Filed 6/26/18 P. v. Lobo CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JERRY R. LOBO, Defendant and Appellant.	B281156 (Los Angeles County Super. Ct. No. KA112327)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas C. Falls, Judge. Affirmed as modified.

Kieran D. C. Manjarrez for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jerry R. Lobo of resisting a peace officer and several Vehicle Code violations. He also pled no contest to assault by means of force likely to produce great bodily injury. His sole contention on appeal is that the prosecutor used peremptory challenges to excuse four Hispanic jurors in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). We affirm.

FACTUAL BACKGROUND

On April 18, 2016, defendant hit Nick H. and allegedly took the victim's cell phone. Nick H. told a nearby police officer he had been robbed. At that moment, defendant sped by in a car with his codefendant Michael Maldonado. The police gave chase. While turning a corner, Lobo crashed his car into another vehicle. He and Maldonado exited the car and ran off. Lobo and Maldonado were later arrested.

Lobo and Maldonado were charged with two counts of robbery (Pen. Code, § 212.5, subd. (c)) and other violations. A mistrial was declared as to count one, and the jury acquitted defendants on the second count. Lobo was charged and convicted of resisting a peace officer (Pen. Code, § 148, subd. (a)(1)), hit-and-run driving (Veh. Code, § 20002, subd. (a)), driving without a license (Veh. Code, § 12500, subd. (a)), driving with a suspended license (Veh. Code, § 14601.1, subd. (a)), and reckless flight from a police vehicle (Veh. Code, § 2800.2).

After the jury returned its verdicts, the parties agreed to a plea bargain. In exchange for being sentenced as a second-strike offender, Lobo pled no contest to a newly added count of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)), and admitted two prior strike convictions. The mistried robbery count was dismissed. The court sentenced

Lobo to seven years and four months in prison for the reckless flight and assault convictions. County jail terms were imposed on the other counts. He timely appealed.

DISCUSSION

1. *Voir Dire Proceedings*

During voir dire, the prosecutor exercised seven peremptory challenges. Defense counsel then made a *Batson/Wheeler* motion, and argued that four of the challenged jurors were Hispanic. The court found that one of the jurors struck—Juror No. 1895— was not Hispanic because that juror appeared "white" and the judge did not recognize the juror's name as being Spanish. (See *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1156, fn. 2 ["Spanish surnames may identify Hispanic individuals, who are members of a cognizable class for purposes of *Batson/Wheeler* motions. [Citation.]"].) The court found that the prosecutor's voir dire questions had been "appropriate" and "standard," and that the prosecutor had not exercised a "disproportionate" number of peremptories against Hispanic jurors. The court denied the motion, finding no prima facie case of discrimination.

The court then invited the prosecutor "to make a record concerning the reasons for exercising these peremptory challenge on these jurors." The prosecutor responded that Juror No. 7151 "was very nervous and possibly afraid of sitting and listening in on this case"; Juror No. 7510 "indicated that he does generally have difficulty with paying attention, and with his attention span"; Juror No. 3868 "looked like he was possibly coming down from probably some narcotics because he kept shaking both of his legs very rapidly"; and Juror No. 1895 had family members who were "going through a case" and he had hesitated before

answering to the court that the police had treated his family fairly. The trial court found that the prosecutor's explanations were "neutral and legitimate reasons."[1]

2. *Batson/Wheeler*

"Peremptory challenges are a long-standing feature of civil and criminal adjudication. But the exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends the guarantee of equal protection of the laws under the Fourteenth Amendment to the federal Constitution. [Citations.] Such conduct also violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article 1, section 16 of the state Constitution. [Citation.]

"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*, 2 Cal.5th at p. 1158.)

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

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[1] On appeal, the parties argue whether Juror No. 1895, was or was not Hispanic. The ethnicity finding was relevant to whether the prosecution dismissed three or four Hispanic jurors. The trial court became exasperated with counsel when the point was argued, stating "this goes to show the absurdity of *Wheeler*, the absolute ridiculousness of what we're dealing with." Nevertheless, the trial court made an express factual finding that the juror was not Hispanic a finding that was supported by substantial evidence.

rise to an inference of discriminatory purpose. . . . [¶] 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. . . . [¶] Third, if the opponent indeed tenders a neutral explanation, the trial court must decide whether the movant has proven purposeful discrimination. [Citation.]" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.)

3. *The Trial Court Did Not Err in Finding No Prima Facie Case of Discrimination*

Lobo contends the trial court erred in denying the *Batson/Wheeler* motion because the prosecution struck Hispanic jurors from the panel for discriminatory reasons. The trial court denied Lobo's motion at the first stage, finding Lobo had not demonstrated a prima facie case. The trial court nevertheless permitted the prosecution to respond to Lobo's challenge, and made a global finding that the prosecutor's reasons were "neutral and legitimate." Under these circumstances, "an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling."[2] (*People v. Scott* (2015) 61 Cal.4th 363, 392.)

A defendant satisfies the requirements of the first stage of a *Batson/Wheeler* motion "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.)

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[2] Trial courts often invite prosecutors to state their reasons for issuing peremptory challenges even when finding no *Batson/Wheeler* violation at the first stage. Proceeding to the second and third stages facilities appellate review if the appellate court concludes there has been a first stage showing. (*Scott*, *supra*, 61 Cal.4th at p. 390.)

"[W]e review the trial court's denial of a *Wheeler/Batson* motion deferentially, considering only whether substantial evidence supports its conclusions." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.)

"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.' [Citation.]" (*Bonilla*, *supra*, 41 Cal.4th at p. 342.)

The record here shows no error in the trial court's conclusion of no first stage, prima facie case of discrimination.[3] First, we do not know whether the prosecution used a disproportionate number of his peremptory challenges against

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[3] Although the reporter's transcript suggests that jury questionnaires were used, defense counsel did not augment the record with them.

Hispanic jurors or struck most of the Hispanics from the venire, because we do not know how many Hispanic jurors were on the panel or in the jury pool. (See *People v. Garcia* (2011) 52 Cal.4th 706, 747 [the court will not "disturb a ruling that no prima facie case arose where our review of the entire record showed that the percentage of prosecutorial strikes in issue did not exceed the percentage by which the relevant group was represented either in the jury pool or in the actual jury that was impaneled."].)

All the record reveals is that defense counsel made the statement that the panel was "far less than half *male* Hispanics," and that the court observed "four male Hispanics left in the panel" at the time the *Batson/Wheeler* motion was made. Because the record does not show how many Hispanic jurors total there were—specifically, how many Hispanic males and females—it cannot be determined whether the prosecutions used a disproportionate number of her peremptories on Hispanic jurors. (See *People v. Bell* (2007) 40 Cal.4th 582, 599 ["the record [] fails to show how many other Filipino-Americans were in the venire and were not challenged by the prosecutor"]; cf. *People v. Reed* (2018) 4 Cal.5th 989, 1000 ["The prosecutor used five of his first eight peremptory strikes (roughly 63 percent) on black jurors, even though such jurors constituted only 34 percent of the venire."].)

Even if the prosecutor used a disproportionate number of her peremptory challenges against Hispanics, this alone would not compel a finding of a prima facie case. (See, e.g., *People v. Hoyos* (2007) 41 Cal.4th 872, 901.) As to the other types of evidence that *Bonilla* held are especially relevant to a prima facie determination, they generally weigh in favor of the trial court's finding. Although Lobo was a member of the excluded group—

Hispanics—so were the alleged victims. A review of the record also showed that the prosecutor's questioning of the challenged jurors was not "desultory," but standard and similar to her questioning of the other jurors. (*Bonilla*, *supra*, 41 Cal.4th at p. 342.) On these grounds, Lobo has not shown that the evidence gave rise to an inference of discriminatory intent for the prosecutor's strikes.[4]

4. *The Abstract of Judgment Must Be Corrected*

Lobo argues, respondent concedes and we agree that the abstract of judgment incorrectly indicates that Lobo was convicted of count 8 (Pen. Code, § 245, subd. (a)(4)) by a jury, rather than by a plea. Lobo also argues that an ambiguity in the abstract of judgment must be corrected. The abstract currently states that Lobo was convicted of "Assault/Bodily Injury" instead of specifying that he was convicted of "assault by means of force likely to produce great bodily injury." The abstract of judgment references the correct statute for this crime: section 245, subdivision (a)(4). Recognizing that there is a limited space to type out convictions on this form, we do not believe the abstract needs to be corrected to state the full title of the crime.

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[4] The most serious crime of which defendant was convicted was assault likely to cause great bodily injury to which defendant had pled. On appeal, the parties do not address the significance of any *Batson/Wheeler* error on a plea following mistrial; nor do we, as defendant was also convicted of lesser offenses in his jury trial.

DISPOSITION

The judgment is affirmed. The abstract of judgment is modified to reflect that Lobo was convicted of count 8 (§ 245, subd. (a)(4)) by a plea.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.