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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

NOE CHANG LEON,

Defendant and Appellant.

2d Crim. No. B279449
(Super. Ct. No. 15F-03953-C)
(San Luis Obispo County)

A jury found Noe Chang Leon guilty of assault with a deadly or dangerous weapon, a shoe (Pen. Code, § 245, subd. (a)(1)¹), assault with force likely to cause great bodily injury (*id.*, subd. (a)(4)), and witness dissuasion (§ 136.1, subd. (c)(1)). The jury found true that the dissuasion was accompanied by a threat of force or violence. Leon admitted a gang enhancement as to the assault with a deadly weapon count. (§ 186.22, subd. (b)(1).) The court sentenced Leon to nine years in state prison.

¹ All statutory references are to the Penal Code.

The sole issue on appeal is the trial court's denial of two *Batson/Wheeler* motions for failure to establish a prima facie case. We affirm.

FACTS

Underlying Offenses

On January 22, 2015, Benjamin Kennedy was driving home in Nipomo. A person later identified as Javier Chang was walking in the middle of the street with a beer in his hand. Kennedy stopped for Chang, and Chang poured beer on Kennedy's car. Kennedy got out of his car and yelled at Chang, calling him a "piece of shit." Chang pulled up his shirt as if he had a gun and threatened to shoot Kennedy. Kennedy told Chang, "Just let me get back in my car. It's not worth it."

While Kennedy was backing away, Chang and another man hit him with beer bottles. Kennedy saw the men making gang signs. One of the men stated, "This is Nipas, homey." Kennedy had heard of Nipas as a local gang. The men charged Kennedy.

A scuffle ensued in which one or two others, including Leon, joined. Kennedy was punched and kicked.

Kennedy managed to get away and ran down the street. Leon followed him. When Leon caught up with Kennedy, Kennedy had his cell phone out. Leon told Kennedy, "If you're calling the police, this is just going to get worse for you and yours." Kennedy ran home.

Batson/Wheeler Motions

(a) Juror No. 3

Juror No. 3 is African-American. He worked as a civilian for the Air Force for 35 years. He obtained a college degree while working for the Air Force. He is retired.

The prosecutor asked jurors whether race would play a part in their evaluation of the evidence. When the prosecutor asked

Juror No. 3 what he thought about that, the following colloquy took place:

“[Juror No. 3] Well, I knew it was going to come to this. I was fortunate in my career. I grew up in Los Angeles, and I could have probably ended up like any of these, but I was fortunate enough and I went into the Air Force. Lucky enough to get out. And while I was in there, I got my college degree. So I consider myself fortunate. I believe in second chances. I understand that I may see things a little differently than these folks. I don’t know how it would turn out. . . .

“Q [W]hat concerns do you think I should know about that may affect or could affect your ability to be fair and impartial?

“[Juror No. 3] Probably one of the deepest things for me is that I do believe in second chances. If you make a mistake once, it shouldn’t end your life unless it’s serious. Committing murder, something like that. If it’s a crime that folks can recover from, I have difficulty with, you know, throwing the book at folks. Okay?

“Just because of where I came from, who I am, and what I look like, the system has not been fair. It has -- how can I put this? The system is set up to where it can be manipulated to affect certain people in different ways. I’m aware of that. I will try to be as objective as I can, but there [are] some things that are just deeply rooted and they may surface. I’m not sure.

“Q Is one of the things that’s a potential for you suspicion of law enforcement?

“[Juror No. 3] Bad actors in law enforcement that are not rooted out, and the system hasn’t even made an effort to root them out. That bothers me a lot. . . .

“Q Here, is there a danger or a potential that you could be an advocate for addressing issues or problems with the criminal justice system as a juror?

“[Juror No. 3] I would have to say honestly it depends on how things unfold. And if things unfolded a certain direction, some things could come to the surface.

“Q Give me a scenario.

“[Juror No. 3] Well, for instance, the benefit of the doubt. That’s kind of one of these gray areas where you can skew certain things in certain directions and, say, almost get a definite result. I’ve been in situations where folks --I’ve hired the best-qualified folks. And the fact that they were minorities, I had to do investigations from the Pentagon. And if they did well on the investigations, everything was above board, but it’s just the fact that trying to do the system -- work the system as it’s supposed to, I have difficulty with that.

“Q Okay. So it’s -- there’s the potential for a question mark in your mind?

“[Juror No. 3] Yes.

“Q Okay. I appreciate that.”

The trial court found the defense failed to make a prima facie case. Nevertheless, the prosecutor stated his reasons for the record:

“We have a gentleman who said that he did not think he could be fair because of the way the criminal justice system has operated in the past. He said it was going to essentially be -- I’m paraphrasing him -- a wait-and-see procedure.

“I did not think that was enough to excuse [Juror No. 3] for cause, but somebody who says that they would have to wait and see how the process played out and if he -- and I’m paraphrasing -- saw any malfeasance, then I was under the distinct impression that he could use the jury system to right any perceived wrongs. That’s not following the law. That is going against what he was tasked to do and, therefore, I do not think he could be a fair and

impartial juror in this case, and that's why I exercised a peremptory challenge.

"Whether the person was black, white, any other color, anybody who has that opinion that they are going to take a wait-and-see approach to the facts of this case and they're going to use this trial as a vehicle to right a perceived wrong, regardless of their race or ethnicity, is improper and I think it's a properly exercised peremptory challenge."

(b) Juror No. 5

Juror No. 5 is Hispanic, married, works at a state hospital as a custodian, and has three adult children. The following colloquy took place between the prosecutor and the juror:

"Q The visual of our situation is we have three Hispanics that are criminal defendants. How does that affect you? How does that make you feel?

"[Juror No. 5] Doesn't affect me.

"Q Okay.

"[Juror No. 5] For me, they're just kids, okay? They get into the wrong -- wrong side of the road. Okay? So I have nephews that put in the same -- they went through gangs and everything, you know, but I never kept -- I know them, but they were living in Santa Ana. Okay? And they were doing the same thing, troublemakers. But these are like kids that get in trouble.

"Q Now, are you presuming that they have done this particular thing that they're alleged of and that's why you're saying they're in trouble?

"[Juror No. 5] No, no, they just -- well, they're here. See what I mean?

"Q So am I --

"[Juror No. 5] Just because they're here doesn't mean they're guilty. You see what I mean?

“Q Yes, I do.

“[Juror No. 5] You see --

“Q I want to see if you see what I mean.

“[Juror No. 5] Correct. Prior military, you know, I’ve been dealing with kids but older kids that are -- what I’m going to say, you know, I’ve been around kids and that. Okay? And that with my situation right now, working at the state hospital, okay, it’s the same. It’s a lot of young kids. So I don’t see -- I don’t know.”

After questioning other jurors, the prosecutor returned to Juror No. 5:

“Q You mentioned that the defendants here on trial are kids.

“[Juror No. 5] Yeah.

“Q And you had, maybe, some experience with some of your nephews in Southern California and something that they may have done that you didn’t agree with --

“[Juror No. 5] Uh-huh.

“Q But maybe it was just the boys will be boys and they will grow out of it. Is there any danger in evaluating the defendants’ behavior here where if they were 40, 45 or 50, you would look at their evidence differently?

“[Juror No. 5] No.

“Q And, therefore, change this beyond a reasonable doubt?

“[Juror No. 5] No. The reality, they’re kids, right? But they committed a crime or a -- excuse me -- or they get in trouble, like I was saying before.

“Q And they’re alleged. They’re alleged to have committed a crime.

“[Juror No. 5] But for me, they’re in trouble; that doesn’t mean they’re not kids. Okay? They’re always going to be kids. But now they got in trouble. But now they have to pay

consequences. Okay? And that's what you have to evaluate, what's going on there.

"Q So --

"[Juror No. 5] Yes, because -- okay. Like my little kids. Okay? They get in trouble. Okay? You think I'm going to punish them like a grownup? I have to see what the problem is before I can make judgment on it.

"Q I hear what you're saying. And you mentioned the issue of punishment. If these defendants are found guilty, there's only one person in this entire room who decides what the punishment is.

"[Juror No. 5] That person over there.

"Q You got it.

"[Juror No. 5] But then I have to evaluate what they did, the problem, you know, and then I have to make a decision what's the response. And then I'm going to make my judgment. Okay? Because, you know, the -- you know, the guilty or not guilty or whatever, but I have to make -- like I say, I haven't heard the evidence. I haven't heard nothing to make a judgment.

"Q And what we're asking you to do --

"[Juror No. 5] If I'm going to go -- If I'm going to have a -- If I'm going to be able to make a difference between being kids or being grownups, is that what you're asking?

"Q No. What I'm saying is, can you judge a person's behavior regardless of their age; you're not going to consider their age?

"[Juror No. 5] No, no, if -- like I say, if under the evidence, I'm going to judge them as a grownup. Okay? But first I have to listen to the evidence and, you know, whatever happened.

"Q And that's what we're going to ask you to do because we cannot have you consider the consequences.

“[Juror No. 5] Uh-huh.

“Q Is there any danger of that happening here?

“[Juror No. 5] I don’t think so.”

When the prosecutor exercised a peremptory challenge to Juror No. 5, defense counsel objected that, looking at the potential jurors in the audience, there were no other people of color. The prosecutor stated that one cannot determine a person’s racial makeup by looking at him or her, and that the names on the jury list undercut defense counsel’s argument.

The trial court found that Leon failed to establish a prima facie case. Nevertheless, the court allowed the prosecutor to state his reasons for the peremptory challenge. The prosecutor stated:

“I exercised my peremptory because one of the first things that was uttered out of [Juror No. 5’s] mouth were ‘these kids.’ He talked about the defendants being kids. He talked about them and equated them to his own nephews who made mistakes in their lives when they were kids. He said some other things that were favorable to the prosecution, but the first reaction he had was to label the defendants ‘kids.’ That is a huge gamble that I am taking that a potential juror is looking at these defendants as something other than adults.

“I voir dired on that. He was back and forth on that. But that is a huge gamble that I’m taking. It has nothing to do with race; it has everything to do with looking at the defendants as something other than they are, which are adults that are being charged as adults and, consequently, not wanting to risk having that juror look at these individuals as kids caused me to exercise a peremptory challenge.

“I did not hear any such articulation from any other jurors, and I gave them ample opportunity to address the issue of age.

But that lone -- my recollection is that lone juror used that lone term 'kids' on multiple occasions, and I exercised the peremptory therefor."

DISCUSSION

Leon contends the trial court erred in denying his *Batson/Wheeler* motions.

Batson v. Kentucky (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 prohibit a prosecutor from exercising peremptory challenges to potential jurors solely because of their race. When a defendant alleges a *Batson/Wheeler* violation, a three-part test is used to determine whether a potential juror was challenged on the basis of race. (*United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 919.) First, the defendant must make a prima facie showing that the prosecutor's challenge was made on an impermissible ground, such as race. (*Ibid.*) Second, if the defendant has made such a prima facie showing, the burden shifts to the prosecutor to offer a race-neutral basis for the challenge. (*Ibid.*) Third, if the prosecutor offers a race-neutral basis, the trial court must decide whether the defendant has proved the prosecutor's motive was purposeful racial discrimination. (*Ibid.*)

Under California law, it is presumed that peremptory challenges have been exercised in a constitutional manner. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193.) The party claiming an unconstitutional use of peremptory challenges therefore bears the burden of making a prima facie case of impermissible exclusion of members of a cognizable group. (*People v. Scott* (2015) 61 Cal.4th 363, 384.)

If upon review of the entire record it appears that grounds exist on which the prosecutor might reasonably have excused the jurors in question, the appellate court will affirm. (*People v. Box*

(2000) 23 Cal.4th 1153, 1188, overruled on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911.)

The defendant establishes a prima facie case by showing that the totality of the facts gives rise to the inference of discriminatory purpose. (*People v. Blacksher* (2011) 52 Cal.4th 769, 801.) The defendant need not show a pattern of discrimination; even a single instance of racial discrimination is prohibited. (*People v. Avila* (2006) 38 Cal.4th 491, 553.) Where, as here, the trial court finds no prima facie case of discrimination but permits the prosecutor to state his reasons for excusing the juror without ruling on the validity of reasons, the appellate court reviews the trial court's first-stage ruling. (*People v. Scott*, *supra*, 61 Cal.4th at p. 386.)

(a) *Juror No. 3*

Leon argues the trial court relied on incorrect law in finding he had not established a prima facie case. The trial court inquired why a Hispanic defendant was making a *Batson/Wheeler* motion for an African-American juror. But the trial court did not deny the motion on that ground. Race-neutral grounds for the prosecutor's challenge to Juror No. 3 are apparent. There is no reason to require further inquiry.

Juror No. 3 twice stated that he believes in second chances; he said he had difficulty "throwing the book at folks." He also said, "I will try to be as objective as I can, but there's some things that are just deeply rooted and they may surface. I'm not sure." He said there are "[b]ad actors in law enforcement that are not rooted out, and the system hasn't even made an effort to root them out. That bothers me a lot."

Finally, when the prosecutor asked Juror No. 3 whether there is the potential that he could address problems with the criminal justice system as a juror, he replied, "I would have to

say honestly it depends on how things unfold. And if things unfold in a certain direction, some things could come to the surface.”

A reasonable prosecutor might not want to go to trial with a juror who gave such responses, no matter what the juror’s race.

(b) Juror No. 5

Leon argues the trial court relied on incorrect law in finding he had not established a prima facie case. Leon claims the court found he failed to establish a prima facie case because there was a possibility other Hispanic jurors were on the jury panel. But the argument that there were no more Hispanic potential jurors was raised by defense counsel. The court did not state it was denying Leon’s motion because there were other Hispanic potential jurors. Instead, the court found no prima facie case. Race-neutral reasons are apparent. Juror No. 5 referred to the defendants as “just kids” and said he had nephews who “went through gangs.”

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

John A. Trice, Judge

Superior Court County of San Luis Obispo

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