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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

THE PEOPLE, Plaintiff and Respondent, v. NATHANIEL CYPRIAN, Defendant and Appellant.	B283088 (Los Angeles County Super. Ct. No. TA141506)

APPEAL from a judgment of the Superior Court of Los Angeles County, Pat Connolly, Judge. Affirmed in part, reversed in part, and remanded with directions.

James M. Crawford, 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, Stephanie C. Brenan and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Nathaniel Cyprian appeals from a judgment and sentence following his convictions for two counts of second-degree burglary and one count of possession of a firearm by a felon. Appellant contends the prosecutor committed *Batson/Wheeler* error.[1] He further contends the trial court erred in imposing and staying sentence enhancements based on two prior prison terms, as no evidence was submitted to prove the prior convictions. Finally, appellant contends that the matter should be remanded for the trial court to exercise its discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620) whether to strike two firearm enhancements imposed. Respondent concedes the sentence was unauthorized, and requests this court remand the matter for a new trial on the prior conviction allegations and for resentencing. For the reasons set forth below, we conclude that the sentence was unauthorized and that remand is the appropriate remedy. Accordingly, we affirm the convictions, vacate the sentence, and remand for further proceedings.

STATEMENT OF THE CASE

Appellant was charged by information with two counts of burglary in violation of Penal Code section 211 (counts 1 & 2), and one count of possession of a firearm by a felon in violation of Penal Code section 29800, subdivision (a)(1) (count 3).[2] As to

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

[2] All further statutory citations are to the Penal Code, unless otherwise stated.

counts 1 and 2, it was further alleged that appellant personally used a handgun within the meaning of section 12022.53, subdivision (b). As to all counts, it was alleged that appellant had suffered two prior prison terms within the meaning of section 667.5, subdivision (b).[3]

A jury found appellant guilty as charged. It found the burglaries to be in the second degree, and found true the firearm allegations.

Appellant waived his right to a jury trial on the prison priors, and a court trial was scheduled for May 24, 2017. On that date, no trial was held, and no parties objected to the lack of trial. The trial court then sentenced appellant to a total of 16 years, four months in state prison as follows: on count 1, two years, plus 10 years for the firearm enhancement; on count 2, one year, plus three years, four months for the firearm enhancement; on count 3, two years, but stayed pursuant to section 654. The court also imposed but stayed the sentences on the prison priors.

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[3] Although appellate counsel states that the trial court imposed but stayed sentences on three prior convictions, the record shows that only two prior convictions within the meaning of section 667.5 were charged in the information, and that the trial court imposed but stayed sentences on the two priors. The discrepancy likely stems from the fact that in count 3 (possession of a firearm by a felon), the information alleged that appellant had three prior felony convictions.

STATEMENT OF THE FACTS[4]

On August 19, 2016, at around 11:45 p.m., appellant and a male companion entered a Wing Stop restaurant in Compton. Briana Rodriguez was working at the restaurant's cash register, and Stephanie Hernandez was cleaning the dining area. Appellant and his companion walked toward the register and placed an order. As Briana was taking the order, the two men walked around the counter. Appellant grabbed Briana's shoulder and said, "Bitch, open the register." When Briana refused, appellant pulled out a black handgun and pointed it at her stomach. The store manager then came out and opened the register. After appellant and his companion took all the money in the register, they fled. When police arrived shortly thereafter, Briana and Stephanie provided the police with a description of appellant. On September 6, 2016, Briana and Stephanie identified appellant from a photographic six-pack. They also identified appellant at trial. The entire incident was captured by the restaurant's five security cameras, and the video-recordings were played for the jury.

DISCUSSION

A. *Batson/Wheeler* Motions

Appellant, who is African-American, contends he was denied his state and federal constitutional rights to equal protection and a jury drawn from a fair cross-section of the community when the prosecutor exercised peremptory challenges

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[4] As appellant does not challenge the factual basis for his convictions, we summarize the evidence supporting them.

to dismiss two prospective African-American jurors. (See *Batson*, *supra*, 476 U.S. 79; *Wheeler*, *supra*, 22 Cal.3d 258.)

1. *General Principles*

"The purpose of peremptory challenges is to allow a party to exclude prospective jurors who the party believes may be consciously or unconsciously biased against him or her. [Citation.]" (*People v. Jackson* (1992) 10 Cal.App.4th 13, 17-18.) A peremptory challenge may be predicated on a broad spectrum of evidence ranging from "the obviously serious to the apparently trivial, from the virtually certain to the highly speculative." (*Wheeler*, *supra*, 22 Cal.3d at p. 275; accord, *People v. King* (1987) 195 Cal.App.3d 923, 933.) However, "[b]oth the state and federal Constitutions prohibit the use of peremptory strikes to remove prospective jurors on the basis of group bias." (*People v. Scott* (2015) 61 Cal.4th 363, 383 (*Scott*).) Group bias is bias against "'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds.'" (*People v. Avila* (2006) 38 Cal.4th 491, 541.)

Trial courts engage in a three-step process to resolve claims that a prosecutor used peremptory challenges to strike prospective jurors on the basis of group bias. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved

purposeful racial discrimination.' [Citation.]" (*Johnson v. California, supra,* 545 U.S. at p. 168, fn. omitted.)

In determining whether appellant has proved purposeful discrimination, """the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." [Citation] In reviewing a trial court's denial of a *Batson/Wheeler* motion, we examine "only whether substantial evidence supports its conclusions." [Citation.]"' (*People v. Chism* (2014) 58 Cal.4th 1266, 1314.) "'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]"' (*People v. Manibusan* (2013) 58 Cal.4th 40, 76.)

2. *Relevant Factual Background*

During the court's voir dire, the prospective juror who first sat in seat No. 18 (Prospective Juror No. 18) stated he lived in Carson and had been married for 59 years. He was a retired military industrial electrician, and his wife was a retired civil service worker. They had three children, one of whom was an adult daughter, described as "retired military." He had sat as a juror on two cases: one resulted in a verdict, the other was pleaded out.

During attorney voir dire, defense counsel presented a hypothetical about winning the lottery and deciding to purchase

a Lamborghini from a car salesman (Hank) at a Volkswagen dealership. Counsel stated: "So you drive down to the Volkswagen dealership, and you meet Hank. You shake Hank's hand. And Hank takes you to the showroom floor, and there is this car that's covered with a big car cover. Now, this car has a very unique silhouette. If anybody knows what a Beatle looks like -- like a super Beatle, or a Beatle Volkswagen, it looks like a big circle that got cut in half and has four wheels attached to it; it has a very high arc. And you look at this car cover, and it looks like there's a Volkswagen Beatle under the car cover. It doesn't look like a Lamborghini."

Defense counsel asked Prospective Juror Nos. 9 and 10 if they would purchase the vehicle. They answered, "No." Counsel then asked if the prospective jurors would purchase the vehicle if Hank were to lift up a corner of the car cover to reveal a hubcap showing the brand "Lamborghini." When asked, both Prospective Juror Nos. 5 and 12 stated that they would not be willing to purchase the vehicle. Counsel then expanded on his hypothetical, asking the jurors to assume Hank had called over two car salesmen from the Nissan dealership next door. "They tell you that they just looked under the car cover two days ago, and they swear it is the most beautiful Lamborghini that they've ever seen." When asked, Prospective Juror No. 14 stated he would not purchase the vehicle "because how do I know that I can trust what they're saying?"

The following colloquy then occurred:

> Counsel: "Okay. Juror No. 18, how about you, sir? Are you going to buy that car?"

> Prospective Juror No. 18: "No, I wouldn't buy that car until it's proven to me that it's a Lamborghini. Take the cover off. If I'm spending half a million dollars, I want to see it."
>
> Counsel: "You saw a hubcap."
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> Prospective Juror No. 18: "No, I want to see the car. I just told you."
>
> Counsel: "You've had two Nissan dealership salesmen tell you --"
>
> Prospective Juror No. 18: "I've just given you my solution to the problem. It has to be proven it's a Lamborghini. End of story."

Subsequently, the parties exercised their peremptory strikes. The prosecutor excused the prospective jurors who sat in seats nos. 3, 12 (formerly No. 14), 1, 10 and 12 (formerly Prospective Juror No. 18).[5] When the prosecutor dismissed No. 18/12, defense counsel made a *Batson/Wheeler* motion. At side bar, defense counsel stated that other prospective jurors had the "same information" as No. 18/12. "I don't see why he was selected beyond the fact he's an African-American." The court then asked the prosecutor if he wanted to be heard. The prosecutor said: "Yes, Your Honor. With regard to Juror No. 12, that I just kicked, when . . . [counsel] was questioning him with regards to the reasonableness and the probability in using the hypothetical,

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[5] When prospective jurors sitting in the first 12 seats were dismissed, those seats were filled with other prospective jurors sitting in the jury box or in the venire.

he was fighting in regards to this hypothetical and what he was saying, how he was explaining himself. This is the only African-American juror that I've kicked so far. Based upon the answers that I've heard and the things he was saying, that's why I [kicked] him."[6]

The court then ruled: "I'm not going to find, first of all, that there's even a prima facie showing. But with that, there has been a response. I thought he was more joking than anything else. There was obviously a connection [with] [defense counsel] Mr. Miller. I used to be a prosecutor. I would have kept him. I like him. [But] I have no issue with it whatsoever." The court then excused No. 18/12, stating, "Thank you very much for your service and also for your child."

A new prospective juror was called from the venire to sit in seat no. 12. The prospective juror stated that she lived in Norwalk and had three children. She had been a victim of an automobile theft. Her son and son-in-law had been convicted of crimes. The prospective juror explained: "My son when he was a teenager was a lookout for two other teenagers that robbed a little pizza man of $45." He was 17 at the time, and the crime happened in Texas. She thought he was treated fairly by the justice system in Texas. As to her son-in-law, he had been convicted of attempted murder and was serving time in Los Angeles County. She also thought he was treated fairly by the justice system.

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[6] None of the jurors who answered the Lamborghini hypothetical -- Prospective Juror Nos. 5, 9, 10, 12, 14 and 18 -- were seated on the jury. The court excused Prospective Jurors Nos. 10 and 12. The prosecutor excused Nos. 14 and 18, and the defense excused Nos. 5 and 9.

Subsequently, the prosecutor excused Prospective Juror No. 12. Defense counsel objected on the basis that this was the second African-American the prosecutor had stricken and that No. 12 had "pretty much the same qualifications" as other prospective jurors.

Before the trial judge ruled whether defense counsel had made a prima facie showing of a *Batson/Wheeler* violation, the prosecutor interjected: "Your Honor, in regards to the juror that I just kicked . . . , she stated that her son and son-in-law were involved in two separate incidents. Son-in-law, I believe, convicted or charged with attempted murder. The son she said was a teenager and mentioned something about a robbery that he was involved in. And she said, 'Yeah, there was a robbery with a little pizza man.' And to me that's minimizing the event in regards to what her son was involved in. And my concern is since this case is a robbery, she's going to think the same thing and minimize the actions that the defendant took. So that's why I kicked her."

The court then ruled that there was no *Batson/Wheeler* violation. It noted: "As soon as she talked about the robbery of her son, I knew she was going to be gone. But I wasn't sure if she was minimizing the amount or the person [robbed]. But I did hear the same thing."

The defense and the prosecutor each dismissed an additional prospective juror before accepting the jury panel. No further *Batson/Wheeler* motions were made.

3. *Analysis*

Appellant first contends that the trial court impliedly found he had made a prima facie case of discrimination with respect to the two *Batson/Wheeler* motions. We agree. As to the first

motion challenging the excusal of Prospective Juror No. 18/12, the court asked the prosecutor for the reasons before ruling whether appellant had made a prima facie case. However, "[w]hen a trial court solicits an explanation of the strike without first declaring its views on the first stage, we infer an 'implied prima facie finding' of discrimination and proceed directly to review of the ultimate question of purposeful discrimination. (*People v. Arias* (1996) 13 Cal.4th 92, 135 ['The court cannot undo an implied ruling once made by stating after explanations have been received that it never intended to find a prima facie case'].)" (*Scott*, *supra*, 61 Cal.4th at p. 387, fn. 1.) As to the second *Batson/Wheeler* motion, the trial court did not make a finding on the issue. This court likewise proceeds directly to review of the ultimate question of purposeful discrimination "where a trial court skips over the first stage altogether." (*Scott*, at p. 387, fn. 1.)

With respect to the excusal of Prospective Juror No. 18/12, the prosecutor explained that he dismissed No. 18/12 based on the prospective juror's answers to the Lamborghini hypothetical. The prosecutor's statement that the juror was "fighting" the hypothetical is reasonably construed to refer to the fact that even as counsel added facts to the hypothetical, the prospective juror was not inclined to change his mind. His insistence, even as counsel was elaborating on the hypothetical -- that nothing short of removing the cover would persuade him of the make of the car, may have suggested a reluctance to credit anything but his own version of conclusive evidence. The court's observation of "an obvious connection" between the juror and defense counsel further supported the court's finding that the prosecutor had excused the juror for reasons having nothing to do with race. We

note that none of the jurors who participated in answering the Lamborghini hypothetical were ultimately selected, and that before excusing No. 18/12, the prosecutor had excused No. 14, who had stated that he would not trust the testimony of two witnesses about the hidden car. In short, substantial evidence supports the trial court's conclusion that the prosecutor's race-neutral reason for excusing No. 18/12 was credible. (*People v. Mai* (2013) 57 Cal.4th 986, 1048 [""Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions.""].)

As to the second *Batson/Wheeler* motion, the prosecutor's stated reasons for excusing Prospective Juror No. 12 were that the prospective juror had family members who had been convicted of crimes, and that she appeared to be minimizing her son's robbery conviction. On their face, the stated reasons were legitimate and race-neutral. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 346 [finding no discriminatory intent in excusing a juror whose father and husband had prior convictions]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1052-1053 [prosecutor did not improperly challenge juror whose uncle had been convicted of murder]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690 ["use of peremptory challenges to exclude prospective jurors whose relatives and/or family members have had negative experiences with the criminal justice system is not unconstitutional"].) The prospective juror stated that her son had been convicted of a robbery of a "little pizza man," and her son-in-law was serving time for attempted murder. Substantial evidence supports the trial court's conclusion that the prosecutor's race-neutral reasons for excusing No. 12 were credible.

Appellant faults the trial court for not making a "sincere and reasoned attempt" to evaluate the prosecutor's stated reasons for dismissing the two prospective jurors. He does not explain what the trial court should have done differently. The prosecutor's stated reasons were "neither contradicted by the record nor inherently implausible." (*People v. Ward* (2005) 36 Cal.4th 186, 205.) There was nothing to indicate that further detailed inquiry was required. In sum, appellant has not shown "'purposeful racial discrimination'" in the excusal of the two prospective jurors (*Johnson v. California*, *supra*, 545 U.S. at p. 168). Accordingly, the trial court did not err in denying the *Batson/Wheeler* motions.

B. *Prior Prison Terms*

As noted above, a court trial of the prior prison term allegations was scheduled for the date of the sentencing hearing, but no such trial was held. Instead, without objection from any party, the court went directly to sentencing. It imposed and stayed sentence enhancements for the two prison priors. However, as the People offered no evidence and appellant did not admit to the truth of the prior conviction allegations, it was not proven that appellant had suffered two prison priors. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1065 ["The People must prove each element of an alleged sentence enhancement beyond reasonable doubt."].) In addition, under section 1385, a trial court may either impose or strike a prior prison term enhancement. (*People v. Haykel* (2002) 96 Cal.App.4th 146, 151.) The court may not impose and stay such enhancements. Accordingly, the challenged sentencing enhancements were unauthorized. (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521.)

Under section 1262, "If a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct." More specifically, it is well-established that where "defects in the proof of the prior convictions" are capable of correction in a new trial, the "proper" procedure is to set aside the true findings and order a new trial on the challenged convictions and resentencing afterward. (*People v. Morton* (1953) 41 Cal.2d 536, 544; see, e.g., *People v. Marin* (2015) 240 Cal.App.4th 1344, 1366 [reversing judgment as to true finding on strike allegation; allowing prosecutor to retry strike allegation on remand]; *People v. Cheatham* (1968) 263 Cal.App.2d 458, 464 [ordering retrial on a prior conviction allegation where "no evidence of the two prior felonies was formally offered"].) Accordingly, we will remand the matter for a new trial on the prior conviction allegations and resentencing pursuant to the outcome of that trial.

C. *Firearm Enhancements*

Section 12022.53 provides sentence enhancements for the use of firearms in the commission of felonies. Prior to the enactment of SB 620, a trial court could not strike these enhancements. (See former § 12022.53, subd. (h) ["Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."].) However, effective January 1, 2018, SB 620 replaced the prohibition on striking the firearm enhancement with the following: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any

resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).) Respondent concedes that SB 620 applies retroactively to nonfinal judgments, such as appellant's.

Here, the trial court imposed firearm enhancements on counts 1 and 2. Accordingly, we vacate the sentence and remand the matter for the trial court to exercise its discretion whether to strike the firearm enhancements. We express no opinion how the court should exercise its discretion on remand.

DISPOSITION

The convictions are affirmed, and the sentence is vacated. The matter is remanded for a limited trial on appellant's prior conviction allegations and for resentencing pursuant to the outcome of that trial and SB 620.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.