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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. TYRONE MARCEL WILSON, Defendant and Appellant.	2d Crim. No. B250343 (Super. Ct. No. BA394308) (Los Angeles County)

Tyrone Marcel Wilson appeals the judgment entered after a jury convicted him of assault with a firearm (Pen. Code,[1] § 245, subd. (a)(2)) and found true a personal firearm use allegation (§ 12022.5). Appellant was acquitted on the charge of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 189, 664, subd. (a)). He admitted suffering two prior serious felony convictions that qualified as strikes (§§ 667, subds. (a)(1) & (b) - (i), 1170.12, subds. (a) - (d)), and serving two prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him to a state prison term of 39 years to

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

life. Appellant contends the court erred in denying his *Batson/Wheeler*[2] and *Romero*[3] motions. He also claims the court abused its discretion in failing to sanitize the prior convictions admitted to impeach him. We affirm.

STATEMENT OF FACTS

In February 2012,[4] appellant was living with his girlfriend Nancy Saracay and Saracay's two-year-old son Denari. Denari's father, Derrick DeShawn Potts, lived about three blocks away with his mother Robin McKinley and 14-year-old sister Taylor Jones. Potts was a member of the East Coast Crips gang and was known by his gang moniker "Rat."

On February 18, appellant went to his job at a nearby tattoo shop. He did not come home that night. Saracay later discovered that appellant was cheating on her with another woman. Saracay testified that she did not see or hear from appellant again until they reconciled in late March.

On February 19, Saracay and Potts got into an argument over the phone. Potts was angry that appellant was around Denari. Saracay said she did not need Potts to watch Denari anymore and hung up the phone.

Saracay took Denari to get pizza at a nearby restaurant. Potts sent Saracay a text message stating that he had seen her leave, then repeatedly called her on her cell phone. As Saracay was driving home, she saw Potts standing in the middle of the street. Saracay stopped her vehicle and began backing up. Potts ran up, punched Saracay in the face, and grabbed her by the hair. He took the keys from her vehicle and threw them to his cousin, who was standing nearby. Potts dragged Saracay out of her vehicle and

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[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 168.

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

[4] All further date references are to the year 2012.

assaulted her. Saracay broke free, grabbed Denari, and ran to her mother's house. Saracay called 911 and Potts ran away.

Later that afternoon, McKinley and Jones were at home when they heard someone outside yelling for Potts. They went outside and saw appellant standing on the sidewalk. McKinley asked appellant who he was, and Jones told her he was Saracay's boyfriend.

Potts was at his aunt's house next door. He came outside and approached appellant. Appellant greeted Potts as "Rat," and Potts asked appellant who he was. Appellant identified himself and said something about Saracay. An argument ensued and the two men began fighting. Jones saw appellant pull a silver revolver out of his sweatshirt pocket. Jones screamed that appellant had a gun and was going to shoot Potts. Potts held appellant's hands in an attempt to prevent appellant from shooting him. McKinley and Jones heard a gunshot. Jones saw blood coming out of Potts' head and told McKinley Potts had been shot.

McKinley tried to separate Potts and appellant. All three of them fell to the ground and appellant dropped the revolver. Appellant retrieved the weapon and ran away. Jones ran inside and called 911. McKinley drove Potts to the hospital, where he was treated for a gunshot wound to the head.

Saracay had no communication with appellant until he called her on or about March 22. He was arrested a week later. Appellant and Saracay spoke on the phone numerous times while appellant was in custody; portions of those conversations were played at trial. Appellant told Saracay to speak with McKinley and Potts prior to his preliminary hearing on April 12. Appellant wanted Saracay to "sit[] down and get[] an understanding with" McKinley. Appellant told Saracay to urge Potts to "handle it in the streets" with appellant when both men got out of prison. Appellant said it was not "gonna sit well with" Potts "to be running around with snitch on his jacket."

Appellant testified on his own behalf. On February 18, he spent the night with another woman. As he was walking home, someone told him Potts had assaulted

Saracay and had taken her keys. Appellant immediately went to Potts's house to retrieve the keys and "kick his ass" if necessary. Appellant did not have a weapon at the time.

Appellant arrived at Potts's house and called for him to come outside. McKinley came out and threatened to sic her dog on appellant. Potts came out of the house next door, walked up to appellant, and said, "Oh, that bitch done sent you over here huh?" Potts then punched appellant in the jaw with his fist. Appellant returned the blow and the fight was on. McKinley joined in and began hitting and scratching appellant. Appellant pushed McKinley and told her the fight was between him and Potts. As appellant said this, Potts pushed past McKinley with a gun in his hand.

Appellant rushed Potts in an attempt to disarm him. Appellant grabbed Potts's hands and they both fell to the ground. The gun fired while Potts was still holding it. Potts dropped the gun and it slid into the street. Appellant did not want to be shot, so he retrieved the gun and tossed it about a block away. He stayed in motels or on the beach until his arrest.

Appellant denied telling Saracay to try to prevent Potts and McKinley from testifying at appellant's trial. He also denied suggesting that he would have something done to Potts if he testified; rather, he had merely expressed his knowledge of the consequences Potts would suffer if he were labeled a snitch.

In 1993, appellant was convicted of voluntary manslaughter and robbery. He also has a 2003 conviction for selling drugs.

DISCUSSION

Batson/Wheeler

Appellant contends the trial court erred in overruling his *Batson/Wheeler* objections to the prosecutor's use of peremptory challenges against four African-American prospective jurors. Appellant, who is also African-American, claims the prospective jurors were excused in violation of his federal and state constitutional rights.

The federal and state Constitutions prohibit the use of peremptory challenges to exclude prospective jurors due to their race. (*Batson, supra*, 476 U.S. at p. 97; *Wheeler, supra*, 22 Cal.3d at pp. 276-277.) Claims that challenges have been used for

this purpose trigger a three-step inquiry. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).)

Here, the court did not expressly determine whether appellant made a prima facie showing of discriminatory purpose. Rather, the prosecutor immediately offered race-neutral reasons for exercising the peremptory challenges. "Accordingly, we express no opinion on whether defense counsel established a prima facie case of discrimination and instead skip to *Batson* 's third stage to evaluate the prosecutor's reasons for dismissing [the African-American] prospective jurors." (*People v. Mills* (2010) 48 Cal.4th 158, 174, fn. omitted.)

""In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" [Citations.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 787.) "Accordingly, because the trial court is 'well positioned' to ascertain the credibility of the prosecutor's explanations and a reviewing court only has transcripts at its disposal, on appeal '"the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" and will not be overturned unless clearly erroneous.' [Citations.]" (*Ibid.*)

Appellant brought a *Batson/Wheeler* motion after the prosecutor used three of her first six peremptory challenges on prospective Jurors Nos. 8, 9, and 12, all of

whom are African-American. The prosecutor offered that three of prospective Juror No. 8's nephews had been charged with murder and his family believed one of the men had been wrongfully convicted. This information led the prosecutor to conclude that prospective Juror No. 8 "would [not] be a good juror for the [prosecution] or for this case."

The prosecutor explained that prospective Juror No. 9 was excused because throughout her childhood she had witnessed her father commit domestic violence against her mother. The prosecutor reasoned, "[T]his is a case involving domestic violence. . . . I don't think that person is a good juror for this case given that the reason from the People's perspective that the defendant went over there and shot the victim is because the victim beat up his girlfriend." The prosecutor noted that another prospective juror who is not African-American had been excused for a similar reason.

The prosecutor excused prospective Juror No. 12 based on his response to a question asked by the court during voir dire. The court posited: "Let's say that since I am the judge and I get to kind of be the one that makes up the rules for how this court is run, that I decide rather than have the witnesses testify and have evidence presented, I am going to tell this jury I want the twelve of you to go into that jury room right now and reach a verdict. [¶] Juror number twelve, could you do so?" Prospective Juror No. 12 replied, "I can't" because "[t]hat's not fair." When asked why it would be unfair, the prospective juror responded, "Well it would be unfair for the defendant." The prosecutor believed this response demonstrated a bias in favor of appellant and noted, "[h]e's the only one that specifically said that it would be unfair to the defendant."

The court found the prosecutor had stated legitimate race-neutral reasons for exercising the peremptory challenges and accordingly denied appellant's motion. Appellant brought another motion after the prosecutor asked the court to excuse prospective Juror No. 5, who is also African-American. The prosecutor offered that the prospective juror "talked about reforming his life. One of the things [the] defense will be getting into is that [appellant] has now changed, reformed his life and become a different person. Juror No. 5 having gone through that experience himself I think he will be more

inclined to appreciate that story than perhaps another juror would and based on that I would like to kick him." The court ruled: "Once again, I'm going to find this is a neutral reason that the prosecutor has stated for exercising a peremptory for Juror No. 5. I'm going to deny your motion."

The court's factual findings that the prosecutor did not exercise her peremptory challenges in a discriminatory fashion are not clearly erroneous. The court properly accepted the prosecutor's explanation that prospective Juror No. 8 was excused due to the fact his nephews were convicted of murder. (See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 138 ["[A] prosecutor may reasonably surmise that a close relative's adversary contact with the criminal justice system might make a prospective juror unsympathetic to the prosecution"].) The prosecutor also gave legitimate reasons for believing that the other three prospective jurors would be biased in favor of the defense. Contrary to appellant's claim, the prosecutor gave a plausible explanation for her excusal of prospective Juror No. 12. A prosecutor's explanation need not rise to the level of a challenge for cause. (*Batson, supra*, 476 U.S. at p. 97; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122.) A juror may be excused even on a hunch. (*Gutierrez,* at p. 1122.) Even a trivial reason that is genuine and group-neutral will suffice. (*People v. Arias* (1996) 13 Cal.4th 92, 136.) That standard was met here.

We reject appellant's claim that the court was required to conduct further inquiry into whether appellant had established purposeful discrimination. "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*People v. Silva* (2001) 25 Cal.4th 345, 386.) "[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) The prosecutor's reasons were both plausible and factually supported. When the prosecutor's proffered justification for excusing prospective Juror No. 12 was initially unclear, the court conducted the necessary inquiry. Contrary to appellant's assertion, it is essentially of no

moment that the excused prospective jurors all said they would not be biased in favor of or against either party. Bias is often unconscious. The trial court, as sole arbiter of the prosecutor's credibility, found her to be genuine. There is thus no basis for us to disturb the court's denial of appellant's *Batson/Wheeler* motions.[5]

Failure to Sanitize Prior Convictions

At trial, appellant was impeached with his prior convictions for voluntary manslaughter (§ 192, subd. (a)), first degree robbery (§§ 211, 212.5, subd. (a)), and possessing cocaine base for sale (Health and Saf. Code, § 11351.5). He contends the trial court prejudicially erred in refusing to sanitize the prior convictions. We disagree.

Evidence Code sections 788 and 352 govern the admissibility of felony convictions for impeachment. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) The former section allows admission of felonies to attack a witness's credibility, while the latter gives the trial court discretion to assess whether the evidence is more prejudicial than probative. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.) The court's exercise of this discretion '"must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]"' (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

A court may sanitize a witness's prior conviction by allowing the prosecutor to refer to it only in a general manner. (*People v. Sandoval* (1992) 4 Cal.4th 155, 178.) Four factors guide the trial court's determination of whether to sanitize a prior: (1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of the prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what effect admission would have on a defendant's decision to testify. These guidelines need not be rigidly followed. (*People v. Mendoza, supra,* 78 Cal.App.4th at p. 925.)

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[5] As the People correctly note, there is no basis for us to conduct a comparative juror analysis because appellant does not rely on such an analysis and the record does not disclose the races of the seated jurors. (See *Lenix, supra*, 44 Cal.4th at p. 622.)

"While before passage of Proposition 8, past offenses similar or identical to the offense on trial were excluded, now the rule of exclusion on this ground is no longer inflexible [citations]." (*People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590.) Indeed, "[t]here is no automatic limitation on the number or nature of prior convictions of crimes involving moral turpitude that may be used to impeach a witness. [Citations.] . . . Although we must, of course, scrutinize with care the impeachment use of prior convictions of crimes identical to a charged offense because of the heightened prejudice, no rule dictates their exclusion." (*People v. Johnson* (1991) 233 Cal.App.3d 425, 459.)

The trial court did not abuse its discretion refusing to sanitize appellant's prior convictions. Simply referring to three unspecified felony convictions may have led the jury to speculate on the severity of appellant's criminal record. As our Supreme Court has recognized, sanitization presents a defendant with the "archetypal Hobson's choice of (1) remaining silent on the point and subjecting himself to . . . improper speculation by the jury, or (2) divulging the nature of his prior conviction and incurring an equally grave risk that the jury will draw an impermissible inference of guilt. Either way leads to prejudice[.]" (*People v. Rollo* (1977) 20 Cal.3d 109, 120, superseded by constitutional amendment on other grounds as stated in *People v. Castro* (1985) 38 Cal.3d 301, 307-308, 312-313.) Moreover, none of appellant's prior convictions is identical to the charged offense. Although two of the prior crimes involved violence, they were not so similar to the charged crimes as to mandate sanitization. The relative remoteness of the priors does not dictate against their admission because appellant spent the majority of the intervening years in prison. Finally, the court's refusal to sanitize the priors did not deter appellant from testifying.

Even if the court should have sanitized the prior convictions, the error would be harmless. Contrary to appellant's claim, the alleged error would not amount to a denial of due process. Any error in admitting prior convictions for purposes of impeachment is one of state law subject to review under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Collins* (1986) 42 Cal.3d 378, 390-391,

& fn. 12.) Accordingly, reversal would be compelled only if it is reasonably probable appellant would have achieved a more favorable result absent the error. (*Ibid.*) Here, the evidence of appellant's guilt was overwhelming. Moreover, the jury was instructed on the limited purpose of the evidence of appellant's prior convictions. We presume the jury followed those instructions. (See *People v. Cain* (1995) 10 Cal.4th 1, 34.) Appellant's claim that his prior convictions rendered the jury unable to "impartially and fairly evaluate the evidence" is refuted by the fact that the jury acquitted him of attempted willful, deliberate, and premeditated murder. (See *People v. Buice* (1964) 230 Cal.App.2d 324, 346.) Because there is no reasonable probability that appellant would have achieved a more favorable result had his prior convictions been sanitized, his claim of prejudicial error fails.

Romero Motion

Appellant asserts that the court abused its discretion in denying his *Romero* motion. He claims the nature and circumstances of the current offense, his criminal history, the remoteness of his prior strike conviction, and his background, character, and prospects, compelled the dismissal of one of his strike priors. We disagree.

Section 1385, subdivision (a) permits a trial court, in furtherance of justice, to dismiss a prior strike conviction for purposes of sentencing if the defendant falls outside the spirit of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) In deciding whether to dismiss a strike prior, the court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions [(i.e., strike convictions)], and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Ibid.*)

A trial court's decision to strike a prior conviction pursuant to section 1385, subdivision (a) is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*).) The burden is on the party attacking the sentence to show

that the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) "It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers*).)

Courts should not exercise their discretion to dismiss a strike prior unless the circumstances are "extraordinary." (*Carmony, supra*, 33 Cal.4th at p. 378.) The trial court did not abuse its discretion in concluding that no such circumstances were present here. The court reasonably found that appellant's "tragic upbringing in life" did not excuse or minimize his crimes and rejected the suggestion that Potts "maybe got what he deserved" such "that somehow we should spare [appellant] the consequences of his actions[.]" The court also properly rejected appellant's claim that he "changed his life" after his strike priors. The court reasoned, "He was only out of prison a relatively short time. He killed somebody. And yes, it was twenty years ago, but within just a short time of being released he was violated on parole, he picked up another felony conviction for possession for sale of narcotics, and went to prison again. [¶] And when . . . there's something that . . . he feels is wrong that's been done to his girlfriend, he doesn't call the police. You say he went over to talk to Mr. Potts, but he went over with a gun. . . . [¶] . . . [T]o go again with a gun, after having spent years . . . in prison for violent conduct, . . . I just am not able at this time in good conscience to strike a strike."

In challenging the court's ruling, appellant at most shows that reasonable people might disagree with the trial court's decision. That is not enough to compel the relief he seeks. (*Myers, supra*, 69 Cal.App.4th at p. 310.) Because the court's ruling is

not "so irrational or arbitrary that no reasonable person could agree with it" (*Carmony*, *supra*, 33 Cal.4th at p. 377), there is no basis for us to disturb it.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Kathleen Kennedy, Judge

Superior Court County of Los Angeles

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