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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. VANESSA REBECCA CELAYA, Defendant and Appellant.	B270857 (Los Angeles County Super. Ct. No. VA136733)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Thomas T. Ono, 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, Senior Assistant Attorney General, Susan Sullivan Pithey,

Supervising Deputy Attorney General, and Heather B. Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Vanessa Rebecca Celaya of second degree murder and robbery. She appeals, and we affirm.

BACKGROUND

An information charged Celaya with the murder of Michelle Young (Pen. Code, § 187, subd. (a)[1]), first degree residential robbery of Rene Augustine[2] (§ 211), and first degree burglary against Augustine (§ 459). The information also alleged as to each count that Celaya personally used a knife (§ 12022, subd. (b)(1)), and that each count was a serious and violent felony (§§ 1192.7, subd (c), 667.5, subd. (c)).

Celaya pleaded not guilty. At trial, Robert Reyes testified that at 11:00 p.m. on September 5, 2014, he was standing outside his apartment next to his car, hanging out with his good friend Michelle Young. Celaya walked toward Reyes and Young on the sidewalk. Reyes had never seen her before, and he noticed she was bald. As Celaya passed by, she said, " 'What the fuck?' " Celaya kept walking, and Reyes and Young asked Celaya who she was to talk to them like

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

[2] At trial, the robbery victim gave his name as Oswaldo Agustin.

that. Celaya turned around and started walking back toward them, and Young walked toward Celaya. Young put her arm up in front of her face and Reyes saw blood on the sidewalk. Young called out, " 'Robert,' " and fell; Reyes saw a large wound on her forearm. Celaya ran away between the cars and into an alley, and Reyes called 911. Young had 11 stab wounds, six of which were fatal, and she died within minutes.

Agustin testified that on the night of September 5, 2014, he was asleep in his bedroom at a nearby tire store where he worked as a security guard, and woke up to noises on the roof. Celaya opened the door and entered the bedroom. Holding something in her hand that he couldn't see clearly in the dark, Celaya ordered Agustin to come over to her. Agustin told her she couldn't be there and she told him to be quiet. He was afraid because she surprised him in his room and her face was bloody, he didn't understand her English, and although she tried to speak Spanish to him her Spanish was bad. Celaya talked to herself and paced back and forth. She asked him for clothing. Agustin gave Celaya some clothes and she changed, putting her old clothes into a bag that he gave her. Celaya left, telling Agustin not to leave or call anyone for 15 minutes. In all, she was in the bedroom about 40 minutes.

A sergeant with the Los Angeles County Sheriff's Department who was one of the deputies that responded to the scene testified that Agustin appeared frightened and startled. After the deputies' arrivals, Celaya, who was on

the roof, jumped off and ran, and the other deputies detained her. After the sergeant watched a security video showing Celaya climbing a ladder up to the roof holding a plastic bag, he searched the roof and found the bag inside a stack of tires. The shirt Celaya took from Agustin was in the bed of a pickup truck in the tire shop bay.

Another officer testified that Agustin said Celaya had something in her hand, "[h]e didn't know if it was a knife or a gun," and he had given Celaya the clothing because he was afraid of her.

When the knife found in the bag was tested, the DNA profile from the blade proved consistent with Young as a major contributor and Celaya as a minor contributor, and the profile from the handle was consistent with Celaya as a major contributor and Young as a minor contributor.

Celaya testified in her own defense. On the night of Young's death she was visiting her aunt in the neighborhood and left to get some air. As she walked by Reyes and Young, someone said, " 'cancer bitch.' " Celaya responded, " 'What the fuck?' " and kept walking as they continued to cuss at her. Both Reyes and Young approached her aggressively. Celaya was scared and thought they were high, and when Celaya turned around Young was right in front of her. Young hit her, so Celaya stabbed Young, defending herself without time to think. She ran to the tire store, where she asked for a change of clothing because she was traumatized. When she left she threw the work shirt into the truck, hid the bag with the knife and her bloody clothes in a stack of

tires on the roof, and hid by some tires. She jumped off the roof and ran when the deputies chased her.

The jury found Celaya guilty of second degree murder and residential robbery, and found the knife allegation true on both counts. The trial court sentenced Celaya to 15 years to life on the murder conviction, a consecutive six years on the robbery conviction, and a one-year weapon enhancement on each count, for a total term of 23 years to life.

DISCUSSION

I. Substantial evidence supported the robbery conviction, and the trial court did not err in failing to instruct the jury on theft.

Celaya argues that there was insufficient evidence of force or fear to support the robbery conviction. We disagree.

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force and fear." (§ 211.) To establish that a robbery was accomplished by fear, the prosecution must present evidence " ' "that the victim was in fact afraid, and that such fear allowed the crime to be accomplished." ' " (*People v. Morehead* (2011) 191 Cal.App.4th 765, 772.) The required fear need not result from an explicit threat or the use of a weapon, and "the victim's fear need not be extreme to constitute robbery [citation]. All that is necessary is that the record show ' " 'conduct, words, or circumstances reasonably calculated to produce fear.' " ' " (*Id.* at p. 775.) "An unlawful demand can convey an implied threat of harm for failure to

comply, thus supporting an inference of the requisite fear." (*Ibid.*)

Substantial evidence is reasonable, credible evidence that would allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Morehead*, *supra*, 181 Cal.App.4th at p. 778.) Augustin testified that he was afraid because Celaya entered his dark bedroom in the middle of the night, her face was bloody, and he could not understand her. She paced back and forth, ordered him to come over to her, and asked him to give her clothing. Certainly this testimony shows conduct, words, and circumstances reasonably calculated to produce fear, and Augustin testified that he was indeed afraid.

Celaya also contends the trial court failed to comply with its sua sponte duty to instruct the jury on theft, which is a lesser included offense of robbery, lacking only the element of force or fear. (*People v. Melton* (1988) 44 Cal.3d 713, 746.) The court is required to instruct on a necessarily included offense, even if the defendant does not request it, " 'when the evidence raises a question as to whether all the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 715.) Celaya is entitled to the instruction only if " 'there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*." (*People v. Memro* (1995) 11 Cal.4th 786, 871.) In this case there is no evidence that the element of

fear required for robbery was missing. Agustin directly testified that he was afraid, and two officers who responded to the scene testified that Agustin told them he was afraid. The trial court was not required to give a theft instruction.

II. The trial court did not err when it denied Celaya's motion under *Batson/Wheeler*.

Celaya argues that the trial court erred when it denied her motion under *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson/Wheeler*), asserting the prosecutor's use of peremptory challenges to excuse Hispanic individuals from the jury was based on group bias.

At the conclusion of voir dire, the prosecutor used peremptory challenges against five prospective jurors. Defense counsel made a *Batson/Wheeler* motion because all the excused jurors were Hispanic. The prosecutor immediately volunteered her reasons for striking the jurors (described below in the order they were excused, with the reasons given by the prosecutor for their exclusion.)

M.A. testified that he was a medical claims examiner, and lived with his homemaker wife in El Monte with one of their three children. While they were dating, his wife entered a plea to welfare fraud, but that would not prevent him from being fair. The prosecutor excused M.A. because of his wife's prior experience with law enforcement.

M.G. testified that he lived in Santa Fe Springs, worked as an energy technician for the gas company, was unmarried with no children, and had never been on a jury.

The prosecutor excused M.G. because he was unmarried with no jury experience and "didn't have the life experience to sit on this potential case."

J.T. testified that she lived in Whittier, worked as an account clerk for a utility company for which her husband was a field supervisor, and had four children. She had been on a jury in a case in which a plea was entered before trial, and also in a case that went to trial and reached a verdict. The prosecutor excused her because "when I asked her questions, she was low on her demeanor and I didn't get a good vibe from her," although J.T. seemed "very in tune with defense counsel" when he asked questions.

D.F. testified that he lived in Pico Rivera with his wife, who worked for DCFS. He had three grown children, and worked at a Kroger warehouse. He had been called to serve on a jury but a plea had been entered before trial. His cousin was a detective and a number of his wife's friends were married to police officers. The prosecutor excused D.F. because he had no jury experience and because she saw him roll his eyes during questioning. Although she did not know whether he rolled his eyes in response to her or defense counsel's questions, she "had a feeling he didn't want to be here, or he was put off by me or the defense attorney."[3]

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[3] The court later stated that it did not believe D.F. was Hispanic, and the prosecutor agreed; the court removed him from its *Batson/Wheeler* analysis. Defense counsel later stated that D.F. "appeared to be Latino" and lived in a majority-Latino area.

D.P. lived in El Monte and worked as a lube technician for a dairy. He had a girlfriend who had two children, and he had never served on a jury. D.P. told the court his cousin had been accused of robbery and was locked up for a couple of years. The family didn't think it was right because the victim said D.P.'s cousin had a gun and there was no other proof he had a weapon. Nevertheless, D.P. could be fair in this case and could treat law enforcement witnesses like any others. The prosecutor excused him because of D.P.'s feeling that his cousin had not been treated fairly by the system.

The trial court initially granted the defense motion, explaining "there's been five direct Hispanic people excused" and they were in a protected class. The court then quickly vacated its "tentative ruling" because it had not completed its analysis. Although the court noted a "presumptive violation of [*B*]*atson/Wheeler*," it also noted that seven Hispanics remained on the panel and "there's not an entitlement to 12 Hispanics on the panel. And for a balanced panel, I find that's a justification for the People to exercise their peremptories." The prosecutor pointed out that the victim was partially Hispanic and "the defendant . . . was identified as actually being Caucasian," so ethnicity was not in issue.[4] The court countered that the relevant analysis was the makeup of the panel. The prosecutor then explained that 75 percent of the panel was

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[4] A probation officer's report identified Celaya's race as Hispanic, and Celaya identified herself as mixed Hispanic and Caucasian in a police interview.

Hispanic, so any peremptory challenges would necessarily involve mostly Hispanic jurors. When she exercised her first four peremptories, there were eight Hispanics on the jury and there were seven when she exercised the fifth peremptory. The court denied the motion.

Later, out of the presence of the prospective jurors, the court stated it was unhappy with its *Batson/Wheeler* analysis. The cases provided by the prosecutor showed that "any non-racial reason for removing a potential juror is generally sufficient," and once the prosecutor gave such a reason, the court was to proceed to "step 3 [which] is, 'the defendant has the burden of proving purposeful discrimination,' " by offering reasons why the prosecutor's presumptively proper face-neutral reasons were actually pretexts for discrimination. The court declined to do a comparative analysis between the excused jurors and the remaining jurors, because the prosecutor's reasons were adequate and in good faith.

The evaluation of a *Batson/Wheeler* motion proceeds in three stages. " 'There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination.' " (*People v. Arellano* (2016) 245 Cal.App.4th 1139, 1156.) First, the defendant must make a prima facie case " ' "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." ' " Second, if that prima facie case exists, the burden shifts to the prosecutor to explain the racial

exclusion " ' "by offering permissible race-neutral justifications" ' " for striking the jurors. In the third and last step, the trial court must decide whether the defense " ' "has proved purposeful racial discrimination." ' " (*People v. Taylor* (2010) 48 Cal.4th 574, 611.) "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from the opponent of the strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612–613.)

Celaya insists that we should review the trial court's denial of the motion using the third stage of the *Batson/Wheeler* analysis. We disagree, as the record shows that the court denied the motion during the first stage, finding the defense had not shown a prima facie case that the prosecutor had a discriminatory purpose in striking the five jurors (and noting there were seven Hispanics left on the panel). It is not problematic that the court returned to put on the record its evaluation of the prosecutor's volunteered reasons for the strikes; the California Supreme Court has encouraged this practice to complete the record on appeal, even where (as here) the court finds the defense has not established a prima facie case. (*People v. Taylor*, *supra*, 48 Cal.4th at pp. 613, 616.) The court's statement that the prosecutor gave the reasons in good faith therefore did not require the court to do a comparative analysis of the jurors that were excused. The court found no prima facie case existed, and " '[w]hatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes

are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales.' " (*Id.* at p. 617.) "[W]here (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," we begin our analysis of the trial court's denial of the motion by reviewing its conclusion that the defense failed to make out a prima facie case of discrimination. (*People v. Scott* (2015) 61 Cal.4th 363, 391.) If we agree with the first-stage ruling, "the claim is resolved." (*Ibid.*)

To evaluate whether the trial court properly found that the defense did not establish a prima facie case of discrimination, we "undertake an independent review of the record to decide 'the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race.' " (*People v. Taylor*, *supra*, 48 Cal.4th at p. 614.) We review the record of voir dire as of the time the motion was made, and " 'certain types of evidence may prove particularly relevant. [Citation.] Among these are 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 those 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. [Citation.] A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record [citations] and that necessarily dispel any inference of bias." (*People v. Sánchez* (2016) 63 Cal.4th 411, 434.) We may not rely on the prosecutor's *stated* reasons in this first-stage analysis, but only those reasons apparent and discernible from the record. (*Id.* at p. 435.)

The prosecutor did not strike most or all of the Hispanics from the venire. While the prosecutor used four of her five strikes against Hispanics, that number was not disproportionate given that Hispanics constituted 75 percent of the panel. We will not "disturb a ruling that no prima facie case arose where our review of the entire record showed that the percentage of prosecutorial strikes in issue did not exceed the percentage by which the relevant group was represented either in the jury pool or in the actual jury that was impaneled." (*People v. Garcia* (2011) 52 Cal.4th 706, 747.) Here, the percentage of strikes of Hispanic jurors was 80 percent. That slightly exceeds, yet closely approximates, the 75 percent Hispanic composition of the juror pool. But our analysis does not stop there. While Celaya identified herself as mixed Hispanic and Caucasian, the prosecutor represented that Young, the victim, was partially Hispanic. Further, Celaya does not argue and the record does not show that the voir dire of the four Hispanic jurors was desultory.

The questioning during voir dire shows that one of the prospective juror's wife had pleaded guilty to welfare fraud; another was unmarried, had no children, and had never been on a jury (thus causing the prosecutor to infer a lack of critical life experience); and a third had a cousin who his family believed had been wrongly convicted of robbery. The face of the record provides nondiscriminatory reasons for excusing three of the four prospective jurors, without any reference to the justifications given by the prosecutor.

After reviewing the totality of the record, we conclude the trial court did not err in denying the *Batson/Wheeler* motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.