Filed 5/8/18 P. v. Colbert CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRANDON LEE COLBERT, Defendant and Appellant.	B276969 (Los Angeles County Super. Ct. No. MA066931)

APPEAL from a judgment of the Superior Court of Los Angeles County. Andrew E. Cooper, Judge. Affirmed in part and reversed in part with directions.

Mary Jo Strnad, 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, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Brandon Lee Colbert of one count of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a); count 1),[1] two counts of assault with a semiautomatic firearm (§ 245, subd. (b); counts 4 & 5), one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)), and one count of possession of ammunition (§ 30305, subd. (a)(1)). As to counts 1 and 4, the jury found true the great bodily injury enhancement (§ 12022.7). As to count 1, the jury also found true various firearm enhancements (§ 12022.53, subds. (b)-(d)). As to counts 4 and 5, the jury found true one firearm enhancement.[2] (§ 12022.5, subd. (a).)

Defendant admitted three prior prison allegations.

Defendant was sentenced to a determinate prison sentence of 22 years eight months and an indeterminate prison sentence of life plus 25 years to life. He was awarded 397 days of custody credit. Various fines were also imposed.

Defendant timely filed a notice of appeal. He argues that the trial court erroneously denied his *Batson/Wheeler*[3] motion. In his supplemental appellate brief, he asks that we reverse the three firearm enhancements imposed and remand the matter back to the trial court with directions to

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant was acquitted of count 2 charging attempted murder. Counts 3 (attempted murder), 6 (assault with a semiautomatic firearm), and 9 (mayhem) were dismissed.

[3] *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277 (*Wheeler*).

exercise its discretion under amended sections 12022.5 and 12022.53. (*People v. Robbins* (2018) 19 Cal.App.5th 660; *People v. Woods* (2018) 19 Cal.App.5th 1080.)

We conclude that the trial court did not err in denying his *Batson/Wheeler* motion and therefore affirm the judgment. However, defendant is entitled to a new sentencing hearing at which the trial court can consider whether to strike the firearm enhancements pursuant to the discretion conferred by section 12022.53. We therefore reverse the sentences on the enhancements and remand the matter to the trial court for the sole purpose of allowing the trial court to exercise its discretion as to whether to strike the firearm enhancements under sections 12022.5 and 12022.53.

FACTUAL BACKGROUND

On September 9, 2015, into the early morning hours of September 10, 2015, bartender Desiree O'Donnell (O'Donnell) was at her job at the Britisher, a bar in Lancaster. Patrons at the bar included Royce Gresham (Gresham), Anthony Gabelman (Gabelman), and Gabelman's friend Heather. Gabelman was socializing, drinking, and playing pool. Daniel Gray (Gray) arrived at the bar at around 9:00 or 9:30 p.m. Ashley Huerta (Huerta) and her African-American companion, identified in court as defendant, were also at the bar.

Two female customers got very drunk. When one of them started a fight with another female customer, O'Donnell made the instigator leave. The kicked-out customer's friend became unruly. Consequently, O'Donnell stopped serving alcohol to her. The woman got into an argument with O'Donnell. She went behind the bar and hit O'Donnell. The bartender struck back. Gresham tried to split them apart. Another customer, Scott, jumped in

front of O'Donnell and told her stop. Customers, including Huerta, came to O'Donnell's aid. Huerta was knocked down and landed on the floor.

Gresham aggressively pushed Huerta multiple times. Defendant came between Huerta and Gresham. At some point, defendant held a gun and was pointing it. Defendant approached Gresham in a threatening manner. To avoid getting hit, Gresham dropped defendant on the floor. Defendant squeezed out from under Gresham and ran out of the bar. Gresham followed him to the back patio.

Feeling like the situation was getting out of control, Gabelman headed out the back patio of the bar. He saw people outside.

At around 12:45 a.m., Gray was on the bar's patio. Because he heard yelling, he went to the bar's rear parking lot.

Defendant said something to Gabelman, who might have replied, "'Excuse me?'" That was the first time Gabelman saw defendant. Gray heard the defendant say, "'What the f*** you guys looking at?'" or "'Do we have a problem?'" Immediately afterward, defendant shot Gabelman in the stomach. He also shot Gresham, who was next to Gabelman. Everyone scattered.

Gresham ended up on a gurney. Gabelman needed emergency surgery for his life-threatening injury.

On September 10, 2015, after 10:00 p.m., a police officer spotted defendant. When the officer illuminated defendant with his patrol lights, defendant rode off on his motorcycle. He subsequently got off of his motorcycle and ran. He went over a wall and jumped a fence into someone's yard. The officer's partner ran after defendant, who ended up on top of a roof. He eventually came down. A gun was recovered nearby.

Defendant stipulated that he was the shooter.

DISCUSSION

Batson/Wheeler Motion

In his opening brief, defendant contends that he is entitled to a new trial on the grounds that the trial court applied an erroneous legal standard to his *Batson/Wheeler* motion and wrongly concluded that he had not met the low threshold to initiate a *Batson* inquiry.

I. *Procedural Background*

During voir dire, the prosecutor exercised six peremptory challenges removing prospective jurors, including the two prospective jurors at issue, Prospective Juror No. 7696 and Prospective Juror No. 6716.

A. Prospective Juror No. 7696

Prospective Juror No. 7696 said that she was a retired nurse married to an electrician. In response to Question No. 13 of a questionnaire that the trial court gave to all of the prospective jurors, she indicated that one of her two sons was in jail for one month and on probation for three years for growing mushrooms because a neighbor reported hearing a shot, even though no shot had been fired. The responding police officers said untruthfully that Prospective Juror No. 7696's son had a lot of mushrooms and a large amount of money. But, she knew that her son only had a few mushrooms, which she documented with photographs, and he worked as a supermarket assistant manager. He had to be in jail for one month because he could not afford to be released. When asked if this experience would affect her ability to be fair and impartial, she answered "'No.'"

In response to questionnaire Question No. 12, which asked "Have you or any member of your family or close personal friends ever been the victim of a crime?," Prospective Juror No. 7696 reported that six years ago, two men

broke into her home and fought with the same son. One of the men had a knife. The son removed a big sword from a wall and ran after the invaders.

The following day, defense counsel asked Prospective Juror No. 7696 to assume the following: She felt the prosecution did not prove its case beyond a reasonable doubt, but it was a Friday and she was tired and wanted to go home, where she expected family guests. Counsel then asked whether she would hold strong and vote not guilty. She replied, "Uh-huh, I do." Alternatively, defense counsel asked, "If you are the only one who feels he's guilty, everyone feels he's not guilty, will you promise that you won't vote with the group just so that you can go home?" She replied, "Right."

Later Prospective Juror No. 7696 answered in the affirmative to the prosecutor's question whether she thought the police lied about her son because she saw something different. The prosecutor then asked, "Can you be fair to the law enforcement that testifies in this case?" She answered, "Sure." The prosecutor next asked whether it would be harder for police officers to prove that they are truthful. She said, "No."

The prosecutor told the prospective jurors as a group that she wanted to be held to the standard of proof required by law, which she explained was that she had to prove that defendant was guilty beyond a reasonable doubt. The prosecutor asked if any of the prospective jurors would hold her to a higher standard than the law requires.

Addressing Prospective Juror No. 7696, the prosecutor noted that "there [was] a hesitation," and asked her why. The trial court read the jury instruction defining reasonable doubt and invited the prosecutor to ask her question again. She did, asking Prospective Juror No. 7696 whether she would hold the prosecutor to the standard in the trial court's instruction or whether she would hold her to a higher standard. The prosecutor asked, "In

other words, do you feel that reasonable doubt is beyond all imaginary doubt based on your own personal experience with your son?" After the prospective juror answered "No," the prosecutor asked if she would hold her to the standard required by law. When the juror answered, "Yes," the prosecutor commented, "And you hesitated. Can you explain why you hesitated?" Prospective Juror No. 7696 answered, "Because . . . of what happened to my son."

The prosecutor then asked if Prospective Juror No. 7696 could set aside what happened to her son. She replied, "It happened eight years ago. I already put that—."

The prosecutor exercised a peremptory challenge to remove Prospective Juror No. 7696.

B. Prospective Juror No. 6716

Prospective Juror No. 6716, an African-American woman, said that she was single and childless. For the past 15 years, she worked for the Antelope Valley Transit Authority. Previously, she worked for six years at a civil law firm, where she was first a receptionist and eventually a paralegal.

In response to Question No. 13 of the trial court's questionnaire, she reported that her parents told her that four years earlier, her brother had been charged with "strong-armed" robbery. She was not sure the charge was dropped because she "wasn't really involved at the time." She went to court once, "just to see" her brother and "hear the charges." When asked if she knew enough about the case to have an opinion as to whether her brother was treated fairly, Prospective Juror No. 6716 replied that she did not know enough about the case, but she found "they were trying to give him a strike," even though that was his first offense. She added, "I felt like that was a little aggressive."

The trial court responded that "some charges are considered strike charges," and that it is up to the lawyers, not the judge, to file such charges. The trial court asked, "So maybe that is what you're referring to?" Prospective Juror No. 6716 answered, "Possibly, yeah."

When the trial court asked if she could think of any reason that she could not be fair and impartial in this case, she replied, "No reason."

The prosecutor asked follow-up questions about Prospective Juror No. 6716's brother. She said that her brother's case was in the same courthouse as the instant matter. She believed that he received probation. The following colloquy occurred:

"[THE PROSECUTOR]: [D]o you feel he was treated fairly?

"[PROSPECTIVE JUROR NO. 6716]: Like I said, initially, I felt like the one strike was too much. With the judge explaining that some charges are just strike charges, now I understand. So—

"[THE PROSECUTOR]: Charges are either strikes or not strikes.

"[PROSPECTIVE JUROR NO. 6716]: Now I understand. Prior to that, no.

"[THE PROSECUTOR]: Ultimately do you think he was wrongfully arrested or mistreated in any way by law enforcement?

"[PROSPECTIVE JUROR NO. 6716]: That is kind of hard to tell because you kind of get two different stories. [¶] I heard my brother's story, and I heard the story—he was detained by loss prevention. I heard that story. So I don't know. [¶] . . . [¶] Because, obviously, I want to believe my brother, but I want to believe the reports.

"[THE PROSECUTOR]: Yeah, you want to believe your brother because it is your brother, obviously. You feel a sense of loyalty, and that

makes sense. [¶] Either it was Lancaster or Palmdale Sheriff's Department. Do you remember which one it was that was involved?

"[PROSPECTIVE JUROR NO. 6716]: I believe it was Palmdale.

"[THE PROSECUTOR]: I believe it is all Lancaster in this case. There is movement between the two departments. [¶] Do you feel you would hold it against any—

"[PROSPECTIVE JUROR NO. 6716]: Absolutely not.

"[THE PROSECUTOR]: Do you feel like you could be fair to both sides in this case, knowing—

"[PROSPECTIVE JUROR NO. 6716]: One hundred percent."

C. Other Prospective Jurors Removed by the Prosecution

Four other prospective jurors were removed through the prosecutor's exercise of peremptory challenges: (1) Prospective Juror No. 0693 had a brother-in-law convicted of the offense of driving under the influence, and this juror had been charged with the same offense three or four years earlier; (2) Two of Prospective Juror No. 6459's cousins had been incarcerated for domestic violence, and she believed that one, whose case had been in the same courthouse as the instant case, was treated unfairly because he told her so; (3) Prospective Juror No. 4110 stated that she held a grudge against law enforcement or prosecutors because she had a 10-year-old conviction for driving under the influence that she felt she did not deserve; and (4) Prospective Juror No. 0567, who had been convicted of driving under the influence more than eight years before, indicated that when deciding the issue of guilt, the question of punishment would be in the back of his mind "because sometimes the judgment is not good."

D. African-American Jurors Accepted by the Prosecution

The prosecutor accepted two African-American prospective jurors.

E. Trial Court's Denial of Defendant's *Batson/Wheeler* Motion

Over defense counsel's objection, the prosecutor exercised its peremptory challenge against Prospective Juror No. 6716. At a sidebar conference, defense counsel specified that he was making a *Batson/Wheeler* objection that the prospective juror, an African-American, was a member of a cognizable group. Defense counsel argued that the previously removed Prospective Juror No. 7696 appeared to be Hispanic and had a heavy Hispanic accent, and that she therefore also belonged to a cognizable group. The trial court noted that it could not tell Prospective Juror No. 7696's ethnicity, though she had an accent, and that the trial court wrote the letter "w" for "white."

The trial court instructed defense counsel that to make his record, he was required to show, "from all the circumstances of this case, a strong likelihood that the person challenged, which is in this case [Prospective Juror No. 6716], was challenged for a group association rather than for a specific bias."

Defense counsel noted that defendant and Prospective Juror No. 6716 were African-American, and he thought that Prospective Juror No. 7696 was Hispanic; the entire venire appeared to have six to seven African-Americans. The trial court asked counsel if he wanted to state anything further. He replied that he did not.

The trial court then invited the prosecutor "to state anything . . . as to any argument or evidence for the record as to whether the defense has made a prima facie case or any reasons for [the prosecutor's] exercise of [her] peremptory challenge[s]." The prosecutor responded that the defense did not

make a prima facie showing. The trial court replied, "I haven't made the ruling." The trial court then said that it was asking if the prosecutor wanted to state anything for the record.

The prosecutor said that she did not know the ethnicity of Prospective Juror No. 7696. Acknowledging that Prospective Juror No. 7696 appeared to have an accent, the prosecutor thought that the juror's "big concern was that the police lied" about her son. The prosecutor said that the prospective juror did not rise to the level of cause because "even though on the first day of jury selection, she said she couldn't be fair, yesterday she did say she could be fair." The prosecutor said that she clearly had concerns about this prospective juror's mistrust of law enforcement.

Regarding Prospective Juror No. 6716, the prosecutor noted that she mentioned twice the issue of a "strike" with respect to her brother, who had been prosecuted in the same courthouse as this case. The prosecutor thought it was unclear to the prospective juror if her brother was currently on probation out of this courthouse.

The trial court noted that the prosecutor accepted two African-American prospective jurors. It then announced its ruling as to Prospective Juror No. 7696: "From all the circumstances in this case and the court's consideration, the court is not finding a prima facie case. The court is convinced that the moving party has failed to overcome the presumption that the peremptory challenge to [Prospective Juror No. 7696] was exercised upon constitutionally-permissible grounds."

Upon the trial court's invitation, the prosecutor then discussed Prospective Juror No. 6716. She stated: "The second portion of the issue with [Prospective Juror No. 6716] was her concern over the issue of a strike and her brother's robbery case out of this courthouse and . . . my office, her

evaluation that, essentially, my office deemed him appropriate for a strike. [¶] She did acknowledge not understanding of what that meant after the court explained that certain charges are strikes, and certain charges are not. But I do also have a concern that that is something that will weigh on her during her deliberation process."

The trial court thereafter stated that it was denying defendant's *Batson/Wheeler* motion based on the statements already made by the court.

F. Final Jury Composition

After the jurors were selected, the trial court noted for the record that four African-Americans were seated on the final jury panel. It did not comment on how many Hispanic jurors were on the final jury panel.

As is relevant to the issues raised in this appeal, we note that Prospective Juror No. 3750 remained on the jury. He stated that he had been convicted of second degree robbery 18 years earlier and of evading law enforcement eight or nine years earlier. He fought his first conviction for four-and-one-half years, resulting in its dismissal. While he felt that he was treated unfairly, he blamed the victim for wrongdoing. Regarding his second conviction, he felt no animosity against the prosecutor's office or law enforcement; he said that he felt that his evading offense was deserved and that the police had been doing their job.

II. *Batson/Wheeler Motions*

The exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends both our United States and California Constitution. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157 (*Gutierrez*).) Accordingly, the "[e]xclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal." (*Gutierrez*, *supra*, at p. 1158.)

A rebuttable presumption exists that a peremptory challenge was exercised properly. The burden rests on the party opposing the peremptory challenge to demonstrate impermissible discrimination. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) A peremptory challenge of a juror need not be supported by cause; it may be based on even trivial reasons or hunches, including body language, the manner of answering questions, or demeanor. (*People v. Reynoso* (2003) 31 Cal.4th 903, 917; *People v. Cornwell* (2005) 37 Cal.4th 50, 70, disapproved on other grounds in *People Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A claim that an opposing party improperly discriminated in exercising peremptory challenges is analyzed in a three-step process. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) First, the party asserting the claim must demonstrate a prima facie case by showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Ibid*.) The moving party satisfies the first step by producing sufficient evidence permitting the trial judge to draw an inference that discrimination has occurred. (*Ibid*.)

In meeting the first step of showing an inference of discriminatory excusal of a prospective juror, the party making the *Batson/Wheeler* motion must make as complete a record as feasible. (*People v. Montes* (2014) 58 Cal.4th 809, 853.) "Certain types of evidence are relevant in determining whether a defendant has carried his burden of showing an inference of discriminatory excusal, such as whether the prosecutor 'struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group,' whether the excused jurors had little in common other than their membership in the group, and whether the prosecutor engaged in 'desultory voir dire' or no questioning at all. [Citation.]" (*People v. Cunningham* (2015) 61 Cal.4th 609,

664; see also *People v. Harris* (2013) 57 Cal.4th 804, 834–835.) Other facts that can be called to the attention of the trial court ruling on a defendant's *Batson/Wheeler* motion are that the defendant is a member of the excluded group and the victim is a member of the group to which the majority of the remaining jurors belong. (*People v. Harris*, *supra*, at p. 835.) Where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears, it is impossible as a practical matter to draw the requisite inference that discrimination occurred. (*People v. Garcia* (2011) 52 Cal.4th 706, 747.) Moreover, in analyzing if the party asserting discrimination has established a prima facie case, the trial court may consider nondiscriminatory reasons "'apparent from and "clearly established" in the record . . . '"" that necessarily dispel any inference of bias. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 43.)

Second, if the trial court finds that the movant met the threshold for demonstrating 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.) The opponent must provide "'a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges.'" (*Ibid.*) "'Unless 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.)

Third, if the opponent of the *Batson/Wheeler* motion gives a neutral explanation for exercising a peremptory challenge, the trial court must then decide whether the movant has proved purposeful discrimination. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) To prevail, the movant must show that it was "more likely than not that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170.) This inquiry focuses on the

subjective genuineness of the reason, not the objective reasonableness. (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 924.)

Ordinarily, we review a trial court's ruling on a *Batson/Wheeler* motion for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 970.) However, if a trial court relies on the """strong likelihood""" standard in ruling that a defendant failed to make out a prima facie case of discrimination in the prosecutor's exercise of a peremptory challenge, the reviewing court must review the record de novo to determine whether the record supports an inference that the prosecutor excused the prospective juror on the basis of race. (*People v. Zaragoza*, *supra*, 1 Cal.5th at pp. 42–43.)

Where a trial court denies a *Batson/Wheeler* motion after finding no prima facie case of discrimination, the reviewing court should uphold the denial where the record suggests grounds on which the prosecutor might reasonably have challenged the jurors in question. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1101, disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 114.)

III. *Analysis*

Applying de novo review, we conclude that the totality of the relevant facts did not give rise to an inference that the prosecutor removed the two prospective jurors for a discriminatory purpose. In questioning the removed jurors, the prosecutor delved into a topic of relevance—the prospective jurors' possible bias against the prosecution as a result of their stated beliefs that their close relatives were harshly treated by the criminal justice system. A prospective juror's relative's negative experience with the criminal justice system is a race-neutral reason for a peremptory challenge. (*People v. Booker* (2011) 51 Cal.4th 141, 167, fn. 13; see also *People v. Lenix* (2008) 44 Cal.4th 602, 628.) Given this record, defendant did not meet the first step of making

a prima facie case of discrimination. It follows that the trial court was correct in denying defendant's *Batson/Wheeler* motion.

Moreover, the appellate record indicates that the prosecutor removed only one African-American prospective juror (Prospective Juror No. 6716) at the time of defendant's *Batson/Wheeler* motion, and four African-Americans remained on the jury. This type of evidence is relevant in deciding whether a defendant carried his burden in establishing a prima facie case of discrimination. (*People v. Cunningham*, *supra*, 61 Cal.4th at p. 664.) Where only a few members of a cognizable group have been excused, and no indelible pattern of discrimination appears, it is difficult to draw an inference of discrimination. (*People v. Bell* (2007) 40 Cal.4th 582, 598, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686 ["'As a practical matter . . . the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion'"].)

Defendant finds fault with the trial court's request that the prosecutor state her reasons for exercising her peremptory challenges of Prospective Juror Nos. 7696 and 6716. But, it is established that trial courts occasionally find no prima facie case but still ask the prosecutor to state reasons for exercising a peremptory challenge. (*People v. Taylor* (2010) 48 Cal.4th 574, 612.)

The fact that both Prospective Juror No. 6716 and defendant are African-American does not itself establish a prima facie case of discrimination. (*People v. Kelly* (2007) 42 Cal.4th 763, 780.)

For the first time on appeal, defendant asserts that his case involved a "black-on-white" crime that was tried "against the backdrop of Lancaster's well-documented and well-publicized racial tensions." Defendant made no such argument to the trial court—he did not assert that the victims were

white or that the area suffered from racial tensions. Regardless, even if the victims were the same race as the majority of the jurors, that fact does not establish a prima facie case of discrimination. (*People v. Kelly*, *supra*, 42 Cal.4th at p. 780.)

In support of this argument, defendant asserts that he was accompanied by a white woman at the Britisher and that he was the only nonwhite patron at the bar. Defendant offers no record citation in support. In fact, the record appears to indicate otherwise. Gabelman testified that Gray is black, and Gray was at the Britisher on the night of the shooting.

Citing *Miller-El v. Dretke* (2005) 545 U.S. 231, 240–241 (*Miller-El*), defendant argues that statistical disparity alone can give rise to an inference of discrimination, and that while the sample was small in this case, the statistical disparity was high. In *Miller-El*, the United States Supreme Court held that if a prosecutor's proffered reason for peremptorily striking African-American prospective jurors applied to an otherwise-similar nonAfrican-American juror left on the jury, that evidence was to be considered at the third step of the *Batson* analysis. (*Miller-El*, *supra*, at p. 241.) As defendant acknowledges, *Miller-El* is inapplicable here, where we are considering the first step (prima facie case) of the *Batson* analysis.

Defendant next argues that the prosecutor's retention of Prospective Juror No. 3750, presumably a nonminority, and her removal of Prospective Juror No. 6716, an African-American, creates a reasonable inference that the prosecutor had an improper motive for removing Prospective Juror No. 6716. This argument ignores the fact that Prospective Juror No. 3750 never expressed any suspicion or feeling that law enforcement officers or prosecutors unfairly treated him or his family members. In fact, Prospective Juror No. 3750 said that he deserved his conviction for evading police, and

that his robbery conviction had been the fault of the victim, not anyone else. In contrast, Prospective Juror No. 6716 specifically blamed the prosecutor who had charged her brother with what she thought was an overly aggressive strike offense.

Finally, we note that the prosecutor removed most of the prospective jurors who either themselves or their family members had had bad experiences with the criminal justice system. She removed Prospective Juror No. 6459 after she shared that she thought her cousin had been treated unfairly by the criminal justice system. She removed Prospective Juror No. 4110 after she said that she held a grudge against law enforcement and prosecutors because of a drunk driving conviction that she felt that she did not deserve. And, she removed Prospective Juror No. 0567 after he shared that he might think about punishment during the guilt phase "because sometimes the judgment is not good." It follows that we can readily conclude that the prosecutor had a proper motive for dismissing Prospective Juror Nos. 6716 and 7696.

Resentencing on Firearm Enhancements

In his supplemental opening brief, defendant requests that we remand the matter to the trial court to exercise its discretion under sections 12022.5 and 12022.53 to strike any or all of the firearm enhancements. The People do not object to his request.

As set forth in *People v. Woods*, *supra*, 19 Cal.App.5th at page 1090: "Under a recent amendment to . . . section 12022.53 . . . trial courts . . . have the power under subdivision (h) of the statute, 'in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section.'" (See also *People v. Robbins*, *supra*, 19 Cal.App.5th at p. 679.) We agree that defendant

is entitled to a new sentencing hearing on the enhancements. The matter is remanded to the trial court to consider whether to strike any or all of the firearm enhancements.

DISPOSITION

The sentences for the firearm enhancements are reversed. The trial court is directed to exercise its discretion under section 12022.53, subdivision (h). If the trial court elects not to strike or dismiss the enhancements, then the trial court is directed to resentence defendant for the firearm enhancement(s). (§ 12022.53, subd. (d).) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ