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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LAMAR AHMAD TATUM, Defendant and Appellant.	B282418 (Los Angeles County Super. Ct. No. BA441078)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Perry, Judge. Affirmed.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Lamar Ahmad Tatum (defendant) contends that the prosecution's peremptory challenge of an African-American prospective juror was racially motivated, and that the trial court improperly overruled his *Wheeler/Batson* objection made on that ground.[1] Finding no merit to defendant's contention, we affirm the judgment.

BACKGROUND

Defendant was charged with second degree murder (count 1), in violation of Penal Code section 187, subdivision (a),[2] and assault on a child causing death (count 2), in violation of section 273ab, subdivision (a). The information alleged for purposes of the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12) and section 667, subdivision (a)(1), that defendant had suffered a prior serious or violent felony conviction (robbery).

A jury convicted defendant as charged, and defendant admitted the prior conviction allegation. The trial court granted defendant's *Romero* motion[3] to strike his prior "strike" conviction, and sentenced defendant to prison for an aggregate term of 30 years to life, comprised of 25 years to life as to count 2, plus a five-year recidivist enhancement. Defendant was awarded 547 actual days of custody credit, and ordered to pay mandatory fines and fees, as well as victim restitution.

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1 See *People v. Wheeler* (1978) 22 Cal.3d 258 (Wheeler), and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

2 All further statutory references are to the Penal Code unless otherwise indicated.

3 See *People v. Superior Court (Romero)* 13 Cal.4th 497, 519.

Jury Selection[4]

Relevant voir dire

After initial voir dire by the court, the prosecutor asked Prospective Juror No. 11 what he believed was the role of a juror. The prospective juror replied, "The role of a juror is to hear both sides of the story and come up with a solution to it." The prosecutor then asked what the prospective juror meant by "both sides of the story," and the following ensued:

> "Prospective Juror No. 11: Well, first you have to establish the party is guilty or not guilty.
>
> "[The prosecutor]: . . . Are you expecting to hear from the defense?
>
> "Prospective Juror No. 11: Am I expecting to hear from him? I don't get your meaning by that.
>
> "[The prosecutor]: When you say both sides, do you mean--
>
> "Prospective Juror No. 11: Yes, if I'm a juror, I expect to hear from her and you.
>
> "[The prosecutor]: So I do have to correct you there because the defense doesn't have to do anything.
>
> "The court: Well, but you're asking what his expectation is. His expectation is that he's going to hear from both attorneys in the case.
>
> "Prospective Juror No. 11: That means you're going to be the only one that's going to fight this and the other one sits back?

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[4] As defendant challenges only the overruling of his *Wheeler/Batson* objection, and presents no other issue related to the trial, we do not summarize the evidence presented at trial.

"[The prosecutor]: . . . You're absolutely going to hear from me. What if you don't hear from the defense?

"The court: Well, what do you mean? What does that mean, don't hear from the defendant?

"[The prosecutor]: It means if you don't hear from the defendant are you going to assume he's guilty.

"The court: That's a different question. The defendant has a right not to testify. Let's not get confused about that. The defendant never in any kind of criminal case has to testify and I hope we made that clear this morning. What we would expect is that counsel will ask questions of the witnesses who testify and you're going to judge the case on the evidence that is produced here at trial.

"[The prosecutor]: I understand that because this is what I do for a living. Do you understand that, Juror number 11?

"Prospective Juror No. 11: I do, but it seems to me like he doesn't defend himself and you do all the talking, you know--

"The court: Well, there are different ways to defend. I mean, . . . you've been on two juries, haven't you?

"Prospective Juror No. 11: Yes, I have.

"The court: All right. Did the defendant in both those cases testify?

"Prospective Juror No. 11: Yes, they did.

"The court: See, that doesn't happen that often. Sometimes they testify, sometimes they don't.

"Prospective Juror No. 11: Well, doesn't his lawyer talk for him?"

"The court: His lawyer talks for him and she attacks and cross-examines.

"Prospective Juror No. 11: She didn't say that.

"The court: See, this is why I'm bothered by the whole discussion here. The defendant does not have to testify. If the defendant decides not to testify, it's not part of the evidence in the case. . . . You can't hold it against the defendant if he decides not to testify. . . . That's his call . . . . Are you okay with that?

"Prospective Juror No. 11: I am, but the way she was coming out--

"The court: I know I didn't like the way she was doing it. I thought it was confusing.

"[The prosecutor]: I'm sorry. Did I confuse anyone else? I just want to be clear--

"Prospective Juror No. 11: [interrupting] "I think everyone was confused."

"[The prosecutor]: -- that the defendant does not have to testify and I don't want anyone holding it against him if he doesn't testify. When you said both sides, I got confused and I just wanted to clarify that."

"Prospective juror No. 11: You confused me right off the bat.

"[The prosecutor]: I'm sorry. . . . Did I confuse anyone else? Juror No. 27, what are your thoughts?

"Prospective Juror No. 27: Confused me too, but I understand what the judge is saying. He explained everything.

"[The prosecutor]: What is your definition of the role of a juror?

"Prospective Juror No. 27: To be open minded. And like he said, make sure only base it on the evidence.

"[The prosecutor]: And when you heard the charges, what was your reaction?

"Prospective Juror No. 27: "Well, it was a terrible thing. My condolences go out to the baby, first of all, but that's all I know."

The prosecutor then asked another prospective juror questions relating to the person's occupation. The court then excused three prospective jurors for cause, including No. 11, but gave no reason. After the prosecutor and defense counsel each exercised five peremptory challenges, the defense accepted the panel, and the prosecutor challenged Prospective Juror No. 27 (Juror No. 27).

Objection, ruling, and prosecutor's reasons

At side bar, defendant objected, stating, "I'm going to challenge based upon *Wheeler*. He is the only the African-American man." The court stated, "I don't think that matters that he's the only one that has been summoned to the jury box. . . . I don't even know if we have any more." Defendant's counsel observed there were no other African-American prospective jurors, but the prosecutor thought that Prospective Juror No. 10 might also be African-American.

The trial court allowed the prosecutor the opportunity to state for the record her justification for excusing Juror No. 27. She stated: "When I got into the line of questioning, which obviously the court did not like, I was trying to explain to the jurors that the defense has no burden. There were two jurors

who had trouble connecting to me and they said I confused them and that was a problem for me. And that's why I didn't want Juror No. 27, because he said I confused him." The court asked who was the other prospective juror, and the prosecutor replied: "The other juror was Juror 11. That juror was excused by the court, but I had him down on my list too. I mean, he was . . . antagonistic towards me because he said -- that's how I perceived it -- because he said I confused him and it took the court to correct that confusion. I don't like having jurors who can't connect with me because I'm confusing them. And I do believe Juror Number 10 is African-American. And I should note that all of my witnesses and my victim are African-American."

The court stated that those were "articulable reasons and indeed that Juror Number . . . 27 did have trouble interacting with the prosecutor on that particular question and he seemed to have a lot of trouble, as did Juror Number 11 who was not around for the peremptory. So I'm going to accept that as a valid articulable reason for the excusal."

DISCUSSION

Defendant contends that the prosecutor improperly exercised a racially based peremptory challenge against Juror No. 27, and that the trial court erred in overruling his *Wheeler/Batson* objection.

The use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias "violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) "Excluding by peremptory challenge even 'a single juror on the basis of race or ethnicity is an error of constitutional magnitude.' [Citation.]" (*People v. Gutierrez*

(2017) 2 Cal.5th 1150, 1172 (Gutierrez).) "A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. [Citation.] 'The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant].' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 75.) "The three-step procedure also applies to state constitutional claims. [Citations.]" (*Lenix, supra*, at pp. 612-613.)

During the first stage, it is presumed that the prosecution uses its peremptory challenges in a constitutional manner. (*Wheeler, supra*, 22 Cal.3d at pp. 278-281.) To rebut that presumption and establish a prima facie case of discrimination, the moving party is required to produce sufficient evidence to show that "'the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, 170; see also *People v. Thomas* (2012) 53 Cal.4th 771, 793-794.) Only after a prima facie showing is made will the burden shift to the challenging party to articulate a race neutral reason for the challenge. (*Batson, supra*, 476 U.S. at p. 94; *Lenix, supra*, 44 Cal.4th at pp. 612-613.)

The trial court made no express ruling that the defense made a prima facie showing of discrimination. Both parties assume that by allowing the prosecutor to state reasons for the challenge, and then finding the reasons to be valid, the court implicitly found that the defense had established a prima facie

case of intentional discrimination, and that review proceeds directly to the third *Batson* stage of inquiry: whether the trial court made a sincere and reasoned effort to evaluate the prosecutor's reasons. The assumption is overly simplistic.

First, it was incumbent upon defendant to press for a ruling, which he failed to do. (*Gutierrez, supra*, 2 Cal.5th at p. 1156.) Sometimes a prima facie finding may be inferred, such as where the trial court requests the prosecutor to justify the peremptory challenge at issue and no other circumstances suggest that the court did not find that defendant failed to a make a prima facie showing. (*People v. Taylor* (2010) 48 Cal.4th 574, 613 (*Taylor*).) However, it is not always the case where the court asked for the prosecutor's reasons that a prima facie finding may be inferred; for example, no inference of such a finding was discerned in *Taylor*, where the trial court invited the prosecutor's reasons, "explaining: 'I know they have to make a showing. However, in this type of a case, I think it is important that the records be complete.'" (*Ibid*.) After hearing the reasons, the court immediately denied the motion. (*Ibid*.)

"'In determining whether to infer a trial court finding of a prima facie case under *Wheeler*, we look to the whole record, examining the court's remarks in context.' [Citation.]" (*Taylor*, *supra*, 48 Cal.4th at p. 612-613.) Here, defendant's sole ground for objection to the peremptory challenge was that Juror No. 27 was African-American, and in defense counsel's opinion, the only African-American man in the jury box. The court responded, "I don't think that matters that he's the only one that has been summoned to the jury box. . . . I don't even know if we have any more." The court's observation that defendant's ground for objection did not matter appears more likely to have expressed a finding that defendant had failed to make prima facie showing. Further, the trial court did not invite the prosecutor to state her

reasons, but simply acquiesced to her request to do so. Far from indicating that the trial court believed a single challenge satisfied defendant's burden, the court's comment was a recognition that without more, excusing just one African-American prospective juror, even one who is the only African-American in the group, is insufficient to make a prima facie showing of discriminatory motive. (See *People v. Hamilton* (2009) 45 Cal.4th 863, 899.) Indeed, "'the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 343; see also *Taylor*, *supra*, 48 Cal.4th at pp. 614-615.)

Reviewing the court's initial remarks in context of the prosecutor's reasons and the court's response does not change our interpretation. The court found the reason to be a "valid articulable reason," which we construe as meaning facially race-neutral. Finding the prosecutor's reasons for the challenges to be race-neutral may "confirm[] the trial court's finding that there was insufficient evidence to permit the court to draw an inference that discrimination had occurred [and that] defendant failed to meet his burden of establishing a prima facie case of group discrimination." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 80, fn. omitted.) The court went on to observe that Juror No. 27 had trouble interacting with the prosecutor as did Prospective Juror No. 11. The court may have meant to imply that it found the reason credible, or it may have simply meant to make a record of its observations. The court did not elaborate, express an opinion on the prosecutor's sincerity or credibility, or rule on the ultimate issue of discrimination. The court "failed to engage in any meaningful evaluation of the prosecutor's justifications [which] equally supports the conclusion . . . that because the trial court found no prima facie case of discrimination, it never intended to undertake a third-stage analysis." (*Taylor*, *supra*, 48 Cal.4th at

pp. 613-614, fn. omitted.) Thus we do not discern an implied finding that a prima facie showing had been made.

"Having determined that the trial court impliedly found defendant failed to establish a prima facie case under *Wheeler*/*Batson*, we apply the standard the high court articulated in *Johnson*, *supra*, 545 U.S. 162, and undertake an independent review of the record to decide 'the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race.' [Citation.]" (*Taylor*, *supra*, 48 Cal.4th at p. 614.) Defendant contends that the prosecutor's discriminatory motive is demonstrated by the *absence* of any indication in this record of the jurors' reactions to the prosecutor's inquiry whether she had confused anyone else. He suggests that because the record is silent, it must be assumed that no juror responded, and that she then specifically singled out Juror No. 27 to ask his thoughts. Defendant also argues that *absent* any contrary indication in this record, it can be assumed that all the prospective jurors were confused and had the same trouble interacting with the prosecutor, and that she nevertheless chose to single out the sole African-American prospective juror. Finally, defendant suggests that because the record contains only the court's agreement that Juror No. 27 did seem to have trouble interacting with the prosecutor, it must be assumed that either he did not have trouble or that all prospective jurors had similar trouble. In essence, defendant urges a comparative analysis based upon assumptions made from the *absence* of evidence in the record. Contrary to the approach urged by defendant, it was his burden to "satisf[y] the requirements of *Batson*'*s* first step 'by producing evidence sufficient to permit the trial court to draw an inference that discrimination has occurred.' [Citations.]" (*Taylor*, *supra*, at p. 614.) In doing so, defendant was required to

"'make as complete a record of the circumstances as is feasible.'" (*Ibid*., quoting *Wheeler*, *supra*, 22 Cal.3d at p. 280.)

A "comparative juror analysis on a cold appellate record has inherent limitations. [Citation.] . . . There is more to human communication than mere linguistic content." (*Lenix*, *supra*, 44 Cal.4th at p. 622.) "Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning.'" (*Id*. at pp. 622-623.) Thus, without a description of what the court or counsel observed during voir dire, the appellate record will not reflect all aspects of the jurors' communication. We therefore decline defendant's invitation to assume "matters not discernable from the cold record." (*Id*. at p. 626.)

We have reviewed the entire voir dire, and conclude that defendant failed to make a record of evidence suggesting that the excusal of a single African-American prospective juror suggested discrimination. Although defendant claims that Juror No. 27 was the only African-American on the panel, there was no evidence to support that claim or that there were other African-Americans in the panel but not in the jury box.

During jury deliberations, the trial court provided the parties with the court's exhibit No. 2, setting forth the court's perception of the race of the prospective jurors at the time of jury selection. As defendant opted not to request transmittal of the exhibit to this court, it is not a part of the record on appeal. Furthermore, defendant failed to make a record of other prospective jurors' reactions to questions during voir dire. We are thus left only with the prosecutor's perception that Prospective Juror No. 11 was antagonistic toward her and the trial court's observation that Juror No. 27 had trouble connecting "as did Juror Number 11." Contrary to defendant's assumptions,

the only possible juror comparison leads to the conclusion that Juror No. 27 did in fact react to the prosecutor, and like Prospective Juror No. 11, his failure to connect may have been antagonistic.

We have concluded that the trial court did not find defendant to have made a prima facie showing of discrimination. We have also found that defendant in fact failed to make such a prima facie showing. Therefore we conclude that the trial court did not err in overruling defendant's *Wheeler/Batson* objection.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST