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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JESSICA HERNANDEZ, Defendant and Appellant.	B282031 (Los Angeles County Super. Ct. No. MA057270)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Jessica Hernandez appeals from a judgment of conviction for kidnapping to commit robbery and carjacking, contending the trial court erred in denying her *Batson*/*Wheeler* motion.[1] We affirm.

BACKGROUND

In a prior appeal we conditionally reversed the judgment and remanded the matter to the trial court for further proceedings on Hernandez's *Batson*/*Wheeler* motion. (*People v. Hernandez* (July 19, 2016, B257026) [nonpub. opn.].) We very briefly summarize the facts from our prior opinion.

In December 2008, Hernandez and an accomplice, wearing ski masks, entered the residence of the manager of Downey Savings Bank, held her at gunpoint for 12 hours, and told her that unidentified people had taken her son hostage and would kill her and her son if she refused to cooperate. In the morning, they drove to the bank and ordered the manager to unlock the front door, disarm the vault alarm, unlock a cabinet containing cash drawers, and remove the money inside. They then drove back to the manager's house, ordered her into the house, and left.

A. Prior Proceedings

Hernandez and her accomplice were tried by separate juries.

During voir dire, a prospective juror identified as "M.O., 1696" filled seat number five after the defense exercised a peremptory challenge. The trial court engaged Juror No. 5 in the following brief voir dire before the prosecution used its next peremptory challenge to excuse this prospective juror:

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

"[The Court]: Welcome, juror number five. Do you agree with all the legal principles I have spoken of?

"Prospective Juror No. 5: Yes.

"The Court: Thank you. First six questions, please [indicating the juror should respond to standard biographical questions about residence, employment, marital status, children, prior jury service].

"Prospective Juror No. 5: Palmdale, 13 years. [¶] I'm a parts worker. [¶] I'm single. No spouse. No kids. [¶] And no jury experience.

"The Court: Any yes answers [to additional standard questions regarding relationships with individuals in law enforcement, victims of crime, persons accused of crimes, etc.]?

"Prospective Juror No. 5: No.

"The Court: Can you be fair?

"Prospective Juror No. 5: Yes."

Neither Hernandez's counsel nor the prosecutor asked Prospective Juror No. 5 any questions, but the prosecution immediately used a peremptory challenge to remove the juror.

Hernandez's counsel then made a *Batson/Wheeler* motion, and argued that Hernandez was "of Latin descent" and the prosecution had used five of its seven peremptory challenges to remove Latino prospective jurors, including Juror No. 5. Hernandez's counsel conceded there were reasons for the prosecution to remove some of the prospective jurors based on "things they said," but stated he found the removal of Juror No. 5 "more concerning" because the juror "said nothing with regard to anything other than where he lives and his occupation."

The trial court confirmed the prosecution had used five of its seven peremptory challenges to remove Hispanic jurors, but

did not find a prima facie case of discrimination. The court noted the prosecution had "accepted the panel [in this case] on a number of occasions" when four Hispanic men and three Hispanic women remained on the panel. The court also noted, and Hernandez's counsel conceded, that there were "fairly obvious" reasons for the prosecution's removal of "some of the Hispanic jurors." The court did not address Prospective Juror No. 5 specifically. The court allowed the prosecution to respond to the motion, but the prosecutor declined to do so.

Hernandez's jury found her guilty of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1))[2] and carjacking (§ 215, subd. (a)), and found true the special enhancement allegations that a principal was armed with a firearm (§ 12022, subd. (a)(1)) and Hernandez took property with a value exceeding $50,000 (§ 12022.6, subd. (a)(1)). The trial court sentenced Hernandez to a life term for the kidnapping, plus a consecutive one-year term for each of the two enhancements, for a total term of life plus two years. The court imposed and stayed a sentence for carjacking.

In Hernandez's first appeal we conditionally reversed the judgment and remanded the matter for further proceedings on her *Batson*/*Wheeler* motion.

B. Proceedings on Remand

On remand, the *Batson*/*Wheeler* hearing was rescheduled two times because Dayan Mathai, the prosecutor, twice forgot the hearing date.

On the third scheduled hearing date, Hernandez's attorney, Hung Du, argued that too much time had elapsed to conduct a

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[2] Further statutory references are to the Penal Code unless otherwise indicated.

meaningful hearing, and Mathai could not provide a race-neutral reason for challenging Prospective Juror No. 5 because the passage of three years and many trials rendered accurate recall impossible, as evidenced by Mathai's inability to remember even the hearing dates for the current proceedings.

Mathai stated that although three years had passed since the trial, he had tried only one jury trial in the interim, and he had a good memory and well remembered this case and Prospective Juror No. 5. Mathai stated that he had made no express inquiry at trial into the ability of Prospective Juror No. 5 to serve, because the trial court had given him a time limit for voir dire, and time had expired by the time the prospective juror was seated. He nevertheless had always had good reason to excuse Prospective Juror No. 5. Mathai explained that over several days spent selecting two juries, he observed that most prospective jurors had "answered the court' s questions in a thoughtful and thorough manner. The court provided a questionnaire to the jurors. Asked the jurors to—the potential jurors to go through the questions one by one, answer each question one through six and then provide any yes answers to the additional questions. And the court additionally asked if there was any disagreement with the court's articulation of the principles, constitutional principles which would guide the jury selection. [¶] The jurors by and large answered the court's questions answered them with some elaboration. Most of the jurors answered each of the six questions completely and added to their comments or their answers in some manner."

Mathai admitted that not every prospective juror answered voir dire questions in this manner, but stated, "this particular juror I remember did not. First of all, I should say that I observed

how he was seated in the chair. He was not seated upright. He was slouching in his seat. In my memory he was dressed very casually and he appeared to me to have what I would describe as a lackadaisical or non-earnest approach to the jury selection process. He seemed uninterested. He seemed like he did not want to be here by his body language and how he was dressed. And that to me was confirmed in the manner in which he answered the questions. [¶] The court asked him to go through the questionnaire, as the court had asked all the jurors to do, and he immediately recited in a very, almost staccato manner, his answers. They are in the transcript but they are very quickly stated."

Mathai explained that "the way [Prospective Juror No. 5] was seated and the way he answered the questions seems like he didn't care to be here. I observed that. I had seen other jurors, in fact even in that very seat just before, answered the questions at length."

Mathai also explained that Prospective Juror No. 5 "did not seem to have, based on his answers, sufficient life experience to analyze the case in my opinion. He didn't offer anything. Other jurors had articulated their life experience when given the opportunity by the court. He offered nothing. Rather, he just answered the questions very rapidly as if he didn't want to be here. So I took that all into account. [¶] I wanted jurors who articulated more life experience . . . ."

The trial judge stated that he remembered the case well but did not specifically remember Prospective Juror No. 5.

The judge then stated, "In terms of Mr. Mathai and my assessment of his credibility, it is true that, if I understand, he forgot about the hearing. And what I will say is this: there are

things in life that are truly meaningful and things in life that are not and when you are a trial lawyer, we all forget hearings because really the hearings are secondary to trials. [¶] And this I'm just disclosing to you, Mr. Du, on the record because now it's actually factoring into my decision. While you were downstairs Mr. Mathai and I were just talking casually, not about this case, and I just asked him how things were going in general. And he shared with me that—first he apologized to me for missing the last court hearing and then he was explaining that he is in organized crime. He had a 12 or 14 defendant high-profile media publicity case with 12 or 14 doctors or people in the medical profession and that he had to dismiss and refile that case. And that the case is so high profile that he actually had to brief people all the way to the top of the D.A.'s office, which rarely happens. And so I take it that that's why he forgot this hearing. And I don't know that it's a fair comparison, apples to apples, to say, well, he forgot two hearings. Therefore, there is no way he can remember this case."

The judge stated he found Mathai to be "completely credible," and in this case Mathai had "repeatedly accepted the jury over and over and over again with a number of Hispanics on it." The court "fully" accepted Mathai's reasons, stating, "I have watched his demeanor, I have listened to his words, I have compared his words with the transcript and there is nothing to cause me to doubt his integrity or the basis on which he exercised that peremptory. [¶] [T]rial work is so intangible in so many ways. You know, when we are picking jurors, sometimes it's the slightest things that throw us off. Sometimes it's the slightest thing where we wonder, do they not like me. Did I say something that offended them. Is there something about me that just

doesn't connect with them. . . . [¶] So . . . when Mr. Mathai tells me that the juror was slouching, was dressed too casually, seemed uninterested based upon his body language and that his cursory and terse answers to a 20-question questionnaire—that questionnaire is a long questionnaire—his terse answers led Mr. Mathai to believe perhaps he will be lackadaisical to his approach to a very complicated case, I find that to be a race neutral reason. [¶] His insufficient life experience, I find that to be credible, too. As I reviewed my notes, the only thing I had for that juror was parts assembler or parts runner. . . . [T]hat was all I had for him. There was nothing notable about him. Now, on many other jurors I fill up—I use little post-its and I fill up the post-its. But with him I have just got that one line. So I can see why Mr. Mathai believed that he had insufficient life experience."

The judge ended by stating, "Then the last thing I would note is this, is that by the time the jury was selected—and I know the appellate court had made note of this as well—but we had 1, 2, 3, 4, 5, 6 Hispanics. Half of the entire jury was Hispanic. And Mr. Mathai had repeatedly over and over and over again accepted the jury with those Hispanics on there." And, "I will note the following: that I have been here in Lancaster both as a prosecutor and now as a judge for 20 years in total. And this is only colloquial. Not colloquial. Anecdotal. But I will note that I have noted a huge shift in the demographic up here. It used to be a predominantly White community but it has shifted, at least in my mind, heavily Hispanic. Heavily Hispanic. And I think that's even seen in the way that this jury was eventually comprised of by half Hispanics. So I just think by sheer numbers Mr. Mathai was going to end up kicking Hispanics because we have so many Hispanics up here now."

The trial court reinstated its original sentence, and Hernandez again appealed.

DISCUSSION

Hernandez, who identifies herself as Hispanic, contends the trial court erred in denying her *Batson/Wheeler* motion after Mathai exercised five of his seven peremptory challenges to excuse Latino or Hispanic prospective jurors.

"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 1, section 16 of the California Constitution." (*People v. Lenix* (2008) 44 Cal.4th 602, 612.) The "exercise of even a single peremptory challenge solely on the basis of race or ethnicity" violates these constitutional principles and "constitutes structural error, requiring reversal." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157-1158.)

"The *Batson* three-step inquiry is well established. 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. [Citation.] The three-step procedure also applies to

state constitutional claims." (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 612-613; *People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1158.)

To make a prima facie showing of impermissible discrimination, a defendant must produce "evidence ' "sufficient to permit the trial judge to draw an inference that discrimination has occurred." ' " (*People v. Jones* (2013) 57 Cal.4th 899, 916.) Once a prima facie case of group bias appears, the prosecution must demonstrate a proper basis for the allegedly offending challenge, and the court must "satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for 'we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.) A trial court may not merely accept a prosecutor's explanation at face value. (*Id.* at p. 169.)

"Because [*Batson/*]*Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." (*People v. Howard* (1992) 1 Cal.4th 1132, 1155; *People v. Lenix*, *supra*, 44 Cal.4th at pp. 613-614 ["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"].)

Here, Mathai demonstrated a race-neutral basis for challenging Prospective Juror No. 5: He appeared to be unengaged in the proceedings and may not have put forth a good faith effort to carry out the duties of a juror. The trial court sincerely and reasonably evaluated Mathai's explanation in light of the circumstances and his observations of the manner in which prosecutor examined members of the venire, exercised challenges, and explained his reasoning. The law requires no more. Deferring to the trial court's personal observations of the manner in which Mathai offered his explanation, as we must, we conclude the court acted within its discretion in crediting Mathai and denying Hernandez's motion.

Hernandez argues the passage of time and the trial judge's inability to recall the excluded juror foreclosed a reasoned, reliable determination. We disagree.

When a long time elapses between the allegedly offending challenge and the prosecutor's explanation for it, the court may find that "[i]t is unrealistic to believe that the prosecutor could now recall in greater detail his reasons for the exercise of peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor examined the venire and exercised his other challenges." (*People v. Hall*, *supra*, 35 Cal.3d at p. 171.) "If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, . . . it should set the case for a new trial."

(*People v. Johnson* (2006) 38 Cal.4th 1096, 1104, overruled on another point in *People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1174.)

" '[T]he best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor.' " (*People v. Williams* (2013) 56 Cal.4th 630, 658.) Credibility of the prosecutor's explanation " ' "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." ' " (*Ibid.*) In assessing credibility the court may " '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.' " (*Ibid.*) A trial court may thus assess the credibility of a prosecutor's explanation "even absent the trial court's personal recollection of [the challenged prospective juror's] demeanor." (*Ibid.*)

Here, the trial judge stated that he had "watched [Mathai's] demeanor, . . . listened to his words, [and] compared his words with the transcript," and found him "completely credible." We have no power or cause to supersede this finding.

Hernandez argues Mathai's stated reasons for challenging Prospective Juror No. 5 were demonstrably false, as the prospective juror had given only proper answers to all questions put to him. The argument is without merit. A prosecutor's reason for challenging a prospective juror need not be sensible or nontrivial, it need only be genuine and race-neutral. (*People v. Cruz* (2008) 44 Cal.4th 636, 655; *People v. Lenix*, *supra*, 44 Cal.4th at p. 613.) The trial court aptly observed that "when we are picking jurors, sometimes it's the slightest things that throw us off." Jury selection is intangible in many ways, and an attorney's

lack of connection with a prospective juror may result from sub-linguistic signals the attorney may later find hard to explain. That a prospective juror seemed uninterested and lackadaisical based on his body language and terse responses is a race-neutral reason to challenge a prospective juror.

Hernandez argues the trial court's ex parte communication with Mathai about his missing two prior hearings in this matter was improper and prejudicial. We disagree. A trial court should of course avoid ex parte proceedings in connection with a *Batson*/*Wheeler* motion "because of the risk that [the] defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete." (*People v. Ayala* (2000) 24 Cal.4th 243, 263-264.) But judges and criminal attorneys for both the prosecution and defense often see and converse with one another outside of court, and mutual inquiries into their respective circumstances and schedules are unavoidable and benign. Here, the trial judge's conversation with Mathai about why he had missed two prior hearings was entirely unremarkable, and its import, if any, was only remotely probative to the only issue for which it was raised in court—Mathai's memory. But a busy attorney's calendar mishaps do not tend in reason to show the attorney is unable to recall events that occurred three years in the past. In any event Du, Hernandez's attorney, had ample opportunity to dispute Mathai's explanation for his absence and to champion the supposedly true explanation—that Mathai's long-term memory was deficient. He sensibly declined to do so.

Hernandez raises one final challenge to the proceedings below. At the end of the hearing the trial judge stated, "There was a history in our country when racism was a major, major issue and I understand that is around today." The judge stated

he would be "the last person" to let a jury verdict stand while he "thought any type of racism was involved." The court stated, "There is this conventional wisdom in jury selection, and I don't subscribe to it, but minorities are considered better for the defense and Caucasians are not," and he reassured those present that "[i]f there was ever a case that I would not uphold on racism, it would be this. Not that I will ever uphold a case on racism."

Hernandez appears to argue that by engaging in these musings the court injected an improper standard into the proceedings, one under which a race-*based* juror challenge would be permissible so long as it is not rac*ist*. We disagree that the court's musings created any sort of alternative standard.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J. *

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.