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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>FABIAN HERNANDEZ JIMINEZ,<br><br>Defendant and Appellant. | B279690<br><br>(Los Angeles County Super. Ct. No. MA064945) |

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

Doris M. LeRoy, 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, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Fabian Hernandez Jiminez was convicted by jury on nine counts related to sexual assaults on children. He challenges the denial of his *Wheeler/Batson* motion. (*People v. Wheeler* (1978) 22 Cal.3d 258, overruled in part by *Johnson v. California* (2005) 545 U.S. 162; *Batson v. Kentucky* (1986) 476 U.S. 79.) We agree with the trial court that appellant cannot establish a prima facie showing of discrimination and therefore affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellant lived with his girlfriend M.R., her two daughters (M. and L.), appellant's daughter (R.), and R.'s younger brother. The testimony of appellant's daughter and M.R.'s two daughters established that appellant repeatedly sexually assaulted all three girls over a period of at least seven years.

Appellant was charged by information with nine counts: count 1, sexual intercourse or sodomy with a child 10 years or younger (Pen. Code, § 288.7, subd. (a))[1]; counts 2, 3, 5, 6, 8, and 9, lewd acts on a child under 14 years of age (§ 288, subd. (a)); and counts 4 and 7, aggravated sexual assault on a child under 14 years of age (§ 261, subd. (a)(2)). It was alleged as to counts 2, 3, 5, 6, 7, 8, and 9 that there were multiple victims (§ 667.61, subds. (b), (e)).

The jury convicted appellant of all the charges and found the allegations true. The court sentenced appellant to a total of 155 years

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1 Unspecified statutory references are to the Penal Code.

to life in prison, calculated as follows: 25 years to life on counts 1 and 4, and 15 years to life on the remaining counts, to be served consecutively. Appellant timely appealed.

## DISCUSSION

*Background*

At the start of jury selection, a panel of 69 prospective jurors was sworn, and 12 members of the panel were called to the jury box for voir dire. The prosecutor used peremptory challenges to excuse three Hispanic jurors–Juror Nos. 8, 9, and 12. Defense counsel raised a *Batson/Wheeler* objection, asking that Juror No. 12 remain on the panel and that the prosecutor stop excluding Hispanics from the jury because appellant is Hispanic. The trial court noted that, based on the names, it appeared that Juror Nos. 3, 7, 10, and 11 were Hispanic and remained on the jury. The trial court found that defense counsel had not made a prima facie case of discrimination, but nonetheless gave the prosecutor the opportunity to make a record.

The prosecutor explained that she excused Juror No. 8 because she appeared to have little life experience and seemed unsure of herself and unlikely to be able to evaluate evidence and judge credibility. As to Juror No. 9, she explained that he showed a strong, aggressive personality and, during defense questioning, stated that if he disagreed with another juror, he would stand his ground. She thought he might not get along well with the other jurors. The prosecutor thought Juror No. 12 was anti-social and withdrawn, based on her appearance and

body language. She also thought Juror No. 12 was hesitant during questioning and might be unable to judge credibility.

Defense counsel challenged the prosecutor's reasons, but the court denied the motion and excused Juror No. 12. The prosecutor subsequently exercised peremptory challenges against three other potential jurors, but not against any of the four jurors the court noted appeared to be Hispanic. Those four jurors ultimately sat on the jury.

*Analysis*

"The familiar *Batson/Wheeler* inquiry consists of three distinct steps. The opponent of the peremptory strike must first make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. If a prima facie case of discrimination has been established, the burden shifts to the proponent of the strike to justify it by offering nondiscriminatory reasons. If a valid nondiscriminatory reason has been offered, the trial court must then decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination. [Citations.]" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 42 (*Zaragoza*).)

In *Zaragoza*, the California Supreme Court explained that "[w]e have previously recognized that removing members of an identifiable group, where the defendant is a member of that group, is a fact that 'may prove particularly relevant' to the first-stage inquiry. [Citation.] But a prima facie case of discrimination can be established only if the *totality* of the relevant facts gives rise to an inference of discriminatory purpose. A court, in particular, may also consider nondiscriminatory

reasons 'that are apparent from and "clearly established" in the record [citations] and that necessarily dispel any inference of bias.' [Citation.]" (*Zaragoza*, *supra*, 1 Cal.5th at p. 43.) "When a trial court denies a *Wheeler* motion because the movant failed to establish a prima facie case of group bias, the reviewing court examines the entire record of voir dire for evidence to support the trial court's ruling. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1172, fn. omitted (*Young*).)

"Although the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made [citation], we have observed that certain types of evidence may prove particularly relevant. [Citation.] Among these are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. [Citation.] A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citations] and that necessarily dispel any inference of bias. [Citations.]" (*People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*).)

We disagree with appellant's contention that a prima facie case has been established. He argues that two of the considerations set forth in *Scott*, *supra*, 61 Cal.4th 363, 384 are satisfied here: appellant is Hispanic, and the prosecutor used her first three challenges to strike

Hispanic potential jurors. However, *Scott* instructs to consider "the entire record of voir dire as of the time the motion was made [citation]." (*Ibid.*) Doing so, we conclude that appellant has failed to establish a prima facie case.

Although all three of the prosecutor's peremptories had been against Hispanic potential jurors when appellant made the *Batson/Wheeler* motion, this is not sufficient to establish a prima facie showing. "While it is true that '[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal' [citation], the prima facie showing is not made merely by establishing that an excluded juror was a member of a cognizable group. [Citations.] Rather, "'in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group" . . . "a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges." [Citation.] Such a pattern will be difficult to discern when the number of challenges is extremely small.' [Citations.]" (*People v. Jones* (2017) 7 Cal.App.5th 787, 803-804 (*Jones*).)

The prosecutor here exercised six preemptory challenges in all– the three challenged by appellant and three others. The number of challenges thus is small, making it difficult to see a pattern of discrimination. Moreover, the prosecutor here did not excuse most or all of the Hispanic potential jurors. When appellant made the *Batson/Wheeler* motion, the court pointed out that there were still potential jurors in the jury box who were Hispanic. Thus, seven of the

12 potential jurors in the jury box apparently were Hispanic, and the prosecutor excused three of those seven.

In *Jones*, the court affirmed the trial court's finding of no prima facie showing of discrimination. (*Jones*, *supra*, 7 Cal.App.5th at p. 806.) The court explained that "the record shows that the prosecutor twice accepted a panel that included two African-American prospective jurors, and that these individuals were ultimately seated on the jury. [Citations.] The record further reflects that the victims of the shootings as well as the civilian witnesses who testified at trial were African-American, and thus, in the same protected class as [the defendant] and the challenged prospective jurors. [Citations.]" (*Ibid.*)

In *People v. Farnam* (2002) 28 Cal.4th 107 (*Farnam*), the "defendant's only stated bases for establishing a prima facie case were that (1) four of the first five peremptory challenges exercised by the prosecution were for Black prospective jurors, and (2) a very small minority of jurors on the panel were Black." (*Id.* at p. 136.) The Supreme Court found that, "even assuming both assertions were factually accurate, they fall short of a prima facie showing. [Citations.]" (*Id.* at p. 137.) The court reasoned that the defendant "was unable to show that the prosecutor had struck most or all of the Black members from the venire. [Citation.] Defendant did not demonstrate that the challenged jurors '"share only this one characteristic–their membership in the group–and that in all other respects they are as heterogeneous as the community as a whole."' [Citation.] Nor did he establish that the prosecutor failed '"to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."' [Citation.]

Finally, defendant was not a member of the excluded group, and the victim was not a member of the group to which the majority of the remaining jurors belonged. [Citation.]" (*Ibid.*)

"Similarly, in *People v. Hoyos* (2007) 41 Cal.4th 872, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 920, the defendant claimed that the prosecution's use of peremptory challenges to strike three of the only four Hispanics on the panel was sufficient to demonstrate a prima facie case. [Citation.] The Supreme Court rejected that argument, reasoning that 'although a prosecutor's excusal of all members of a particular group may establish a prima facie discrimination case, especially if the defendant belongs to the same group, this fact alone is not conclusive.' [Citations.]" (*Jones*, *supra*, 7 Cal.App.5th at p. 804.)

There is less evidence here to support a prima face case than in *Hoyos*, where "the prosecutor struck three of the only four Hispanics called to serve on the jury." (*Hoyos*, *supra*, 41 Cal.4th at p. 901.) Here, after the prosecutor struck three Hispanic potential jurors, the trial court observed that four more remained on the jury. Thus, similar to *Farnam*, appellant cannot show that the prosecutor struck most or all of the Hispanic members from the venire because four Hispanics still remained on the jury. (See *Farnam*, *supra*, 28 Cal.4th at p. 137.)

Nor can appellant show that the challenged jurors shared only the one characteristic of their membership in the group and otherwise were "'"as heterogeneous as the community as a whole."' [Citation.]" (*Farnam*, *supra*, 28 Cal.4th at p. 137.) He "points to nothing in the

record suggesting that the four challenged jurors shared no characteristics other than their race." (*People v. Clark* (2011) 52 Cal.4th 856, 906 (*Clark*).) Moreover, our review of the record shows no indication the prosecutor "failed to engage these jurors in more than desultory voir dire." (*Scott*, *supra*, 61 Cal.4th at p. 384.)

The record further shows that, similar to *Jones*, where "the prosecutor twice accepted a panel that included two African-American prospective jurors, and . . . these individuals were ultimately seated on the jury," (*Jones*, *supra*, 7 Cal.App.5th at p. 806) the prosecutor here accepted the jury eight times, and the four Hispanic jurors the court noted were on the jury at the time of the *Batson/Wheeler* motion remained on the jury the entire time and ultimately sat on the jury. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 115 (*DeHoyos*) [stating that "the prosecutor had accepted the jury several times when minorities were in the jury box" in affirming the denial of a *Batson/Wheeler* motion]; *Clark*, *supra*, 52 Cal.4th at p. 906 ["Although the circumstance that the jury included a member of the identified group is not dispositive [citation], 'it is an indication of good faith in exercising peremptories . . .' and an appropriate factor to consider in assessing a *Wheeler/Batson* motion."].)

Appellant's membership in the same protected class as the challenged potential jurors is not sufficient to establish a prima facie case because the victims here also were members of the same protected

class.[2] (See *DeHoyos*, *supra*, 57 Cal.4th at p. 115 ["the trial court noted that the victim, as well as the defendant, in this case was Hispanic, so it was unlikely the prosecutor would be concerned about minorities unduly identifying with the defendant"]; *Jones*, *supra*, 7 Cal.App.5th at p. 806 [no prima facie showing where the victims and witnesses were African-American and thus "in the same protected class" as the defendant and the challenged jurors].)

Appellant has failed to establish that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Zaragoza*, *supra*, 1 Cal.5th at p. 42; see *People v. Davenport* (1995) 11 Cal.4th 1171, 1201 [where "the only basis for establishing a prima facie case cited by defense counsel was that three of the six challenged prospective jurors had Hispanic surnames," this was not sufficient to establish prima facie case]; *People v. Turner* (1994) 8 Cal.4th 137, 167 [prima facie case not established where "the only bases for establishing a prima facie case cited by defense counsel were that all of the challenged prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution"]; *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536 [defense counsel's statement that "'there were only two [B]lacks on the whole panel, and they were both challenged by the district attorney'" insufficient to establish a

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[2] We presume the victims were of the same protected class because one was appellant's daughter and the others were the daughters of M.R., who had a Hispanic surname. Moreover, respondent asserts that the victims and all the witnesses "were of the same ethnicity as appellant," and appellant does not dispute this.

prima facie case].) Because we agree with the trial court that appellant failed to establish a prima facie case, "we do not evaluate the prosecution's stated reasons for the challenges. [Citation.]" (*People v. Sánchez* (2016) 63 Cal.4th 411, 439; *Young*, *supra*, 34 Cal.4th at p. 1173 ["If the reviewing court concludes the trial court properly determined no prima facie case was made, it need not review the adequacy of the prosecutor's justifications, if any, for the peremptory challenges."].)

## DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.