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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DARRYL GLENN BROWNLEE, Defendant and Appellant.	B279398 (Los Angeles County Super. Ct. No. NA103837)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

Jeffrey J. Douglas, 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, Michael C. Keller and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Darryl Glenn Brownlee, an African-American, of one count of making criminal threats under Penal Code[1] section 422, but found untrue the weapon allegation—use of a knife—under section 12022, subdivision (b)(1). On appeal, defendant contends the trial court erred in denying his *Batson/Wheeler*[2] motion. Defendant also contends that there was insufficient evidence to support his criminal threats conviction in light of the untrue finding on the weapon allegation because defendant's words were not sufficiently sustained and unequivocal.

Because we conclude there was sufficient evidence to support the criminal threats conviction and the denial of the *Batson/Wheeler* motion was proper under the three-step analysis in *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*), we affirm.

FACTUAL AND PROCEDURAL SUMMARY

At around 12:24 a.m. on March 19, 2016, defendant left the emergency room at St. Mary's Medical Center in Long Beach. Reginald Isaiah, Jerry Afandor and Lorenzo Noria were working as security guards outside the emergency room exit. At that time, they were trying to prevent a transient from entering the

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

[2] *Batson v. Kentucky* (1986) 476 U.S. 79, 89; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Batson/Wheeler*). A *Batson/Wheeler* motion asserts that trial counsel exercised a peremptory challenge because of a prospective juror's race or other prohibited discriminatory basis.

emergency room. Defendant was exiting the emergency room and according to the guards, defendant was cursing, yelling, and stating that someone should shut down the emergency room. According to the guards, defendant mistakenly believed the guards had told defendant—as opposed to the transient—to leave, which upset defendant.

Defendant then threw down his backpack, took off his glasses and jacket and raised his hands as though he wanted to box. According to Isaiah, defendant shouted, "This is World War Three. I will take all three of you guys on." According to Afandor, defendant yelled, "You don't know who the fuck I am. I will fuck all you guys up. I will fuck all three of you guys up. I am an old man, but I will still fuck you guys up." He put on rubber gloves commonly seen in hospitals.

As the guards moved closer to defendant, defendant took out an object which Isaiah described as a red-handled, silver-bladed knife, although he did not know how large the blade was. He testified that he did not see from where defendant "pulled" out the knife, but that it was in defendant's right hand "when [Isaiah] heard the sound." Isaiah described the sound as "the sound like a switch blade, sound of a blade just coming out." When asked what "coming out" meant, Isaiah responded, "When the sound of the blade comes out, when you switch it, the blade come out like a sound like that. That's what alerted me to look down to his right hand and I seen the knife."

Afandor saw only the blade of a knife, not the handle. Noria testified that he heard a click as though the knife were a switchblade and saw a reflection and shape like a knife in defendant's hand. Afandor was fearful for his life and took out a

baton. Noria believed defendant was going to use the knife to stab one of the guards.

According to Isaiah, defendant took a step toward the guards from a distance of 10 to 15 feet. Noria described defendant's movement as a lunge. Isaiah testified that defendant "didn't get . . . too close," but that defendant's approach caused Isaiah to move backwards. He considered defendant's statements to be a threat and he was scared. The prosecutor asked Isaiah whether "[d]uring the entire encounter with Mr. Brownlee, regarding his statements and the knife, were you scared," Isaiah responded, "Yes, I was scared."

The guards "repeatedly" asked defendant to leave to no avail. Isaiah testified that defendant held the knife in his fist, with the blade pointing up and not toward the guards. According to Isaiah, defendant did not thrust the knife toward the guards or make slashing motions with the knife. Defendant did not make any verbal reference to the knife.

Noria estimated defendant remained in the parking lot and was "very hostile" for about 15 minutes. The police came after Afandor had called them to deal with the transient and Isaiah had called regarding defendant. Defendant left the parking lot shortly before the police arrived.

When Long Beach Police Officer James Connell arrived, the security guards pointed him in the direction of defendant's departure. Officer Connell found defendant about two blocks away and arrested him. He searched defendant and found a stick of deodorant, some cards, and a medical rubber glove on the sidewalk. He did not find a knife or backpack in defendant's possession or in the surrounding area. When defendant was booked in jail, his

personal property included a belt, laces, beanie, two sweatshirts, basketball shorts, pen, and an ankle bracelet that required removal.

At trial, all three security guards testified about their mental state during their encounter with defendant. As noted above, Isaiah testified he was scared and believed defendant was going to stab him. Afandor testified he was fearful for his life and had taken out his baton for self-defense. Noria testified he believed defendant was going to stab one of them.

Defendant testified at trial. He stated he went to the hospital with breathing difficulties and did not have a backpack or knife, but had gloves for his work, a paper identification card, bus pass, deodorant, beanie, and pen.

Defendant left the hospital when he was offered only one of two medications he thought he needed for his breathing problems. Because he was not familiar with the area, he called 911 twice and was instructed each time to talk to the emergency room nurse. He was angry with himself for not going to a public hospital, and went outside to vent his frustration, and said to himself, "Man, this is, you know, this see this is what you get, dumb ass. Like you should have known better to come to a private hospital, you should have gone into one of the bigger public hospitals."

Still having trouble breathing, defendant collapsed in the parking lot onto his knee, removed his sweater, took off his glasses, and grabbed his throat. Someone said, "If you don't get out of here, we are going to kick your ass." Without his glasses, defendant could only see the shape of four people, who did not identify themselves and who were putting on blue gloves. Defendant further testified he threw all the items in his pockets to the ground and was looking for his gloves. The people started laughing and one of them said, "Look, old man, you need to get out of here before you quickly get

your ass kicked." Defendant replied, "Well, they already tried that over in Iraq." The taunting continued.

Because he was still having trouble breathing, defendant bent over. When he realized the people were not moving toward him, he reached down and put on his glasses. Defendant then realized the people were security guards. He continued to pick up his belongings from the ground. The last item he picked up was the pen. He clicked it closed. One of the guards then took out his baton and slapped it against his thigh. Defendant testified he then left the hospital and was disoriented. As he walked away, the police arrived and handcuffed him. He was told that the security guard claimed defendant had a knife, which defendant denied. Defendant stated he watched the officers search the area with flashlights.

On March 22, 2016, defendant, who was self-represented at the time, requested that Long Beach Police Detective David Ternullo provide a surveillance video of the incident; there was none. Defendant shared with Detective Ternullo that he was frustrated on the morning of the incident because the doctor would not prescribe the medicine defendant wanted.

Officer William Bordeaux testified in rebuttal. He was the communication center supervisor for the Long Beach Police Department and had received a request from Detective Ternullo to investigate 911 records for conversations with defendant at the time of the incident. Officer Bordeaux did not find any calls that might have come from defendant. Afandor and Isaiah also testified on rebuttal to hearing a clicking sound when defendant pulled out a knife, but that sound was not from a pen. They denied insulting defendant during the incident.

Defendant was charged with three counts of making a criminal threat (§ 422, subd. (a)—counts 1-3), and three counts of

assault with a deadly weapon (§ 12022, subd. (a)(1)—counts 4-6). As to all counts, the prosecutor sought a sentencing enhancement under section 12022, subdivision (b)(1) for personally using a deadly or dangerous weapon in the commission of a felony, and alleged as to counts 1 through 3 that defendant had previously served a prison term (§ 667.5, subd. (b)).

The jury convicted defendant on count 1—criminal threats regarding Isaiah—and acquitted him on the remaining counts, including all counts regarding Afandor and Noria. The jury found the weapon allegation not true; defendant admitted the prior offense allegations. (§ 667.5, subd. (b)(2).)

The trial court sentenced defendant to the two-year middle term, plus one year (§ 667.5, subd. (b)). It imposed a $30 criminal conviction assessment (Gov. Code, § 70373), a $40 court operations assessment (§ 1465.8, subd. (a)(1)) and a $300 restitution fine (§ 1202.4, subd. (b)), and imposed and stayed a $300 parole revocation fine (§ 1202.45). Defendant was awarded 510 days of presentence custody credit: 255 days of actual custody and 255 local conduct credits. Defendant filed a timely appeal.

DISCUSSION

A. The Evidence was Sufficient Given Defendant's Verbal Threats While in Possession of a Knife Even if the Jury Found Defendant Did Not Personally Display the Knife in a Menacing Matter While Making the Verbal Threats.

Defendant contends his statements to Isaiah were not " 'so unequivocal, unconditional, immediate, and specific as to convey to

the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.' " (*People v. Fruits* (2016) 247 Cal.App.4th 188, 203, n. 8.) Defendant further claims there is insufficient evidence to show Isaiah was in "sustained" fear. Given that such a sustained, unequivocal threatening statement is required by section 422, the evidence adduced at trial was insufficient to support defendant's section 422 conviction. Defendant further contends the jury's finding that the weapon allegation was not true is fatal to his conviction of a criminal threat: "The existence of the knife was essential to prove the offense of criminal threat. Therefore there was, as a matter of law, insufficient evidence to convict appellant of a criminal threat." Accordingly, defendant argues his conviction violated his constitutional right to due process.

1. The applicable law regarding criminal threats

"Section 422 was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others. [Citation.] 'One may, in private, curse one's enemies, pummel pillows, and shout revenge for real or imagined wrongs—safe from section 422 sanction.' [Citation.]" (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.)

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by

means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

The threats should be considered together with the surrounding circumstances to determine the true meaning of the words in the threat. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1433; *People v. Butler* (2000) 85 Cal.App.4th 745, 753.) These circumstances include the defendant's history, "mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant." (*People* v. *Solis* (2001) 90 Cal.App.4th 1002, 1013.) Although nonverbal conduct alone is insufficient, a combination of words and gestures may constitute a criminal threat. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1442-1446.)

There is no minimum amount of time a person must be in fear for that fear to qualify as sustained. Even one minute of fear can be "sustained fear" if a person believes he is about to die. (*People* v. *Fierro* (2010) 180 Cal.App.4th 1342, 1349 ["we believe that the minute during which [the victim] heard the threat and saw defendant's weapon qualifies as 'sustained' under the statute. When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory.' "].)

Regarding the weapon allegations, section 12022, subdivision (b)(1) provides: "A person who personally uses a deadly or

dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense."

2. Sufficiency of the evidence standard of review

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] 'This standard applies whether direct or circumstantial evidence is involved.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

"It is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility. [Citation.] Moreover, the testimony of a single witness is sufficient for the proof of any fact. [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.)

3. Analysis

The jury found not true the allegation that defendant personally used a deadly weapon within the meaning of section

12022, subdivision (b)(1). The jury was instructed that "personally used" means "the defendant must have intentionally displayed a weapon in a menacing manner or intentionally fired it or intentionally struck or hit a human being with it." Defendant does not argue this instruction was erroneous.

Defendant appears to conclude from the jury's not true finding that the jury necessarily believed defendant's testimony he did not have a knife but merely a pen at the time of the incident in the hospital parking lot, and that his words alone were insufficient for a criminal threats conviction. At oral argument, however, defendant appears also to argue that even if the jury found defendant possessed a knife, Isaiah's fear was not sufficiently sustained to support a criminal threats conviction.

The substantial evidence rule requires us to consider the evidence in the light most favorable to the judgment. Viewing the testimony through this prism, the jury could have disbelieved defendant's denial of possessing a knife at the time of the incident. Instead, the jury could have believed Isaiah's testimony that he saw (1) a knife in defendant's possession when defendant threatened to take on all three guards, and (2) defendant's contemporaneous, pugilistic stance while lunging at Isaiah, even if the jury did not find true that defendant was wielding the knife in a menacing way at the time he uttered his threats. The other security guards confirmed hearing a clicking reminiscent of a switchblade and not a pen.

Isaiah's testimony shows that he evaluated defendant's words in light of defendant's possession of a knife. The prosecutor asked, "When Mr. Brownlee said, 'I will take all three of you on,' what did you take that to mean?' Isaiah replied, "It was a threat." The prosecutor asked, "Did you believe the defendant was going to stab

you [with] the knife?" Isaiah replied, "Yes." Isaiah added, "I was scared" during the entire encounter with the knife and defendant's statements. Isaiah did not claim that defendant displayed the knife in a menacing manner. Rather, he testified that defendant held the knife to his side in his fist and that the blade was not really toward Isaiah.

The threat to "start World War Three" and "take on" the security guards including Isaiah was not "outlandish," but instead "immediate" and "specific" enough[3] "to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat" when it was made by a man who was known to be in possession of a knife, had physically prepared for a confrontation by removing his jacket and glasses, moved towards Isaiah, and did not comply with repeated requests to leave. These facts support a reasonable inference that Isaiah was afraid during his encounter with defendant.

As for defendant's claim there is no evidence Isaiah was in sustained fear, Isaiah testified that he was scared throughout the entire encounter "regarding [defendant's] statements and the knife." Noria testified that defendant was "very hostile" for about 15 minutes after the guards called police. This puts the encounter between defendant and the guards at a minimum of 15 minutes, which is more than sufficient to constitute "sustained" fear for purposes of section 422. (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.)

Because we have determined that "a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States

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[3] *People v. Toledo*, *supra*, 26 Cal. 4th at p. 228.

Constitution is satisfied [citation] as is the due process clause of article I, section 15 of the California Constitution [citation]." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

B. Based on the Record of the Voir Dire, the Prosecutor's Stated Reason for Exercising the Peremptory Challenge Was Not Improperly Motivated and the Trial Court Properly Denied Defendant's *Batson/Wheeler* Motion.

Defendant made a *Batson/Wheeler* motion after the prosecution had exercised a peremptory challenge first to Prospective Juror No. 15 and then to Prospective Juror No. 1. Both prospective jurors were African-American. Initially, defendant argued that both peremptory challenges violated *Batson/Wheeler*. In his reply, defendant concedes the prosecutor's use of a peremptory challenge to remove Prospective Juror No. 1 was justified; the prospective juror had a niece who had been executed recently by the state of Texas. Thus, we evaluate the *Batson/Wheeler* motion as to Prospective Juror No. 15 only.

Defendant contends the prosecutor's explanation she excused Prospective Juror No. 15 because that prospective juror would not listen to the evidence was "nonsensical," and therefore, under *Gutierrez*, *supra*, the trial court erred in not inquiring further to ensure that the prosecutor's reason was not motivated by discrimination.

When defense counsel made his *Batson/Wheeler* motion, he noted defendant was African-American and argued, "She [the prosecutor] has kicked one African-American juror already [Prospective Juror No. 15], and she is kicking another [Prospective Juror No. 1]. He argued further "[t]here [are] very few on the panel.

I don't believe he said anything that would lead to a peremptory challenge or otherwise."[4]

The trial court responded, "I don't see a pattern in that if you look at the makeup of the 12, we have three African-American prospective jurors and . . . [the] bulk of the prospective jurors are minorities, but out of [an] abundance of caution, I am going to ask you to state your record why you are exercising challenge as to Prospective Juror [No. 1] and [Prospective] Juror [No. 15]."

The prosecutor explained she excused Prospective Juror No. 1 "because his niece was executed by the prosecution." As for Prospective Juror No. 15, the prosecutor stated, "I did not like her answer to the box in that hypothetical that defense counsel asked about." The trial court asked, "What was it about?" The prosecutor replied, "She had said the mouse escaped. I felt that she would not listen to the evidence."

The prosecutor was referring to a hypothetical question that defense counsel posed to Prospective Juror No. 15 and two other prospective jurors. This was the third in a series of hypothetical questions that defense counsel posed to prospective jurors in sets of three. In each hypothetical, a cat and mouse are put in a box, but when the box is opened, the mouse is missing. Defense counsel added facts as the series progressed. In the third hypothetical, when the box is opened, the mouse is missing, and a small hole and an unidentified dark stain are visible. Two prospective jurors stated that they had an abiding conviction that the cat ate the

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[4] Defendant made his motion after the prosecutor had just excused the second African-American prospective juror—Prospective Juror No. 1—who was male. Prospective Juror No. 15 was a female. Defense counsel's reference to "he" is therefore ambiguous.

mouse. Prospective Juror No. 15 stated that she thought the mouse had escaped, but that she did not have an abiding conviction as to that conclusion. Neither the prosecutor nor the trial court inquired further.

The trial court then ruled, "At this time I don't find a pattern of removal of jurors based on race, and I do accept counsel's representation that removal was based on . . . non-racial factors."

1. Applicable law

In a *Batson/Wheeler* motion "the issue is whether a particular prospective juror has been challenged because of group bias." (*People v. Avila* (2006) 38 Cal.4th 491, 549.) Even "a single discriminatory exclusion" violates a defendant's right to a representative jury. (*Ibid.*)

"When a party raises a claim that an opponent has improperly discriminated in the exercise of peremptory challenges, the court and counsel must follow a three-step process. First, the *Batson/Wheeler* movant must demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Gutierrez*, *supra*, at p. 1158.)

Second, if the moving party has demonstrated a prima facie case, the burden shifts to the opponent of the motion to give "an adequate nondiscriminatory explanation for the challenges." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) " ' "[U]nless a discriminatory intent is inherent in the prosecutor's explanation," ' the reason will be deemed neutral. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.)" (*Gutierrez, supra*, at p. 1158.)

Third, if the opponent offers a neutral explanation, the trial court must determine if the moving party has proven "purposeful discrimination." (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) "In order

to prevail, the [moving party] must show that 'it was more likely than not that the challenge was improperly motivated.' [Citation.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1059; see *Rice v. Collins* (2006) 546 U.S. 333, 338 [moving party has burden of proof].) The focus of this portion of the inquiry is on "the subjective genuineness of the reason, not the objective reasonableness." (*Gutierrez, supra*, 2 Cal.5th at p. 1158.)

During this third step, the trial court assesses the credibility of the opponent's explanation. (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) "[T]he court may consider, ' "among other factors, the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy." ' [Citation.]" (*Ibid.*) The trial court must make " 'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. [Citation.] Justifications that are 'implausible or fantastic . . . may (and probably will) be found to be pretexts for purposeful discrimination.' [Citation.]" (*Id.* at p. 1159.)

"When a reviewing court addresses the trial court's ruling on a *Batson*/*Wheeler* motion, it ordinarily reviews the issue for substantial evidence. [Citation.] A trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' [Citation.] What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. '[A] prosecutor simply has got to state his reasons as

best he can and stand or fall on the plausibility of the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.' [Citation.]" (*Gutierrez, supra,* 2 Cal.5th at p. 1159.)

2. The prosecutor's stated reason for exercising the peremptory challenge was facially and subjectively neutral.

After the trial court's ruling on defendant's *Batson/Wheeler* motion, the Supreme Court issued its opinion in *Gutierrez*. As Justice Cuellar explained in *Gutierrez*, that case provided the Supreme Court with "an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*Gutierrez, supra*, 2 Cal.5th at p. 1154.) As noted above, of particular concern to the Supreme Court was the adequacy of the record to support a trial court's denial of a *Batson/Wheeler* motion. We apply the three-step process in *Batson/Wheeler* and conclude that the record below was adequate to support the trial court's denial of defendant's motion.

a. First Step: Did defendant establish a prima facie case of discriminatory exercise of a peremptory challenge?

As set forth above, in response to defendant's motion, the trial court stated, "I don't see a pattern in that if you look at the makeup of the 12, we have three African-American prospective jurors and . . . the bulk of the prospective jurors are minorities, but out of [an] abundance of caution, I am going to ask you to state your

record why you are exercising challenge as to Prospective Juror [No. 1] and [Prospective] Juror [No. 15]."

The trial court did not expressly address the "totality of the relevant facts" required in assessing a prima facie case (*Gutierrez, supra*, 2 Cal.5th at p. 1158). The trial court did not explicitly rule on whether defendant had established a prima facie case. Neither party sought clarification when the trial court denied defendant's *Batson/Wheeler* motion. On appeal, respondent does not contend that defendant did not satisfy the first step of the *Batson/Wheeler* analysis, to wit, establishing a prima facie case of discriminatory exercise of a peremptory challenge. We thus treat respondent's lack of argument on this issue as a concession that defendant established a prima facie case of discriminatory intent.

b. Second Step: Was the prosecutor's stated reason for the peremptory challenge facially race-neutral?

The second step of the *Batson/Wheeler* analysis requires the trial court to determine whether the prosecutor has provided a race-neutral reason for its challenges. This step " 'does not demand an explanation that is persuasive or even plausible. ". . . [T]he issue is the facial validity of the prosecutor's explanation." ' (*Purkett [v. Elem], supra,* 514 U.S. at p. 768.)" (*Gutierrez, supra,* 2 Cal.5th at p. 1168.)

The prosecutor stated that she had excused Prospective Juror No. 15 because that prospective juror would not listen to the evidence. "The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.) Thus, a failure to listen to the evidence is a facially valid, race-neutral reason for exercise of a peremptory challenge.

c. Third Step: Was the prosecutor's stated reason for exercising the peremptory challenge subjectively genuine?

Defendant contends Prospective Juror No. 15's answer that the mouse escaped was "consistent with a reasonable resolution of the hypothetical" and was "equally reasonable as the alternative conclusion (the cat ate it)." Defendant contends far from demonstrating Prospective Juror No. 15 did not listen to the evidence, the voir dire demonstrated that Prospective Juror No. 15 in fact did so. Under *Gutierrez*, the trial court thus had an obligation to inquire further to ensure the peremptory challenge was not exercised for a discriminatory reason.

The record shows two of the prospective jurors did not agree with the inference advocated by defendant, to wit, that the mouse escaped. Indeed, these prospective jurors had an abiding conviction of the more obvious conclusion that the cat ate the mouse.[5] Because two prospective jurors found the hypothetical evidence so compelling they were convinced beyond a reasonable doubt that the cat ate the mouse, it was reasonable for the prosecutor to infer that Prospective Juror No. 15's conclusion to the contrary reflected an inability to process the evidence logically—in other words, an inability to listen to the evidence.

Defendant contends that the prosecutor's failure to question Prospective Juror No. 15 about her answer to the hypothetical shows that the prosecutor's stated reason was a sham. Under some factual circumstances, " '[T]he State's failure to engage in any

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[5] Defense counsel had earlier told the jury that "proof beyond a reasonable doubt" was "the state of the case or the evidence that gives you an abiding conviction that the charge is true."

meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.' " (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246.)

There is nothing in the record to support a finding that the prosecutor's explanation was a sham. The prosecutor said, "I did not like her answer to the box in that hypothetical that defense counsel asked about." This was after two jurors came to what was the more obvious conclusion without equivocation that the cat had eaten the mouse in defendant's hypothetical. The prosecutor's explanation that the prospective juror would not listen to the evidence, albeit stated somewhat inartfully, was merely shorthand for saying she did not want a juror who rejected an obvious conclusion from the hypothesized evidence. She did not have a duty to inquire further.

For all these reasons, we conclude there was substantial evidence to support the trial court's conclusion that the prosecutor's challenge was race-neutral, and the trial court had no duty to inquire further. The trial court properly denied defendant's motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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