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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT HOLMES,

Defendant and Appellant.

B275783

(Los Angeles County
Super. Ct. No. TA139058)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Tammy Chung Ryu, Judge. Affirmed.

Christine M. Aros, 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, Blythe Leszkay and Abtin Amir, Deputy
Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A prosecutor's reasons for exercising a peremptory challenge to excuse a prospective juror must be race-neutral. In this case, the prosecutor asked the trial court to excuse a prospective juror because the prosecutor's notes indicated the prospective juror could not be fair and impartial and because the prospective juror had previously served on a civil jury. The trial court accepted both reasons and denied the defendant's motion to dismiss the panel of prospective jurors under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Batson/Wheeler* motion). Deferring to the trial court's evaluation of the prosecutor's second explanation, we conclude substantial evidence supports the court's ruling. We also conclude, after independently reviewing the sealed record of an in camera hearing under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531,¹ the trial court did not improperly withhold any discoverable information. Therefore, we affirm.

¹ In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 the Supreme Court held a criminal defendant's fundamental right to a fair trial entitled him or her to discover relevant information in a peace officer's personnel records relating to citizen complaints. Motions for discovery of peace officer personnel files under the subsequently enacted statutory scheme (see Pen. Code, §§ 832.7, 832.8; Evid.Code, §§ 1043, 1045) are still commonly referred to as "*Pitchess* motions." (See *Galindo v. Superior Court* (2010) 50 Cal.4th 1, 5; *Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 657.)

FACTUAL AND PROCEDURAL BACKGROUND

A. *Holmes Threatens Security Officers*

Kathy Patterson and Nalleli Valiente, security officers employed by the Los Angeles County Sheriff's Department, were conducting fare checks on the Metro Blue Line. Valiente approached Robert Holmes, who was with two other men, and requested his TAP card. Checking Holmes's card, Valiente found he had no fare on it, and she asked him to exit at the next stop. Holmes slowly complied, but shouted, "Fuck you, bitches. You know, that's why you all need a man. Go suck a dick. Fuck you all." Holmes also threatened, "I'll light your ass up."

Valiente and Patterson followed Holmes as he walked to the turnstile. When they reached the bottom of the stairs, Holmes took off his backpack and reached into it, as he continued to say, "I'll light your ass up." Valiente and Patterson feared for their safety, concerned that Holmes might be reaching into his bag for a weapon. They drew their pepper spray and called for backup. Holmes picked up a sign and threw it in the direction of Valiente and Patterson. He continued yelling obscenities at the security officers until sheriff's deputies arrived.

B. *The Trial Court Denies Holmes's Batson/Wheeler Motion*

The People charged Holmes with two counts of making a criminal threat. During jury selection, the prosecutor exercised her second, fourth, and seventh peremptory challenges to remove, respectively, Prospective Juror Nos. 8, 19, and 27. After the prosecutor exercised her seventh peremptory challenge, counsel for Holmes made a *Batson/Wheeler* motion.

This appeal involves only Prospective Juror No. 19, an African-American woman. She was unmarried, had two adult children, and was a retired telecommunications executive assistant. She had previously served on a jury in a civil case that reached a verdict. Twenty years ago, she was robbed at gun point while with a group of people in a car. Counsel questioned her twice during jury selection. Counsel for Holmes asked her if she would have negative feelings if the defendant did not testify. Prospective Juror No. 19 responded, “No, I don’t have an issue with that. . . . I know that it is their right not to have to testify.” The prosecutor addressed Prospective Juror No. 19, along with the rest of the panel, and asked if she could follow the law even if she sympathized with the defendant. Prospective Juror No. 19 responded, “Yes.”

At the side bar conference concerning Holmes’s *Batson/Wheeler* motion, counsel for Holmes explained her motion was based on race and gender, asserting the prosecutor had exercised peremptory challenges against Prospective Juror Nos. 8, 19, and 27 because they were African-American females. Counsel for Holmes believed Prospective Juror No. 8 was Black or “likely mixed,” while the prosecutor believed she was White. The court stated, “I make a note whenever I have a question regarding that person’s race or ethnicity such as sometimes Hispanic or some Asian-American. . . . I write down all possible races that person can be. But for this juror, Juror No. 8, I put female White.” The court concluded, “She was female White. And we can’t settle that dispute right now because she was the second person that People had exercised their peremptories. . . . There’s no way to actually check on that at this point.” Despite the trial court’s determination that Prospective Juror No. 8 was a

White female, the prosecutor volunteered she had challenged Prospective Juror No. 8 because she was a mental health counselor at a church and might let sympathy influence her decision.

The following exchange occurred regarding Prospective Jurors Nos. 19 and 27.

“The Court: So for the record, to be clear, you are talking about this Juror 27 and Juror 19.

“[Counsel for Holmes]: Yes.

“The Court: Who I believe were – well, 27 clearly is female Black. I don’t think there can be any dispute. 19 was also female Black. I am going to ask the People to give a reason for excusing—or wanting to excuse 27 and 19 because I don’t believe they had ever given any answers that would indicate they cannot be fair and impartial.

“[The Prosecutor]: Sure. For 27, primary reason, I’ve been watching her and worried about her. She is sighing audibly, rolling her eyes, crossing her arms. I watched her, and she audibly—I could hear it from counsel table. And she does not seem like she wants to pay attention or be a member of this jury. I’ve noted on my sticky multiple times she closed her eyes. She seems hostile. And when I was accepting the panel, I was specifically looking to her to see if I could read her. After I accepted twice, that was her response both times, that’s when I decided to kick her. Also, her husband has been charged with a crime and in prison. Although she says she could be fair and impartial, that might get in the way of her being fair to the People in this case.

“The Court: All right. Let’s go to 19.

“[The Prosecutor]: 19, I have in my – on my sticky that she had indicated at some point she can’t be fair and impartial. I had circled it. I did not note the exact reasons why. But that is the reason why I kicked her. She also –

“The Court: She cannot be fair and impartial?

“[The Prosecutor]: That’s what I have on here.

“The Court: You didn’t challenge her for cause.

“[The Prosecutor]: No, I didn’t. I thought maybe I had forgotten to do that. Because I’m pretty methodical about writing when it’s somebody I was worried about. That’s why I got rid of her. She’s also been on a civil jury. I didn’t want her to confuse the two because this is a criminal case.

“The Court: So you actually have on your notes that she indicated at one point in time she cannot be fair and impartial?

“[The Prosecutor]: Yes. I don’t have the underlying reasons why on this sticky that was causing me pause. I did write it on the note.”

The court then asked counsel for Holmes to respond. Counsel for Holmes challenged the content of the prosecutor’s note and asserted there were other prospective jurors who had served on civil juries. The court stated the only other prospective juror who had civil jury experience was Prospective Juror No. 22, and counsel for Holmes had asked the court to excuse him. The prosecutor stated, “I don’t believe I have anyone left who’s been on a civil trial. No. 24 has been on a criminal trial. I myself had an experience after I talked to the jurors where they were confused and didn’t understand it was a unanimous verdict even after instructed by the court in a criminal case.” The court confirmed Prospective Juror No. 12, an African-American male, remained on the panel.

The trial court recalled Prospective Juror No. 27's demeanor and body language indicated she did not want to be there. The trial court stated, "Her husband was convicted and . . . served in prison, . . . although she said it was before having been together. Something about her answer that gave me pause because of the timing." The court denied the *Batson/Wheeler* motion with regard to Juror No. 27.

The court returned to the prosecutor's reasons for challenging Prospective Juror No. 19.

"The Court: As for 19, I did have a question regarding Juror No. 19. I have no notes saying that she could not be fair and impartial. In fact, she spoke very little. However, counsel's reporting to the court that's what you have and that's why you kicked her off.

"[The Prosecutor]: Yes. As well as the fact she was on a civil jury.

"The Court: All right. Court will accept that as an explanation, both bases. And *Batson/Wheeler* motion is denied."

C. *Holmes Is Convicted and Sentenced*

The jury convicted Holmes of two counts of making a criminal threat in violation of Penal Code section 422, subdivision (a). The court sentenced Holmes to the middle term of two years on count 1 and concurrent term of two years on count 2. Holmes timely appealed.

DISCUSSION

A. *Applicable Law and Standard of Review*

A prosecutor who exercises peremptory challenges to strike prospective jurors on the basis of bias against members of a cognizable group (*People v. Williams* (2013) 58 Cal.4th 197, 280) violates the defendant's federal constitutional right to equal protection (*Batson v. Kentucky, supra*, 476 U.S. at p. 88) and state constitutional right to trial by a jury drawn from a representative cross-section of the community (*People v. Wheeler, supra*, 22 Cal.3d at pp. 276-277). African-American women are a cognizable group within the meaning of the representative cross-section rule. (*People v. Jones* (2013) 57 Cal.4th 899, 917; *People v. Young* (2005) 34 Cal.4th 1149, 1173.) "Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158.)

Courts use a three-step process to evaluate a *Batson/Wheeler* motion. "First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination." (*People v. O'Malley* (2016) 62 Cal.4th 944, 974.)

At step one, the defendant must make a prima facie showing by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson*

v. California (2005) 545 U.S. 162, 170 (*Johnson*); see *People v. Avila* (2006) 38 Cal.4th 491, 548 (*Avila*).) “In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: “[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court’s attention.”” (*People v. Parker* (2017) 2 Cal.5th 1184, 1211-1212.) Trial courts are in the best position to determine whether the facts give rise to an inference of discrimination at step one because they personally witness the totality of the circumstances, ““including the jurors’ demeanor and tone of voice as they answer questions and counsel’s demeanor and tone of voice in posing the questions.”” (*People v. Lenix* (2008) 44 Cal.4th 602, 626-627.)

Once the defendant has made a prima facie showing, the burden shifts to the prosecution to offer a race-neutral explanation for the peremptory challenge. (*People v. Winbush*

(2017) 2 Cal.5th 402, 433.) At step two, the prosecutor must “provide ‘a “clear and reasonably specific” explanation of his “legitimate reasons” for exercising the challenges.’ [Citation.] In evaluating a trial court’s finding that a party has offered a neutral basis—one not based on race, ethnicity, or similar grounds—for subjecting particular prospective jurors to peremptory challenge, we are mindful that, “[u]nless a discriminatory intent is inherent in the prosecutor’s explanation,” the reason will be deemed neutral.” (*Gutierrez, supra*, 2 Cal.5th at p. 1158.)

At the third step of the *Batson/Wheeler* analysis, the trial court determines whether the defendant has carried his or her burden of proving purposeful discrimination has occurred. (*Winbush, supra*, 2 Cal.5th at p. 433.) At this stage, “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.” (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339; accord, *Lenix, supra*, 44 Cal.4th at p. 613.) ““The justification need not support a challenge for cause, and even a ‘trivial’ reason, if genuine and neutral, will suffice.”” (*Winbush*, at p. 434.) A prosecutor is permitted to draw on his or her experiences when exercising peremptory challenges and may rely on facial expressions, gestures, hunches, and arbitrary or idiosyncratic reasons. (*Lenix*, at p. 613.) A mistake, if genuine and race-neutral, is a legitimate reason. (*People v. Williams* (2013) 56 Cal.4th 630, 661.) “The inquiry is focused on whether the proffered neutral reasons are subjectively *genuine*, not on how

objectively reasonable they are. The reasons need only be sincere and nondiscriminatory.” (*People v. Melendez* (2016) 2 Cal.5th 1, 15 (*Melendez*); see *Jones, supra*, 57 Cal.4th at p. 917; *Lenix*, at p. 613.)

“The existence or nonexistence of purposeful racial discrimination is a question of fact.” (*People v. Hamilton* (2009) 45 Cal.4th 863, 900.) “Review of a trial court’s denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] ‘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 fida 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.” (*Lenix, supra*, 44 Cal.4th pp. 613-614; see *Hernandez v. New York* (1991) 500 U.S. 352, 364-365 (*Hernandez*); *People v. Williams, supra*, 56 Cal.4th at p. 650.) Because the best evidence of discriminatory intent is often the demeanor of the prosecutor, determinations of credibility and demeanor lie ““peculiarly within a trial judge’s province.”” (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477; see *People v. Fuentes* (1991) 54 Cal.3d 707, 720 [“the trial court is in the best position to determine whether a given explanation is genuine or sham”].)

When a prosecutor’s stated reasons are either unsupported by the record, inherently implausible, or both, the trial court must do more than make “a global finding” of credibility, such as

question the prosecutor and make specific findings, to demonstrate for the record that the court made a sincere and reasoned attempt to evaluate the credibility of the race-neutral explanation. (*Gutierrez, supra*, 2 Cal.5th at pp. 1171-1172; *People v. Silva* (2001) 25 Cal.4th 345, 386 (*Silva*).) The trial court and counsel must ensure the record is sufficient to allow the reviewing court to evaluate a prosecutor's reason for exercising a peremptory challenge when that reason is not self-evident. (*Gutierrez*, at p. 1172.)

B. *The Trial Court Did Not Err in Denying Holmes's
Batson/Wheeler Motion*

We proceed directly to step three of the analysis because the trial court impliedly made a prima facie finding when it proceeded to the second step of the *Batson/Wheeler* analysis and ultimately ruled on the credibility of the prosecutor's reasons. (See *O'Malley, supra*, 62 Cal.4th at p. 975; *Scott, supra*, 61 Cal.4th at p. 387; *People v. Arias* (1996) 13 Cal.4th 92, 135.) There is also no dispute that the prosecutor's stated reasons at step two were nondiscriminatory.

As noted, Holmes contests only the ruling on Juror No. 19, arguing that both of the prosecutor's reasons—her reliance on her note stating that Prospective Juror No. 19 could not be fair and impartial—and her concern about Juror No. 19's prior civil jury service, were pretextual. Holmes contends that, because “the prosecutor neglected his duty to provide a genuine reason, and the trial court failed to verify the sincerity of that reason, the trial court's finding of a race-neutral reason is not given great

deference on appeal.” He asserts substantial evidence does not support the trial court’s ruling.²

We have some concern about the prosecutor’s first reason for asking the court to excuse Prospective Juror No. 19, which was that she had written on her sticky note that Prospective Juror No. 19 “had indicated at some point she can’t be fair and impartial” and the prosecutor had circled the comment. The prosecutor explained she was usually methodical about writing down the numbers of jurors about whom she had concerns and, thinking she must have forgotten to challenge the juror for cause, asked the court to excuse Prospective Juror No. 19 by exercising a peremptory challenge. The prosecutor, however, could not remember why she had made that notation, and the trial court observed that Prospective Juror No. 19 had not said or done anything indicating she could not be fair and impartial. The record confirms the court’s observations: the prosecutor was mistaken.

It is true that “[f]aulty memory, clerical errors, and similar conditions that might engender a ‘mistake’ of the type the

² Holmes also argues the reviewing court must undertake comparative juror review. “Although we must consider comparative juror analysis evidence raised for the first time on appeal [citation], our focus is limited to the responses of stricken panelists and seated jurors that have been identified by defendant in his claim of disparate treatment.” (*People v. Lomax* (2010) 49 Cal.4th 530, 572.) Holmes mentions this issue without citing, addressing, or identifying any responses from other prospective or seated jurors as compared to Prospective Juror No. 19. We treat Holmes’s failure to do so as a concession he is not relying on a comparative analysis in support of his argument. (See *People v. Arellano* (2016) 245 Cal.App.4th 1139, 1160.)

prosecutor proffered to explain his peremptory challenge” are legitimate if genuine and neutral. (*People v. Williams* (1997) 16 Cal.4th 153, 189; see *People v. Williams, supra*, 56 Cal.4th at p. 661.) And the best evidence of a prosecutor’s credibility is often the demeanor of the attorney who exercised the challenge, particularly where, as here, the proffered reason is not supported by the record. (See *People v. Manibusan* (2013) 58 Cal.4th 40, 78; *People v. Williams, supra*, 56 Cal.4th at p. 658.) Nevertheless, claimed clerical errors may be veils for a prosecutor’s impermissible use of peremptory challenges. And the prosecutor’s admission here that she was unable to state the “exact reasons” may not have satisfied her obligation to state a “clear and reasonably specific” explanation of her reasons for exercising the peremptory challenge. (*Gutierrez, supra*, 2 Cal.5th at p. 1158; see *People v. Cisneros* (2015) 234 Cal.App.4th 111, 121 [giving “no reason at all . . . while striking a prospective juror who is a member of a protected class is not an adequate nondiscriminatory justification for the excusal”]; *Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327, 1331 [“[w]hen there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it”].)

The prosecutor’s second reason, however, was supported by the record: Prospective Juror No. 19 had prior service on a civil jury. Because of her past experience, the prosecutor was concerned Prospective Juror No. 19 would confuse the civil and criminal verdict standards. The record confirms the prosecutor never accepted a panel that included a prospective juror who had prior civil jury experience. The prosecutor’s reason was

legitimate: A prosecutor may strike jurors with prior hung or dissenting jury experience without thoroughly questioning them. (*Manibusan, supra*, 58 Cal.4th at p. 78; see *Davis v. Ayala* (2015) ___ U.S. ___, ___, 135 S.Ct. 2187, 2207; *People v. Jones* (2017) 7 Cal.App.5th 787, 805.) A prosecutor may also rely on his or her personal experiences when exercising a peremptory challenge. (See *Melendez, supra*, 2 Cal.5th at p. 20 [a prosecutor’s prior experience with a juror who had difficulties imposing the death penalty because of his military service was a credible and nonpretextual reason for exercising a peremptory challenge on a potential juror with a similar military background].) After inviting counsel for Holmes to respond, considering its recollections of the jury selection proceedings, and observing the prosecutor give her explanation, the court found the prosecutor’s reason was credible. We defer to that credibility determination. Therefore, the trial court did not err in denying Holmes’s *Batson/Wheeler* motion. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 198 [that “at least one of [the prosecutor’s] ‘neutral explanations’ may be without basis in the record on appeal . . . does not undermine the ‘genuineness’—or the sufficiency—of the other ‘neutral explanations’”].)

C. *The Trial Court Properly Reviewed Information
Responsive to Holmes’s Pitchess Motion*

Prior to trial, Holmes moved pursuant to *Pitchess v. Superior Court, supra*, 11 Cal.3d 531 and Evidence Code sections 1043 and 1045 for a review of the personnel records of Valiente and Patterson. The trial court granted the motion with respect to any records reflecting false reporting and false statements by

either security officer. After conducting an in camera hearing and review, the trial court found no discoverable information.

At Holmes's request, which the People do not oppose, we have independently examined the sealed reporter's transcript of the trial court's in camera hearing and review. We conclude the trial court followed the required procedure for in camera review and did not abuse its discretion in ruling on the motion. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229; *People v. Myers* (2007) 148 Cal.App.4th 546, 553.)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.