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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LOUIS W. LEE, Defendant and Appellant.	B233403 (Los Angeles County Super. Ct. No. BA357504)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Law Offices of Robert S. Gerstein and Robert S. Gerstein for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Louis W. Lee of second degree murder (count 1) (Pen. Code, § 187, subd. (a)),[1] and with two counts of assault with a firearm (counts 2 & 3) (§ 245, subd. (a)(2)). As to count 1, the jury found true the allegation that appellant personally used and/or discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), and (d), and as to counts 2 and 3 that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a).

Appellant was sentenced to 54 years to life in state prison, consisting of 15 years to life as the base term for count 1, plus 25 years to life for the section 12022.53, subdivision (d) enhancement and the upper term of four years as to count 2, plus 10 years pursuant to the section 12022.5, subdivision (a) enhancement. An identical term (four years and 10 years) as to count 3 was ordered stayed pursuant to section 654.

Appellant contends: (1) the photographic lineup used by the police was unduly suggestive; (2) the trial court abused its discretion by excluding evidence regarding other individuals who were present at the scene of the murder; (3) the trial court abused its discretion by admitting into evidence gun grips found at appellant's home; (4) the prosecutor committed misconduct by (a) eliciting testimony from an investigating police officer that early in the investigation appellant was believed by the police to be guilty, (b) vouching for the credibility of prosecution witnesses, and (c) attacking the integrity of defense counsel; (5) the cumulative impact of the foregoing errors requires reversal of appellant's conviction; and (6) the convictions are reversible due to *Wheeler/Batson* error. Because we are not persuaded by any of appellant's contentions, we affirm the judgment of conviction.

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[1] All further undesignated statutory references are to the Penal Code.

FACTUAL BACKGROUND

I. The Altercation Resulting in the Shooting Death of Michael Kim

On June 6, 2009, a group of friends including Timothy Lee, Michael Kim, Shin Lee, Jin Hong Mo, and Jae Goon Kim were socializing at the M2 Karaoke Bar.[2] They arrived at the bar, located at the corner of Sixth Street and Manhattan Place in Los Angeles, around 9:30 p.m. Jin Hong Mo was the designated driver for the group and did not drink alcohol that evening.

At some point, Timothy went to the restroom and saw three men, one of whom was wearing a baseball hat and jeans. Another of the men, the tallest of the three at 5 feet 11 inches, said to Timothy that they had been seeing him everywhere they went. Timothy replied, "[P]robably not and just have a good time," and that he did not know them. Timothy saw the three men again later and said to the third man, who had a muscular build and a spiky hairstyle, "Gae Saeg Ki," which meant low life dog. A brief scuffle ensued with minor pushing and shoving, but it ended and they separated.

At around 2:00 a.m., Timothy's group left the bar and stood outside discussing where they would go next. The area in front of the M2 Bar was well-lit. A few minutes later, the three men with whom Timothy had scuffled exited the bar and approached Timothy's group. An individual wearing a white tank top said, "[Y]ou call me Gae Saeg Ki." Timothy and his friends tried to calm things down, denying that Timothy had made that statement, and saying they did not want to fight and they should all go home. The man in the tank top began pushing and shoving and the two groups began to tussle. Three or four other men arrived, appellant among them, and joined the three men who were confronting Timothy and his friends.

The man in the white tank top suddenly grabbed Timothy by the neck and punched him in the face. Timothy's friends, including Michael, tried to stop the scuffle. Someone

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[2] Because various people involved in this case share surnames, we refer to some individuals by their first names, and to others by both their first and last names, in order to avoid confusion.

pushed Michael. A security guard employed by the bar, Jose Lopez, also attempted to stop the fight. Timothy then saw someone pull out a gun but did not see the gunman's face well. Jin Hong Mo, who was standing two or three feet away from Michael, saw appellant pull out a gun and try to hit Timothy with it. Lopez also saw appellant (described by Lopez as an Asian male age 20 to 25 wearing a black t-shirt and jeans) pull out a gun and strike someone in the head twice with it. Lopez was standing one or two feet from appellant. After striking Timothy with the gun, appellant fired the gun in Timothy's direction. Michael, who was positioned between appellant and Timothy, was shot in the left side of his head and fell to the ground.

Lopez did not see Michael being shot because as soon as he saw appellant pull out the gun he ran toward the bar. Lopez heard a total of four gunshots being fired by the time he reached the door of the bar. Timothy and Jin Hong Mo said that after firing the gun twice in Timothy's direction and striking Michael, appellant said, "Fuck you," and fired twice more. Jin Hong Mo saw that appellant fired the last two shots into the air. A surveillance camera trained on the front entrance of the bar recorded parts of the incident.

The members of appellant's group ran toward the cars in which they had arrived, including a silver Mercedes or BMW that was double parked on Manhattan Place, and a white Chrysler convertible that was in the bar parking lot. They all entered the cars and drove away. Lopez specified that he saw the gunman leave in the same car in which he had arrived, a four-door silver Mercedes or BMW parked on Manhattan Place. Jin Hong Mo stated at trial that the shooter and his friends left the scene in two cars, a white convertible and a dark car, and he did not see in which vehicle appellant left. At the preliminary hearing he testified that the shooter left in the white convertible, or at least ran in the direction of that vehicle.

Jae Goon Kim, who had been a police officer in Korea, tried to administer CPR to Michael, without success. An autopsy later revealed that Michael died from injuries caused by a bullet that entered just above his left eye, pierced his brain, and exited through the back of his head. Timothy had two wounds on his head: the first was a grazing wound on the left side of his head that required stitches, and the second was an

injury on the top middle portion of his head. Timothy felt that something had hit his head to create one of the wounds.

II. The Police Investigation

Police officers and paramedics responded to the scene. Los Angeles Police Detective Jay Balgemino recovered four shell casings from the area. Los Angeles Police Detective Matthew Gares viewed the bar's surveillance tapes.

A. The Interview of Lopez

Police interviewed Lopez on June 7, 2009, and recorded the interview. Lopez stated that a gray Mercedes S440 arrived and four or five people exited from it. Those individuals started the altercation and Lopez stepped in to intervene. He said the gunman, who was with the group that arrived in the Mercedes, had Asian features, short hair, stood five feet six inches tall, weighed about 130 pounds, and was wearing a black long-sleeved shirt. The gunman took out a black automatic handgun and pistol-whipped someone twice, then shot that person twice in the face. Lopez "stepped back" from the altercation as soon as he saw the gun.

B. The Photographic Lineup Conducted With Lopez

On June 8, 2009, police officers conducted a photographic lineup with Lopez at his home. The lineup was audio taped and the defense played the tape for the jury. The detectives noted that when he was presented with a photographic six-pack, Lopez's attention was immediately drawn to appellant's photograph at the bottom right corner, then he looked up nervously. Lopez initially said he did not remember. He stated he was afraid because the people involved knew where he worked. He was hoping for a reassignment of his security guard duties to a new location. He was then directed to look at the photographs one at a time. He eliminated five photographs, one by one, because they did not depict the gunman. Viewing the last remaining photograph, Lopez said, "He

looks like him. It's his skin, the hair[,] and he looks like him." Lopez circled the photograph of appellant and placed his initials on it.

Lopez testified that he recognized appellant as the shooter as soon as he saw appellant's photograph. He was certain, but he did not want to identify the photograph immediately and implicate anybody because the people involved knew where he worked. He also said that the officers were talking and there was no opportunity for him to immediately identify appellant.

During the preliminary hearing, Lopez did not immediately recognize appellant in court because his hair was styled differently and also because Lopez was scared.

C. Appellant's Arrest

Information obtained by the police investigation indicated appellant was the shooter. Police officers went to appellant's home in La Habra Heights on June 7, 2009. They spoke to appellant's mother but did not find appellant inside the house. They found in a dresser in appellant's bedroom an unopened package of gun grips, which could be used on a variety of different guns of different calibers and with different barrel sizes.

The police received information that appellant was at an apartment in Hacienda Heights but they did not find him there. Appellant's father eventually agreed to tell the police where appellant was if they agreed to arrest him in a "low key" manner rather than "SWAT style." Appellant's father led the police to a home in Rowland Heights. Appellant's father entered the home and led appellant out to the police officers. Appellant was placed under arrest.

D. The Photographic Lineup Conducted With Jin Hong Mo

On June 9, 2009, Detective Gares and Detective George Lee showed a photographic six-pack to Jin Hong Mo. Without hesitating, Jin Hong Mo identified appellant as the shooter. Jin Hong Mo circled appellant's photograph and placed his

initials on it. Jin Hong Mo also identified appellant in court at the preliminary hearing in January 2010.[3]

E. The Photographic Lineup Conducted With Timothy Lee

Police officers conducted a photographic lineup with Timothy. He identified appellant as having been at the scene. However, he did not see the shooter's face well and did not indicate that appellant was the shooter.

III. Defense Evidence

Dr. Scott Fraser testified that eyewitnesses have a significantly lower rate of correctly identifying someone if the event they witnessed was highly stressful, if a weapon was present, and if the witness belonged to a different race than the suspect. Even if a witness expresses a high degree of certainty regarding the identification, he or she is as likely to be mistaken as someone who expresses some uncertainty.

Los Angeles Police Officer Maria Soto responded to the scene of the shooting on June 7, 2009, and spoke to Lopez. Lopez told her he observed the confrontation but not the shooting. While he was trying to break up the fight, he saw someone pull out a gun and pistol whip the victim. When he saw the gun Lopez ran into the bar. Officer Soto noted that the area in front of the M2 bar where the shooting occurred was well lit.

Los Angeles Police Detective Ron Kim prepared the photographic six-pack used to conduct the lineups in this case. He did not ascertain whether the people pictured in the six-pack, other than appellant, were Korean.

Wendy Lo knew appellant from high school. On the evening of the shooting, June 6, 2009, she saw appellant at around 9:40 p.m. at the Gamm bar located at Sixth Street and Kenmore. Appellant was with a different group of people than Wendy, but he

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[3] Police detectives testified at trial that during the preliminary hearing, appellant's hair was styled differently than it was at trial; at the preliminary hearing he had long bangs that came down near his eyebrows and swept across his forehead.

also did some drinking with Wendy's group. Wendy said that about 30 minutes after he arrived, appellant paid for Wendy's table and said he was going to leave.

Annie Kim knew appellant and his family for a long time. On the night of the shooting, Annie arrived at the Gamm bar around 10:00 p.m. and was in the same group as appellant. She also saw Wendy's group at the bar. Annie recalled that appellant left around 1:50 a.m., by himself, in his black BMW. She saw a group of four people get into a white convertible and leave at about the same time as appellant. At about 2:30 a.m., Annie went to her friend Minh Su Park's house, located near Halliburton and Colima, to retrieve her car. She saw appellant at Minh's house. Annie stayed at Minh's house for about 10 minutes then left to drive one of her friends home.

At 11:30 a.m. on June 7, 2009, Annie went to Minh's house again and saw appellant there. Friends of Minh's, including appellant, were helping Minh move to a new place near Hacienda Boulevard and Tetley. Later that night, the police went to Minh's apartment and ordered everyone out at gunpoint. Annie was placed in handcuffs and was interviewed by the police that evening. She told Detective Gares that she had not seen appellant. Thereafter, Annie changed her story when the detectives told her they knew appellant had been there at the apartment. Annie stated that appellant called her during the period before trial to arrange for her to meet with his lawyers.

Defense investigator Eric Lessard stated that the distance from the façade of the M2 bar to the edge of the curb was 6 feet 11 inches. The nearest lamppost was about 137 feet and 9 inches from the entrance of the M2 bar. The sign for the M2 bar, located above the building near the entrance, was another light source. There was an awning at the entrance that extended almost to the curb, falling short of the curb line by five inches. Lessard visited the M2 bar at night and observed that the area in front of the bar was lit by a "great deal of light," but that the awning cast a shadow onto the entrance area, making it somewhat darker.

Lessard measured appellant's height to be 5 feet 11 inches in shoes. He testified that the gun grip recovered from appellant's home would fit a .45 1911, a semi-automatic pistol, and was the most popular model of grip on the market. It also could be used for a

BB gun. Lessard said that people who use that type of grip for BB guns were military gear enthusiasts.

DISCUSSION

I. The Photographic Six-Pack Was Not Unduly Suggestive

Appellant contends, as he did at trial, that the photographic six-pack used by the police, from which the eyewitnesses identified appellant as the shooter, was impermissibly suggestive because distinctive characteristics of appellant's picture made him stand out from the other five photos. Appellant further contends on appeal that comments made by the police detectives to the eyewitnesses while conducting the photographic lineups with Lopez and Jin Hong Mo further enhanced the suggestiveness of the photographic lineup. We conclude that the photographic six-pack was not unduly suggestive and the identifications were reliable. Further, appellant forfeited any argument that the police statements to the witnesses were improper and suggestive by failing to make those arguments to the trial court as part of his motion to suppress the evidence of the identifications.

"[A] violation of due process only occurs '"if a pretrial identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' [Citations.] 'Whether due process has been violated depends on "the totality of the circumstances" surrounding the confrontation. [Fn. omitted.] [Citation.]' The burden is on the defendant to show that the identification procedure resulted in such unfairness that it abridged his rights to due process. [Citation.]" [Citations.]' [Citation.] [¶] Generally, a pretrial procedure will only be deemed unfair if it suggests in advance of a witness's identification the identity of the person suspected by the police. [Citation.] However, there is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance. [Citation.] Nor is the validity of a photographic lineup considered unconstitutional simply where one suspect's

photograph is much more distinguishable from the others in the lineup. [Citations.]" (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051-1052 (*Brandon*).)

"Defendant [bears] the burden of showing an unreliable identification procedure. [Citation.] 'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.] In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

"The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. [Citation.] Appellant must show unfairness as a demonstrable reality, not just speculation. [Citation.]" (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.)

The constitutionality of an identification procedure presents a mixed question of law and fact, and "consistent with '[the Supreme Court's] usual practice for review of mixed question determinations affecting constitutional rights' (*People v. Cromer* [(2001)] 24 Cal.4th [889,] 901), we conclude that the standard of independent review applies to a trial court's ruling that a pretrial identification procedure was not unduly suggestive." (*People v. Kennedy* (2005) 36 Cal.4th 595, 609, disapproved of on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459; see also *People v. Avila* (2009) 46 Cal.4th 680, 698-699 (*Avila*).)

Appellant has not met his burden of demonstrating the photographic lineup was unduly suggestive. Appellant points to characteristics of his photograph that purportedly distinguished him from the other participants in the photo six-pack, making the lineup

impermissibly suggestive. Specifically, he complains that his photograph was noticeably much lighter than the others, his eyebrows were much thinner, and he was the only one wearing a black shirt. However, number three also had a relatively light complexion, and number two was a noticeably darker photograph than the others. Number three also had thin eyebrows and was wearing a dark shirt. Number four was the only one in a white tank top. In other words, there were noticeably different characteristics about other photographs that could similarly have been said to distinguish them from the other photos. The people depicted all had similar lengths and colors of hair and were reasonably similar in appearance.[4] Our independent review of the six-pack does not reveal any suggestion of "'"the identity of the person suspected by the police."' (*People v. Ochoa*[, *supra*,] 19 Cal.4th [at p.] 413.)" (*Avila*, *supra*, 46 Cal.4th at p. 699.)

Under the totality of the circumstances, the identifications themselves were reliable. Lopez and Jin Hong Mo had ample opportunity to observe appellant on the night of the incident and they separately identified him as the shooter. The area was well lit and both witnesses were standing in very close proximity to appellant. At the preliminary hearing and at trial, Jin Hong Mo positively identified appellant. Lopez did not identify appellant at the preliminary hearing but did so at trial, explaining that at the preliminary hearing appellant's hair and clothes were different so he did not immediately recognize him. There is no evidence in the record that the police detectives said anything to the eyewitnesses to suggest that they believed one of the photographs was of the person who shot Michael. The pretrial identification procedure was not impermissibly suggestive and the identifications themselves were reliable.[5]

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[4] Jae Goon Kim also was shown the six-pack and made no identification, and Timothy viewed the six-pack and said appellant was at the scene but he did not identify appellant's photograph as depicting the shooter. This tends to indicate that the six-pack was not unduly suggestive of the identity of the suspect.

[5] To the extent appellant argues that his eyewitness identification expert's trial testimony would support a finding that the identifications were not reliable, he is arguing matters of weight and credibility that were matters for the jury to decide.

Appellant argues on appeal that in conducting the photographic lineups with Lopez and Jin Hong Mo, the police made suggestive remarks that could have induced a misidentification. Specifically, when Lopez was reluctant to make an identification, the officer said that he need not worry about incriminating someone because the jury decided guilt and if he pointed out someone who was innocent, he would be found innocent. After Jin Hong Mo immediately identified number 6 as the gunman, he asked the detectives whether he had made the correct choice and was told that he had.

However, appellant forfeited any argument that the police statements to the witnesses were improper and suggestive by failing to make those arguments to the trial court as part of his motion to suppress the evidence of the photographic identifications.[6] In any event, the officers' statements did not suggest which picture the witnesses should choose before they made a choice. Thus, the statements did not undermine the reliability of the photographic identifications.[7]

II. Exclusion of Evidence Regarding the Park Brothers

Appellant contends that the trial court violated his right to present evidence tending to establish third party culpability because the court excluded evidence regarding Alvin and Kevin Park's involvement in the shooting. We do not find this contention persuasive.

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[6] Appellant briefly mentioned the officers' comments in his motion for new trial, but focused on the suggestiveness of the photographic six-pack itself. He does not argue on appeal that the trial court erred in denying his motion for new trial on the basis of the officers' comments during the photographic lineups.

[7] Appellant argues that the trial court should have suppressed Jin Hong Mo's identifications made after the inappropriate reassurance was given that he had picked the right suspect. However, he did not make this argument in the trial court and has thus forfeited the argument on appeal.

In addition, because we have found Jin Hong Mo's photographic identification was reliable, appellant's contentions concerning his purportedly tainted in-court identifications at the preliminary hearing and at trial also must fail. (See *People v. Suttle* (1979) 90 Cal.App.3d 572, 580.) The trial court properly did not suppress Jin Hong Mo's in-court identifications. (*Brandon*, *supra*, 32 Cal.App.4th at p. 1052.)

A. Factual Background

Before trial, appellant brought a motion seeking to exclude Alvin Park's statement to the police, during which he indicated that appellant was the shooter, on the basis that his statement was coerced. The transcript of the police interview with Alvin Park attached to the defense motion included Alvin Park's statement that he was the person Timothy insulted and that he called his brother Kevin Park, who thereafter arrived at the M2 bar in his white convertible. The court ruled that the statement was not coerced and could be introduced if the People called Alvin Park to testify at trial. However, Alvin Park was not called to testify by either party.

Appellant now contends that "the trial court twice refused to allow the defense to introduce any evidence regarding the Park brothers." The two occasions to which appellant refers are as follows.

1. Placing the Park Brothers in the Photographic Lineup

During cross-examination of Detective Gares regarding Lopez's photographic identification of appellant, defense counsel asked if the detective knew individuals named Alvin and Kevin Park and whether he was aware of who they were. The detective answered yes to both questions. Defense counsel then asked if the detective had placed Alvin or Kevin in a photo spread. The trial court sustained the People's relevance objection to that question. The defense made no offer of proof relating to this line of questioning.

2. Annie Kim's Testimony

Prior to the defense's presentation of evidence, the trial court held an Evidence Code section 402 hearing to discuss the admissibility of Annie Kim's testimony that she saw appellant leave the Gamm bar in a black BMW at about the same time that she saw Kevin Park and two or three other people leave the Gamm bar in a white Chrysler. It was anticipated Annie Kim would also testify that appellant helped move furniture for a

mutual friend of Kevin Park's and that appellant was friendly with a third Park brother. The People sought exclusion of the testimony associating the Park brothers with the white car unless the defense could make an offer of proof sufficient to meet the requirements for introduction of third party culpability evidence. Defense counsel responded that because the prosecution's "number one witness [said] that the shooter got into a white car," the testimony would cast doubt on the prosecution's evidence regarding the identity of the shooter.

The court agreed that, because the identity of the shooter was at issue and there was evidence indicating appellant did not go to the car the shooter went to after the shooting, Annie Kim could testify that she saw appellant leave the Gamm bar alone in his dark BMW and saw other people leave at the same time in a white convertible. Counsel for the People argued that Annie Kim should not be permitted to mention the name Park as being one of the individuals who left in the white convertible, given that defense counsel previously asked whether Detective Gares had put the Park brothers in a photographic lineup and the prosecution's relevance objection was sustained. Defense counsel was unwilling to stipulate that Annie Kim would not mention Kevin Park by name. The trial court ruled that the People's concerns about the speculative nature of the third party culpability evidence were legitimate and therefore Annie Kim should be admonished not to mention the Parks by name, although she could testify she saw unnamed individuals leave the Gamm bar in a white convertible at the same time appellant left in his dark BMW.

B. The Applicable Law

In reviewing the trial court's evidentiary rulings, we apply the abuse of discretion standard. The trial court has the discretion to determine whether evidence is relevant, and on appeal we will not disturb the exercise of that discretion unless it was arbitrary, capricious, or patently absurd, resulting in a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

As did the trial court, we use the two-step test adopted in *People v. Hall* (1986) 41 Cal.3d 826 for determining the admissibility of proffered third party culpability evidence. First, we determine whether there is direct or circumstantial evidence that both links the third party to the actual perpetration of the crime and is capable of raising a reasonable doubt of defendant's guilt. (*Id.* at p. 834; *People v. DePriest* (2007) 42 Cal.4th 1, 43 ["[T]hird party culpability evidence is relevant and admissible only if it succeeds in 'linking the third person to the actual perpetration of the crime.' [Citations.]"].) Second, we must decide whether the evidence is substantially more prejudicial than probative under Evidence Code section 352. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

C. Analysis

Appellant contends that "[t]here was evidence introduced or available for introduction to show that (1) Alvin was an immediate participant in the argument which led to the shooting, (2) that he called his brother Kevin to come to the scene, (3) that Kevin was among those who arrived to back up Alvin and the others, one of whom was the gunman, and that (4) the gunman was seen getting into Kevin's car." However, there was no evidence introduced or *available for introduction* to prove that Alvin participated in the argument leading to the shooting and called his brother to come to the scene, or that Kevin was among those who arrived to back up Alvin. That information was contained in Alvin Park's statement to the police, but when defense counsel asked Detective Gares about placing the Park brothers in a photographic lineup, counsel did not make any offer of proof to that effect when the court sustained the People's relevancy objection.[8] Later, when the court and counsel were discussing Annie Kim's anticipated testimony, the People had rested without calling Alvin Park, so the defense could have had no expectation that evidence would be introduced regarding Alvin and Kevin Park's

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[8] The trial court's ruling was correct. It was clearly irrelevant whether the Park brothers' photographs were or were not included in a photographic lineup. The police officer's opinion about whether the Parks were suspects was inadmissible hearsay and irrelevant.

roles in the incident. As such, the defense was unable to present or offer to present direct or circumstantial evidence that linked the Parks to the actual perpetration of the crime and was capable of raising a reasonable doubt of appellant's guilt. Nor was there evidence to establish the Park brothers had motive and opportunity to kill the victim.

Annie Kim was properly *permitted* to testify that several people left the Gamm bar in a white convertible at the same time appellant left that bar in his black BMW, and the defense elicited from Jin Hong Mo that he had testified at the preliminary hearing that the shooter left the scene in a white convertible. Thus, the defense was permitted to introduce evidence tending to show that appellant was not the shooter. What the defense was *not* permitted to do was introduce evidence purporting to link the Park brothers to the shooting without having established the required nexus between the Park brothers and the crime by proffering *available, admissible evidence.* We therefore conclude that the trial court did not err in ruling that Annie Kim could not identify Kevin Park by name as the driver of the white convertible. Indeed, even if we were to conclude the ruling was error, such error would be harmless beyond a reasonable doubt, as it would not undercut the definitive identifications made by Lopez and Jin Hong Mo.

III. Admission of the Gun Grips

Appellant next argues that the trial court erred in allowing the prosecution to introduce over defense objection an unopened package of gun grips that was found during the search of appellant's home. He contends that because the weapon used to commit the murder was not found and there was no evidence connecting appellant to the murder weapon, the gun grips could have been considered by the jury for an improper purpose, i.e., as evidence of appellant's propensity to possess and use guns. He contends the gun grips were irrelevant and unduly prejudicial.

Although the court and the parties appear to have assumed that there was evidence that the shell casings found at the scene were nine millimeter, we have not been cited to such evidence and have not found such evidence in our own review of the record. Appellant did not dispute at trial nor does he dispute on appeal that the gun grips would

fit the caliber of gun apparently used in the murder (along with a multitude of other calibers of guns), but we do not find evidence in the record to directly establish that fact.

Assuming without finding that the trial court erred in admitting the gun grips, we find any error was harmless. Despite appellant's arguments to the contrary, the eyewitness identifications of appellant as the shooter were solid and compelling evidence of his guilt. On the other hand, the evidence regarding the gun grips carried very little weight. Defense counsel was able to quite effectively undercut the value of the evidence by demonstrating the gun grips could fit any number of guns, even military replicas or air guns. Even if we assume that the jury might have viewed the gun grips as propensity evidence, merely having an unopened package of gun grips is not the type of propensity evidence that implies violent tendencies. It implied, in a mild and noninflammatory manner, only gun ownership. The prosecutor did not place undue emphasis on the gun grip evidence or imply that appellant had a propensity for violence because he possessed the gun grips. As such, we conclude that any error in admitting the gun grips was harmless, whether measured under the *Watson*[9] or the *Chapman*[10] standard.

IV. Prosecutorial Misconduct

Appellant contends that three instances of prosecutorial misconduct compel reversal of his conviction. We disagree.

A. Questions Regarding the Police Investigation

While questioning Detective Gares, the investigating police officer, the prosecutor asked, "And following the completion of a series of [witness] interviews, did you determine the identification, at that point of the investigation, of the shooter?" The detective replied in the affirmative. Defense counsel objected to the form of the question as calling for a conclusion. The trial court overruled the objection, stating, "there's no

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9 *People v. Watson* (1956) 46 Cal.2d 818, 836.

10 *Chapman v. California* (1967) 386 U.S. 18.

conclusion stated, though, as to who the shooter was or wasn't." The prosecutor continued, "So you interviewed the witnesses, and at some point during that time, you believed that you had the identification of the shooter; is that correct?" The detective answered, "Yes," and the prosecutor asked what he did immediately following that. Detective Gares said he instructed another detective to prepare a photographic six-pack. The prosecutor had the detective identify the six-pack that was prepared, and asked if he saw anyone he recognized. Detective Gares indicated appellant was pictured in photo number six. The prosecutor asked if he then began the process of trying to locate appellant, and Detective Gares began to respond, "Once I learned the identity of the shooter, then I immediately . . . ." Defense counsel objected. The court said, "At this point, I do want to admonish you, Ladies and Gentlemen, that what the witness believes with respect to who did or did not shoot is not relevant in any respect whatsoever. And it's understood, of course, that you were not there at the time of the shooting; correct?" Detective Gares said, "Yes, sir." The court continued, addressing the jury: "So it would be pure speculation and not to be considered by you for any purpose whatsoever." The second prosecutor stated, "Detective, just so that the jury is clear, you're explaining the entire process of the investigation and what you did; correct?" Detective Gares said, "I'm explaining the process of it. Someone was presented to me as the shooter." Defense counsel objected and asked to approach.

After a side bar conference during which defense counsel argued that the detective was inappropriately implying to the jury that he was privy to additional evidence that established appellant's guilt, the court admonished the jury as follows: "Just to be clear about this, Ladies and Gentlemen, this evidence is being offered to explain certain steps that the witness took, not to suggest that any one person, based on the witness' information, is guilty of anything, but it merely explains why he did certain things, took certain steps."

Appellant contends that Gares's testimony "planted the idea that the police had sufficient evidence to conclude that [appellant] was guilty even before the witnesses who testified at trial made their identifications." He asserts that the trial court's admonitions

could not cure the effect of those statements, and that the prosecutor committed misconduct by eliciting such statements and by failing to warn the detective not to make such statements.

We conclude that there was no misconduct here. The prosecutor did not intentionally elicit inadmissible testimony. Rather, he merely questioned the detective regarding the investigation that led to appellant's photograph being included in the photographic lineup. The cases relied upon by appellant are readily distinguishable. (See *People v. Bentley* (1955) 131 Cal.App.2d 687, 690-691, disapproved on other grounds in *People v. White* (1958) 50 Cal.2d 428 [police officer deliberately referred to defendant being a suspect in prior similar case and district attorney knew or should have known officer would so testify and should have warned him not to make statement]; see also *People v. Schiers* (1971) 19 Cal.App.3d 102, 112-113 [officer referred to use of lie detector test at preliminary hearing, so prosecution obligated to warn officer not to repeat reference at trial].)

When viewed in the context of the prosecutor's line of questioning, the statement "Someone was presented to me as the shooter" did not suggest to the jury "that the police had sufficient evidence to conclude that [appellant] was guilty even before the witnesses who testified at trial made their identifications." Rather, the detective was explaining the process he followed in conducting his investigation *without* revealing inadmissible and prejudicial details.

In addition, the trial court effectively admonished the jury that what the detective believed about the shooter's identity was not relevant, and that the evidence was offered to explain the steps the witness took, not to suggest appellant's guilt. We presume that the jury followed the court's instructions. (*People v. Hardy* (1992) 2 Cal.4th 86, 208.)

B. Vouching for Personal Knowledge of Guilt During Closing Argument

Appellant contends that during closing argument, the prosecutor committed misconduct by stating that "when we filed charges of murder . . . in Count I, we believe that it is murder in the first degree because he made that decision to go there to that

location with the gun." Appellant contends that this amounted to an assertion that the district attorney's office believed he was guilty when it formulated the charges against him. We disagree.

As the trial court said, the comment was proper because "[b]y implication[,] it's based on the evidence." (See *People v. Frye* (1998) 18 Cal.4th 894, 971 [so long as prosecutor's statements are based on facts of record and inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief, comments cannot be characterized as improper vouching], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) It is plain that in this case the prosecutor was explaining the People's position that the evidence tending to show premeditation and deliberation was sufficient to support a conviction of murder in the first degree rather than in the second degree, and nothing more. The prosecutor was not commenting on the state of the evidence before trial or on his personal belief in appellant's guilt. "When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citations.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) We conclude there is no reasonable likelihood the jury construed the prosecutor's remarks in an objectionable fashion. Accordingly, there was no prosecutorial misconduct in this instance.

C. Disparaging Defense Counsel

Finally, appellant contends that during closing argument the prosecutor inappropriately disparaged defense counsel's cross-examination of Jin Hong Mo, stating, "We see the way that they were attacking Mr. Mo and the way that they were trying to show he was inconsistent of some sort. They also showed you certain things that showed that basically what they are trying to do is manipulate his facts that he gave to us." Defense counsel objected and the trial court stated to the jury, "Well, this is certainly argument and again remember, everyone, irrespective who says anything purporting it to be fact in this case, ultimately you must decide the case based on the evidence, so please

keep that in mind." Appellant contends that this amounted to a personal attack on the integrity of defense counsel. Again, we disagree and conclude that there was no misconduct.

"It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury [citation]. Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom. [Citations.]" (*People v. Bemore* (2000) 22 Cal.4th 809, 846 (*Bemore*).) However, a prosecutor may focus on the deficiencies in the defense case. For example, no misconduct was found in *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781, in which, "[w]hen commenting on defense counsel's closing argument, the prosecutor asserted that because the facts were against appellant, counsel had to 'obscure the truth' and confuse and distract the jury in order 'to manufacture doubt even where none exist[ed.]' The prosecutor continued, citing specific examples in which she disagreed with defense counsel's characterization of the facts, and suggested that counsel's argument was not made in 'pursuit of the truth' but was instead meant to 'deceive,' 'distract,' and 'confuse' the jurors." The appellate court concluded that "The prosecutor's remarks were proper in that they served as 'a reminder to the jury that it should not be distracted from the relevant evidence and inferences that might properly and logically be drawn therefrom.' (*People v. Bell* (1989) 49 Cal.3d 502, 538.)" (*Williams*, *supra*, 46 Cal.App.4th at p. 1781.)

In a similar context, our Supreme Court has held that a prosecutor's argument that "'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something'" did not constitute misconduct. (*People v. Medina* (1995) 11 Cal.4th 694, 759.) "[A] prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. (See *People v. Frye*[, *supra*,] 18 Cal.4th [at pp.] 977-978 [no misconduct where prosecutor accused counsel of making an '"irresponsible"' third party culpability claim].)" (*Bemore*, *supra*, 22 Cal.4th at p. 846.) Here, the prosecutor was not attacking the personal integrity of defense

counsel, but rather was commenting on the defense strategy employed while questioning Jin Hong Mo and on the defense's characterization of Jin Hong Mo's testimony. This constituted fair comment on the defense case. While the prosecutor used the word "manipulate" in reference to the facts to which Jin Hong Mo testified, the prosecutor did not argue that defense counsel actually fabricated or manipulated the evidence in a manner that involved dishonesty. This was not an attack on defense counsel's personal integrity.[11]

V. The *Wheeler*/*Batson* Motions

Finally, appellant contends that during voir dire the prosecution exercised its peremptory challenges in a discriminatory manner to systematically exclude male Hispanics, African-Americans, and specifically female African-Americans. Appellant contends the court erred in denying his *Wheeler*/*Batson*[12] motions concerning those challenges. We are not persuaded.

A. The Applicable Law

When a party makes a *Wheeler*/*Batson* motion, "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.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).) A defendant establishes a prima facie case "by producing evidence sufficient to permit the trial judge to draw an inference that

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11 Having concluded that no error was committed during the trial (other than arguably the admission of the gun grips, which error was clearly harmless), appellant's claim of cumulative error necessarily fails.

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

discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170 (*Johnson*).)

"'Jurors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.' [Citations.]" (*People v. Watson* (2008) 43 Cal.4th 652, 670.) Counsel also may properly rely on a juror's body language or manner of answering questions in exercising a challenge. (*People v. Reynoso* (2003) 31 Cal.4th 903, 917.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

"'When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling. [Citations.] We will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question.' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1101 (*Guerra*), disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, itself disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 74 (*Lancaster*) [where trial court finds no prima facie case, we review voir dire to determine whether totality of relevant facts supports inference of discrimination].)

B. Background

During voir dire, the defense objected that "the last four or five [excusals] by the People have been male Hispanics. 5159, 2092, 8384. And there is a possible male Hispanic in the pool and I am making a *Wheeler* motion. 5592, adult children. Lives in Montebello and prior jury experience. 2092 is a clothing manager. And 8384. It appears to be a pattern on excuses."[13] The court said to the prosecutor, "Without making a

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13 There was no Prospective Juror No. 8384, nor No. 5592.

finding one way or the other, do you want to say anything?" The prosecutor said he would respond to two. He started to mention No. 5159, but the court interjected that the real issue was with the most recent one, which was No. 3074. The prosecutor pointed out he had a family member who went to prison for murder. "The one counsel is referring to, 5159, he said he needed 110 to 120 percent." The court pointed out that the panel was comprised of one-third female Hispanics, and the defense replied that it was referring to removal of male Hispanics. The court denied the motion.

Later, an African-American male was excused after steadfastly maintaining that he did not trust the police. Defense counsel expressed concern that African-Americans were underrepresented because the one female African-American on the panel had been excused by the prosecution. However, defense counsel did not indicate that her removal had been without cause. The court again denied the motion.

The defense later renewed its motion, arguing that out of 12 peremptory challenges, one was the only African-American, and five were male Hispanics, including the most recent one.[14] Without making a finding whether a prima facie case was established, the court asked the prosecutor if he wished to respond. The prosecutor replied that the juror most recently removed (Prospective Juror No. 2922) had said, "I hope he is innocent." The court indicated that it did not have the sense that either side was offering pretextual reasons for removing prospective jurors from the panel. Defense counsel said, "We have 12 jurors, and when six of them are the only African-American and five male Hispanics, I think there is a pattern." The court then proceeded with jury selection.

Defense counsel brought another *Wheeler* motion when a Latina woman was removed by the prosecution. The prosecutor responded that this juror said she was the defendant in a driving under the influence case in which she felt the police officer "just

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[14] Defense counsel specified that he was referring to Prospective Juror Nos. 2922, 1390, 2092, 3014, and 5159. It is apparent from the record of the voir dire proceedings that he was referring to No. 3074, rather than No. 3014.

straight out lied and she doesn't trust them based on that experience." The court denied the motion.

The defense again renewed its *Wheeler* motion when a second African-American woman (Prospective Juror No. 7910) was excused by the prosecution. The prosecution said, "The one I just kicked is an individual who required the People to have more than one witness that is believable plus physical evidence on top of that." The earlier juror (Prospective Juror No. 9334) reported having had unpleasant experiences with the Sheriff's Department in 1979. The court noted that neither side was required to "keep someone who is underrepresented as a class for the sake of keeping them irrespective of what that person might say that is otherwise objectionable." Defense counsel reiterated that it believed the prosecution's stated reasons were pretextual. The court disagreed, stating, "I don't get the sense that there is any effort on either side to systematically exclude any group on its face. I have seen both sides excuse people that under the circumstances might very well have prompted the making of a *Wheeler* motion." The court stated, "either way had it been raised, I saw reasons for excusing the juror in question as I do here." Accordingly, the court denied the motion.

C. Appellant's Contentions on Appeal

Appellant specifically focuses in this appeal on "the justifications given for the strikes against the two African-American women and one of the Hispanic men based, not on the specific statements in isolation, but in the context of the record as [a] whole" (citing *People v. Johnson* (1980) 26 Cal.3d 557, 577). He asserts that "their 'genuineness' is not supported by substantial evidence. Rather, they are revealed for what they are: pretexts for group bias."

Appellant argues that, although the African-American woman excused by the People said she would require the prosecution to have more than one believable witness plus physical evidence, she later said she would treat both sides even-handedly and would follow instructions from the judge even if they were contrary to her personal views. Appellant acknowledges that the second African-American woman had bad experiences

with the Sheriff's Department, but points out that she was a child at the time. Finally, as to the fifth Hispanic male who expressed that he hoped appellant was innocent, appellant argues that the prospective juror said it was a shame because appellant was a young kid, but he also said he could be impartial. Appellant argues that these remarks would not reasonably have moved the prosecution to exercise a strike. Rather, "they were part of the pattern by which the prosecution proceeded to remove five Hispanic males, and *all* African-Americans, from the jury."

Appellant further asserts that because the trial court "failed to find a prima facie case, the prosecution was never required to provide 'permissible race-neutral justifications' for the rest of its peremptory strikes of minority jurors." He argues that even if the justifications provided had been adequate, such partial justification of the many strikes could not dispel the pattern of discrimination asserted by defense counsel, as the Constitution forbids striking even a single prospective juror for a discriminatory purpose.

D. Analysis of the Trial Court's Rulings

1. The Two Female African-Americans

As stated above, the second African-American woman challenged by the People (Prospective Juror No. 7910) said she would require the prosecution to have more than one believable witness plus physical evidence in order to be convinced of a defendant's guilt. Although she later said she would treat both sides even-handedly and would follow instructions from the judge even if they were contrary to her personal views, the prosecution was not required to accept at face value her assurances that despite answering to the contrary she would have no problem applying the law. A juror's apparent uncertainty is a legitimate reason for exercising a peremptory challenge. (See *People v. Rushing* (2011) 197 Cal.App.4th 801, 812.)

The other African-American woman challenged by the People (Prospective Juror No. 9334) had reported that when she was a child during the 1970's the Sheriff's Department confiscated her brother's new motorcycle and wrongfully accused him of

having stolen it. It was apparent that she harbored ill will regarding the incident, and that it was perhaps a formative experience for her. Appellant's observation that the incident happened a long time ago when she was a child does not suffice to undermine the prosecutor's reliance on this factor in challenging her on that basis.

The trial court made a sincere and reasoned effort to evaluate the prosecutor's race-neutral reason for challenging the two jurors, and substantial evidence supports the trial court's finding that the prosecutor's reason was genuine and nondiscriminatory in each instance. (*Guerra*, *supra*, 37 Cal.4th at p. 1103.) We flatly reject appellant's assertion that the prosecutor's explanations were unworthy of credence.

2. The Five Male Hispanics

We note that, because the trial court did not make a finding that defense counsel had made a prima facie showing that the prosecutor exercised peremptory challenges based on race and denied the motion—and thus impliedly found that no prima facie showing was established—we are concerned here with the first step of the *Wheeler*/*Batson* analysis. When the trial court concludes that a defendant has failed to make a prima facie case, we review the voir dire of the challenged jurors to determine whether the totality of the relevant facts supports an inference of discrimination. (*Lancaster*, *supra*, 41 Cal.4th 50, 75.) When the record suggests grounds upon which the prosecutor might reasonably have challenged the juror or jurors, a defendant has failed to "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson*, *supra*, 545 U.S. at p. 170; see also *Guerra*, *supra*, 37 Cal.4th at p. 1101; *People v. Avila* (2006) 38 Cal.4th 491, 554 [no prima facie case established where record revealed "reasons other than racial bias for *any* prosecutor to challenge [juror]"].)

As detailed above, the prosecutor explained on the record his reasons for exercising peremptory challenges against three of the five male Hispanic prospective jurors. The record indicates the prosecutor's statement of reasons for excusing three of the five jurors: (1) Prospective Juror No. 3074 had a family member who went to prison

for murder; (2) Prospective Juror No. 5159 "said he needed 110 to 120 percent," referring to the quantum of evidence he would require the People to prove in order to convict; and (3) Prospective Juror No. 2922 expressed the hope that appellant was innocent. These statements provided a legitimate, race-neutral basis to excuse each of the three prospective jurors. (See *People v. Hartsch* (2010) 49 Cal.4th 472, 489 (*Hartsch*).) Appellant specifically addresses in his opening brief only the final juror, arguing that taken in context his statement was not troubling. However, viewed in context, the statement was in fact a clear expression of sympathy on which the prosecution could well rely in exercising a peremptory challenge. Even if reasonable minds could disagree, the trial court acted within its discretion in concluding that the challenges were not racially motivated.

The prosecutor did not state his reasons for removing the other two male Hispanic jurors, Prospective Juror Nos. 1390 and 2092, because when the fifth one was removed and defense counsel renewed his motion, the court again declined to make a finding that a prima facie case had been established.[15] The defense argued that out of 12 peremptory challenges, one was the only African-American, and five were male Hispanics. Taken alone, that fact would suggest a prima facie showing; however, the totality of the circumstances known to the trial court must be considered. Here, the record reveals that Prospective Juror No. 1390 reported that he had relatives who were wrongfully prosecuted for serious crimes by a corrupt district attorney's office, albeit in another state. Certainly that suffices as a nondiscriminatory reason for his removal.

Lastly, we consider Prospective Juror No. 2092. Review of the voir dire involving this juror is notable for the fact that he answered every question put to him in very few words and he volunteered no opinions whatsoever. Nothing in the record discloses a race-neutral reason for the prosecutor's decision to excuse this prospective juror.

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15 It would be preferable for purposes of developing the appellate record for the trial court to permit the prosecutor to provide justifications for excusing minority group jurors because it assists the appellate court in evaluating the merits of the claim in the event it disagrees with the trial court's conclusion on the first step of the *Wheeler*/*Batson* analysis. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13.)

Nonetheless, the exercise of a peremptory challenge against this prospective juror alone is not sufficient to raise the specter of group racial bias in jury selection. (See *Hartsch, supra*, 49 Cal.4th at p. 489, fn. 16 [although "the objective factors supporting the challenge of [the juror] are unclear," "it is still the case that the challenge of a single apparently qualified prospective juror does not suggest racial discrimination, 'particularly "given the legitimate role that subjective factors may have in a prosecutor's decision" to challenge or not challenge jurors peremptorily'"]; see generally *Lenix*, *supra*, 44 Cal.4th at p. 622 ["[m]yriad subtle nuances" not reflected in the record may shape an attorney's jury selection strategy, "including attitude, attention, interest, body language, facial expression and eye contact."].) Indeed, the court indicated that it did not have the sense that either side was offering pretextual reasons for removing prospective jurors from the panel. In denying the final *Wheeler* motion, the court stated, "I have seen both sides excuse people that under the circumstances might very well have prompted the making of a *Wheeler* motion." The court continued, "either way had it been raised, I saw reasons for excusing the juror in question as I do here." In sum, on the record before us, appellant has failed to meet his burden of demonstrating a prima facie case of discrimination in the prosecutor's use of peremptory challenges.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J. MANELLA, J.