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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ISMAEL MARQUEZ, Defendant and Appellant.	B259210 (Los Angeles County Super. Ct. No. BA364222)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael E. Pastor and Monica Bachner, Judges. Affirmed.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following two jury trials, Ismael Marquez was found guilty of first-degree murder, battery upon a spouse, and criminal threats. He contends the prosecutors in both trials committed *Batson/Wheeler* error.[1] He also raises numerous challenges to the trial court's rulings in the second trial, and contends the evidence was insufficient to show the murder was gang related. For the reasons set forth below, we find no error and accordingly, affirm.

STATEMENT OF THE CASE

Appellant was charged by information with the murder of Juan Hernandez (Pen. Code, § 187, subd. (a); count 1),[2] corporal injury to a spouse (§ 273.5, subd. (a); count 2), and criminal threats to said spouse (§ 422; count 3). As to the murder charge, it was alleged that appellant personally discharged a firearm causing death (§ 12022.53, subd. (d)), and that the crime was gang related (§ 186.22, subd. (b)(1)(C)). It was further alleged that appellant had suffered a prior "strike" within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

In appellant's first trial, the jury found him not guilty of corporal injury to a spouse (count 2), but guilty of the lesser-included offense of battery upon a spouse (§ 243, subd. (e)(1)). The jury deadlocked on the charges of murder (count 1) and criminal

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

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

threats (count 3), and the trial court declared a mistrial on those counts.

In the second trial, the jury found appellant guilty of first-degree murder and criminal threats. It found true the personal firearm use and gang allegations. After appellant waived his right to a jury trial on the prior conviction allegation, the trial court found that he had suffered a prior strike.

The court sentenced appellant to 79 years to life in state prison, consisting of 50 years to life on count 1, plus 25 years to life for the gun use enhancement and 4 years on count 3. Appellant was sentenced to time served on count 2.

Appellant timely appealed.

STATEMENT OF THE FACTS

A. *Appellant's Battery upon His Wife Martha*

At the first trial, appellant's wife, Martha, testified that in 2009, she and appellant were married, but living separately. During this time period, appellant was abusive. On June 12, 2009, Martha was walking on the street when appellant approached her on his bike. He then either "socked" her or pulled on her hair. Appellant dragged her some distance, causing a small cut to her leg. The assault lasted about three minutes.

B. *Appellant's Murder of Hernandez and Criminal Threats against Martha*

According to the prosecution, the victim Juan Hernandez was a member of the 29th Street gang. Hernandez was driving in 29th Street gang territory when he was flagged down by two other Hispanic males, including appellant. Appellant, a member of a rival gang -- the Ghetto Boyz -- walked up to the passenger

side of Hernandez's car and started shooting. Hernandez died from multiple gunshot wounds.

1. *The Shooting of Juan Hernandez*

Maria Gaetan testified that on the morning of February 18, 2009, she was walking with her daughter when she saw a car turn the corner toward the direction of a nearby laundromat. Two men crossed the street and approached the vehicle. One man walked up to the vehicle, greeted the person inside, and seconds later, Gaetan heard gunshots. Gaetan noticed the person who had greeted the driver waving a gun. Both men then ran away.

Gaetan did not see either of the men's faces, but observed that the man who had been next to the car had a tattoo on his neck. Gaetan spoke to the police, and described the tattooed man as 5'10", about 200 pounds, and 25 to 30 years old. She was shown some photographic six-packs and selected multiple photographs. However, Gaetan explained that she selected the photographs only because the police were pressuring her. At trial, Gaetan could not identify appellant as the shooter.

Carolina Noe testified that she lived near the crime scene. She was at home when she heard gunshots. She looked out her window and saw two Hispanic men running, one of whom was holding a gun. Noe did not see the men's faces. The police showed her two photographic six-packs and she selected four photographs. Noe testified that she simply selected photographs of people she had previously seen in the area. At trial, Noe could

not identify appellant as one of the two men she had seen running.[3]

2. *Appellant's Confession to Shooting Hernandez and his Criminal Threats against Martha*

Martha testified she married appellant in 1998. During their marriage, appellant was physically, verbally and emotionally abusive.

On July 9, 2009, Martha went to a Los Angeles police station on her own initiative and spoke with the police about Hernandez's shooting. Her recorded interview was played for the jury. Martha told the police that she did not want to "be involved," but that recently appellant "beat me up in the street, literally, down the street." Appellant then told her that "if he went to jail because of me, he was gonna come out and kill me. He wasn't gonna do life because of me." Martha told the police she did not want to go to court or testify, even though "I pretty much know exactly what happened" because she "fear[ed] for [her] life."

According to Martha, in February, appellant began "using" and "hanging out with this other guy," whom she later identified as "Stalker." The day after the shooting, appellant came to her work place. He gave her his car keys and said, "The cops are looking for me." Martha asked why, and appellant responded that he was "getting the fuck out of here" because "I think I killed

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[3] Appellant's photograph was not among those shown to either Gaetan or Noe. The police investigated two men whose photos were selected by Gaetan and Noe. One man had a significantly smaller build than appellant. As to the other man, timecards and the testimony of multiple co-workers established he was at work at the time of the shooting.

somebody." Appellant started crying and told her to sell his car to raise money for their children. Martha returned the keys to appellant, and told him to leave because she did not want to hear any more.

Later that night, appellant shared more details regarding the shooting. Appellant and Stalker had seen a man walking with a woman by a laundromat. Although they were not sure whether the victim was from 29th Street, appellant started shooting at him.

Appellant asked to borrow Martha's car to "go to one of his homeboy's house because he needed to get rid of the gun." When she later called to check up on him, he told her that he was "dissolving the gun." A few days later, Martha saw appellant with blisters on his hands.

Approximately two months later, appellant visited Martha at her house. They began arguing. Appellant knocked Martha down, choked her, and said, "[B]itch, I'll fuckin' smoke you. I'll kill you. . . . I'll kill you in front of your mom just like I killed Primo in front of his mom." Martha explained that appellant was simply guessing that the woman walking with Primo the day of the shooting was the victim's mother.

Martha testified at the preliminary hearing on June 18, 2010. She repeated the statements she had given the officers during her interview. She testified that appellant told her, "I'll smoke you," and later, "I'll kill you in front of your mom, just like I killed Primo in front of his mom."

C. *The Fingerprint Evidence*

Forensic print specialist Yolanda Reyes testified she lifted a latent print from the exterior passenger side of Hernandez's car on February 19, 2009. The car was "fairly clean," and no other

prints were found. Forensic print specialist Defonso Litiatco testified he matched the latent print with a left palm exemplar provided by appellant.

Meteorologist Robert Baxter testified that weather data for the area indicated that it had rained on February 16 and 17, 2009. Both Reyes and Litiatco testified that rain or water could wash a latent print off a car. Feresa Hernandez, the victim's sister, testified she saw him wash the car two weeks before his death.

D. *Gang Evidence*

Appellant's wife Martha testified at trial that he was a Ghetto Boyz gang member. Hernandez's sister Feresa testified that the victim was a 29th Street gang member. The shooting occurred in 29th Street gang territory.

Los Angeles Police Detective David Torres testified as the prosecution's gang expert. Asked about the Ghetto Boyz gang, he testified that it started in the 1980's and numbered between 100 and 130 members. Torres also testified that Ghetto Boyz's rivals included the 29th Street gang. Asked about the Ghetto Boyz's primary activities, Torres testified: 'Their primary activities are narcotic sales, assaults, attempted murders, shootings, murders, possession of firearms, stealing vehicles, and thefts or robberies." Asked to elaborate what he meant "when you refer to these as primary activities," Torres explained: "A primary activity is something that the gang is known for or the gang is involved in, which either enhances the gang, furthers the gang, is something that the gang uses itself to instill fear within the community. It's

part of the gang activity which is all encompassing and the reason that the gang is known."[4]

Asked a hypothetical question based on the facts of the case, Detective Torres opined that the shooting was gang related. He stated that going into a rival gang's territory in daylight and shooting a rival gang member would promote both the shooter and his gang.

E. *Defense Case*

Maria Fuentes testified that she had known appellant since they were children, and began dating him in 2008. She joined the 29th Street gang when she was 14, and knew appellant was a Ghetto Boyz member. Although Ghetto Boyz and 29th Street were rival gangs, Fuentes explained that she and her friends had "grown out of" that rivalry.

Fuentes testified she knew Hernandez as a fellow 29th Street gang member with the moniker "Primo." Although Fuentes claimed they were "close friends," she did not know where Hernandez lived, the names of his mother and siblings, or whether he had a girlfriend.

According to Fuentes, Hernandez sold marijuana from his car. Three or four times, she had seen appellant buy marijuana

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[4] The jury was instructed that a criminal street gang is an "ongoing organization, association or group" that has a "common name or symbol" and has as "one or more of its prim[ary] activities, the commission of murder, attempted murder, robbery, assault with a deadly weapon or sales of controlled substances." The jury was further instructed that to qualify as a "primary activity," "the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group."

from Hernandez. The last time was in the middle of January 2009. Fuentes specifically recalled seeing appellant buy drugs by speaking to Hernandez from the passenger side of Hernandez's car.

Steven Tillmann testified as the defense's fingerprint expert. Tillman acknowledged that prints could be "fragile" and destroyed by rain. However, on many occasions, he was able to retrieve prints from cars after they had been rained upon. Tillman also testified he had reviewed a scholarly article that concluded, based on experimental evidence, that fingerprints could survive being fully submerged in water.

DISCUSSION

A. *Batson/Wheeler M*otions

Appellant, who is Hispanic, 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 in both his first and second trials. (See *Batson*, *supra*, 476 U.S. 79; *Wheeler*, *supra*, 22 Cal.3d 258.) For the reasons set forth below, we reject these challenges.

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* (2005) 545 U.S. 162, 168, fn. omitted.)

2. *Jury Selection in First Trial*

a. *Relevant Factual Background*

During the first trial, the trial court (Hon. Michael E. Pastor) informed the parties they would have 20 minutes to question the prospective jurors after the court conducted an "extraordinarily detailed" voir dire. During the court's voir dire, Prospective Juror No. 4 stated she had a brother-in-law who was in jail for a "shooting." She visited him in prison, and sent him a card on his birthday. She also used to visit her brother, who was in jail on a drug charge. Prospective Juror No. 14 stated that her husband was in jail for an assault with a deadly weapon. She

visited him in prison, wrote to him and talked to him by phone. Prospective Juror No. 9 did not have a relative who was convicted of a crime. During the prosecutor's voir dire, Prospective Juror Nos. 4, 9 and 14 were not specifically questioned.

The prosecutor exercised his peremptory challenges to strike Prospective Juror Nos. 28, 14, 15, 9, and 4. When the prosecutor struck Prospective Juror No. 4, defense counsel objected on the basis that the prosecutor was excluding Hispanics. Counsel observed that Prospective Juror Nos. 4 and 14 were Hispanic women and that Prospective Juror No. 9 was a Hispanic man. He made no record of the number of Hispanic individuals in the venire.

The trial court determined that based on "the totality of the information before this court," the defendant had not made a prima facie showing of a *Batson/Wheeler* violation. The court nonetheless invited the prosecutor to provide his reasons for the peremptory strikes, if he wished to do so. The prosecutor stated that with respect to Prospective Juror Nos. 4 and 14, "one of the reasons" for challenging them was because "both indicated they had very close relatives in prison with whom they communicate[d] regularly. Juror 4, her brother. Juror 14, her husband. Both convicted of violent crimes." The court found the dismissal of these two jurors "very reasonable." It stated: "I believe the prosecution when the prosecution makes that representation in view of their answers to [the] questions." It then denied the *Batson/Wheeler* motion.

b. *Analysis*

Appellant contends his spousal battery conviction must be reversed because the prosecutor improperly excluded Hispanics from the jury. We disagree.

Here, the trial court determined that appellant had not made a prima facie showing, invited the prosecutor to state reasons for dismissal of the prospective jurors, found those reasons credible, and then denied the *Batson/Wheeler* motion on the basis of the lack of a prima facie showing. Under these circumstances, we review the trial court's first-stage ruling that no prima facie case of discrimination was shown. (See *Scott*, *supra*, 61 Cal.4th at p. 391 ["where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling"].) Our review is de novo. (See *People v. Edwards* (2013) 57 Cal.4th 658, 698 (*Edwards*) ["'[R]egardless of the standard employed by the trial court,' we independently review the record and determine whether it 'supports an inference that the prosecutor excused a juror on the basis of race.'"], quoting *People v. Cornwell* (2005) 37 Cal.4th 50, 73.)

In determining whether a prima facie case of discrimination exists, we consider the entire record of voir dire at the time the *Batson/Wheeler* motion was made. (*Scott*, *supra*, 61 Cal.4th at p. 384.) Particularly relevant evidence includes: "that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the

victim is a member of the group to which the majority of the remaining jurors belong." (*Ibid.*) "A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record . . . and that necessarily dispel any inference of bias." (*Ibid.*) Finally, the reviewing court should consider any "proffered justification that is facially discriminatory." (*Id.* at p. 391.)

The record before us is devoid of information concerning the number of Hispanics in the venire. Although the prosecutor struck 12 prospective jurors, we cannot determine from the appellate record whether the prosecutor used a disproportionate number of strikes against Hispanics or what number of Hispanics remained in the venire. The fact that three out of the first five challenged jurors were Hispanics, standing alone, is not dispositive. (See, e.g., *Scott*, *supra*, 61 Cal.4th at pp. 384-385 ["that the prosecutor struck two of the three African-Americans and three of an unknown number of Latinos who made it into the jury box" insufficient to establish prima facie showing]; *People v. Farnam* (2002) 28 Cal.4th 107, 136-137 [fact that "four of the first five peremptory challenges exercised by the prosecution were for Black prospective jurors" "fall[s] short of a prima facie showing"].)

Appellant faults the prosecutor for not questioning the challenged jurors. However, in light of the trial court's lengthy voir dire and the 20-minute limitation on the prosecutor's voir dire, we conclude that the lack of questioning raises no inference of bias. (See, e.g., *Edwards, supra,* 57 Cal.4th at p. 699 [where prospective jurors completed lengthy detailed questionnaire, "'we place little weight on the prosecutor's failure to . . . more thoroughly question a prospective juror before exercising a peremptory challenge'"], quoting *People v. Dement* (2011) 53

Cal.4th 1, 21.) Additionally, because the racial identity of each prospective juror is not in the record, "[t]he record therefore provides no indication that there was any discernible racial pattern to the prosecutor's questioning." (*Edwards*, *supra*, 57 Cal.4th at p. 699.)

Similarly, the prosecutor's failure to proffer a justification for challenging Prospective Juror No. 9 does not give rise to an inference of bias. Although it is good trial practice to proffer a justification for the exercise of a peremptory challenge, it is not legally required, as "a party exercising a strike . . . has no obligation to articulate a reason until an inference of discrimination has been raised." (*Scott*, *supra*, 61 Cal. 4th at p. 387.)

Appellant also contends the justification for challenging Prospective Juror Nos. 4 and 14 was pretextual. However, unless facially discriminatory, "the fact that the prosecutor volunteered one or more nondiscriminatory reasons for excusing the juror is of no relevance at the first stage." (*Scott*, *supra*, 61 Cal.4th at p. 390.) Therefore, we need not address those reasons further, except to note that the proffered reasons were not facially discriminatory, and the trial court implicitly found they reflected no racial bias. (*Id.* at p. 391.)

Finally, appellant requests a comparative juror analysis. No such analysis is required at the first stage ruling. Moreover, the record before us is insufficient to permit a comparative juror analysis. Specifically, there is no evidence about the ethnicity of the other prospective jurors. (See *People v. Lenix* (2008) 44 Cal.4th 602, 607 ["Comparative juror analysis . . . must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the

record is adequate to permit the comparisons."].) Finally, even assuming the other prospective jurors were nonHispanics, a comparative juror analysis would not assist defendant because no other juror had a comparable profile with Prospective Juror Nos. 4 and 14. Prospective Juror No. 1 stated that his *wife* visited his brother-in-law in prison. Prospective Juror No. 5 last visited his brother in prison two years earlier. Prospective Juror No. 12 had visited her brother who was imprisoned in a foreign country. Thus, none of these jurors had recently visited close relatives in jail for serious crimes.

As the foregoing demonstrates, appellant has not shown that the "totality of the relevant facts . . . give[s] rise to an inference of discriminatory purpose." (*Scott*, *supra*, 61 Cal.4th at p. 391.) Thus, appellant has not made a prima facie showing of discriminatory bias under *Batson/Wheeler*. Accordingly, we affirm the trial court's denial of the *Batson/Wheeler* motion.[5]

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[5] In a June 5, 2017 letter brief, appellant asked us to consider two recent cases addressing *Batson/Wheeler*. *People v. Gutierrez* (2017) 2 Cal.5th 1150 (*Gutierrez*) is not helpful, because, as appellant concedes, it focuses on the third stage ruling. Although *Currie v. McDowell* (9th Cir. 2016) 825 F.3d 603 addresses the first stage ruling, we find its analysis unpersuasive. There, in reviewing a claim for habeas relief, the federal court found that the state appellate court had erred in relying on the prosecutor's proffered reasons to defeat an inference of racial bias at the first stage. The court did not analyze whether, setting aside the prosecutor's proffered reasons, the totality of the circumstances gave rise to an inference of purposeful discrimination. Instead, it proceeded directly to the third stage ruling. (*Currie v. McDowell*, at pp. 609-610.) Here, we have considered the record under the totality of the

3. *Jury Selection in the Second Trial*

a. *Relevant Factual Background*

A different prosecutor handled the second trial. The jury pool consisted of 65 persons, each of whom had an identifying badge number. The court made general inquiries to the entire jury pool. Later, 20 prospective jurors were called to the jury box for further voir dire; they were seated in "seats 1 through 20." The court requested that the parties "when you're excusing, please indicate their seat numbers. For example hypothetically Juror Number 15 in seat 5."

During voir dire, Prospective Juror No. 6 stated that he had a new job starting around the time the trial was scheduled to end. In response to the prosecutor's inquiry about the new job, the prospective juror stated he would prioritize it over jury service. Prospective Juror No. 16 stated she had nieces and nephews who were involved in gangs and had been victims of a shooting. Prospective Juror No. 21 stated she had a son who was arrested for a DUI. Prospective Juror No. 53 stated she had dated "many gang members" and had worked for the public defender.

The prosecutor and defense counsel then made challenges for cause as to certain prospective jurors. At one point, defense counsel stated he had a challenge for cause to Prospective Juror No. 3. When informed that that prospective juror had already been excused, counsel stated: "These number systems are throwing me off. . . . I do have a cause challenge to Juror No. 4 in seat 3." Later, defense counsel informed the court he had a

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circumstances and found no prima facie showing of purposeful discrimination.

challenge for cause to prospective "Juror Number 19 in seat 19." The court asked if counsel meant "Juror 26," and he agreed that he was referring to Prospective Juror No. 26.[6]

Subsequently, Prospective Juror No. 16, who was sitting in Seat No. 11, along with two other prospective jurors, was dismissed for cause. The trial court then asked three prospective jurors to move into the vacated seats. Prospective Juror No. 21, who was sitting in a different seat in the jury box, moved into Seat No. 11.

The parties then began to exercise their peremptory challenges. The prosecutor used her third peremptory challenge to excuse Prospective Juror No. 16, stating, "People would like to thank and ask the court to excuse Juror No. 16 seated in seat number 11. I'm sorry, no. That's wrong. Juror Number 21, seated in seat number 11."

After the prosecutor used her sixth peremptory challenge to strike Prospective Juror No. 53, defense counsel made a *Batson/Wheeler* motion, arguing that "my client is being deprived of the African-American race." Counsel observed, "I don't believe there is any other African-Americans in the current jury box right now, nor is there any African-Americans, from what I view in the veneer [*sic*] that is left." The trial court (Hon. Monica Bachner) determined a prima facie case had been made, noting that Prospective Juror Nos. 6, 21, and 53 were African-Americans.

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[6] The transcript also reflects confusion about the numbers of the prospective jurors. For example, on several occasions the answers of Prospective Juror No. 66 are attributed to "Prospective Juror No. 53 No. 55."

Asked to provide her reasons for striking the three African-American prospective jurors, the prosecutor stated that she had excused Prospective Juror No. 6 because he had said he would prioritize his new job over sitting as a juror; she had excused prospective Juror No. 53 because she had dated gang members and worked for the public defender. As to Prospective Juror No. 21, the prosecutor stated, "This lady specifically stated that she had family members who had been in gangs. I believe -- I'm not sure if it was nieces or nephews -- . . . -- Let me make sure, [and] also look at my notes I have that weren't on my post-it. I'm going to double-check my notes as well. Yes. And in addition to [having] family members who were in gangs, . . . her son was arrested for a D.U.I." Defense counsel responded that as to Prospective Juror No. 21, "I didn't hear too much about gangs. I heard her son was arrested for D.U.I." The court asked whether Prospective Juror No. 21 had said that "her nieces and nephews had been shot?" The prosecutor responded that it was a different juror who said that, whereas Prospective Juror No. 21 stated she had family members who were in gangs.

The trial court denied appellant's *Batson/Wheeler* motion. It determined that under the totality of the circumstances, the prosecutor was credible and had offered nonpretextual race-neutral reasons for striking the prospective jurors. Specifically as to Prospective Juror No. 21, the court found that she had "family members in gangs" and that she had "a family member that had been involved in a D.U.I."

b. *Analysis*

On appeal, appellant claims the trial court erred in denying his *Batson/Wheeler* motion as to Prospective Juror No. 21, because it was factually incorrect that the prospective juror had

relatives in gangs. We conclude appellant has not shown purposeful discrimination in the prosecutor's excusal of Prospective Juror No. 21.

Our review of the record indicates there was confusion about the various prospective jurors, due in large part to the fact that different numbers were used to identify the same prospective juror -- the juror badge number and the jury box seat number associated with that person -- and that the latter number changed as prospective jurors moved into vacated seats. For example, Prospective Juror No. 21 moved into Seat No. 11, which had been vacated by Prospective Juror No. 16. It is thus possible the prosecutor conflated the answers of Prospective Juror No. 16 -- who stated she had nieces and nephews in gangs-- with those of Prospective Juror No. 21, as both occupied the same seat. Any such misapprehension was shared by the trial judge, who determined that Prospective Juror No. 21 had acknowledged having relatives in gangs.[7]

In light of the undisputed evidence of confusion, we conclude that at worst, the prosecutor made a good-faith mistake about Prospective Juror No. 21 and dismissed the prospective juror on the basis of that mistake. A "genuine 'mistake' is a race-neutral reason" for exercising a peremptory challenge. (*People v. Williams* (1997) 16 Cal.4th 153, 188-189.) As one federal appellate court has explained, "For a prosecutor to eliminate a prospective juror by peremptory strike based on an honest mistake as to what that juror had said in *voir dire* is not the

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[7] It also is possible both the prosecutor and the court were correct, and the transcript is in error. As noted, more than once the transcript clearly misidentifies a prospective juror by an incorrect number.

same, for constitutional purposes, as striking the juror based on an intentionally discriminatory motive." (*Aleman v. Uribe* (2013) 723 F.3d 976, 982.)

Appellant contends the trial court did not make a "sincere and reasoned attempt to evaluate the prosecutor's explanation" because it did not recognize the prosecutor's statement about Prospective Juror No. 21 was not supported by the record. (See *People v. Silva* (2001) 25 Cal.4th 345, 386 ["[w]hen the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient"]; accord, *People v. Arellano* (2016) 245 Cal.App.4th 1139, 1167.) As noted above, however, the parties themselves had difficulty keeping track of the prospective jurors. Thus, it was not obvious that the prosecutor had made a misrepresentation about Prospective Juror No. 21. Accordingly, we find the trial court satisfied its obligation to make a sincere and reasoned attempt to evaluate the prosecutor's explanation. The prosecutor's explanation was permissible and thus appellant has not demonstrated a violation of *Batson/Wheeler*. [8]

B. *Evidence of Appellant's Flight*

1. *Relevant Factual Background*

According to defense counsel, 10 months after Hernandez's shooting, appellant was arrested in Mexico on a warrant in connection with the domestic abuse charge. Subsequently, the

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8 *Gutierrez*, *supra*, 2 Cal.5th 1150 and *Currie v. McDowell*, *supra,* 825 F.3d 603, are not helpful to our analysis because neither case involved an honest mistake about a prospective juror's information.

murder charge was filed against him. Counsel sought to exclude any evidence about appellant's flight out of the country because the "time parameters" did not show a consciousness of guilt about the murder. The prosecutor stated she intended to introduce evidence of flight, but would not mention it in her opening statement. The court instructed the prosecutor not to mention it until a hearing was held on the issue.

During the prosecutor's case-in-chief, defense counsel sought to attack the police investigation. The following colloquy occurred during the cross-examination of Detective Torres:

> "[Counsel]: Did you ever go look for any clothing from Mr. Marquez's house?
>
> "[Torres]: No, sir.
>
> "[Counsel]: Why not?
> "[Torres]: The crime happened in February. We learned of Mr. Marquez in July. Mr. Marquez was, we learned, on the run, either in July—
>
> "[Counsel]: Your Honor, that's non-responsive, why he didn't do a search warrant at the house.
>
> "[Court]: Overruled.
>
> "[Torres]: Again, we learned possibly in the month of July or August he was on the run, and then after that, he was out ofthe country, so—
>
> "[Counsel]: Your Honor, I'm going to move to strike. Non-responsive to the question.
>
> "[Court]: You asked why. Overruled."

Subsequently, the parties discussed whether evidence supported the giving of a flight instruction. The trial court indicated it would give a flight instruction based on Martha's statements that appellant had told her he needed to get out of town because the police were looking for him.

Over the prosecutor's objection, the court also gave a limiting instruction with respect to Detective Torres's statement that appellant was out of the country:

> "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other. [¶] Detective Torres testified that in deciding whether or not to seek a search warrant for defendant's house, he considered information that the defendant was out of the country. You may consider those statements only to explain the officer's actions. Do not consider those statements as proof that the information contained in the statement is true."

Following trial, appellant requested new counsel because he wanted to raise in his motion for a new trial the ground that his trial counsel had been ineffective in eliciting testimony from Detective Torres that appellant was "on the run" "out of the country." The court denied the request to substitute counsel. Subsequently, counsel filed a motion for a new trial arguing, among other grounds, that Detective Torres's statements about appellant's flight were prejudicial. The court denied the motion, concluding that the detective's statements were responsive to the question and not inflammatory or unduly prejudicial.

2. *Analysis*

Appellant raises several claims related to Torres's statements that appellant was "on the run" and "out of the country." First, appellant contends Torres engaged in misconduct because the trial court had instructed the prosecutor not to mention that appellant fled to Mexico before an evidentiary hearing was held on that issue. Second, he argues the trial court erred in overruling a nonresponsiveness objection to Torres's statements because Torres already had explained why he did not serve a search warrant on appellant's residence. Third, he contends his trial counsel was ineffective for eliciting Torres's testimony. Finally, he contends the trial court erred in denying his request for new counsel to file a motion for a new trial based on that same ineffectiveness.

a. *Prosecutorial Misconduct*

Appellant likens Torres's testimony to that of the detective in *People v. Navarette* (2010) 181 Cal.App.4th 828 (*Navarette*), which the appellate court found constituted a willful violation of a court order excluding evidence of a defendant's confession. In *Navarrete*, the trial court had barred the use of a statement the defendant had made to detectives after his arrest. Upset over the court's ruling, a police detective, told a district attorney that he "'was going to show'" the court. In response to the prosecutor's question asking why swabs taken from the victim were not tested for appellant's D.N.A., the detective answered, "Well, for several reasons, the first of which [is] it's a court rule that the defendant's statement is inadmissible. So I can't state the first reason." (*Id.* at pp. 831-832.) Noting that evidence of the defendant's guilt was not overwhelming, the appellate court determined the defendant had suffered incurable prejudice

because the detective's answer improperly disclosed that the defendant had confessed to the crime. (*Id.* at p. 834.)

Navarette is inapposite. Nothing in the record suggests Torres willfully violated a court order. Rather, he was responding to defense counsel's question. More important, there was no incurable prejudice. First, the jury had already heard from appellant's wife Martha that in the days following the shooting, appellant told her he planned to flee. Torres's statements were, at most, cumulative of Martha's testimony. Second, the trial court gave a limiting instruction confining the jury's consideration of the evidence to explaining why the detective had not sought to search appellant's home. We presume the jury followed the court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) Finally, Torres's statements neither indicated why appellant was on the run months after the shooting, nor referred to any inadmissible confession. (See *Navarette*, *supra*, 181 Cal.App.4th at p. 836 ["even a single reference to an inadmissible confession can be the sort of 'exceptional circumstance' that supports granting a mistrial because a curative instruction cannot undo the prejudice to the defendant"].) In short, we conclude Torres's statements did not constitute misconduct, and appellant suffered no prejudice from their admission.

b. *Erroneous Evidentiary Ruling*

Appellant contends the trial court improperly overruled counsel's nonresponsiveness objection to Torres's statements and failed to strike them. We discern no error. Torres's statements were responsive to defense counsel's question, as they explained why no search was conducted of appellant's home. In any event, any error was harmless. As noted, Torres's testimony was

cumulative of Martha's, and the court gave a limiting instruction as to his testimony. Additionally, appellant's confession and his palm print found on the victim's car provided strong evidence of his guilt.

c. *Ineffective Assistance*

Appellant asserts his trial counsel was ineffective for eliciting Torres's statements. "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

Appellant has failed to demonstrate prejudice. As noted above, the jury heard from Martha that appellant planned to flee shortly after the shooting; the flight instruction was based on her testimony, and the court gave a limiting instruction as to Torres's testimony. On this record, appellant has not shown a reasonable probability that his trial counsel's alleged error undermined confidence in the jury's verdicts. Accordingly, we reject appellant's ineffectiveness claim.

d. *Denial of Postverdict Request for New Counsel on New Trial Motion Based on Ineffective Assistance of Counsel*

Finally, appellant contends the court abused its discretion in denying his request for new counsel to pursue his claim that

his trial counsel had been ineffective in eliciting testimony from Torres about appellant's flight. We disagree. Where a defendant asks the trial court to appoint new counsel to prepare and present a motion for a new trial based on ineffective assistance, the court may, in its discretion, appoint new counsel if "'the defendant's claim of inadequacy relates to matters that occurred outside the courtroom,'" and "'the defendant makes a "colorable claim" of inadequacy of counsel.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 346 (*Bolin*), quoting *People v. Diaz* (1992) 3 Cal.4th 495, 574.) Here, the ineffectiveness claim arose from courtroom events that the trial court observed. Thus, the trial court did not abuse its discretion in denying appellant's request for a new trial. (See *Bolin*, *supra*, at p. 346 ["'If the claim of inadequacy relates to courtroom events that the trial court has observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant.'"], quoting *People v Diaz*, *supra*, at p. 574.) In any event, any error was harmless, as, for the reasons set forth above, appellant cannot demonstrate prejudice.

C. *Confidential Marital Communication Privilege*

At trial, appellant sought to exclude Martha's statements in the recorded police interview on the basis that the statements were confidential marital communications. In particular, he sought to exclude her statement that appellant had threatened to "smoke you in front of your mom just like I smoked Primo in front of his mom." Under Evidence Code section 980, a person may "prevent another from disclosing[ ] a communication if he . . . claims the privilege and the communication was made in confidence between him . . . and the other spouse while they were spouses." (Evid. Code, § 980.) The court denied the motion in

limine. It determined that the confession to Hernandez's shooting was "intertwined" with the criminal threats against Martha charged in count 2, and thus fell within the exception set forth in Evidence Code section 985. Under that section, a spouse may not assert a marital privilege in a criminal proceeding if he is charged with a "crime committed at any time against the person or property of the other spouse" or a "crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property or the other spouse." (Evid. Code, § 985, subds. (a) & (b).) The court further determined that appellant had waived his right to assert the marital communication privilege because his counsel first raised the issue at the preliminary hearing -- asking Martha about her conversation with appellant at her workplace -- and later failed to object when the prosecutor asked Martha more specific questions about the conversation. Although counsel later attempted to invoke the marital privilege, the court determined that the assertion was untimely. (See Evid. Code, § 912 [privilege waived where any holder of privilege voluntarily discloses significant part of communication or has consented to disclosure made by anyone].)

Appellant challenges the trial court's ruling that Martha's statements fell within the crime exception of Evidence Code section 985. We disagree. *People v. Johnson* (1991) 233 Cal.App.3d 425 (*Johnson*) is instructive. There, the defendant married Lenora after his first wife (Adrianne) went missing. One night, Lenora "woke to find defendant beating and threatening to kill her, telling her that what had happened to Adrianne would happen to her." Defendant also had struck her on a previous occasion, after she had taunted him about possibly having killed

Adrianne. (*Id*. at pp. 434-435.) During appellant's trial for the murder of Adrianne, he sought to exclude Lenora's testimony, asserting the marital communication privilege. The trial court rejected the assertion of privilege, and the appellate court affirmed. The appellate court held that once a marital communication was disclosed during a spouse's testimony at a preliminary hearing, the marital privilege could no longer be asserted to exclude the communication. (*Id*. at p. 437.) It further determined that although defense counsel did not object to Lenora's testimony at the preliminary hearing, "any such attempt would have been futile," as the "marital communication privilege does not exist in a criminal proceeding in which one spouse is charged with committing a crime against the other." (*Id*. at p. 437.) The court observed that "the complaint charged defendant with attempting to murder Lenora in August 1986 and that charge was still pending at the time of the preliminary hearing." (*Ibid*.) Thus, no marital communication privilege then existed. For the same reason, the appellate court also rejected an ineffectiveness claim based on counsel's failure to assert the marital communication privilege. (*Id*. at pp. 438-439.)

Similarly, appellant was charged with committing corporal injury to and making criminal threats against Martha, and those charges were pending at the time of the preliminary hearing. Thus, there was no marital communication privilege to invoke at the time of the preliminary hearing. Once the statements were disclosed, appellant could no longer assert the privilege. Moreover, because appellant was charged with criminal threats against Martha at the time of trial, he could not assert the marital communication privilege in that proceeding. Thus, appellant's statements about killing Hernandez and the

circumstances of the shooting were admissible over appellant's assertion of privilege.

Appellant argues he could assert the marital communication privilege to exclude the statements about Hernandez's shooting "because the shooting of Hernandez was not in the course of the criminal threats against Martha, or any other crime against her." Although subdivision (b) of Evidence Code section 985 provides that a defendant cannot assert a marital privilege if he commits a crime against a third person "in the course of" committing a crime against the other spouse, subdivision (a) of Evidence Code section 985, applicable here, contains no such limiting language. Under that subdivision, if the defendant is charged with a crime against the person or property of the other spouse, the defendant loses his right to assert the marital privilege. As appellant was charged with a crime against his wife, he could not assert the marital communication privilege at trial.

For the same reasons, appellant's reliance on *People v. Sinohui* (2002) 28 Cal.4th 205 (*Sinohui*) is misplaced. There, a wife sought to invoke her spousal testimony privilege not to testify against her husband. (See Evid. Code, § 970 ["a married person has a privilege not to testify against his spouse in any proceeding"].) Like the marital communication privilege, the spousal testimony privilege also is subject to exceptions for crimes committed against the spouse (Evid. Code, § 972, subd. (e)(1)) and for crimes "against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse" (Evid. Code, § 972, subd. (e)(2)). In *Sinohui*, our Supreme Court addressed the latter exception and determined that "the defendant commits a crime

against a third person 'in the course of committing a crime' against his or her spouse as contemplated in section 972(e)(2) if the crimes are part of a continuous course of criminal conduct and have some logical relationship to each other." (See *Sinohui*, *supra*, at p. 212.) *Sinohui* does not assist appellant, because neither the third-party crime exception in Evidence Code section 972, subdivision (e)(2) nor the analogous provision in subdivision (b) of section 985 is at issue. As explained above, appellant could not invoke the marital communications privilege under the spousal-crime exception in section 985, subdivision (a).

Finally, appellant argues the trial court should have redacted the statement to excise the confession to Hernandez's shooting and/or given an instruction limiting its consideration to count 2 (criminal threats). As there was no marital communication privilege, there was no basis for redacting the statements. Accordingly, we reject this claim of error.

D. *Proposed Defense Experiment*

As part of the defense case, counsel argued that the latent print found on the passenger side of the victim's car was left by appellant a few weeks prior to the shooting as part of a drug deal. Anticipating this defense, the prosecutor presented evidence that it had rained in the area several days before the shooting, and the victim's sister testified she saw him wash the car two weeks before his death. Forensic print specialist Litiatco testified that rain or water could wash a latent print off a car. During the cross-examination of Litiatco, defense counsel proposed placing a palm print on a mirror and pouring water onto the print to show the print would survive contact with water. The prosecutor objected, and the court sustained the objection. The court stated that it was excluding the proposed experiment on relevancy

grounds and also under Evidence Code section 352. It invited defense counsel to submit briefing if he wished to conduct the proposed experiment during the defense case.

During the defense case, counsel did not renew his request to conduct the proposed experiment. However, he presented expert testimony that a latent print on a vehicle could survive rainfall. Tillman testified that on many occasions he had been able to retrieve prints from cars after they had been rained on. He also testified that experimental evidence had shown fingerprints could survive being fully submerged in water.

Appellant contends the trial court abused its discretion in denying his request to conduct the proposed experiment. We disagree. The court acted well within its discretion in excluding the proposed experiment because counsel failed to demonstrate that it would be substantially similar to the events that occurred (rainfall and carwash). (See *People v. Bonin* (1989) 47 Cal.3d 808, 847 [in the case of experimental evidence, the preliminary fact necessary to support its relevancy is that the experiment be conducted under the same or similar conditions as those existing when the event in question took place].) Here, no evidence was presented that the surface of the mirror was similar to the surface of the car door, or that pouring water onto a mirror would create pressure similar to rain falling on a vehicle or water being applied to wash a vehicle. In addition, appellant cannot show prejudice, as counsel presented expert testimony that prints on car surfaces had survived rainfall on multiple occasions and could survive being fully submerged in water.

E. *Gang-Related Evidence*

The jury found that the shooting was gang related within the meaning of section 186.22, subdivision (b). Appellant

contends the evidence was insufficient to support the gang enhancement, because the prosecution's gang expert, Torres, failed to establish either that the Ghetto Boyz consistently and repeatedly engaged in certain crimes, or that the crime was committed for the benefit of and with specific intent to promote the gang. "In considering a challenge to the sufficiency of the evidence to support an enhancement, 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." (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

1. *Criminal Street Gang's Primary Activities*

A gang enhancement under section 186.22 requires proof that one of the primary activities of a criminal street gang is the commission of one or more of a list of enumerated crimes, including sale of a controlled substance, assault with a deadly weapon, shooting at an inhabited dwelling or occupied vehicle, possession of a firearm, and murder. (See § 186.22, subd. (e).) As detailed above, Torres testified that the primary activities of the Ghetto Boyz included "narcotic sales, assaults, attempted murders, shootings, murders, [and] possession of firearms." This testimony is sufficient to satisfy this element of the gang enhancement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 (*Sengpadychith*) [gang expert testimony sufficient to prove enhancement].)

Appellant contends that Torres did not testify that a criminal street gang's primary activities are those activities which the gang "consistently and repeatedly" commits. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324, italics omitted.)

Torres had testified that a "[p]rimary activity is something that the gang is known for or the gang is involved in, which either enhances the gang, furthers the gang, is something that the gang uses itself to instill fear within the community. It's part of the gang activity which is all encompassing and the reason that the gang is known." Appellant argues that these statements show Torres was unaware that a primary activity is not necessarily an activity that a gang is "involved in" or "known for." Torres, however, also stated that a primary activity is a gang activity that is "all encompassing." That testimony is sufficient to demonstrate he was aware that a gang's primary activity is criminal activity that the gang often or repeatedly commits.

2. *Whether Shooting was Gang Related*

Appellant contends the evidence was insufficient to demonstrate the shooting was gang related, noting that Martha had testified appellant was unaware whether Hernandez was a 29th Street gang member, and that there was no evidence of gang shouts or signals during the crime. We disagree. It is undisputed that appellant was a Ghetto Boyz gang member, that Hernandez was a 29th Street gang member, that the shooting occurred in 29th Street gang territory, and that Ghetto Boyz and 29th Street are rivals. As Torres testified, shooting a rival gang member on the rival gang's territory promoted both the shooter and his gang. As to Martha's testimony that appellant was unaware that Hernandez was a 29th Street gang member, we note that Martha testified appellant later identified the victim by his gang moniker "Primo." When viewed in the light most favorable to the judgment, this evidence indicates appellant was aware that Hernandez was a 29th Street gang member when he

shot him. On this record, the evidence was sufficient to show the shooting was gang related.

F. *Cumulative Error*

Finally, appellant contends that even if harmless individually, the cumulative effect of the claimed trial errors mandates reversal of their convictions. Because we have rejected appellant's other claims, his claim of cumulative error fails. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316; *People v. Seaton* (2001) 26 Cal.4th 598, 692.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.