg opening of her shorts and touched her “privates” for less than three seconds. She also specified that the ride was “up high,” had “a metal fence with glass,” and had a seatbelt “that came over her lap and over her shoulder.” Kristy was present during the interview.

Afterward, Mariah and her parents went to the police department for a photo lineup. Detective Alfred Lopez read the standard admonition to Mariah:

“In a moment, I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hairstyles, beards and mustaches may be easily changed. Also, photographs may not always depict the true complexion^[6] of a person. It may be lighter or darker than shown in the photo. Pay no attention to any markings or numbers that may appear on the photos or any other differences in the type

⁵ The record indicates that the Little Cricket Express is alternatively known as Little Cricket, C-Train, Cricket Train, and Critter Train.

⁶ Lopez testified that Mariah asked him to explain the meaning of “complexion.” He recounted, “[T]he way I did that was I used my skin color compared to her skin color.”

or style of the photographs. When you have looked at all the photos, tell me whether or not you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone.”

Mariah was shown a six-photo array that included a picture of defendant. She identified defendant as the perpetrator “in less than 15 seconds,” noting his hair and eyes. Lopez informed Mariah that she was “correct” and revealed to her parents that defendant “was already incarcerated for th[e] same action.” Kristy told Mariah that “she did a great job” to make “her ... feel good about what she had done no matter who she picked” and later gave her a notepad “for doing good and picking the right person.”

On October 22, 2009, Mariah was interviewed by Maria Gutierrez at the Multi-Disciplinary Interview Center (MDIC).⁷ She told Gutierrez that the man who buckled her seatbelt on the caterpillar ride “went in the inside of [her] clothes and underneath [her] underwear” with his hand and touched the “outside” of her “privates.”⁸ No one, including her grandmother, could see the incident because “there was a little glass [¶] ... [¶] ... fence” and “the caterpillar ride ... had a cover.”⁹ Mariah commented that the touching made her “sad.”

At retrial, Mariah, then seven years old, testified that she was molested on the Little Cricket Express. She described the ride:

“I remember the track was flat when you started and it had ... the caterpillar And the same color, the same pattern, everything like that.... [¶] ... [¶] ... [B]ut then when you start going, it gets bumpy, bumpy, bumpy and then it goes super high up then it goes down fast, then they unbuckle you.... [¶] ... [¶]

⁷ The jury watched a video recording of the interview.

⁸ Mariah stated that the man “was holding [her shorts] and ... accidentally touched [¶] ... [¶] ... [her] privates.” When Gutierrez asked “how [the man] accidentally touched [her] privates,” Mariah demonstrated that the man’s finger clasped the hem of her shorts and “accidentally went all the way” to her crotch.

⁹ Mariah gestured that her waist was concealed on the ride.

“... [W]e went up, down, and then up again and way high up, then back down, super fast, going in a circle. [¶] ... [¶] ... And then there was a bump and the rollercoaster kind of went up a little ... and then ... I had to get off.”

Mariah noted that two men were working at the Little Cricket Express: defendant “buckl[ed] everyone up” while his partner “watch[ed]” and “ma[de] sure he d[id] the job right.” However, the partner was unable to witness the touching because he was “below” the ride. Mariah mentioned that she and the prosecutor had looked at photographs of the rides together and the prosecutor “helped [her] a lot [¶] ... [¶] ... by ... sa[ying] some words ... to remind [her] about the rollercoaster”

On cross-examination, defense counsel impeached Mariah with her testimony at the first trial. The following excerpt was read into the record:

“Q Mariah I’m gonna show you [a photo of the Wacky Worm]. I’m gonna show this to you.

“A Okay.

“Q Can you tell us what that is?

“A That is the caterpillar that I went on and I was close to the front. I was the second row.

“Q You were the second row?

“A Yes.

“Q Okay. And may I have that back?

“A Yes.

“Q Thank you. Now I want to make sure I can see?

“A That’s when I was a little kid because I look little in that picture.

“Q Can you see that? There’s a bit of a glare.

“A I can see it.

“Q Okay. And ... is this the ride that you were on when the man touched you?

“A Yes.

“Q And is that a roller coaster? We can see it a little bit high?

“A Yeah, it’s a little bit high, not that much, but when it goes on the bump it’s high.”

Mariah conceded that she made these statements, but said, “[I]f I picked the [Wacky Worm], then I was wrong [¶] ... [¶] ... I was little. So I probably didn’t know.” Mariah later added, “[A]fter the first court day, I’ve been thinking about and thinking about it ever since and then today I finally remembered it.”

Defendant had been a fulltime employee for Shamrock Shows (Shamrock), a traveling carnival company, since 2008. On October 9, 2009, he served as a “breaker”—one who “gives the ride operators a break”—at the Big Fresno Fair’s Kiddie Land area. One of his responsibilities was to check and fasten the seatbelts before the start of the ride. Defendant worked at the Little Cricket Express from 2:42 p.m. to 3:42 p.m., 7:00 p.m. to 8:00 p.m., and 10:15 p.m. to 10:45 p.m. He did not work at the Wacky Worm.

Joseph Blash, Shamrock’s president, distinguished the Wacky Worm from the Little Cricket Express:

“[The Wacky Worm]’s a rollercoaster, ... 90 f[ee]t long, 50 f[ee]t wide, it’s got a double layer of track. It’s a kind of an ‘O,’ in a figure eight so it starts up on top [12 feet high] and then goes around the top, comes down and then comes around the bottom later and back in the station. [¶] ... [¶]

“... [The Little Cricket Express] is a train and [the Wacky Worm] is a coaster. They’re ... kind of similar, they both run on a track and they kind of look similar in shape and design, but [the Little Cricket Express] is definitely a train that stays on the ground that doesn’t go up a hill and it’s flat all the time. And it runs under its own power. It doesn’t run, you know, up a hill and then gravity pulls it along the track. [¶] ... [¶] ... [I]t’s got an engine in it in the little cars and that propels it along the track. [¶] ... [¶] ... A flat track under ground.”

Blash testified that the Wacky Worm “has at least two and sometimes three people operating it,” whereas “most of the kiddie rides have one person operating them.” Neither the Little Cricket Express nor the Wacky Worm had a glass fence. Blash could not recall whether any of the rides in Kiddie Land had lap-and-shoulder seatbelts.¹⁰

Victoria Willms, a fulltime Shamrock employee and Kiddie Land’s supervisor at the time of the incident, testified that both the Little Cricket Express and the Wacky Worm “look like a caterpillar.” She described the Little Cricket Express as a “ground train” that “sit[s] on the ground,” “doesn’t go up or down,” is operated by one person, and uses a lap belt. The Wacky Worm, on the other hand, has track supports, “never reach[es] ground level,” “go[es] up and down,” and is operated by three people.

DISCUSSION

I. Substantial evidence supported the jury’s guilty verdict on count 1.

a. Standard of review.

“When an appellant challenges the sufficiency of the evidence, the reviewing court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.” (*People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1511; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 331; see *People v. Farnam* (2002) 28 Cal.4th 107, 143 [“The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”].) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis what[so]ever is there sufficient substantial evidence to support [the conviction].’” (*People v. Bolin, supra*, at p. 331.) “For evidence to be ‘substantial’ it must be of ponderable legal significance, reasonable in nature, credible and of solid

¹⁰ The record indicates that neither the Little Cricket Express nor the Wacky Worm had lap-and-shoulder seatbelts.

value.” (*People v. Aispuro, supra*, at p. 1511; accord, *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

“Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court[,] that must be convinced of the defendant’s guilt beyond a reasonable doubt.” (*People v. Farnam, supra*, 28 Cal.4th at p. 143.) “Simply put, if the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*Ibid.*) “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.... We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.” (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

b. *Analysis.*

We conclude that substantial evidence supported the jury’s guilty verdict on count 1. “[A]ny person who willfully and lewdly commits any lewd or lascivious act ... upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony” (§ 288, subd. (a); accord, *People v. Warner* (2006) 39 Cal.4th 548, 556.) The record—viewed in the light most favorable to the verdict—shows that Mariah rode the Little Cricket Express when defendant was on duty. Before the start of the ride, defendant buckled Mariah’s seatbelt, reached under her shorts and underwear, and touched her vagina for up to three seconds. (See *People v. Martinez* (1995) 11 Cal.4th 434, 452 [“[T]he circumstances of the touching remain highly relevant to a section 288 violation.... A touching which might appear sexual in context because of ... the nature of the touching, or the absence of an

innocent explanation, is more likely to produce a finding that the act was indeed committed for a sexual purpose and constituted a violation of the statute.”]; *In re Mariah T.* (2008) 159 Cal.App.4th 428, 440 [“Because intent for purposes of ... section 288 can seldom be proven by direct evidence, it may be inferred from the circumstances.”].)¹¹ Again—viewed in the light most favorable to the verdict—the record shows, the day after the incident, Mariah identified the Little Cricket Express as the ride on which she was molested (see generally *People v. Slobodion* (1948) 31 Cal.2d 555; *People v. Perkins* (1937) 8 Cal.2d 502 [identity of the defendant as the perpetrator may be proved by circumstantial evidence tending to connect the defendant with the crime]) and promptly selected defendant’s picture in a six-pack photo lineup (see *People v. Boyer* (2006) 38 Cal.4th 412, 480 [an eyewitness’s out-of-court identification of the defendant as the perpetrator of the crime can be sufficient evidence of the defendant’s guilt even if the witness does not confirm the identification in court]). Based on this evidence, a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt of committing a lewd or lascivious act upon Mariah.

On appeal, defendant challenges Mariah’s credibility in several respects: (1) Mariah previously identified the Wacky Worm as the ride on which she was molested; (2) Mariah was purportedly coached by the prosecutor and Kristy to identify the Little Cricket Express as said ride; (3) Mariah’s description of the Little Cricket Express inaccurately incorporated features of the Wacky Worm and other rides; (4) Mariah’s pretrial identification of defendant as the perpetrator was subsequently tainted by Lopez’s and Kristy’s comments that she was “correct” and “did a great job” and Kristy’s notepad

¹¹ Defendant points out that Mariah characterized the incident as “accidental[.]” in the MDIC interview (see *ante*, fn. 8) and claims this utterance alone negated the element of intent. We disagree. Notwithstanding Mariah’s use of the word “accidental[.]” based on her account of what actually transpired, a reasonable trier of fact could have found the touching was anything but inadvertent.

gift; and (5) the pretrial identification was the product of Mariah's poor perception and memory. However, "it is not a proper appellate function to reassess the credibility of the witnesses." (*People v. Jones* (1990) 51 Cal.3d 294, 314-315.) The resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. (*People v. Solomon* (2010) 49 Cal.4th 792, 818; *People v. Young* (2005) 34 Cal.4th 1149, 1181; see *Stromerson v. Averill* (1943) 22 Cal.2d 808, 814-815 ["Inconsistencies only affect the credibility of the witness or reduce the weight of his testimony and it was for the trier of fact to weigh the evidence and determine his credibility."].) The jury, by its guilty verdict, necessarily credited Mariah's account at retrial of the October 9, 2009, incident and her October 10, 2009, pretrial identification of defendant. It accepted her explanation that she mistakenly identified the Wacky Worm at the first trial and rejected the proposition that she was influenced by third parties. (See *People v. Brady* (1887) 72 Cal. 490, 491 [a guilty verdict cannot not be disturbed if testimony credited by the jury demanded such a verdict].)

The reviewing court may reject the testimony of a witness who has been believed by the trier of fact only if (1) it is physically impossible for the testimony to be true, or (2) the falsity of the testimony is apparent without resort to inference or deduction. (*People v. Thompson* (2010) 49 Cal.4th 79, 124; *People v. Friend* (2009) 47 Cal.4th 1, 41; *People v. Barnes* (1986) 42 Cal.3d 284, 306; see *People v. Young, supra*, 34 Cal.4th at p. 1181 ["[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction."].) Although "variances [and] inconsistencies in [Mariah]'s testimony[,] and the showing that she had talked with her mother and certain police officers, undoubtedly afforded an opportunity for a persuasive argument to the jury against the reliability of her testimony" (*People v. Wilder* (1957) 151 Cal.App.2d 698, 704), we are not convinced that her testimony was either impossible to believe or obviously false (see *ibid.*). In view of the record, the jury could have plausibly concluded that Mariah, who was molested at the age of five on one

of the many rides that she rode during a seven-hour visit to the Big Fresno Fair, could “not reasonably be expected to give a ... wholly unvarying description of the entire transaction and of the circumstances surrounding [the] occurrence [of the ordeal].” (*People v. Kearney* (1942) 20 Cal.2d 435, 437-438; see *People v. Golden* (1961) 55 Cal.2d 358, 365 [unusual or inconsistent testimony is not necessarily improbable]; see also *People v. Harlan* (1990) 222 Cal.App.3d 439, 454 [“[C]onfusion or inability to recall details of the incident[] in question goes to the witness’s credibility”].)

II. Substantial evidence supported the trial court’s determination that the prosecutor’s peremptory challenges vis-à-vis V.R. and M.G., two prospective jurors with Spanish surnames, were not racially motivated.

a. *Background.*

V.R., a female with a Spanish surname, was one of 21 prospective jurors called to the jury box on October 14, 2011, the first day of jury selection. During voir dire, she indicated that she served as a juror in a previous case:

“Um, years ago, I really don’t remember what it was about. It must have been like 15 [years]. [¶] ... [¶] ... I couldn’t even tell you [if it was criminal or civil]. [¶] ... [¶] ... Not guilty is what I remember.”

On October 17, 2011, the prosecutor used his first peremptory challenge to strike V.R. from the panel.

M.G., a female with a Spanish surname, was one of 10 prospective jurors called to the jury box on October 17, 2011, to replace excused panelists. During voir dire, she disclosed that a member of her family was incarcerated:

“I have an older brother who is being charged with a crime. He’s been in prison for drugs, but I never went to any court procedures ... I have never gone to prison to visit him and I don’t really have any contact with him.”

That same day, the prosecutor used his sixth peremptory challenge to strike M.G. from the panel.

Defense counsel raised a *Wheeler/Batson*¹² objection immediately after the prosecutor exercised his sixth peremptory challenge. She specified:

“[I]t was my belief that [the prosecutor] exercised peremptories simply because [V.R. and M.G.] appeared to be Latino women.... [They’re] certainly Spanish surname[s].¹³ [¶] For the record, I am Latino, as is my client [I]n our last trial that hung, the lone hold out in one of the counts was a Latino male. And so I believe that ... he’s projecting and hoping ... to ... remove Latinos ... from the box.

“... [M.G.] said she had no contact with [her brother] [S]he couldn’t even tell us whether he had gone to trial or how long ago or anything. Basically, I got that she had nothing or very little to do with him and it seemed ... that he had been incarcerated.... [S]he said she didn’t visit him or anything.... [M]y impression was no contact [¶] ... [¶] ... I didn’t see [or] hear anything from [V.R.] that I thought that [the prosecutor] could objectively point to other than that she was a Latina.”

The court determined that defense counsel established a prima facie case of racially motivated peremptory challenges, shifting the burden of proof to the prosecutor to provide race-neutral justifications. The prosecutor responded:

“[T]he reason we excused [V.R.] is maybe through a slip of the tongue or some other reason she said that she had sat on a criminal trial before and ... it was a not guilty verdict. That raised some concern in the People’s eyes that [V.R.] ... might be prejudiced against the People’s case because of her prior experience as a juror when she felt the case had not actually reached the level of proof beyond a reasonable doubt. Without inquiring any further into the reasons for her position on that and maybe further muddying of the waters, we thought ... it would be best for our case to excuse her.

“The other case, [M.G.,] is the one who shared with ... this Court that ... her older brother had been in prison for drugs. The People are of the opinion that[,] as a result of such a close family member ... being sent

¹² *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

¹³ Hispanic-surnamed jurors are a cognizable class for *Wheeler/Batson* purposes. (*People v. Davis* (2009) 46 Cal.4th 539, 584.)

away to prison, ... she might project onto the People and law enforcement that somehow they are unfair and are the cause of her older brother being in prison. Therefore, we felt it would be appropriate to exercise a peremptory challenge against [M.G.]”

The court accepted these justifications:

“I don’t find at this time any reason to question those reasons ... [and] find that they are [the] types of reasons that would be a basis for exercising the peremptory challenge. One, being with regard to [V.R.], the not guilty verdict. She did, I do recall, state that immediately. And again, it’s difficult to ever know for sure which ... potential jurors might harbor some unstated biases or reasons why they might be good jurors for the case.

“I think the reason that is given that [M.G.] has a brother in prison who has gone through the criminal justice system ... would be a reason other than just her Hispanic surname ... for the People, who sit on the law enforcement side[,] to not want that particular juror as someone who may side or want to side with Defense.

“So at this point, the Court has denied the motion. We have still ... Latina jurors who are prospective jurors in the box, ... and I will continue to monitor the situation.”

Defense counsel did not raise another *Wheeler/Batson* objection for the remainder of jury selection.

Following the court’s *Wheeler/Batson* ruling, V.F., a female without a Spanish surname, and E.S., a male without a Spanish surname, were two of 10 prospective jurors called to the jury box on October 19, 2011, to replace excused panelists. During voir dire, V.F. stated that she served as a juror in two previous cases:

“I was a juror in two cases, ... one in Kings County [about 25 years ago] and one in Fresno County [about seven, eight years ago].... [A] DUI case [in] which a conviction was obtained and then a case just like this one, same type of scenario and it was a hung jury. And I will say the last one, the hung jury case was a very bad experience. [¶] ... [¶] ... [T]here were some men ... in the deliberation room that almost came to blows. I mean, it was a hostile environment. Every day when we met back there, ... there were, you know, those that felt one way, and those that felt the other way and it was hostile. We had to call the bailiff in once.”

E.S. revealed that he was once investigated as a criminal suspect 20 years earlier. When the court asked whether “anything c[a]me of that,” E.S. replied, “No.” On October 20, 2011, V.F. and 11 others were sworn as jurors¹⁴ and E.S. and two others were sworn as alternate jurors.

b. *Standard of review.*

“[T]he question presented at the third stage of the [*Wheeler*/]*Batson* inquiry is “whether the defendant has shown purposeful discrimination.””” (*People v. Hamilton* (2009) 45 Cal.4th 863, 900.) “The existence or nonexistence of purposeful racial discrimination is a question of fact.” (*Ibid.*) “We review the decision of the trial court under the substantial evidence standard, according deference to the trial court’s ruling when the court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror.” (*Id.* at pp. 900-901, fn. omitted; see *People v. Burgener* (2003) 29 Cal.4th 833, 864 [“We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses.”].)

c. *Analysis.*

In a criminal case, a party may object to a prospective juror by way of a challenge for cause or a peremptory challenge. (Code Civ. Proc., §§ 192 & 225, subd. (b); accord, *Batson*, *supra*, 476 U.S. at p. 127 (dis. opn. of Burger, C.J.); *Wheeler*, *supra*, 22 Cal.3d at p. 273.) Whereas a challenge for cause “obviously ha[s] to be explained” (*Batson*, *supra*, at p. 127 (dis. opn. of Burger, C.J.); see Code Civ. Proc., § 225, subd. (b)(1)), “no reason need be given for a peremptory challenge, and the court shall exclude any juror challenged peremptorily” (Code Civ. Proc., § 226, subd. (b); accord, *Wheeler*, *supra*, at p. 273). “Peremptory challenges ‘traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury’ [citation] to be asserted by either

¹⁴ Three members of the jury—two males and one female—had Spanish surnames.

the defense or prosecutor ““on his [or her] own dislike, without showing any cause” ... without reason or for no reason, arbitrarily and capriciously.” (*People v. Williams* (1997) 16 Cal.4th 635, 663.) However, “[t]he prosecution’s use of peremptory challenges to remove prospective jurors based on group bias¹⁵ ... violates a defendant’s right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and his right to equal protection under the Fourteenth Amendment to the United States Constitution.” (*People v. Blacksher* (2011) 52 Cal.4th 769, 801; see *Batson*, *supra*, at pp. 97-98; *Wheeler*, *supra*, at pp. 276-277; see also Code Civ. Proc., § 231.5.)

The issue of whether a peremptory challenge was racially motivated is analyzed pursuant to the *Wheeler/Batson* three-step inquiry. “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. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).)

“A prosecutor asked to explain his conduct must provide a “clear and reasonably specific” explanation of his “legitimate reasons” for exercising the challenges.’ [Citation.] ‘The justification need not support a challenge for *cause*, and even a “trivial” reason, if genuine and neutral, will suffice.’ [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or

¹⁵ “Group bias” refers to the presumption that “certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds ...” (*Wheeler*, *supra*, 22 Cal.3d at p. 276.)

idiosyncratic reasons. [Citations.] 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. [Citation.] Certainly a challenge based on racial prejudice would not be supported by a legitimate reason.” (*Lenix, supra*, 44 Cal.4th at p. 613.)

“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.” (*Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted.)

We conclude substantial evidence supported the court’s determination that the prosecutor’s peremptory challenges vis-à-vis V.R. and M.G. were not racially motivated. After defense counsel made a prima facie showing of group bias, the prosecutor articulated legitimate, race-neutral justifications for each challenge. First, he rationalized that V.R. may be biased in favor of defendant in view of her past experience as a juror who returned a not guilty verdict.¹⁶ (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1014; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.) Second, the prosecutor expressed concern that M.G., whose older brother was convicted of a drug offense and imprisoned, might harbor prejudice against him and law enforcement officials. (See *People v. Lomax* (2010) 49 Cal.4th 530, 573; *People v. Gutierrez, supra*, at pp. 1123-

¹⁶ Defendant highlights that V.R. “could not recall if the trial was criminal or civil” and “never said that she served on a criminal trial.” However, one may reasonably deduce that V.R. was a juror in a criminal case because she remembered a verdict of not guilty. (See § 1151.)

1124.)¹⁷ The court evaluated these justifications at that particular stage of the voir dire process, found them to be reasonable, tactical, and bona fide, and assured the parties that it would “continue to monitor the situation.” Furthermore, it had ample opportunity to examine the prosecutor’s demeanor. (See *People v. Stevens* (2007) 41 Cal.4th 182, 198 [“The best evidence of whether a race-neutral reason should be believed is often ‘the demeanor of the attorney who exercises the challenge,’ and ‘evaluation of the prosecutor’s state of mind based on demeanor and credibility lies “peculiarly within a trial judge’s province.””].) We therefore defer to the court’s ruling on the matter.

For the first time on appeal, defendant contends that a comparison between the voir dire responses of V.R. and M.G. and those of V.F. and E.S., respectively, “demonstrates that the prosecutor’s stated reasons ... were pretextual.” Comparative juror analysis is “one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination” (*Lenix, supra*, 44 Cal.4th at p. 622), and “must be considered ... for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons” (*ibid.*; accord, *People v. McKinzie* (2012) 54 Cal.4th 1302, 1321; *People v. Hamilton, supra*, 45 Cal.4th at p. 902, fn. 12). However, “the trial court’s finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments.” (*Lenix, supra*, at p. 624; accord, *People v. Trinh* (2014) 59 Cal.4th 216, 241; *People v. Chism* (2014) 58 Cal.4th 1266, 1319.)

¹⁷ Defendant points out that the prosecutor did not ask questions about V.R.’s previous jury service or M.G.’s relationship with her brother. Although “[a] failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual” (*People v. Lomax, supra*, 49 Cal.4th at p. 573), such evidence is not conclusive.

The record shows that the court denied defense counsel’s first and only *Wheeler/Batson* motion on October 17, 2011. V.F. and E.S. were called to the jury box on October 19, 2011, underwent voir dire examination, and were sworn on October 20, 2011. Because defense counsel failed to renew the objection, defendant forfeited any argument involving V.F.’s and E.S.’s responses. (See *People v. Trinh, supra*, 59 Cal.4th at p. 241; *People v. Chism, supra*, 58 Cal.4th at p. 1319; *People v. Hartsch* (2010) 49 Cal.4th 472, 490, fn. 18.)¹⁸

DISPOSITION

The judgment is affirmed.

DETJEN, J.

WE CONCUR:

GOMES, Acting P.J.

FRANSON, J.

¹⁸ Even if we conducted the requested analysis, we would not find evidence of pretext. First, the prosecutor’s justification for striking V.R. would not equally apply to V.F., who returned at least one guilty verdict as a past juror. Second, the prosecutor’s justification for striking M.G. would not equally apply to E.S., who was merely investigated and subsequently ruled out as a suspect. (See *Lenix, supra*, 44 Cal.4th at pp. 630-631; *People v. Lewis and Oliver, supra*, 39 Cal.4th at pp. 1018-1024 [compared panelists must be “similarly situated”].)