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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. JOSE LUIS PADILLA, Defendant and Appellant.	B266269 (Los Angeles County Super. Ct. No. VA135711)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

Sally Patrone Brajevich, 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, Paul M. Roadarmel, Jr. and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On the afternoon of May 24, 2014, defendant Jose Luis Padilla went to Ramiro Ramirez's home. While Ramirez was napping in his bed, Padilla picked up a serrated knife and cut three to four inches across Ramirez's neck. The jury convicted Padilla of aggravated mayhem and found true the allegations that he personally used a deadly or dangerous weapon and inflicted great bodily injury in the commission of the crime.

On appeal, Padilla argues his conviction should be reversed because of *Batson/Wheeler*[1] error, insufficiency of the evidence to support his conviction, and prosecutorial misconduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts from the Trial*

Ramirez lived in a converted garage in Pico Rivera. He and Padilla, whom he knew as "Wicked," had known each other for about 20 years.[2] On the night of May 23, 2014, the two were together at Ramirez's home when Padilla became upset over seeing a photograph of his "girl" on Ramirez's cell phone. Padilla left and Ramirez went to bed around 2:00 a.m. He woke up between 11:30 a.m. and noon when his friend Rubin knocked on the door. They spoke briefly, and Ramirez went back to bed. As

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1 *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*), disapproved in part in *Johnson v. California* (2005) 545 U.S. 162, 165, 168.

2 Ramirez passed away prior to trial. The prosecution read his preliminary hearing testimony to the jury.

Rubin left, Padilla was on his way over to see Ramirez. Rubin and Padilla passed by each other on their respective ways.

About 30 seconds after Rubin left, Padilla knocked on Ramirez's door. Ramirez let him in. Ramirez told Padilla he was going to take a nap, and Padilla asked if he could stay and "kick back a bit." Padilla asked to use Ramirez's cell phone. Ramirez gave him the pass code to unlock the phone. Ramirez went back to bed. He was facing the wall with his back to Padilla.

Roughly five to seven minutes later, Ramirez felt something "gouge" his neck. He looked up and saw Padilla, who had a "wild crazed look in his eyes." Padilla did not say anything and went out the door. Ramirez got up, looked in the mirror, and saw a "big ol' gap" in his neck. He applied a towel to his neck to stop the bleeding.

Ramirez went to the main house and told the people there that "Wicked" had cut him. Roughly 15 minutes later, a deputy from the Los Angeles County Sheriff's Department and an ambulance arrived. Ramirez told Deputy Tim Shultz that "Wicked" had attacked him. Ramirez provided Deputy Shultz with a physical description of "Wicked." Ramirez was then taken to the hospital.

At the hospital, the hole in Ramirez's neck was stapled closed. The attack left "a three- to four-inch scar on the left side of the throat below the jawline."

Ramirez kept a folding knife on a dresser near his bed. On one side of the blade was a straight razor and on the other side the blade was serrated. When he returned from the hospital, Ramirez discovered both his knife and cell phone were missing. He told the sheriff's department his knife and cell phone had been stolen.

On May 25, Deputy Kenneth Felix, while responding to a disturbance call, saw an individual matching Ramirez's description of "Wicked." Deputy Felix arrested this individual, who turned out to be Padilla. When asked what name he went by on the street, Padilla responded, "Wicked."

Shortly thereafter, Detective Cuouhtemoc Gonzalez was assigned to the case. Detective Gonzalez interviewed Ramirez and learned about the missing phone and knife. The Detective obtained a search warrant for the residence where Padilla had been arrested. The deputies executing the warrant found Ramirez's cell phone inside the residence.

B. *Charges, Verdict and Sentencing*

Padilla was originally charged by information with attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664),[3] and it was alleged he personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury (§ 12022.7, subd. (a)) in the commission of the crime. The People also alleged Padilla suffered a prior serious felony conviction (§ 667, subd. (a)) constituting a strike within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and served a prior prison term (§ 667.5). The aggravated mayhem (§ 205) count was added by amended information along with allegations that Padilla personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury (§ 12022.7, subd. (a)) in the commission of the mayhem offense.

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

A jury found Padilla not guilty of attempted murder and guilty of aggravated mayhem. It found true the allegations he personally used a deadly or dangerous weapon and inflicted great bodily injury in the commission of the crime. Padilla admitted a prior serious felony conviction and a prior prison term. The trial court sentenced Padilla under the three strikes law to 14 years to life, plus five years for the prior serious felony. The court struck the weapon use, great bodily injury, and prior prison term findings for purposes of sentencing.

DISCUSSION

A. *Batson/Wheeler Motion*

Padilla, who is Hispanic, contends the prosecutor violated his state and federal constitutional rights to equal protection and a jury drawn from a fair cross section of the community by peremptorily excusing Juror No. 10, who is African-American. (*Batson*, *supra*, 476 U.S. 79; *Wheeler*, *supra*, 22 Cal.3d 258.) At trial, the court denied the *Batson/Wheeler* motion, finding Padilla had not made a prima facie case of impermissible discrimination and accepted the prosecutor's explanation for excusing Juror No. 10.

Padilla submits we should review this case through the lens of a first stage/third stage *Batson/Wheeler* hybrid. We agree with the approach, but not with the relief Padilla seeks. We affirm the trial court's denial of the *Batson/Wheeler* motion.

1. *Proceedings Below*

The venire panel consisted of 30 prospective jurors. The trial court conducted general background questions of the entire

panel. Juror No. 10 was single, lived alone in Culver City, and was a senior technical services specialist, working for a medical laboratory dealing mainly with physicians. While she previously served on a civil jury, the jury did not reach a verdict. Juror No. 10 indicated if she were not convinced by the evidence of the defendant's guilt beyond a reasonable doubt, she would not vote to convict. She could be impartial with respect to law enforcement and non-law enforcement witnesses.

After the court completed its routine background questions, both counsel were given the opportunity to conduct voir dire. In one section of his voir dire, the prosecutor questioned whether any of the jurors had a problem rendering a verdict in a case based upon the testimony of a single witness. Several jurors discussed their concerns.

The prosecutor asked Juror No. 10 how she felt. Juror No. 10 responded, "I was thinking [about] what the judge had said earlier, that you get what you get,[4] but at the same time,

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4 While pre-instructing the jury panel regarding the prosecution's burden of proof beyond a reasonable doubt, the court "test[ed]" the jurors on various scenarios, including one in which the prosecution presented only one witness, who was convincing. When one juror indicated his verdict in that case would be guilty, the court responded: "Absolutely correct. That is what you will be required to do based on the evidence that is presented in this trial during the sessions that we are in trial, nothing else. Ladies and gentlemen, you get what you get, not what you want to get, not what you think you will get, not what you would like to see. You get what you get, and based on that decision that is what you are going to view, you are going to decide guilty or not guilty." The court went on to explain that the defendant is not obligated to present any evidence but can simply hold the prosecution to its burden of proof.

just one person, it depends on if they are credible when you are listening to the evidence and examining what they say, and then you make your decision based on that. Because she did indicate that you get what you get, if it is one witness, two witnesses, three, that is what you have to base your decision on." The prosecutor probed further, trying to determine the juror's comfort level. Juror No. 10 said, "I can be impartial. I can listen to the testimony and determine I guess based on what they present and determine if it is credible."

The prosecutor asked "if you find the witness to be credible would you hesitate . . . to vote guilty?" Juror No. 10 answered, "If the witness is credible and the defendant decides for whatever reason not to take the stand or whatever, it would be tough but based on the information that I received, yes, and it is credible." In response to further questioning, Juror No. 10 stated she was comfortable with the proof beyond a reasonable doubt standard.

The prosecutor used a total of seven peremptory challenges. He excused Jurors Nos. 2, 4, 9, 11, 19, 20 and 10 in that order. After he excused Juror No. 10, defense counsel objected, "Your honor, this is the second African American, the only other African American in the box that counsel has dismissed, and I see there is nothing he has said or done that would indicate, well, based on that I believe that counsel has made a race-based peremptory challenge."[5]

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[5] At trial, defense counsel referred to Juror No. 10 as male. The prosecutor referred to Juror No. 10 as female. Padilla and the People similarly disagree. Because gender is not at issue, it is of no moment. For consistency, we shall refer to Juror No. 10 as female.

The trial court asked the prosecutor for a response**,** and he "state[d] for the record that the defendant is not Black, he is Hispanic." The court indicated the prosecutor should continue, and he explained "this is a case where the People honestly only have one witness to the attack and she expressed a lot of hesitancy as to being able to form her opinion based on one witness. I have [dismissed] other races, whether or not they are White or Hispanic or Black because they were hesitant on that one subject." The court responded that "in my notes there were some issues with respect to the one witness scenario. The court doesn't have a prima facie *Wheeler* [case]."

2. *Applicable Law*

In *People v. Gutierrez* (2017) 2 Cal.5th 1150 (*Gutierrez*), the California Supreme Court recently revisited and discussed the standards to be applied in *Batson/Wheeler* cases. The court stated: "At issue in a *Batson/Wheeler* motion is whether any specific prospective juror is challenged on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds. [Citation.] Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal. [Citation.]" (*Gutierrez*, *supra*, at p. 1158.)

Generally, the *Batson/Wheeler* inquiry consists of three distinct steps. "First, the *Batson/Wheeler* movant must demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) "Second, if the court finds the movant meets the threshold for demonstrating a prima facie case, the burden shifts to the opponent of the motion

to give an adequate nondiscriminatory explanation for the challenges." (*Ibid*.) "Third, if the opponent indeed tenders a neutral explanation, the trial court must decide whether the movant has proven purposeful discrimination. [Citation.]" (*Ibid*.)

In the present case, the trial court denied the *Batson/Wheeler* motion at the first stage, stating that because "there were some issues with respect to the one witness scenario[,] the court doesn't have a prima facie *Wheeler*." Padilla contends that because the trial court invited the prosecutor to provide an explanation for his challenge before ruling on whether a prima facie case of discrimination had been made and implicitly adopted the reasons offered by the prosecutor, this case should be analyzed as a first stage/third stage *Batson* hybrid.[6] Where a trial court does not find a prima facie case "and also rules on, indicates agreement or satisfaction with, or otherwise passes judgment on the ultimate question of purposeful discrimination, the case is described as a first stage/third stage *Batson/Wheeler* hybrid, and the question whether a defendant established a prima facie case of group bias is rendered moot." (*People v. Chism* (2014) 58 Cal.4th 1266, 1314; accord, *People v. Riccardi* (2012) 54 Cal.4th 758, 786 [question whether defendant established prima facie showing of purposeful discrimination rendered moot where "the court expressly agreed with the prosecutor's reasons, and thereafter appeared implicitly to agree with the prosecutor's reasons given in response to [the] defendant's subsequent *Wheeler* motions"]; *People v. Mills* (2010)

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6 The People do not object to nor challenge Padilla's contention this case presents a first stage/third stage *Batson/Wheeler* hybrid. Conceding the point, the People go on to argue the merits of the third stage analysis.

48 Cal.4th 158, 174 [question whether prima facie case of group bias has been made is mooted where the trial court "passed judgment on the prosecutor's actual reasons for the peremptory challenges (the third stage of a *Batson* inquiry), expressly noting that the court was 'satisfied . . . from the explanation given by the prosecutor' that the motivation for the challenges was not based on race" (fn. omitted)]; *People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. 8, citing *Hernandez v. New York* (1991) 500 U.S. 352, 359 [111 S.Ct. 1859, 114 L.Ed.2d 395].)

In *People v. Scott* (2015) 61 Cal.4th 363 (*Scott*), the California Supreme Court clarified its first stage *Batson/Wheeler* analysis. The court held "that an appellate court properly reviews the first-stage ruling if the trial court has determined that no prima facie case of discrimination exists, then allows or invites the prosecutor to state reasons for excusing the juror, but refrains from ruling on the validity of those reasons. [Citations.]" (*Scott*, *supra*, at p. 386.)[7] The court set forth a protocol to help

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[7] The court in *Scott* stated: "We recognize that our jurisprudence on this issue has not always been entirely consistent. (Compare *People v. Banks* (2014) 59 Cal.4th 1113, 1146 . . . [in "'such a circumstance,'" ""we express no opinion on whether defense counsel established a prima facie case of discrimination and instead skip to *Batson*'s third stage to evaluate the prosecutor's reasons""] with *People v. Lopez* (2013) 56 Cal.4th 1028, 1049-1050 . . . [where trial courts choose "'to request and consider a prosecutor's stated reasons for excusing a prospective juror even when they find no prima facie case of discrimination,'" the request does ""not convert [this] first-stage *Wheeler/Batson* case into a third-stage case""].) We therefore take this opportunity to clarify our practice." (*Scott*, *supra*, 61 Cal.4th at pp. 386-387, fn. omitted.)

clarify the first stage process: "[W]here (1) the trial court has determined that no prima facie case of discrimination exits, (2) the trial court . . . invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with review of the first-stage ruling. [Citations.]" (*Id*. at p. 391.)

In the present case, before ruling on whether defense counsel had made a prima facie showing, the court invited the prosecutor to respond to the *Batson/Wheeler* motion. The prosecutor explained he dismissed Juror No. 10 based upon her hesitancy to convict on the testimony of a single witness. The court reviewed its notes and confirmed "there were some issues with respect to the one witness scenario. The court doesn't have a prima facie *Wheeler* [case]."

Unlike those cases wherein the court determines in the first instance that a prima facie case has not been made, and thereafter invites the prosecutor to state his or her reasons for the record, the trial court here invited the prosecutor's comments first, corroborated those reasons by reference to her own notes and then denied the motion. In so doing, the court implicitly, if not expressly, found the prosecutor's explanation for excusing Juror No. 10 credible. Accordingly, whether Padilla established a prima facie case is moot, and we "skip to *Batson*'s third stage to evaluate the prosecutor's reasons for" excusing Juror No. 10. (*People v. Mills*, *supra*, 48 Cal.4th at p. 174; accord, *People v.*

Booker (2011) 51 Cal.4th 141, 165; see also *Scott*, *supra*, 61 Cal.4th at p. 387, fn. 1.)[8]

3. *Batson/Wheeler's Third Stage*

"In reviewing the correctness of a trial court's ruling on a *Batson/Wheeler* motion, we consider 'all the circumstances of th[e] case.'" (*People v. Williams* (2013) 56 Cal.4th 630, 653-564, quoting *People v. Reynoso* (2003) 31 Cal.4th 903, 908.) Padilla argues the prosecutor's reasons for excusing Juror No. 10 were a "sham" and the court's inquiry was insufficient.

In analyzing the credibility of the prosecutor's explanation, we must first identify the reason advanced by the prosecutor for excusing Juror No. 10. (*People v. Jones* (2011) 51 Cal.4th 346, 365 [the trial court and reviewing court must examine only those reasons actually expressed].) "'[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.'" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159, quoting *Miller-El v. Dretke* (2005) 545 U.S. 231, 252 [125 S.Ct. 2317, 162 L.Ed.2d 196.)

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[8] By contrast, in *People v. Sattiewhite* (2014) 59 Cal.4th 446, 469, the California Supreme Court declined to apply the first stage/third stage hybrid where trial court "made its finding *before* the prosecut[or]'s recitation of reasons," invited the prosecutor to give his reasons "'notwithstanding the court's finding'" that a prima facie case had not been made, and "the court's final words on the matter were not an express or implied comment on the prosecutor's reasons."

Here, the prosecutor stated clearly his reasons for excusing Juror No. 10. He explained that "the People honestly only have one witness to the attack and she [Juror No. 10] expressed a lot of hesitancy as to being able to form her opinion based on one witness." At the third stage of the *Batson/Wheeler* inquiry, ""the issue comes down to whether the trial court finds the prosecutor's race-neutral explanation to be credible."" (*People v. Mills*, *supra*, 48 Cal.4th at pp. 174-175.) Credibility may be gauged by examining factors including but not limited to ""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."" (*People v. Jones*, *supra*, 51 Cal.4th at p. 360.) In order to assist the court in reaching its conclusion, a comparative juror analysis "may be probative of purposeful discrimination at *Batson*'s third stage." (*Gutierrez*, *supra*, 2 Cal. 5th at p. 1173, quoting *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241; see also *Mills*, *supra*, at p. 177 ["'[c]omparative juror analysis is a form of circumstantial evidence' [citation] courts can use to determine the legitimacy of a party's explanation for exercising . . . peremptory challenge[s]"].)

The third stage of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 924.) The trial court must make "'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, [its] knowledge of trial techniques, and [its] observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159, citing *People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

Justifications that are "implausible or fantastic . . . may (and probably will) be found to be pretexts for purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834]; accord, *Gutierrez*, *supra*, at p. 1159.) "'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. . . .'" (*People v. Lenix*, *supra*, 44 Cal.4th at p. 614, quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864.)

"We recognize that the trial court enjoys a relative advantage vis-à-vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159; see *People v. Lenix*, *supra*, 44 Cal.4th at p. 613.) "We review [the] trial court's determination regarding the sufficiency of tendered justifications with "'great restraint.'" [Citation.] We presume an advocate's use of peremptory challenges occurs in a constitutional manner. [Citation.]" (*Gutierrez*, *supra*, at p. 1159.)

Padilla claims the prosecutor's justification for excusing Juror No. 10 was pretextual, or as he states it, "a sham." The facts show otherwise. To begin, the prosecutor's justification for excusing Juror No. 10 was race neutral. (See *Briggs v. Grounds* (9th Cir. 2012) 682 F.3d 1165, 1175 [juror properly excused where, among other things, she "suggested that she would hesitate to convict on the word of one witness alone"].) Juror No. 10 stated it "would be tough" for her to render a verdict in a single witness case. As such, the prosecutor correctly noted she "expressed a lot of hesitancy as to being able to form her opinion based on one witness." This was a reasonable explanation given the circumstances of the case. (See *People v. Jones*, *supra*, 51

Cal.4th at p. 360.) There was nothing "'implausible or fantastic'" about the prosecutor's explanation. (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 916, quoting *Purkett v. Elem*, *supra*, 514 U.S. at p. 768.) Here, the prosecutor's stated reasons are "'"both inherently plausible and supported by the record."'" (*People v. Long* (2010) 189 Cal.App.4th 826, 842; accord, *People v. Mai* (2013) 57 Cal.4th 986, 1054.)

The prosecutor's explanation also had a basis in trial strategy. Because the case turned, in large part, upon the testimony of a single witness, the prosecutor's trial strategy would naturally be to find jurors who could base their decision on the testimony of a single witness. (See *People v. Avila* (2009) 46 Cal.4th 680, 703 ["'the testimony of a single witness is sufficient for the proof of any fact'"]; see also CALCRIM No. 301.) Jurors that would have trouble doing so would be the focus of peremptory challenges.

We similarly find no error in the court's implicit determination of credibility. The prosecutor did not engage in a desultory examination of Juror No. 10. (*People v. Parker* (2017) 2 Cal.5th 1184, 1211-1212.) In fact, the prosecutor examined Juror No. 10's thoughts and feelings on the subject of a single witness case. The prosecutor's conclusion that Juror No. 10 would have a "very hard time" in deciding a case with only one witness was amply supported by the record.

While the court's colloquy with the prosecutor was brief, it was, nonetheless, "'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.'" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.) No doubt because the court found defense counsel had failed to make a prima facie case, its inquiry was necessarily limited. But that does not mean it was not a sincere

and reasoned effort to evaluate the nondiscriminatory justifications offered. Not only did the trial court see and hear the voir dire of Juror No. 10, but the court also reviewed its own notes to corroborate the validity of the basis for the prosecutor's peremptory challenge. A sincere and reasoned effort to evaluate a nondiscriminatory reason is not tethered to the time it takes to make the determination, but rather to the nature of the inquiry and assessment of the reasons at issue. (See *People v. Mai*, *supra*, 57 Cal.4th at pp. 1053-1054 ["terse ruling" not incompatible with sincere and reasoned effort to evaluate prosecutor's reasons where those reasons were plausible and supported by the record].)

Finally, a review by comparative juror analysis demonstrates convincingly the sincerity of the prosecution's justification for the excusal of Juror No. 10.[9] In fact, out of the prior six jurors excused by the prosecutor, five of them identified their reluctance and skepticism to reach a verdict in a case involving a single witness.[10] The comparative juror analysis reveals:

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[9] Finding that a comparative juror analysis may be probative of purposeful discrimination, the California Supreme Court in *Gutierrez* held it was error for the Court of Appeal to "categorically conclude that a court should not undertake a comparative analysis for the first time on appeal—regardless of the adequacy of the record." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1174.)

[10] Juror No. 4 was the only juror excused who did not raise an issue concerning his or her ability to make a determination based upon the testimony of only one witness. Defense counsel did not make any comments or raise any issues concerning the basis for the prosecution's peremptory challenge of Juror No. 4.

Juror No. 2 expressed uncertainty as to whether he could believe a single police officer who appeared to be giving a "pat answer."

Juror No. 9 expressed skepticism about deciding a case based on a single witness because a witness could say anything he or she wanted and may have unknown biases. The juror expressed concern that "[j]ust one person doesn't seem valid enough."

Juror No. 11 agreed with Juror No. 9 and stated: "To add onto [*sic*] that, in a lot of situations if there is a substantial amount of evidence or if there is not, *it is just hard* to base a lot of what is going on [in] one person's testimony when you are dealing with someone's life." (Italics added.)

Similarly, Juror No. 17 said, "I don't think sometimes one person would be enough to prosecute somebody."

Juror No. 19 stated, "I would be *reluctant* if you only have a single eyewitness." (Italics added.)

Juror No. 20 said, "I think I would have a little problem with that witness, the severity of it. I don't know if I could be content with one witness."

The prosecutor excused all of these jurors, and as he pointed out, it was not based on race. "I have [dismissed] other races, whether or not they are White or Hispanic or Black . . . ." Although the race of each of the excused jurors is unknown and the record is silent in this regard, six of the seven jurors excused by the prosecutor (including Juror No. 10) shared this common characteristic: the hesitancy to convict in a case involving a single witness.

Against this record, Padilla's effort to show "'it was more likely than not that the challenge was improperly motivated'" is

not persuasive. (*People v. Mai*, *supra*, 57 Cal.4th at p. 1059.) Padilla makes two arguments. First, Padilla argues the prosecutor's challenge was neither sincere nor plausible because at the outset of the *Batson/Wheeler* motion the prosecutor observed Padilla is Hispanic and the challenged jurors are African-Americans. This comment has nothing to do with the basis for the juror's exclusion. Rather it reflects a preliminary concern over the cognizability for making a *Batson/Wheeler* motion.[11]

The only other point raised by Padilla is that Juror No. 10 was the second and only other African American excused from the jury box. Statistical challenges involving one or two jurors who are a member of a cognizable group, standing alone, present the weakest possible evidence of impermissible exclusion. (See *People v. Parker*, *supra*, 2 Cal.5th at p. 1212 [""""[a]s a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion""""]; *People v. Semien* (2008) 162 Cal.App.4th 701, 708 [same].)[12]

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[11] A *Batson/Wheeler* motion will lie where the defendant and the jurors are of a different cognizable group. """[T]he defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule . . . .""" (*People v. Parker*, *supra*, 2 Cal.5th at p. 1212; accord, *Wheeler*, *supra*, 22 Cal.3d at p. 281.)

[12] While defense counsel stated Juror No. 10 was the second African American excluded from the panel, neither counsel nor the court identified the other African American juror. Nor did defense counsel make a *Batson/Wheeler* challenge with respect to the dismissal of this unidentified juror.

In *People v. Long*, *supra*, 189 Cal.App.4th 826, on which Padilla relies, the prosecutor claimed to have excused a juror based on his nonparticipation in a discussion, lack of eye contact, body language, and the way he expressed himself. The trial court accepted this explanation as legitimate, even though the record revealed the claim that the juror did not participate in the discussion was "demonstrably false." (*Id.* at p. 843.) On appeal, the court cautioned: "We do not expect trial judges to provide a continuous recorded narrative during jury voir dire of the appearance, behavior, and intonation of each prospective juror. However, when the prosecutor bases a peremptory challenge on an unrecorded aspect of a prospective juror's appearance or behavior, we must and will look for some support in the record for the prosecutor's observation." (*People v. Long*, *supra*, 189 Cal.App.4th at p. 848.) In the case before it, the record was "devoid of any mention, let alone description, by the trial judge or the prosecutor of what was disturbing or unseemly about [the juror's] body language or his way of expressing himself. [The court was] unable to extend normal deference to the trial court's implied finding on this point when another stated reason, though pronounced 'legitimate' by the trial court, was demonstrably inaccurate." (*Ibid.*) The court concluded "that the trial court erred in accepting the prosecutor's virtually unverifiable and unverified explanation for challenging" the juror. (*Ibid.*)

Here, by contrast, the trial court's own notes corroborated the same concerns expressed by the prosecutor. The record similarly supports the prosecutor's observations and the legitimacy of the prosecutor's concern. There are no contradictions with respect to the prosecutor's explanations.

On this record, there is no basis to conclude the prosecutor's offered justification was implausible, untrue or a "sham." We find that the prosecutor's non-discriminatory reason for excusing Juror No. 10 was fully supported by the record, reasonable, based on legitimate trial concerns, and credible. Accordingly, the trial court did not err in denying Padilla's *Batson/Wheeler* motion.

B. *Substantial Evidence Supports the Jury's Verdict*

Padilla argues his conviction for aggravated mayhem must be reversed because there was insufficient evidence to demonstrate a specific intent to maim. He also argues the evidence was insufficient to prove he was the perpetrator of the crime. Neither contention has merit.

1. *Standard of Review*

In determining whether the evidence is sufficient to support a conviction, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

However, "[s]peculation is not substantial evidence. [Citation.] "'To be sufficient, evidence must of course be substantial. It is such only if it "'reasonably inspires confidence and is of 'solid value.'"' By definition, 'substantial evidence' requires *evidence* and not mere speculation. In any given case, one 'may *speculate* about any number of scenarios that may have occurred . . . . A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" [Citation.]" (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851; accord, *People v. Gonzales* (2015) 232 Cal.App.4th 1449, 1466.) Similarly, "evidence that 'merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence . . . .'" (*People v. Watkins* (2012) 55 Cal.4th 999, 1024.)

2. *Specific Intent To Maim*

The jury was instructed pursuant to CALCRIM No. 800: "The defendant is charged in [c]ount [2] with aggravated mayhem in violation of . . . section 205. [¶] To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant unlawfully and maliciously disabled or disfigured someone permanently;

"2. When the defendant acted, he intended to permanently disable or disfigure the other person; [¶] AND

"3. Under the circumstances, the defendant's act showed extreme indifference to the physical or psychological well-being of the other person.

"Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to annoy or injure someone else. [¶] A disfiguring injury may be permanent even if it can be repaired by medical procedures. [¶] The People do not have to prove that the defendant intended to kill."

Aggravated mayhem is "a specific intent crime, such that conviction requires proof beyond a reasonable doubt 'that the defendant acted with the specific intent to cause a maiming injury.' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 86; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) "'Furthermore, specific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately. [Citation.]' [Citation.]" (*People v. Park* (2003) 112 Cal.App.4th 61, 64.) Specific intent may be inferred, however, from the circumstances of the offense, including the nature and location of the injuries. (See *Quintero*, *supra*, at pp. 1162 ["'[S]pecific intent may be inferred from the circumstances attending an act, the manner in which it is done, and the means used, among other factors'"].)

For example, in *People v. Manibusan*, *supra*, 58 Cal.4th 40, the court noted "the fact the victim was shot in the head can support an inference of an intent to kill. [Citations.] We now find that the same fact can support an inference of an intent to cause permanent disability or disfigurement. 'It takes no special expertise to know that [several shots fired at someone's head] from close range, if not fatal, [are] highly likely to disable permanently.'" (*Id.* at p. 88, quoting *People v. Ferrell* (1990) 218 Cal.App.3d 828, 835.)

While *Manibusan* involved several shots to the face, *Ferrell* involved a single shot to the neck. In *Ferrell*, the appellant carried out a "cold and deliberate attack" on the victim, shooting her once in the neck from close range. (*People v. Ferrell*, *supra*, 218 Cal.App.3d at p. 835.) The court observed that "[o]nce [the victim] was down, appellant did not fire additional shots at her, to make certain that she was dead; instead, appellant was apparently satisfied with the result of her single shot. . . . Appellant's shooting of [the victim] was not an indiscriminate, random attack on her body; instead, the shooting was directed and controlled. From all this evidence, the jury could reasonably have inferred that appellant intended both to kill [the victim], and, if she did not die, to disable her permanently. Substantial evidence supports the jury's verdict." (*Id.* at pp. 835-836.)

In *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, the court was careful to point out that "'[e]vidence of a "controlled and directed" attack or an attack of "focused or limited scope" may provide substantial evidence of' a specific intent to maim." (*Id.* at p. 831, quoting *People v. Quintero*, *supra*, 135 Cal.App.4th at p. 1162.) In *Szadziewicz*, the victim was asleep in bed when the defendant entered his room, held him down on his bed and, in a controlled and directed manner, cut across his face from his temple to his nose. The defendant argued his intent was to burn or kill the victim, not to maim him. The court rejected this argument, stating that "an intent to burn [the victim] or even to kill him is not inherently incompatible with an intent to maim." (*Szadziewicz*, *supra*, at p. 833.) "'[A] defendant may intend both to kill his or her victim and to disable or disfigure that individual if the attempt to kill is unsuccessful.'" (*Id.* at p. 833, quoting, *People v. Ferrell*, *supra*, 218 Cal.App.3d at pp. 833-834.)

Padilla argues the method of the attack here, involving a single "stab" wound, reflects an intent to kill rather than an intent to maim. But one intent does not foreclose the other. (See *People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 834.) Next, Padilla argues because he did not target Ramirez's face but, instead, cut him once across the neck, the evidence is insufficient to demonstrate an intent to maim. While Padilla is correct Ramirez was gouged once in the neck, as opposed to multiple times, the numerical count, while a relevant factor for the jury's consideration, is not dispositive of intent. (See, e.g., *People v. Lee* (1990) 220 Cal.App.3d 320, 325.)

Padilla looks to *People v. Lee*, *supra*, 220 Cal.App.3d 320, for support. *Lee* provides none. In *Lee*, the defendant attacked the victim, punching him three times in the face and kicking him twice someplace on the body. Finding insufficient evidence of the requisite intent, the court focused on the fact that Lee "did not shoot or stab his victim; instead, he used his fists and his feet." (*Id*. at p. 326) It found "[t]he evidence shows no more than a sudden, indiscriminate, and unfocused battering of [the victim's] body. While this evidence undoubtedly shows extreme indifference to [the victim's] physical well being, it does not show a controlled, directed, limited attack . . . from which a jury could reasonably have inferred that [the] defendant specifically intended to disable [the victim] permanently." (*Ibid*.)

Padilla also cites *People v. Anderson* (1965) 63 Cal.2d 351. In *Anderson*, the California Supreme Court reversed a conviction for murder in the perpetration of mayhem finding insufficient evidence. Anderson was charged with the murder of a 10-year-old girl. In addition to evidence of sexual misconduct and testimony concerning the defendant's unconsciousness, epilepsy,

intoxication and diminished capacity, the mortician testified there were over 41 wounds ranging over the entire body, as well as over 20 more superficial cuts. The high court stated, "[t]he evidence does no more than indicate an indiscriminate attack; it cannot independently uphold a verdict based on the precise premise that [the] defendant entertained the specific intent to commit mayhem." (*Id*. at p. 359.) Although the court did not explain its ruling, presumably the indiscriminate, unfocused and explosive nature of the attack precluded a finding of specific intent to maim.

Our facts are very different from those in *Lee* and *Anderson*, and far closer to those in *Manibusan*, *Ferrell* and *Szadziewicz*. Here, Padilla carried out a "cold and deliberate attack" on Ramirez. (*People v. Ferrell*, *supra*, 218 Cal.App.3d at p. 835.) Padilla selected the serrated side of the knife blade and cut Ramirez's neck while Ramirez lay in bed sleeping, with his back to Padilla. Padilla did not simply puncture or stab Ramirez's neck. He gouged Ramirez's neck, leaving a "big ol' gap." Padilla's acts were controlled, directed and limited in scope. (*People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 831.) At the time of the preliminary hearing, which took place on August 15, 2014, roughly three months after the incident, Ramirez still had one staple in his neck. He had "a three- to four-inch scar on the left side of the throat below the jawline." The jury saw the photographs of Ramirez's injuries. Cutting a three- to four-inch gash in someone's neck with a serrated knife, if not fatal, is highly likely to disfigure or disable someone permanently. It is reasonably inferable from the nature of the attack and the wound that Padilla did not merely intend to injure Ramirez, but intended "'to cause a maiming injury.'" (*People v.*

Manibusan, *supra*, 58 Cal.4th at p. 86.) From this evidence a reasonable jury could find that Padilla acted with the intent to permanently disable or disfigure Ramirez.

3. *Identification of the Assailant*

Padilla argues the evidence is insufficient to establish his identity as the assailant, in that "[t]he only witness to the stabbing, Ramirez, did not see who stabbed him, did not see [him] holding a knife, and never saw what knife stabbed him." Although Padilla acknowledges that "Ramirez testified [he] was the only other person in the room with him," he argues that "a second man, Rubin, left 30 seconds earlier. [Ramirez] was napping with his back to the door, so Rubin or someone else could have assaulted Ramirez. . . . There was no direct evidence [Padilla] stabbed Ramirez. The circumstantial evidence did not amount to substantial evidence, and reversal is necessary."

The evidence leaves little room for doubt that Padilla was the perpetrator. Ramirez testified Rubin left 30 seconds before Padilla arrived at his home. Ramirez let Padilla inside. Padilla "kicked back" and used Ramirez's cell phone while Ramirez tried to go back to sleep. Padilla was the only other person in the room. Ramirez felt a gouge in his neck, looked up and saw Padilla with a wild and crazy look in his eyes. Padilla left immediately. Circumstantial evidence was similarly corroborative. Ramirez's cell phone was discovered inside Padilla's residence.

Padilla argues that because Ramirez did not actually see the assailant cut his neck, there is a possibility Rubin or someone else committed the attack. This argument lacks merit. So long as "'"the circumstances reasonably justify the jury's findings, the

judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.]'" [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 945.)

Viewed in the light most favorable to the prosecution (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357), the evidence reasonably supports the jury's verdict.

C. *Prosecutorial Misconduct*

Shortly after deliberations began, the jury sent a note to the court seeking guidance on how to proceed due to the unlikelihood of reaching a unanimous decision. After conferring with counsel and deciding on the appropriate way to address the jury's concerns, the court allowed counsel to re-argue certain points to the jury. The jury asked for re-argument on two issues: premeditation (related to the charge of attempted premeditated murder) and identification of the assailant. Padilla contends that during this re-argument, the prosecutor committed misconduct.

Padilla takes issue with four comments: First, he claims it was misconduct for the prosecutor to argue that the jurors "should split their verdict as a means of reaching a unanimous verdict." Second, he claims the prosecutor committed misconduct by speculating on the split of the jury. Third, he asserts it was misconduct for the prosecutor to speculate the jury had already convicted Padilla of attempted premeditated murder on count 1. Finally, he claims it was misconduct for the prosecutor to use a hypothetical involving a stabbing in a bar to discuss the difference between attempted murder and premeditation. Although several of Padilla's claims were forfeited by the failure of defense counsel to object below, we have considered the claims

and find them to be without merit. As we find no prosecutorial misconduct, Padilla's contention the court erred by failing to sustain his objections during the re-argument similarly fails.[13]

1. *Proceedings Below*

After deliberating for half a day, the jury sent the court a note requesting "[a]dvice and direction on how to proceed due to the unlikelihood of a unanimous decision." The court told counsel it was "inclined to get the jurors out and ask them if they would prefer to have additional instructions, if they want us to clarify previous instructions, if they want to ask or if they would like to hear further argument on behalf of counsel. Then if that is not enough, the court is going to suggest to them . . . that we will ask both the majority and the dissenting jurors to reconsider their positions, and we'll ask them to engage in reverse role playing in order to better understand each other's position." Neither the prosecutor nor defense counsel objected to the court's proposed procedure.

The court brought the jury in and asked the foreperson if the jurors were "open to some advice and direction." The foreperson said they were. The court asked if clarifying

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[13] Captioned within Padilla's prosecutorial misconduct argument is an assertion the trial court "coerce[d] the deadlocked jury to reach a verdict." Padilla cites to *People v. Hinton* (2004) 121 Cal.App.4th 655, presumably for the proposition the court's instructions to the deadlocked jury were coercive and constituted error. Missing from his argument, however, is any factual support for such a claim. Padilla does not identify any particular instruction that was allegedly given in error. As such, this sub-claim relating to coercion by the trial court lacks substance.

instructions would assist the jury. The foreperson responded, "Perhaps. It feels like we have some immovable objects on polar opposites." The court asked if permitting counsel to give further argument would help. The foreperson thought it could.

The court then advised the foreperson "to ask both the majority and the dissenting jurors to reconsider their positions, and then, that the jurors engage in reverse role-playing in order to better understand each other's positions." The foreperson thought the jury could do that, adding, "I think we've been doing a lot of that already."

The court asked the foreperson to identify the subject matter of the issues for re-argument. Juror No. 11 stated, "[p]robably, it would be the premeditation aspect." Juror No. 4 asked for Ramirez's "testimony, not his testimony specifically, but what he says about the defendant, seeing the defendant after the crime was committed."

Defense counsel argued first. He discussed the concept of premeditation and argued the jury had to determine the identification of the perpetrator based upon the facts presented.

The prosecutor went next. "First, procedurally, I wanted to make it abundantly clear that count 1 [attempted murder] and count 2 [aggravated mayhem] are completely separate counts. So you could find him guilty on count 1 and not guilty on count 2." Defense counsel objected on the grounds the argument was beyond the scope of the jury's question. The trial court overruled the objection.[14] The prosecutor continued to argue that the jury

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[14] Defense counsel did not object on the grounds the prosecutor's argument was wrong as a matter of law or unduly coercive. Accordingly, the claim of misconduct is forfeited.

could find the defendant "guilty of count 2 independently of count 1. All right. So they are separate counts that have to be decided separately."

The prosecutor discussed the jury's consideration of the different counts and the differences between reaching a verdict and making findings on the special allegations. The prosecutor stated: "Now, so that I just want that to be clear[,] because if the jury is hung only on the allegation of premeditation or deliberations, then you must have already found him guilty of the attempted murder. The attempted murder has nothing to do with premeditation and deliberation. Attempted murder is simply an attempt to kill followed by an act that is a direct step to kill."

Defense counsel objected to "counsel's statement that they have already found him guilty of anything." The court responded, "[h]e is presenting a hypothetical. Overruled."

The prosecutor went on to discuss the concept of premeditation. In so doing, he presented the jury with a hypothetical: "Now, let me give you a hypothetical scenario to help distinguish the concepts of mere intent to kill an[d] attempted murder and one that is premeditated, one that is deliberated over, one that is willful. Imagine this scenario, you go to a bar. You are a carpenter, okay. You carry one of those carpenter knives on you as you work. You just got off work. You go to a bar. You go with your girlfriend. You are at the bar. You sit down to have a drink. You have a few drinks. Your girlfriend has a few drinks. Some random guy walks up and starts talking

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However, as stated previously, we have, nonetheless, considered and rejected the claim.

to your girl, asking her for her number. This just gets you very upset and without really considering the consequences of what you are going to do, you pull that knife out of your pocket and you stab the guy who is hitting on your girlfriend." There was no objection to the prosecutor's use of this hypothetical.

As the prosecutor reached the end of his argument, he told the jury: "If there are further questions that you need from us or clarity, then you can ask us, and we'll be happy to readdress them, but once again, I want to make it abundantly clear that the counts, attempted murder and mayhem, that is where you have the guilty or not guilty, and then the allegations are separate. Those aren't necessarily verdicts. Those are allegations that you find true or not true, and you could be hung, whatever, 6/6 on the allegation of premeditation or on [great bodily injury] or on the use of the knife. Any of the allegations you guys could be having trouble with, that doesn't mean you haven't reached your verdict as to one or both of the counts . . . ." Defense counsel did not object.

2. *Standard of Review*

"'"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.'" [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.) "'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however,

'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 60-61.) "Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law." (*Lloyd*, *supra*, at p. 61, citing *People v. Hill* (1998) 17 Cal.4th 800, 821.) As the Supreme Court has explained, "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667; accord, *Lloyd*, *supra*, at p. 61.)

Ordinarily, "'"[t]o preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument."' [Citation.]" (*People v. Charles* (2015) 61 Cal.4th 308, 327; *People v. Williams* (2013) 58 Cal.4th 197, 274.) "[F]ailure to request the jury be admonished does not forfeit the issue for appeal" if "a timely objection and/or a request for admonition . . . would be futile" or "'"an admonition would not have cured the harm caused by the misconduct."'" (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; accord, *People v. Seumanu*, *supra*, 61 Cal.4th at pp. 1328-1329.)

3. *Analysis*

Appellant claims prosecutorial misconduct with respect to the following portions of the prosecutor's supplemental argument.

a. *Splitting the Verdict*

Padilla claims the prosecutor encouraged the jurors to "split their verdict as a means of reaching a unanimous verdict," encouraging them "to convict on count 2 and acquit on count 1 as a means of reaching a verdict when the jury was split as what the fore[person] described as 'immovable objects on polar opposites.'"

The prosecutor told the jury counts 1 and 2 were separate counts, so the jury "could find [defendant] guilty on count 1 and not guilty on count 2," or it could find defendant "guilty of count 2 independently of count 1. . . . So they are separate counts that have to be decided separately." The prosecutor did not tell the jurors to resolve their deadlock by splitting the verdict and forsaking their views.

Padilla also claims the prosecutor's discussion was a misstatement of the law. It was not. The prosecutor properly pointed out that counts 1 and 2 were separate counts and should be considered separately. (See CALCRIM No. 3515—Multiple Counts: Separate Offenses ["Each of the counts charged in this case is a separate crime [except for Counts ___, which are charged as alternative offenses."] Because the argument was not improper, it did not constitute prosecutorial misconduct. (See *People v. Chatman* (2006) 38 Cal.4th 344, 387.)

b. *Speculation Regarding the Jurors' Split*

Padilla argues "[i]t was also improper for the prosecutor to speculate the jurors were split 6 to 6 on premeditation and deliberation, or split on the great bodily injury or knife allegations, and to urge them to convict on attempted murder and remain hung on the allegations." While it may be error to encourage the jurors to consider their numerical division when

continuing their deliberations, pressuring the minority to reconsider their views in light of the majority's views (*People v. Gainer* (1977) 19 Cal.3d 835, 852, disapproved on another ground in *People v. Valdez* (2012) 55 Cal.4th 82, 163; *People v. Hinton*, *supra*, 121 Cal.App.4th at p. 659), that is not what happened here. The prosecutor did not encourage the minority to question their views in light of the majority's position or to abandon their positions in order to resolve the case.

Padilla cites *People v. Hinton*, *supra*, 121 Cal.App.4th 655 for support. In *Hinton*, the trial court "instructed jurors holding a minority position to question that position in light of the majority's view." The trial court told the jurors to "'respect the majority opinion' and [they] should 'listen with proper deference to each other and should question their own judgment if a majority of the jurors take a different view of the case.'" (*Id*. at pp. 659-660.) None of these improprieties is present in our case.

The prosecutor's argument did not venture near the objectionable and coercive language found in the instructions given by the court in *Hinton*. Merely speculating that the jurors may be split six to six, without more, does not violate the proscription against jury coercion or discussion of "'majoritarian appeal.'" (*People v. Valdez*, *supra*, 55 Cal.4th at p. 161.)

Even if the prosecutor's argument could be interpreted as "urg[ing the jury] to convict on attempted murder and remain hung on the allegations," there was no prejudicial error. (*People v. Valdez*, *supra*, 55 Cal.4th at p. 164.) The jury acquitted defendant on the attempted murder charge, and the jury found true the weapon use and great bodily injury allegations with respect to the aggravated mayhem charge. It did not convict

Padilla on the charged offense and hang on the allegations in order to reach a compromise verdict.

c. *The Hypothetical Conviction on Count One*

Padilla contends it was misconduct for the prosecutor to "argue the jury must have already found [him] guilty of attempted murder." The prosecutor argued, "if the jury is hung only on the allegation of premeditat[ion] or deliberation[], then you must have already found him guilty of the attempted murder." Defense counsel objected and the court overruled the objection stating, "[h]e is presenting a hypothetical."

Padilla claims the argument was a comment on the numerical split of the jury. It was not. Placed in context, the argument presented a hypothetical to help illustrate the procedural context in which the jury should consider the special allegations. The argument did not comment upon the split of the jury. No error is found in this argument.

d. *The Discussion of Premeditation*

Finally, Padilla claims the prosecutor committed misconduct by using a "hypothetical scenario to help distinguish the concepts of a mere intent to kill in attempted murder and one that is premeditated, one that is deliberated over, one that is willful." Padilla tries to equate the hypothetical used in the present case with prosecutorial arguments that inflame the passions of the jury by asking the jury to put themselves in the shoes of the victim.[15] But that is not what the prosecutor argued

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[15] Padilla's reference to *People v. Vance* (2010) 188 Cal.App.4th 1182, demonstrates why this contention fails. In *Vance*, the court condemned the prosecutor's "Golden Rule"

here. To the contrary, the prosecutor used a hypothetical man to elucidate the concepts of premeditation. In any event, as the jury acquitted Padilla of attempted murder and the special allegations, no possible prejudice resulted from this argument; hence, there was no prosecutorial misconduct. (*People v. Ochoa* (1998) 19 Cal.4th 353, 432.)

DISPOSITION

The judgment is affirmed.

BENSINGER, J.*

We concur:

PERLUSS, P. J. SEGAL, J.

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argument wherein the prosecutor urged the jurors to "'Walk in [the Victim's] Shoes.'" (*Id.* at p. 1192-1193.) Here, the prosecutor did not make such an argument. The prosecutor's reference to the hypothetical man in the bar does not raise the same emotionally inflammatory concerns. Rather, the prosecutor's argument was a discussion by hypothetical example on the topic of premeditation.

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