Filed 2/24/12 P. v. Beal CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. BOBBIE BEAL, Defendant and Appellant.	B231175 (Los Angeles County Super. Ct. No. BA373655)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norm Shapiro, Judge. Reversed and remanded.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Paul M. Roadarmel, Jr., and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Bobbie Beal was convicted of possessing hydrocodone for sale and sentenced to an eight-year prison term. He contends on appeal that the trial court erred in denying his challenge pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 706 (*Wheeler*) to the prosecution's peremptory excusal of three African-American jurors. We conclude that the trial court's denial of the *Batson/Wheeler* challenge to one juror was supported by substantial evidence, but that the trial court erred in finding defendant's challenge to the other two untimely. We therefore conditionally reverse the judgment and remand with directions.

STATEMENT OF THE CASE

On October 19, 2010, defendant was charged by a second amended information with selling hydrocodone (Health & Safety Code, § 11352, subd. (a) [count one]) and possession for sale of hydrocodone (*id*., § 11351 [count two]). The information also alleged 12 prior "strike" convictions. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)[1]

On October 29, 2010, a jury found defendant guilty of possessing hydrocodone for sale, but was unable to reach a verdict regarding the sales allegation. The court declared a mistrial as to this charge.

On February 24, 2011, following defendant's waiver of his right to a jury trial as to the prior convictions, the court found the prior convictions to be true. Pursuant to Penal Code section 1385, the court struck 11 of defendant's 12 strikes. It then sentenced defendant to an eight-year prison term (upper term of four years doubled pursuant to the "Three Strikes" law).

Defendant timely appealed.

---

[1] The prosecutor deleted a thirteenth alleged prior conviction.

DISCUSSION

Defendant contends that the trial court erred by denying his challenge pursuant to *Batson* and *Wheeler* to the prosecution's excusal of African-American jurors. Specifically, he contends: (1) the trial court's conclusion that the prosecution excused Juror No. 33 for a race-neutral reason was not supported by substantial evidence; and (2) the trial court erred when it refused to require the prosecutor to articulate her reasons for excusing two other African-American jurors. We consider these issues below.

I. Relevant Facts

During voir dire, Juror No. 33[2] stated that she lived in Los Angeles, "[r]ight outside Compton," worked as an executive assistant for a CPA firm, was divorced, and had three adult sons, all of whom were employed. She also stated that she previously sat as a juror in two civil cases and a verdict was reached in both of those matters.

When questioned by defense counsel, Juror No. 33 stated as follows:

"Ms. Many: . . . And, Juror No. 33, the same kind of questions. Do you have any idea about that, about a police officer coming into court? What do you think?

"Prospective Juror No. 33: None, whatsoever.

"Ms. Many: You have no feelings about it at all?

"Prospective Juror No. 33: No.

"Ms. Many: How do you feel about the charges here today? Do you have any strong feelings one way or another about the accusations being made or allegations?

"Prospective Juror No. 33: Not really because nothing has been proven, so.

"Ms. Many: You feel you're open-mind[ed], open slate?

"Prospective Juror No. 33: Yes.

"Ms. Many: Do you understand if it shows people that have a different socioeconomic group may live differently than other people?

---

[2] Juror No. 33 is also referred to in the transcript as Juror No. 11.

"Prospective Juror No. 33: Of course.

"Ms. Many: Say they have habits and patterns that are different than yours, or people that are more stable, do you accept that?

"Prospective Juror No. 33: Yes. But I believe the people that are stable, it's not saying they're not doing the same thing.

"Ms. Many: You're talking about committing crimes?

"Prospective Juror No. 33: Yes.

"Ms. Many: Fair enough."

Subsequently, the prosecutor exercised a peremptory challenge to excuse Juror No. 33. The following colloquy then took place at sidebar.

"Ms. Many: I'm sorry, I have to make a *Batson, Wheeler* challenge at this point. She's the third out of four Black jurors. Two have already been excused. I was a little concerned. She's now . . . the third juror who's also Black. I should mention my client's African-American. She's being excused. I don't see any reason for it. I don't see any reason for Mr. (name redacted) to be excused, or the first guy, No. 4, who was Black.

"The Court: Lea[ving] aside the other people[,] as to this particular juror, you think there is insufficient reason?

"Ms. Many: At this point I'm not going to give the benefit of the doubt.

"The Court: You think that there is insufficient reason to excuse this juror based on race?

"Ms. Many: Yes.

"The Court: Could you review what you were able to recall from the interview of this juror?

"Ms. Many: She lives in Los Angeles. She's an assistant for an investment firm. Three adult children, three adult kids. They're also doing well. One is in the service. The other one is doing well. She's been on two civil trials and reach[ed] verdicts. I haven't seen anything negative. They were all very neutral.

"The Court: My observation I didn't seem to recall anything negative. Go ahead and state the reasons as to her.

"Ms. Kardan: First of all, counsel asked her about socioeconomic people being held up in the criminal justice system. She made a comment specifically that said, other people do it too. They just don't hear about it. That made me feel people are targeted in the socioeconomic field. That would be a level of sympathy toward somebody, not privilege[d]. That was one thing. She also has a cross necklace and big cross earrings. I tend to think people who are religious to that extent have a difficult time judging other people.

"The Court: Anything else?

"Ms. Kardan: No.

"The Court: Any responses or any thoughts?

"Ms. Many: I do. I didn't pay any attention to the jewelry. She certainly wasn't questioned whether she made any comments she couldn't be judgmental, or sit in judgment. As to the statement of the question, I asked her was she, did she understand people of different socioeconomic groups might behave differently. She said, yes. I think she misunderstood my question which finding [*sic*] in her response people of other economic groups may do the same kinds of things, but they may not get caught as much. I don't think that shows particular prejudice.

"The Court: I understand where you're coming from here. I understand your client's Black. I understand how you feel, how the process, this is your first mention. I do think that the District Attorney indicated her impression with the juror's answer to that left her with a feeling that she may be problematic. So I have to honor that. As far as the religious impulse, I didn't notice that either. Then, again, the District Attorney gets the certain impression that people who do perhaps exhibit or wear their religion, perhaps Ms. Kardan has found over in her experience there have been some difficulty. She tended to stay away from those jurors. On that reason I think the District Attorney has established a reason that is sufficient for me to honor the challenge.

"Ms. Many: I think the Court needs to inquire as to the other jurors also excused. I don't believe there was any reason for that.

"The Court: Unfortunately you didn't make a challenge. So I'm not in a position to make a reasonable call on that. If you had, I would have gone through the same process here. So there's not much I can do for you on those.

"Ms. Many: I believe the law asks the Court at this time to even justify those challenges.

"The Court: I'm not in the position to do that because we have had 90 jurors in this courtroom. There will be another 20 or so that we haven't interviewed yet of the 70 or so. I'm not in a position at this time just because you've been refused on this challenge to go back now and make calls on the others. Those jurors have left the courtroom. Your challenge on them is untimely, so I can't take any action on that.

"Ms. Many: Over my objection.

"The Court: The record is clear.

"Ms. Many: Again, I just wanted to make extra clear there have been four Black people in the box. Three have been dismissed already by the Prosecutor.

"The Court: Excused?

"Ms. Many: Excused on a peremptory challenge, yes.

"The Court: I understand your point on this particular issue here. I think the District Attorney has stated a reason. The Court accepts that. So I'll excuse the juror and seat the next juror."

II. Applicable Law

"A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds'—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*Wheeler, supra,* 22 Cal.3d at pp. 276-277; see *People v. Griffin* (2004) 33 Cal.4th 536, 553.) Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United

States Constitution. (*Batson, supra,* 476 U.S. at p. 88; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 732.)

"The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard to be used by trial courts when motions challenging peremptory strikes are made. '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." [Citations.] 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.)" (*People v. Avila* (2006) 38 Cal.4th 491, 541.)

III. Substantial Evidence Supported the Trial Court's Conclusion That the Prosecutor Excused Juror No. 33 for Race-Neutral Reasons

Defendant contends that the trial court erred in concluding that the prosecutor excused Juror No. 33 for race-neutral reasons. For the following reason, we disagree.

"A prosecutor asked to explain his conduct must provide a '"clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' (*Batson, supra*, 476 U.S. at p. 98, fn. 20.) 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' (*People v. Arias* (1996) 13 Cal.4th 92, 136, italics added.) A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (See *People v. Turner* (1994) 8 Cal.4th 137, 165; *Wheeler, supra,* 22 Cal.3d at p. 275.) Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. (*Purkett v. Elem* (1995) 514 U.S. 765, 769.) Certainly a challenge based on racial prejudice would not be supported by a legitimate reason.

"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.' ([*Miller-El v. Cockrell* (2003)] 537 U.S. [322,] 339.) [Fn. omitted.] 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. (See *Wheeler*, *supra*, 22 Cal.3d at p. 281.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. (*People v. Bonilla* [(2007)] 41 Cal.4th [313,] 341-342.) '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.]' (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)" (*People v. Lenix* (2008) 44 Cal.4th 602, 613-614.)

In the present case, the prosecutor articulated two reasons for her exercise of a peremptory challenge against Juror No. 33: (1) her impression that Juror No. 33 believed that people of low socioeconomic status are unfairly targeted by law enforcement, and (2) her belief that people who are very religious (as she believed Juror No. 33 was, based on her large cross earrings and necklace) have a difficult time judging others. The record reflects that the trial court made a "sincere and reasoned effort" to evaluate these justifications, crediting the prosecutor's statements that Juror No. 33 "left her with a feeling that she may be problematic" and that she tends to excuse jurors who "exhibit or

wear their religion" because "in her experience there have been some difficulty." We defer to these observations on appeal and, because an analysis of the record demonstrates the trial court's findings that the prosecutor's proffered reasons were not pretextual, we conclude that the trial court did not err in denying the *Batson/Wheeler* challenge with regard to Juror No. 33.

IV. The Trial Court Erred in Concluding That Defendant's Challenge to Two Other African-American Jurors Was Untimely

Defendant contends that the trial court erred in refusing to consider the merits of his challenge to the prosecutor's peremptory excusal of two African-American jurors who were excused before Juror No. 33. As to those jurors, the trial court said defendant's challenge was "untimely" and thus the court "can't take any action on that [defendant's *Batson/Wheeler* challenge]." The court thus never considered whether defendant had successfully made out a prima facie case as to these jurors.

The Attorney General contends that the present record does not permit us to review defendant's challenge because "Juror 4's race is not apparent from the record [internal record reference omitted], and the record does not show the identity of Mr. (name redacted)." We do not agree. Although we cannot determine the juror's race from the appellate record, "[w]e can assume [defense attorney's] description was accurate, as neither the court nor [the prosecutor] challenged it." (*People v. Hamilton* (2009) 45 Cal.4th 863, 905.) We thus assume, as defendant asserts, that the prosecutor exercised two peremptory challenges against African-American jurors before exercising a similar challenge against Juror No. 33.

As to those two African-American jurors, the trial court erred in concluding that defendant's *Batson/Wheeler* challenge was untimely. In *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1020-1021, 12 jurors were sworn to decide the case. During the process of selecting those jurors, the prosecutor exercised peremptory challenges as to two Hispanic jurors. After the jury was sworn, the court went on to select three alternates. When the prosecutor exercised a peremptory challenge against a Hispanic

alternate, the defense attorney immediately made a *Batson/Wheeler* motion as to the excusal of all three Hispanic jurors. The trial court considered the motion as to the alternate juror, but denied it as to the two other jurors, stating that it "'has not been made timely.'" (*Id*. at p. 1021.) The Court of Appeal reversed, concluding that defendant's *Batson/Wheeler* motion was timely as to all three Hispanic jurors. (*Id*. at p. 1023.) Quoting its earlier decision in *People v. Gore* (1993) 18 Cal.App.4th 692, the court explained as follows: "'. . . [T]o be timely a *Wheeler* objection or motion must be made, at the latest, before jury selection is completed. "The general rule is that where a court has indicated that a trial will be conducted with alternate jurors, the impanelment of the jury is not deemed complete until the alternates are selected and sworn." (*In re Mendes* (1979) 23 Cal.3d 847, 853.)' (18 Cal.App.4th at p. 703.)" (*People v. Rodriguez*, *supra*, at p. 1023.) Thus, because the jury had not yet been impaneled when the defendant made his *Batson/Wheeler* motion, the motion was timely.

In the present case, defendant made his *Batson/Wheeler* challenge as to all three African-American jurors well before the jury was empanelled or sworn. Accordingly, the trial court erred when it ruled that challenge was untimely. The question then becomes the appropriate remedy.

Our Supreme Court addressed the issue of remedy in *People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104 (*Johnson*). There, the court held that although the trial court had erred in concluding that the defendant had not established a prima facie case of group bias under *Batson*, it need not reverse the judgment. Instead, even though seven or eight years had passed since the jury selection, it remanded the case with directions to the trial court to attempt to conduct the second and third *Batson* steps. (*Id*. at pp. 1101, 1103.) In other words, the court said, the trial court "should require the prosecutor to explain his challenges. If the prosecutor offers a race-neutral explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should

set the case for a new trial. If it finds the prosecutor exercised his peremptory challenges in a permissible fashion, it should reinstate the judgment." (*Id*. at pp. 1103-1104.)

This court reached a similar result in *People v. Hutchins* (2007) 147 Cal.App.4th 992 (*Hutchins*). There, the defendant made a *Wheeler* motion after the prosecutor exercised a peremptory challenge to an African-American juror. The trial court found that defendant had made a prima facie case, but ultimately concluded that it could not find purposeful discrimination by clear and convincing evidence. (*Id*. at p. 996.) We held that the opponent of a peremptory challenge does not have the burden of proving purposeful race discrimination by clear and convincing evidence; rather, it need only demonstrate such discrimination by a preponderance of the evidence. (*Id*. at p. 997.) Further, we concluded that we could not determine in the first instance whether the prosecutor had shown by a preponderance of the evidence that her peremptory challenge was race-neutral. (*Id*. at p. 998.) We thus said a limited remand was appropriate so that the trial court could reconsider the third step under the proper legal standard. We noted that the factors to be considered in determining whether remand is appropriate are "'the length of time since voir dire, the likelihood that the court and counsel will recall the circumstances of the case, the likelihood that the prosecution will remember the reasons for the peremptory challenges, as well as the ability of the trial judge to recall and assess the manner in which the prosecutor examined the venire and exercised other peremptory challenges.'" (*Id*. at pp. 998-999.) Because voir dire had occurred a little over a year earlier, there were detailed trial transcripts, both sides filed a written motion on the issue, and the prosecutor took notes, we found that a limited remand was appropriate.

In the present case, as in *Hutchins*, voir dire occurred a little over a year ago and there are detailed transcripts of the voir dire. Thus, as in *Johnson* and *Hutchins*, a limited remand is appropriate to permit the trial court to reconsider defendant's *Batson/Wheeler* challenge to the first two African-American jurors excused by the prosecutor. On remand, we direct the trial court to consider whether the defendant presented a prima facie case as to these two jurors. If so, the court should require the prosecutor to explain her challenges. If the prosecutor offers a race-neutral explanation, the court must

evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised her peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised her peremptory challenges in a permissible fashion, the trial court should reinstate the judgment.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court for reconsideration of its ruling on the *Wheeler/Batson* challenge. If the trial court finds that it cannot adequately address the challenge or make a reliable determination, or if it determines that the prosecutor exercised her peremptory challenges improperly, the reversal is to stand and the trial court is ordered to set the case for a new trial. If the trial court determines that defendant has not met his burden of proving purposeful race discrimination, the judgment shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.