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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT YOUNG KIM,

Defendant and Appellant.

B267523

(Los Angeles County  
Super. Ct. No. GA074941)

APPEAL from the judgment of the Superior Court of Los Angeles County. Jared Moses, Judge. Affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant and appellant Scott Young Kim guilty of second degree murder and found true three gun-use allegations. Defendant was sentenced to 75 years to life in prison.

Defendant contends the court erred in denying his *Batson/Wheeler*<sup>1</sup> motion, erred in denying his motion for mistrial, and committed evidentiary error in admitting evidence he engaged in drug transactions while in jail and in admitting testimony from Deputy Jason Viger that he called himself a “cold blooded killer.” Defendant further argues the evidentiary errors violated his right to due process, and that the multiple trial errors amount to cumulative error warranting reversal.

We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Defendant has not raised a substantial evidence question. We summarize only those material facts germane to the issues raised on appeal, as well as some additional facts for context.

Defendant was charged by information with one count of murder (Pen. Code, § 187, subd. (a)), and one count of dissuading a witness (§ 136.1, subd. (b)(3)). It was also alleged defendant personally and intentionally discharged and used a firearm causing great bodily injury in the commission of the offense (§ 12022.53, subds. (b), (c) & (d)). The dissuasion charge was dismissed and the case proceeded to trial on the murder charge and the special allegations. Proceedings were bifurcated as to the allegation that defendant had suffered two prior convictions for

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<sup>1</sup> *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162 (*Johnson*).

serious or violent felonies within the meaning of the Three Strikes law.

The charges arose from an incident that occurred on October 21, 2008 in the city of Alhambra. Several friends, including defendant, were at the home of Sam L.W.S.<sup>2</sup> Some of the other people at the home that day were Luciano Brash, who was also known by the nickname “Lucky,” Megan C., William G. and his wife, Susana G.

Defendant and Luciano had been friends for a while. Luciano would sometimes call defendant “*hyung*” which means older brother in Korean. Luciano ran errands for defendant, and also occasionally sold drugs for him. Megan was also involved in selling drugs. Megan believed Luciano and defendant to be good friends, but she had seen defendant “play” Russian roulette with Luciano on several occasions. Defendant would put one bullet in a revolver, point it at Luciano, ask him if he felt “lucky” and then pull the trigger.

On October 21, most everyone was hanging out in the living room and the kitchen of Sam’s condo, except a few people who were either upstairs or in the downstairs garage. Defendant was walking around in the living room with a gun in a shoulder holster.

At some point, defendant and Luciano appeared to have some sort of disagreement. Sam heard defendant say that Luciano was “f--ing” up. Defendant told Luciano “to shut up and sit the F down.” Defendant was being “aggressive” with Luciano and Luciano appeared scared.

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<sup>2</sup> We refer to the witnesses only by their first names and the initials of their last names to protect their privacy.

Defendant, now holding the gun in his hand, sat down next to Luciano on the couch. He cocked the gun, pointed it at Luciano and shot him. Luciano said something to the effect of “[w]hy, hyung, why? I thought we were cool.”

Susana, who was in nursing school at the time, ran down from upstairs when she heard the gunshot and began to perform CPR on Luciano. Defendant tried to assist her. Defendant told Sam the shooting was a mistake.

When several of them, including Susana, started to say that they should call 911, defendant said no. Susana heard defendant say they should put Luciano’s body in the dumpster. Defendant was pacing around, still holding the gun, and Susana did not feel free to leave. Eventually, defendant helped Sam and Megan put Luciano in the back seat of Sam’s car. Sam then drove Luciano to an outpatient medical facility and left him lying on the floor of the lobby.

Luciano died from a fatal gunshot wound to his chest.

The case was first tried in 2014. The jury was unable to reach a verdict and the court declared a mistrial.

The second trial began in July 2015. During voir dire, defendant made a *Batson/Wheeler* motion, arguing the prosecutor had used seven of his 12 peremptory challenges to excuse Hispanic jurors.

The court found defendant had made a prima facie case, and heard argument from the prosecutor as to the race-neutral reasons for his striking of the Hispanic jurors. The prosecutor explained his reasons for exercising each peremptory, including statements by the individual jurors expressing skepticism or criticism of the judicial system and/or against law enforcement, personal or family member experience with the criminal justice

system, and recognition by the prosecutor of one of the jurors as an employee of a legal aid office where he used to work (although the juror apparently did not recognize him).

Defense counsel noted his concern was with the prosecutor's excusal of just two of the prospective Hispanic jurors: Juror No. 6884 (a male juror) and Juror No. 8207 (a female juror). Defendant argued that both jurors had expressed their belief they could be fair to both sides and had not made any statements reflecting an unfair distrust or criticism of law enforcement or the judicial system.

The court denied defendant's motion, finding the prosecutor presented race-neutral reasons for his challenges. The court pointed out that a predominate factor in the prosecutor's use of peremptory challenges was to excuse jurors who had personal experience or family member involvement with the criminal justice system, and that other non-Hispanic prospective jurors, who also had admitted family member involvement with the criminal justice system, had been excused by the prosecutor.

The court and counsel then continued with voir dire. Following the exercise of a peremptory challenge by defendant against an Asian juror, the prosecutor made a *Batson/Wheeler* motion on the grounds defense counsel had excused 11 Asian jurors. The court heard argument as to each of the excused jurors and then denied the prosecution's motion. The court stated that either party could renew its motion as appropriate until voir dire was completed.

The final composition of the jury included two Hispanic jurors. One of the two alternate jurors was also Hispanic.

Defendant moved to exclude evidence he had engaged in efforts to smuggle drugs into the jail while he awaited trial. As in

the first trial, the prosecution intended to introduce five “kites” (handwritten messages circulated by inmates) referencing the drug transactions, including one in which defendant referred to himself as a “bonafide killer.” The prosecutor argued the kites were admissible because they provided circumstantial evidence of defendant’s identity as the author of all of the kites, including the one containing the admission of being a killer. Defendant argued the evidence was not relevant to the murder charge and was unduly prejudicial.

The court ruled all five kites were admissible, with certain redactions, consistent with its ruling from the first trial. (The court also added one additional minor redaction to one kite.)

On the second day of testimony, the prosecutor requested a sidebar conference just before calling Deputy Jason Viger to the stand. The prosecutor advised that Deputy Viger had disclosed to him for the first time that morning that he recalled a conversation he had with defendant while he was in custody. Deputy Viger reported he had been walking with defendant down a hall at the jail having a casual conversation when defendant spontaneously said he was a “cold blooded killer.” The prosecutor said he did not believe there was any report documenting the conversation. Defense counsel said the late disclosure would be a discovery violation and the statement was not only highly prejudicial but suspect since Deputy Viger, who had testified at the first trial, had never previously reported any such conversation with defendant. The court ruled the testimony would be admissible, there was no discovery violation, and defense counsel could seek to impeach Deputy Viger about his failure to previously attest to any such statement.

Deputy Viger then testified that he was assigned to Operation Safe Jails and was familiar with defendant. Part of his assignment included monitoring defendant's jailhouse phone calls. During one such phone call, Deputy Viger heard defendant arranging for an individual who went by the name of "Malo" to smuggle drugs into the jail. Deputy Viger knew "Malo" to be Martin Luna. When Martin Luna was brought into the facility, Deputy Viger placed him in a holding cell and explained he was suspected of smuggling drugs. Deputy Viger was able to recover a package of tar heroin from Mr. Luna after he defecated. Deputy Viger's testimony was consistent with the information contained in some of the kites.

Deputy Viger also testified that defendant had told him he was a "cold blooded killer." Deputy Viger conceded on cross-examination he had not testified to this conversation with defendant in the first trial and he had not written a report documenting the admission. Deputy Viger explained his jail assignment results in a lot of interaction with inmates. Some talk freely to him, and he does not always document every conversation.

During the testimony of Detective Martindale, the lead investigating officer, the prosecution introduced portions of three recorded pretrial statements (one each from defendant, Sam and Megan). The court had ordered the prosecution to make various redactions to the recordings. The recording of Megan included a statement by her that defendant and Luciano "met in prison," a reference the court had ordered redacted. Defendant raised an immediate objection, and the court excused the jury for a break in order to discuss the matter with counsel.

Defendant requested a mistrial. The prosecutor said the inclusion of the statement in Megan's recording was a mistake and not intentional, given he had had less than a day to prepare copies of the redacted recordings in response to the court's ruling. The prosecutor also advised the court that they had all missed a reference in Sam's recording that defendant and Luciano "did time" together. The transcript of Megan's recording that went to the jury did not include the improper reference, but the transcript of Sam's interview did. After hearing argument from counsel, the court took the matter under submission.

The court subsequently denied defendant's motion for a mistrial, explaining that there were two "very brief passing references" to defendant and the victim having been in jail or having done time, with no other details, but not a sufficient degree of potential prejudice to warrant a mistrial. The court reasoned that most of the witnesses who testified had criminal histories, that the incident involved drug use and drug dealing, and that the jury was not likely to be improperly misled under the circumstances. The court said the jury should be admonished to disregard the references, and solicited input from counsel as to the phrasing.

When the proceedings resumed, the court admonished the jury as follows: "On the audio CD, there was a brief reference to the defendant Mr. Kim and the individual who was killed, Mr. Brash, having been in custody together. And, at this point, I'm going to tell you that that's not relevant at all for purposes of these proceedings. [¶] You're not to speculate about that. You're not to consider that for any purpose. It is completely irrelevant to these proceedings. So wipe that out of your minds as if you didn't hear it."



The jury found defendant guilty of second degree murder and found true the gun-use allegations. Defendant admitted his prior convictions and the court found them to be true. The court sentenced defendant to a state prison term of 75 years to life.

This appeal followed.

## DISCUSSION

### 1. The *Batson/Wheeler* Motion

Defendant contends the court erred when it denied his *Batson/Wheeler* motion. Defendant argues the prosecutor exercised peremptory challenges to excuse two prospective Hispanic jurors from the jury based solely on group bias and failed to articulate a race-neutral justification for excusing either juror. We are not persuaded.

A prosecutor's use of a peremptory challenge to strike a prospective juror on the sole ground of group bias, such as race, violates a defendant's rights to equal protection and to trial by jury by a representative cross-section of the community under the United States Constitution and California Constitution, respectively. (*Batson, supra*, 476 U.S. at p. 84; *Wheeler, supra*, 22 Cal.3d at pp. 276-277.) In assessing a defendant's *Batson/Wheeler* motion, the court follows a three-step test. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. *The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent*

*of the strike.*” (*People v. Taylor* (2009) 47 Cal.4th 850, 885-886, italics added (*Taylor*); accord, *Johnson, supra*, 545 U.S. at p. 168.)

The final composition of the jury included two Hispanic jurors, and one of the alternate jurors was also Hispanic. As defendant concedes, he argued that only two of the seven Hispanic jurors excused by the prosecutor raised concerns: Juror No. 6884 (a male juror) and Juror No. 8207 (a female juror). The prosecutor gave specific, race-neutral reasons for excusing both jurors which the court found to be credible. “‘At the third stage of the *Wheeler/Batson* inquiry, “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 assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court’s own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her.’ [Citation.]” (*People v. Jones* (2011) 51 Cal.4th 346, 360 (*Jones*).)

Our review of the court’s denial of a *Batson/Wheeler* motion is deferential. We look only for substantial evidence supporting the trial court’s conclusions. (*Jones, supra*, 51 Cal.4th at pp. 360-361.) “‘We review a trial court’s determination regarding the sufficiency of a prosecutor’s justifications for exercising peremptory challenges ‘“with great restraint.”’ [Citation.] 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.]” ’ [Citation.]” (*Id.* at p. 361.)

Both Juror No. 6884 and Juror No. 8207 admitted to having family members prosecuted for felonies. Juror No. 6884 said a cousin had been convicted of murder but he did not feel the cousin was treated unfairly. He said he thought he could be fair to both sides. Juror No. 8207 said her brother was convicted of murder but did not feel he had been treated unfairly. She said a nephew was also arrested for robbery and when he was taken into custody in the family home, she felt some of the other family members were treated badly by the police. She thought she could be fair as a juror.

The prosecutor said he understood those two jurors had said they believed they could be fair, but he remained concerned they both had a close family member involved with the criminal justice system and therefore excused them. “ ‘[T]he 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.’ [Citation.]” (*People v. Roldan* (2005) 35 Cal.4th 646, 703, overruled in part on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord, *People v. Arellano* (2016) 245 Cal.App.4th 1139, 1161-1162; *People v. Turner* (2001) 90 Cal.App.4th 413, 419.) The trial court was in the best position to assess the credibility of the prosecutor’s explanation for his decisionmaking and the record supports the court’s conclusion to deny defendant’s motion. Defendant has not shown the prosecutor’s stated reason was a sham or that the prosecutor was

racially motivated in excusing Juror No. 6884 or Juror No. 8207. (*Taylor, supra*, 47 Cal.4th at p. 886.)

## **2. The Denial of the Motion for Mistrial**

Defendant contends the court abused its discretion in denying his motion for a mistrial following the admission of the recorded statements of witnesses Sam and Megan which both included brief references to defendant and Luciano having been in jail together.

In reviewing a motion for mistrial, we apply the abuse of discretion standard. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) A trial court should grant a motion for mistrial “if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]’ [Citation.]” (*Ibid.*)

Defendant contends it was highly prejudicial for the jury to have heard recorded interviews from two witnesses both making reference to the fact that defendant and Luciano had been in jail together or had otherwise done “time.”

After going through the recordings with counsel and agreeing on various edits and redactions, the trial court ruled that the statement in Megan’s recording be redacted. Both parties and the court apparently missed the reference in the recording of Sam’s interview. The written transcript of Megan’s recording given to the jury to use while the recording was played did not include the improper reference, but the transcript of Sam’s interview did. The prosecutor represented that the inclusion of the improper references was accidental, and there is no evidence demonstrating otherwise. Looking at those two brief

references in the context of the overall factual record, we are convinced the court fairly exercised its discretion to deny defendant's motion.

The jury heard testimony that some of the individuals at the home at the time of the shooting, including defendant and Luciano, were involved with drug use and drug sales. They also heard testimony that at least three of the main prosecution witnesses had suffered prior criminal convictions. It was not unreasonable for the trial court to conclude that the jury was not likely to be prejudicially misled by a brief reference to defendant and the victim, Luciano, having met while in jail. (See *People v. Marshall* (1996) 13 Cal.4th 799, 839 [witness's testimony that defendant was an "ex-felon" was not so prejudicial as to warrant a mistrial].)

The record demonstrates the court considered the matter thoroughly and admonished the jury to disregard the reference. (*People v. Williams* (1995) 40 Cal.App.4th 446, 456 [jurors are presumed to have followed the law].) Defendant has not demonstrated the court's denial amounted to an abuse of discretion.

### **3. The Admission of the "Kite" Evidence**

Defendant objected, both orally and by written motion, to the introduction of the five "kites" (jailhouse messages) related to the smuggling of drugs into the jail. Defendant contends the admission of this kite evidence was prejudicial propensity evidence that should have been excluded under Evidence Code section 1101. Respondent argues any such objection was forfeited by failure to raise it in the trial court, and that, in any event, the kite evidence was properly admitted.

In seeking to exclude the kite evidence at trial, defendant did not make an objection on the grounds the evidence violated Evidence Code section 1101 or was otherwise improper propensity evidence. Defendant only argued the evidence was irrelevant to the murder charge and unduly prejudicial. Defendant contends the nature of his argument was understood by the court and prosecutor as reflected by the court's ruling which was couched in language relevant to a ruling on propensity evidence (e.g., that the kites were circumstantial evidence of identity). He urges us to therefore find there was no forfeiture.

We agree with respondent the objection was forfeited. (*People v. Valdez* (2012) 55 Cal.4th 82, 130 [trial objections that evidence is "irrelevant, cumulative, lacking in foundation, or prejudicial" are insufficient to preserve for appeal the objection that challenged evidence was inadmissible character evidence under Evidence Code section 1101].)

In any event, the argument fails on the merits. A trial court is vested with broad discretion in determining the admissibility of evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 374-375.) It is well established that evidence of prior charged or uncharged crimes may be admissible *if relevant to prove a material fact in issue* and not simply to establish the defendant's general criminal disposition or "bad character." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1002; see also Evid. Code, § 1101, subd. (b), italics added ["Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act *when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to commit such an act.*"].)

Defendant was charged with murder. His primary defense was the shooting was an accident. The admission by defendant in one of the kites that he was a “bonafide killer” was relevant to the prosecution’s case that the shooting was intentional. The kite evidence reflecting the smuggling of drugs into the jail was circumstantial evidence defendant was the author of all five of the kites, including the one in which defendant calls himself a “bonafide killer.” The drug smuggling evidence was corroborated by the testimony of Deputy Viger. In ordering the kites admissible, the court ordered substantial portions to be redacted to minimize the jury’s exposure to potentially prejudicial information. We find no fault with the court’s assessment that the kite evidence was properly admitted, in its redacted form, as circumstantial evidence.

We also find no fault in the court’s determination that the prejudicial value of the evidence did not outweigh its probative value under Penal Code section 352. “The word ‘prejudicial’ is not synonymous with ‘damaging.’ [Citation.] Rather, evidence is unduly prejudicial under section 352 only if it ‘ “ ‘uniquely tends to evoke an emotional bias against the defendant as an individual and . . . has very little effect on the issues’ ” ’ [citation], or if it invites the jury to prejudge ‘ “ ‘a person or cause on the basis of extraneous factors’ ” ’ [citation].” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 534.) We are not persuaded the evidence of drug smuggling would lead a reasonable person to think it was more likely the shooting was intentional, nor that the jury would necessarily resolve any doubts it had about defendant’s guilt on the murder charge because of the kite evidence.

#### **4. The Admission of Deputy Viger's Testimony**

Defendant also claims evidentiary error related to the testimony of Deputy Viger. Deputy Viger attested to defendant's spontaneous reference to himself as a "cold blooded killer" during a conversation at the jail. Deputy Viger did not so testify during the first trial and the information was not disclosed to defendant until the morning of the day Deputy Viger testified. Defendant contends the late disclosure was a discovery violation that warranted exclusion, and that the admission of such prejudicial testimony violated due process.

The prosecutor represented to the court that he disclosed the information as soon as he learned of it that morning. He explained there was no report documenting the jailhouse conversation and that he had not therefore withheld any discoverable reports. The court concluded there had been no discovery violation and that defendant's concerns about the alleged conversation being suspect because Deputy Viger had not attested to it in the first trial was properly the subject of cross-examination. As we already explained above, the court enjoys broad discretion in determining the admissibility of evidence. We are not persuaded there was any abuse of the court's discretion in allowing Deputy Viger to testify to the jailhouse statement by defendant. Defense counsel thoroughly cross-examined Deputy Viger on the issue, including his failure to document the alleged admission in a report or to testify to it in the first trial. Defendant has not shown any undue prejudice from the admission of the evidence.

#### **5. Due Process (The Three Claimed Evidentiary Errors)**

Defendant argues the three rulings favorable to the prosecution (testimony that defendant had previously been in



jail, the kite evidence, and Deputy Viger’s testimony) denied him his right to due process and a fair trial. As we have already explained above, we are not persuaded the admission of the kite evidence or Deputy Viger’s testimony was improper. The references in the recorded witness statements that defendant and Luciano met in jail were erroneously admitted. However, in light of the full record and solid evidence of defendant’s guilt, those brief admissions did not deprive defendant of a fair trial or otherwise violate his due process rights. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1317.)

**6. Cumulative Error**

Defendant urges us to find that even if none of his claims of error individually warrants reversal, their cumulative effect nonetheless requires reversal. We are not persuaded. “The ‘litmus test’ for cumulative error ‘is whether defendant received due process and a fair trial.’ [Citation.]” (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Whether viewing his claimed errors individually or cumulatively, defendant has failed to show he was deprived of a fair trial. At most, defendant has shown his trial was “ ‘not perfect—few are.’ ” (*People v. Farley* (2009) 46 Cal.4th 1053, 1124.)

**DISPOSITION**

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.