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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LAKENDRICK CHILDRESS, Defendant and Appellant.	B270380 (Los Angeles County Super. Ct. No. NA102107)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Affirmed.

Phillip A. Treviño, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Lakendrick Childress appeals from the judgment entered following a jury trial in which he was convicted of first degree home invasion robbery in violation of Penal Code[1] section 211 (count 1), assault with a firearm in violation of section 245 subdivision (a)(2) (count 2),[2] and possession of a firearm by a felon in violation of section 29800, subdivision (a)(1) (count 5). With respect to counts 1 and 2, the jury found the personal firearm use allegations to be true. (§§ 12022.53, subd. (b), 12022.5.) In subsequent proceedings, the trial court found true all of the prior conviction allegations. The court sentenced appellant to an aggregate term of 28 years in state prison.

Appellant contends the trial court erred when it denied a defense *Batson-Wheeler*[3] motion, and the prosecutor committed prejudicial misconduct in closing argument to the jury, requiring reversal. We disagree and affirm.

FACTUAL BACKGROUND

Approximately 9:30 p.m. on June 29, 2014, Marcia Zepeda and her brothers-in-law, Anthony and Steven Zepeda, were gathered around the dining room table at Marcia's home when four or five men entered the house through the unlocked screen door. All of the men wore black hooded sweaters or sweatshirts with the hoods drawn tight, covering their heads. Pointing a hunting rifle with a scope at the occupants of the room, appellant

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[1] Undesignated statutory references are to the Penal Code.

[2] The jury acquitted appellant on two additional counts of assault with a firearm.

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

ordered them down to the floor. Marcia stood up from the table, and confronted appellant, pushing the rifle away as she yelled at him to get out of her house. Anthony demanded, " 'What do you want?' " He then pulled two $20 bills from his pocket, handed them to appellant, and said, " 'Now leave, that's all we have.' "

Afraid that the men might try to harm her dog, Marcia dragged the dog through the house and outside. When she realized no one had followed her, she went to the side porch and started screaming to get help from the neighbors.

Appellant repeated the order to get down on the floor, and poked Anthony in the stomach with the barrel of the rifle. Anthony pushed the barrel away, saying, " 'Get that thing out of my stomach.' " Appellant swung the rifle back and struck Anthony in the ribs. Anthony fell to the floor hitting the back of his head on a wooden table. When the assailants fled, appellant, who was still carrying the rifle, dropped one of the $20 bills on the porch.

During the commotion, appellant's hood fell down, exposing his face. Marcia's and Anthony's struggles with appellant brought them within two feet of him, and all three victims were able to see appellant's face clearly.

Police responding to the call regarding a home invasion robbery encountered a crowd of people on the corner near Marcia's home. The crowd pointed the officers in the direction the suspects had run, and the officers saw a person running across the street about two blocks away. The officers attempted to follow but lost track of the person. After losing sight of the subject, the officers doubled back to the area where they had first seen him and found appellant walking on the sidewalk. The officers detained appellant, who was carrying a black hooded sweater and sweating profusely. Police also found a long rifle

with a scope matching the description of the rifle used in the robbery along the route the subject had been seen running.

In separate field show-ups, Marcia, Anthony and Steven unequivocally identified appellant as the perpetrator with the rifle. A neighbor who had gone outside when he heard Marcia screaming also identified appellant in a field show-up as the man who had run by him carrying a rifle.

Appellant's grandmother testified for the defense. Sometime in the evening on the day of the robbery, appellant visited his grandmother at her home, not far from Marcia's house. But the grandmother could not recall what time he was there and did not know if he was at her house during the time of the robbery.

DISCUSSION

I. *Batson-Wheeler*

A. *Relevant background*

Prospective Juror Nos. 4101 and 6121 were both African-American women, and the prosecutor's exercise of two peremptory challenges to excuse these jurors prompted a defense *Batson-Wheeler* motion.

Prospective Juror No. 4101 worked in the office of Development and University Affairs at Charles R. Drew University of Medicine and Science. She had no prior jury experience. Prospective Juror No. 6121 was retired from her previous employment as a civil service clerical worker. She had served on three civil juries and one criminal jury. The juries reached verdicts in two of the civil cases, and the court declared a mistrial in the other civil case. The criminal case was a domestic violence prosecution which resulted in a mistrial due to an honest difference of opinion among the jurors.

During voir dire, Prospective Juror No. 4101 stated that although she had seen "all" of the legal crime dramas, she did not know what to expect in this trial because this was her first experience as a juror. In response to the district attorney's questions, the prospective juror said she did not think the government or police departments have unlimited funds for criminal investigations. The prosecutor then asked if she expected to see in this trial the "tons of lab tests" and other types of evidence one sees in legal dramas on television. Prospective Juror No. 4101 responded, "I don't know."

The district attorney exercised his first peremptory challenge against Prospective Juror No. 4101. The court excused the juror and replaced her with Prospective Juror No. 8897, who was also African-American.[4] After the defense exercised its first peremptory challenge, the prosecution accepted the panel with two African-American jurors.

When the prosecution used another peremptory challenge to excuse Prospective Juror No. 6121, the defense made a *Batson-Wheeler* motion on the ground that appellant is African-American, and the prosecution had excused two of the three African-American prospective jurors. The court found the defense had made a prima facie showing of discrimination and asked the district attorney to explain his reasons for excusing these prospective jurors.

The prosecutor explained that Prospective Juror No. 4101's statement that she did not know what to expect about the

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[4] Prospective Juror No. 8897 was an aerospace engineer with no prior jury experience.

evidence that would be presented at trial indicated to him that she might anticipate the same expenditure of resources in this case as is depicted in television legal dramas like "C.S.I." The prosecutor added that he tended to disfavor people in education or university employment. Finally, the prosecutor pointed out that the juror who replaced No. 4101 was also African-American, and it would make no sense to excuse one juror on account of race only to have her replaced by another juror of the same race.

The district attorney explained that he excused Prospective Juror No. 6121 because two of the four cases on which she had served as a juror had resulted in mistrials. The prosecutor also reminded the court that after exercising his first peremptory challenge, he had accepted the panel with two African-American jurors.

Accepting the district attorney's explanations as race-neutral, the trial court denied the *Batson-Wheeler* motion.

B. *The trial court did not err in denying the defense* Batson-Wheeler *motion*

"Both 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; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *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." (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).)

"The familiar *Batson*/*Wheeler* inquiry consists of three distinct steps. The opponent of the peremptory strike 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.

If a prima facie case of discrimination has been established, the burden shifts to the proponent of the strike to justify it by offering nondiscriminatory reasons. If a valid nondiscriminatory reason has been offered, the trial court must then decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 42; *Lenix*, *supra*, 44 Cal.4th at p. 612.)

This case concerns the third step of the *Batson-Wheeler* inquiry; that is, whether the trial court correctly determined that the prosecutor had not engaged in purposeful discrimination in exercising his peremptory challenges to exclude two African-American prospective jurors. The trial court's finding on discriminatory intent is " 'a pure issue of fact' " to which we apply a substantial evidence analysis. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339; *People v. Hamilton* (2009) 45 Cal.4th 863, 900.) And because the issue comes down to the credibility of the prosecutor's race-neutral explanation, we accord great deference to the trial court's evaluation of "whether the prosecutor's demeanor belies a discriminatory intent" as well as "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477; *Lenix*, *supra*, 44 Cal.4th at p. 614.) The Supreme Court has recognized that such assessments of credibility and demeanor lie peculiarly within the province of the trial judge, and in the absence of exceptional circumstances, an appellate court should defer to the trial court's determination. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 477.)

"The prosecutor's ' "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 idiosyncratic reasons.' [Citation.] 'The proper focus of a *Batson*/*Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective reasonableness of those reasons. . . . All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' " (*People v. O'Malley* (2016) 62 Cal.4th 944, 975.)

Here, we find the prosecutor's explanations for excusing each of these jurors to be both plausible and supported by the record. The district attorney explained that Prospective Juror No. 4101's responses to questions about legal crime dramas suggested to him that the juror might expect the police and prosecution to devote the same level of resources to this case as is portrayed in fictional crime dramas. Even if the prosecutor's perception was not entirely accurate, the explanation does not demonstrate purposeful discrimination. "Where the record suggests that a mistake may underlie the prosecution's exercise of a peremptory challenge, ' "we rely on the good judgment of the trial courts to distinguish bona fide reasons . . . from sham excuses belatedly contrived to avoid admitting acts of group discrimination," ' and 'give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose.' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 78.) The trial court thus properly accepted the prosecutor's concern that a juror might hold the prosecution to the standards of investigation and evidence collection depicted in such programs to be a legitimate nondiscriminatory reason to excuse Prospective Juror No. 4101.

The prosecutor also stated that he tends not to favor university employees as jurors. The Supreme Court has held that

a juror's employment background may provide a reasonable nondiscriminatory justification for exclusion. (*People v. Watson* (2008) 43 Cal.4th 652, 677.) Finally, both the trial court and the prosecutor noted that the juror who replaced No. 4101 was also African-American, and the prosecutor had accepted the panel with two African-American jurors. While not dispositive of a nondiscriminatory motive for the strike, this circumstance is " 'an indication of the prosecutor's good faith in exercising his peremptories,' " and tends to support the trial court's credibility assessment of the prosecutor's justification. (*People v. Dement* (2011) 53 Cal.4th 1, 20, overruled in part on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, quoting *People v. Snow* (1987) 44 Cal.3d 216, 225; see also *Lenix*, *supra*, 44 Cal.4th at p. 614.)

As for Prospective Juror No. 6121, the district attorney explained that he exercised his strike because two of the four cases on which she had previously served as a juror had resulted in mistrials. Our Supreme Court has recognized that "the circumstance that a prospective juror has previously sat on a hung jury is a legitimate race-neutral neutral reason for exercising a strike." (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 78.) The trial court thus properly accepted the prosecutor's justification in this instance.

II. Prosecutorial Misconduct

Appellant contends the district attorney committed prejudicial misconduct in his rebuttal argument by misstating the law and improperly shifting the burden of proof to defendant. We disagree.

In rebuttal the prosecutor argued: "The defense also tried to bring in grandma. We don't really have to talk about her fraud conviction but what you can focus on is the fact that she can't, she

can't say that he didn't do it. She can't say that she was with him at the time. She can't say you know why because the only ones who can say they were with him were those other guys who were also committing the robbery with him. Grandma can't say that. And she knows and you know that she can't. Also she can't explain why the officer finds him running down that path." Defense counsel objected that the prosecutor was trying to shift the burden of proof. The trial court overruled the objection, stating, "The jury will follow my legal instructions."

Next, the district attorney argued, "The defendant wants you to say, oh, you know what no DNA, no DNA and they harped on that and as [defense counsel] also actually mentioned, I asked Detective Kloss, Detective Kloss is the DNA able to be tested by both sides—" These comments drew the same objection from defense counsel with the same ruling from the court. The prosecutor continued: "As [defense counsel] said in her closing both sides are able to test it. Detective Kloss gave you a reason, his honest reason for why he didn't you have to make a call, but the fact of the matter is that if this information was so important it's available to both sides."

Finally, the prosecutor returned to the theme of the evidence supporting a conviction that the defense could not explain: appellant's presence on Obisbo and 11th Streets, sweating and carrying a heavy sweater on a hot summer night; appellant's sudden disappearance and reappearance on the street where the suspect had fled when police were trying to track him; and the lack of any equivocation on the part of the witnesses who identified appellant in the field show-up.

Appellant maintains that by repeatedly criticizing the defense for failing to provide an innocent explanation for the evidence against him, the prosecutor impermissibly shifted the

burden of proof from the prosecution to the defense. The error was prejudicial, he asserts, because it led to confusion of the jury about the reasonable doubt standard as evidenced by the jury's request for further definition of the standard during deliberations.[5]

As our Supreme Court has often explained, " 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].' [Citation.] Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid.*) To establish misconduct, defendant need not show that the prosecutor acted in bad faith. (*Id.* at p. 822.)" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) Rather, "[w]hat is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant. [Citation.] When . . . the claim focuses on comments made by the prosecutor before the jury, a

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[5] After deliberating for nearly two hours, the jury submitted the following request to the trial court: "We need a definition of 'reasonable doubt' we have jurors who believe because they are not 100 percent sure, they have reasonable doubt." The trial court responded by referring the jury to the definition of reasonable doubt in CALJIC No. 2.90.

court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror." (*People v. Benson* (1990) 52 Cal.3d 754, 793; *Cortez*, *supra*, at p. 130.)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 667.) We also consider " ' "whether the prosecutor's comments were a fair response to defense counsel's remarks." ' " (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1337; *People v. Chatman* (2006) 38 Cal.4th 344, 386 ["Defendant's challenges to rebuttal must be evaluated in light of the defense argument to which it replied"].)

Appellant contends that the prosecutor's comments on the grandmother's testimony, appellant's failure to provide an innocent explanation for much of the evidence against him, and the failure of the defense to conduct its own DNA tests were intended to (and did) shift the burden of proof to the defense. Not so. Contrary to appellant's assertion, the prosecutor's comments during rebuttal argument did not suggest to the jury that the defense bore any burden of proof. Rather, with regard to all three instances of alleged misconduct, the district attorney's remarks consisted of nothing more than fair comment on the state of the evidence and a reasonable response to appellant's alibi defense and defense counsel's own closing argument.

Appellant attempted to present an alibi defense through his grandmother's testimony that he was at her house sometime

during the evening of June 29, 2014. By pointing out that the grandmother's testimony had not provided appellant with an actual alibi because the grandmother could not specify the time appellant was with her, the district attorney simply made a fair comment on the state of the evidence, which the prosecution is entitled to do. (*People v. Cook* (2006) 39 Cal.4th 566, 608.)

Similarly, the prosecutor was entitled to highlight and comment on evidence presented at trial to which no objection was made or sustained. Here, Detective Kloss testified without objection that the defense could have performed DNA tests on the evidence, even though neither he nor the prosecutor had ordered such tests.

The prosecutor was also entitled to rebut the defense argument that the entire case against appellant was built on nothing more than flawed field identifications, which could not stand up to various inconsistencies in the prosecution's case. In so arguing, defense counsel had offered several innocent characterizations of the evidence that suggested reasonable doubt. In response, the prosecutor appropriately highlighted the reasonable and innocent explanations the defense had omitted from its argument.

A prosecutor has wide latitude during argument, which " ' " 'may be vigorous as long as it amounts to fair comment on the evidence, [and] can include reasonable inferences, or deductions to be drawn therefrom.' " ' " (*People v. Martinez* (2010) 47 Cal.4th 911, 957; *People v. Williams* (1997) 16 Cal.4th 153, 221.) In this regard, "[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229,

1340.) Here, the district attorney's rebuttal in response to the defense closing argument neither crossed the line into prejudicial prosecutorial argument, nor shifted the burden of proof to the defense. Accordingly, we find no prosecutorial misconduct occurred.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.