Final 12/9/25 P. v. Espejo CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PONCHITO SERRANO ESPEJO, Defendant and Appellant.	H051082 (Santa Clara County Super. Ct. No. C1900549)

A jury convicted defendant Ponchito Serrano Espejo of nine counts of forcible sex crimes against his stepdaughter, K.D.,[1] two counts of attempting to dissuade a victim or witness from prosecuting a crime, and two misdemeanor counts of disobeying a court order.

Espejo raises three issues on appeal: (1) the trial court violated his constitutional rights and Code of Civil Procedure section 231.7[2] by overruling the defense's objection to the prosecution's peremptory challenge of a prospective juror; (2) his trial counsel was ineffective for failing to object to the prosecutor's argument concerning consideration of lesser included offenses; and (3) insufficient evidence supported his convictions for the counts of attempting to dissuade a victim or witness from prosecuting a crime.

[1] A pseudonym was used for the victim's last name at trial. We refer to her by the initials of the name used in the trial court proceedings to protect her privacy interests. (See Cal. Rules of Court, rule 8.90(b)(4).)

[2] Unspecified statutory references are to the Code of Civil Procedure.

We conclude that the trial court erred under section 231.7 in overruling the defense's objection to the prosecution's use of a peremptory challenge. Accordingly, we will reverse the judgment and remand for a new trial. We also accept the Attorney General's concession that insufficient evidence supported Espejo's convictions for the counts of attempting to dissuade a victim or witness from prosecuting a crime.

I. FACTUAL AND PROCEDURAL BACKGROUND

The prosecution charged Espejo with 13 counts: six counts of lewd or lascivious acts on a child under the age of 14 by force, violence, duress, menace, or fear (Pen. Code, § 288, subd. (b)(1); counts 1-6); three counts of aggravated sexual assault of a child under the age of 14 and seven or more years younger than the defendant (*id.*, § 269, subd. (a)(4); counts 7-9); two counts of attempting to dissuade a victim or witness from prosecuting a crime (*id.*, § 136.1, subd. (b)(2); counts 10-11); and two counts of misdemeanor contempt of court for willfully disobeying the terms of a court order (*id.*, § 166, subd. (a)(4); counts 12-13).

At trial, K.D. testified that Espejo committed various sexual acts against her from the time she was in the fifth grade until she was in the seventh grade. She testified that Espejo repeatedly touched her breasts and vagina and orally copulated her, and that one time Espejo "was basically rubbing his penis in front of [her] vagina" after he pulled down her pants and underwear. K.D. testified that Espejo had her take a pregnancy test after this incident. K.D. testified that one time Espejo told her "if I told my mom that my mom would kill him."

K.D. eventually told friends at school and a school counselor about the abuse. Espejo then admitted to police some acts of touching K.D., saying he made a "mistake."

For about two months after he was placed in confinement, Espejo wrote letters to K.D.'s mother. The first such letter was dated January 10, 2019, the same day the complaint was filed in this case. The letters also were directed toward K.D., and K.D.'s mother gave some of the letters to K.D. at Espejo's request. In the letters, Espejo

requested forgiveness, asked K.D. and K.D.'s mother to drop the charges and gave them pre-drafted letters to do so, and offered financial assistance to the family. An investigator said she recovered 42 letters from Espejo to K.D.'s mother. Espejo also repeatedly called K.D.'s mother making similar requests, with the first call taking place on January 10, 2019. In the calls, Espejo made statements including that he " 'made a mistake' " and he " 'ruined his whole life because of lust.' "

Espejo testified at trial, denying most of the charged acts. He testified that he touched K.D.'s vagina twice—once on top of her clothes and once under her underwear—because he was sleeping and mistook K.D. for his wife.

The jury convicted Espejo on all counts. The jury also found true two aggravating factors for all counts: the victim was particularly vulnerable, and Espejo took advantage of a position of trust or confidence to commit the offenses.

The trial court sentenced Espejo to 45 years to life consecutive to 52 years. This appeal timely followed.

II. DISCUSSION

A. *Overruling of Defense Objection to Peremptory Challenge against Prospective Juror L.R.*

Espejo argues that the trial court erred in overruling his objection to the prosecution's peremptory challenge against L.R., a prospective juror he asserts shares his Filipino ethnicity. He argues the error violated both section 231.7 and his federal and state constitutional rights to a fair trial, a jury drawn from a representative cross-section of the community, and equal protection.

The Attorney General responds that the trial court appropriately permitted the peremptory challenge because the prosecution's stated reasons for the challenge were unrelated to bias and bore on L.R.'s ability to be fair and impartial. The Attorney General cites L.R.'s " 'limited life experience' and desire for 'clear and concise' testimony from a child victim" as valid reasons for the peremptory challenge.

We conclude that the prosecution's proffered reasons for challenging L.R. are presumptively invalid under section 231.7, and that the prosecution did not rebut the presumption by showing by clear and convincing evidence that: (1) an objectively reasonable person would view the reasons as unrelated to L.R.'s ethnicity or perceived ethnicity; and (2) the reasons articulated bore on L.R.'s ability to be fair and impartial in the case. We therefore conclude that the trial court erred in denying Espejo's objection to the peremptory challenge.

1. *Factual background*

Prospective jurors in Espejo's case each completed a questionnaire. Question 33 asked: "One of the instructions you will receive concerns the testimony of a single witness: [¶] The conviction of a sexual assault crime may be based on the testimony of a complaining witness alone. Do you have a problem following this instruction?" L.R. checked "No" in response to this question. In a space to explain his answer, L.R. stated: "Their testimony may be enough as long as it is clear and concise."

The questionnaire also included two follow-up questions to question 33. Question 33.1 asked: "Would you be able to accept proof of a fact in this case if it came from a single witness who was a **child that you believed beyond a reasonable doubt**?" L.R. checked "Yes" in response to this question, without comment. Question 33.2 asked: "If you believe a witness's testimony proves each element of the charged crime beyond a reasonable doubt, would you still require additional evidence or witnesses before you could find the defendant guilty? If YES, please explain." L.R. provided no comment in response, impliedly answering the question in the negative.

In voir dire by the trial court and Espejo's counsel, L.R. said he was single with no children, and he worked full-time as a Nike sales employee and part-time as a music teacher assistant at a Christian school. He said he wanted to serve on the jury and he could follow instructions concerning the use of circumstantial evidence and the beyond a reasonable doubt standard.

The prosecutor brought up questionnaire item 33 and its follow-up questions in voir dire of a panel that included L.R. The prosecutor asked all prospective jurors: "Does anyone have an issue with returning a verdict of guilty if that's the evidence that you have, the word of the victim, and you believe that victim beyond a reasonable doubt? Will you return a verdict of guilty?" All prospective jurors, including L.R., indicated they were comfortable complying with this, before a different prospective juror expressed his concerns with this issue. After this other prospective juror voiced his concerns, the prosecutor discussed the need to keep an open mind during the trial and to "be able to assess all witnesses equally," and asked L.R. his views on these statements. L.R. agreed he could give a child witness "the same level of open mindedness that [he] would any other witness." The prosecutor did not ask L.R. at that point about his responses to question 33 or its sub-questions.

The prosecution peremptorily challenged L.R., and Espejo objected. The trial court announced it would allow counsel to ask L.R. additional questions. The prosecutor then asked L.R. about his answer to question 33, stating that the charged date range was broad and that "[y]ou're not going to have like a concise date about whether it happened on a Sunday or a Monday." The prosecutor asked L.R.: "Are you okay with listening to evidence that's not as clear and concise, as you indicated on your form initially?" L.R. replied: "Yes. Probably just because I've never done this before and it's new to me. I added a few more questions or added a few more comments. But from what I'm hearing of everyone, and what you've been asking, I can follow that." The prosecutor then asked: "Fair to say that your answer to that question then would change, and that you're okay with rather generic testimony almost as long as you find that's proof beyond a reasonable doubt?" L.R. replied: "Yes." The trial court then sustained the defense's objection, denying the prosecution's peremptory challenge of L.R. without explanation.

In a separately transcribed session that same day, the trial court stated that the defense objection was raised because Espejo is Filipino and because L.R. "appears to be

possibly the same ethnic group." The trial court stated that "we've excused four minorities" and "[t]hree of them were definitely Asian," adding, "I don't know if any of them were Filipino though, and we never asked." Stating that "at least on the surface there might be an unconscious bias," the trial court asked the prosecutor what reason(s) supported the peremptory challenge.

The prosecutor responded that "first and foremost" the challenge was based on L.R.'s response to questionnaire item 33. The prosecutor stated: "That statement that it is 'clear and concise' gave me hesitation and concerns about this specific juror, because in sexual assault cases we have testimony from children, and evidence that may at times not be as clear and concise as some jurors may wish, and may not be able to follow the law. There is generic testimony that is necessary." Thus, the prosecutor stated her concern that L.R. might not be comfortable convicting based on the complaining witness's testimony alone. The prosecutor also stated: "[B]ased on his answers alone, [L.R.] has limited life experience. He's single with no kids. There wasn't a lot of depth or explanation in the questionnaire, or even during jury voir dire. What we're looking for is someone with life experience, and the ability to follow the law. And all those reasons gave the People concerns."

The trial court then stated: "I have been back and forth on this one. And when I look at the only reason for the challenge really is that [L.R.] may be Filipino. Probably is, I would say. Let's assume he is. But that would be the only -- only reason that the motion is being brought. [¶] But when you look at this entire case all the major players, including the victim, who is the most major, [are] Filipino. And, if anything, I think that would probably help the People more than it would help the Defense. And because not only do we have the victim testifying is Filipino, we have her mother testifying is Filipino. And any other family members. Her girlfriends who are going to testify, I think by looking at their names, might be Filipino as well. So the bulk of the civilian witnesses are going to be Filipino. So I'm not sure how excusing him would be -- detrimental to

Mr. Espejo." The trial court thus reversed its earlier ruling, this time overruling the objection to the peremptory challenge and excusing L.R.

The next day, the prosecutor put on record further matters regarding the peremptory challenge of L.R. The prosecutor first represented that both the trial court and defense counsel said L.R. "appeared to be Filipino," though the prosecutor stated that she neither agreed nor disagreed with this assessment. The prosecutor argued that L.R.'s answer to questionnaire item 33 justified the peremptory challenge because it "places a restriction as well as skepticism on a victim's testimony." The prosecutor stated: "This is a sexual assault case involving delayed incremental disclosure from a child when she was 13 years old. There will not be linear responses in a clear and concise fashion that [L.R.] required, in which the law does not mandate." The prosecutor asserted that K.D. was unable to use clear and concise language in her initial police interview and was unclear at the preliminary hearing as to whether Espejo vaginally penetrated her.

The prosecutor also stated that in addition to L.R.'s answer to question 33, which the prosecutor said "may be due to his lack of life experiences with interacting with children," L.R. "does not have any work or volunteer experience with children, and does not have any additional experience interacting with children." The prosecutor argued that she considered this issue "in conjunction with" L.R.'s questionnaire answer.

The prosecutor then represented that "the defendant and victim are members of the same perceived cognizable group as a challenged juror, Filipino/Filipina." The prosecutor also stated that "there are other jurors sitting in the panel that may be part of the same cognizable group that the People did not dismiss," identifying Juror No. 7 who had been accepted to serve in the case and a prospective juror the defense had peremptorily challenged. The trial court made no finding whether these two people were of Filipino ethnicity.

The trial court then stated that L.R. "possibly could be Filipino," though L.R. also "could have been a number of things." The trial court stated the parties could ask seated

jurors about their "race" if they wanted to. The record contains no indication that the parties asked any jurors about their race or ethnicity.

Following his conviction, Espejo moved for a new trial based in part on the trial court overruling his objection to L.R.'s peremptory challenge. The trial court denied the motion.

2. *Legal principles and standard of review*

a. Code of Civil Procedure section 231.7

"The use of peremptory challenges to strike prospective jurors because of their race is prohibited by our state and federal Constitutions. [Citations.]" (*People v. Hinojos* (2025) 110 Cal.App.5th 524, 539-540 (*Hinojos*).) "To evaluate a party's constitutional objection to an opposing party's exercise of a peremptory challenge purportedly based on race, trial courts engage in a three-step procedure: first, the objecting party must make out a prima facie case ' "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" '; second, if the objecting party makes a prima facie showing, the ' "burden shifts" ' to the party seeking to exercise the peremptory challenge ' "to explain adequately the racial exclusion" ' by offering permissible race-neutral justifications for the strikes; and third, if the party offers a race-neutral explanation, the trial court then decides whether the objecting party has proven purposeful discrimination. [Citations.]" (*Id.* at p. 540.)

Prior to Espejo's trial, the Legislature enacted section 231.7 for all criminal trials in which jury selection begins on or after January 1, 2022, because "the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate . . . discrimination." (Stats. 2020, ch. 318, § 1, subd. (b).) In enacting section 231.7, "the Legislature's overriding intent was to make it easier to prove discrimination in the use of peremptory challenges." (*People v. Caparrotta* (2024) 103 Cal.App.5th 874, 895.) "By adopting an objective

standard of discrimination, defining it to include both conscious and unconscious bias, requiring that reasons be given whenever an objection to a peremptory challenge is made, and disallowing certain reasons that were seemingly neutral, but still closely associated with discrimination, the Legislature hoped to overcome 'deficiencies' " in the three-step process for evaluating constitutional claims of discrimination in peremptory challenges. (*Ibid.*) The Legislature intended that section 231.7 "be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges." (Stats. 2020, ch. 318, § 1, subd. (c).)

Section 231.7, subdivision (a) states: "A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups." The statute's remaining provisions govern procedures for evaluating objections to peremptory challenges.

Under section 231.7, subdivision (b), a party may object to the improper use of a peremptory challenge under subdivision (a). Upon such an objection, "the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised." (*Id.*, subd. (c).)

Subdivision (e) provides a list of reasons that are presumptively invalid "unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case." (*Id.*, subd. (e).) Espejo asserts that the last reason listed in subdivision (e) applies in this case: "Any justification that is similarly applicable to a questioned

prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid." (*Id.*, subd. (e)(13).)

"For purposes of subdivision (e), the term 'clear and convincing' refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case." (§ 231.7, subd. (f).)

b. Standard of review

"The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial." (§ 231.7, subd. (j).)

The trial court in the instant case made no express findings of fact that bear upon the question of whether the prosecution's proffered reasons for the challenge were presumptively invalid under section 231.7, subdivision (e), or whether the prosecution rebutted that presumption by clear and convincing evidence. We therefore review the overruling of Espejo's objection to the peremptory challenge de novo. (See *People v. Ortiz* (2023) 96 Cal.App.5th 768, 803-804.)

3. *Analysis*

We conclude that the trial court erred under section 231.7 by overruling the objection to the peremptory challenge of L.R. The prosecutor's stated reasons for the challenge were presumptively invalid, and the prosecution did not rebut the presumption. Because the statute provides that an error in overruling an objection shall be deemed prejudicial and compels reversal, we will reverse the judgment and remand the case for a new trial.

a. <u>The prosecution's stated reasons for the peremptory challenge are presumptively invalid.</u>

The record demonstrates that both reasons the prosecution offered for peremptorily challenging L.R.—his response to questionnaire item 33 and his "limited life experience" particularly concerning children—are presumptively invalid under section 231.7, subdivision (e)(13). The prosecution and the trial court both treated L.R.'s actual or perceived ethnicity as Filipino. The prosecution's justifications were similarly applicable to other jurors or prospective jurors who were not members of this same cognizable group and who were not subject to a prosecution peremptory challenge.

As to the prosecution's "first and foremost" reason—L.R.'s answer to item 33 on the questionnaire—numerous jurors who were permitted to serve in this case expressed concerns in the questionnaire and in voir dire about convicting Espejo based solely on the complaining witness's testimony.

Juror No. 5 wrote in response to question 33: "I think I might have a problem unless there is some additional evidence." When questioned about this in voir dire, Juror No. 5 stated she could follow the instruction that conviction could be based solely on the complaining witness's testimony, though she "would prefer additional evidence."

Juror No. 12 stated on the questionnaire he could follow an instruction about convicting based solely on the complaining witness's testimony, but "[h]aving all facts and information in would aid in deciding if the defendant is guilty." In voir dire, Juror No. 12 briefly stated he was "okay" with this instruction.

Juror No. 4 wrote on the questionnaire in response to a different question: "I think evidence, other witness or some other corroborating details are generally needed. Regarding Question #33, if the trial rules allow conviction based on a single witness, I can follow the trial rule." The record contains no voir dire about this matter.

Juror No. 7 wrote in response to question 33.1 that " 'beyond a reasonable doubt' could involve other factors and testimony." The prosecution did not ask Juror No. 7 about this response. However, when the prosecutor asked in voir dire if he could reach a verdict based only on the evidence presented in court and if he could avoid speculating as to evidence the jury did not receive, Juror No. 7 said it would be "impossible to not speculate" about other potential evidence. When the prosecutor asked Juror No. 7 if he could "keep an open mind, listen to the evidence, and then form your opinions back in the jury room only," Juror No. 7 replied, "I'm not sure."

Juror No. 10 wrote in response to question 33.2 that he could follow the single witness instruction, stating that "[a]dditional evidence, of course, would be helpful but not required if the alleged victim is clearly believable in the recount of events." In voir dire, this juror reiterated he could follow this instruction.

An alternate juror mistakenly checked both "yes" and "no" for question 33. In voir dire, the alternate juror stated she was "fine" with this instruction and would follow the law in this regard, but stated she did not understand why this rule was in place and

she "would prefer to see multiple proof of something instead of just hearing one person say one thing, and one person say another thing" because "[t]he gray is hard for me."

Finally, Juror No. 1 wrote in response to question 33.2: "I cannot affect someone's life solely by the accusation of someone else, regardless of age. There needs to be more evidence, testimony from others, etc. for me to render a verdict." In voir dire, Juror No. 1 stated that he no longer felt this way after learning that the testimony of a sole complaining witness could support a conviction and his questionnaire response was based on the "assumption . . . that there would be more than just that."

Thus, the prosecution's first stated reason for the challenge was "similarly applicable" to other jurors or prospective jurors who were not members of the same cognizable group as L.R. Numerous jurors expressed concerns about question 33 and its follow-up questions without the prosecution challenging them. The prosecution only asserted that one of these jurors—Juror No. 7—was Filipino. As a result, the prosecution's offered justification for the peremptory challenge to L.R. is presumptively invalid under section 231.7, subdivision (e)(13).

The prosecution's second stated reason for peremptorily challenging L.R.—L.R.'s lack of life experience and experience with children—is similarly presumptively invalid under section 231.7, subdivision (e)(13). To the extent this reason for the prosecution's peremptory challenge was based on L.R.'s status as single and without children, three seated jurors were also single and childless, while one juror and one alternate juror were unmarried but in committed relationships without children. In addition, seven of the 12 jurors and one of the two alternate jurors answered "no" in response to a questionnaire inquiry if they had any experience with children not already discussed on the questionnaire. Three of these jurors had no children, thus matching L.R.'s stated lack of experience with children. The prosecution cited no other information that supported the conclusion that L.R. lacked life experience.

Espejo's situation stands in contrast to two recent decisions in which Courts of Appeal concluded that "lack of life experience" justifications by prosecutors did not result in section 231.7 violations. (See *People v. Garcia* (2025) 115 Cal.App.5th 92; *People v. Garcia* (2025) 114 Cal.App.5th 1154.) In both cases, the Courts of Appeal analyzed peremptory challenges based on lack of life experience under subdivision (d) of section 231.7, and neither case included an allegation that subdivision (e) of the statute was implicated. Subdivisions (d) and (e) of section 231.7 contain different standards for evaluating challenges to peremptory challenges. Subdivision (e) lists presumptively invalid reasons for peremptory challenge, a presumption that must be overcome by clear and convincing evidence. Subdivision (d), in contrast, requires the trial court to "evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances," and to sustain an objection if "there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge." Thus, neither of these cases guides our analysis, and the prosecution's second articulated reason for peremptorily challenging L.R. is presumptively invalid.[3]

b. The prosecution did not rebut the presumption of invalidity.

For both reasons the prosecution articulated, the prosecution did not rebut the presumption of invalidity by showing by clear and convincing evidence that an "objectively reasonable person would view the [prosecutor's] rationale as unrelated to [L.R.'s] . . . ethnicity . . . and that the reasons articulated bear on [L.R.'s] ability to be fair and impartial in the case." (§ 231.7, subd. (e).)

[3] The Attorney General does not contend that the prosecutor's statement that L.R.'s voir dire responses lacked "depth or explanation" constituted a third reason for the peremptory challenge. The trial court also did not consider this as an independent reason for the peremptory challenge. Thus, we do not address this proffered justification.

As to the first articulated reason, the jury was instructed in accordance with CALCRIM No. 1190 that "[c]onviction of a sexual assault crime may be based on the testimony of a complaining witness alone." The prosecutor argued that L.R.'s answer to question 33 was unrelated to his ethnicity because it raised concern about his ability to follow this instruction, where testimony from the child sexual abuse victim "may at times not be as clear and concise as some jurors may wish."

A prospective juror's reluctance to follow the law is a valid basis for a peremptory challenge. (*People v. Smith* (2019) 32 Cal.App.5th 860, 873.) However, the record here does not demonstrate that L.R. would not follow the court's instruction. L.R. indicated on the questionnaire that he could follow CALCRIM No. 1190, and none of his answers to question 33's follow-up questions gave reason for concern in this regard. Any concern regarding L.R.'s answer to question 33 was cleared up in voir dire. The prosecutor only questioned L.R. about this matter after the trial court sustained the objection to the peremptory challenge. Once questioned, L.R. demonstrated no reluctance to follow the law. L.R. was one of the prospective jurors who agreed when the prosecutor asked whether they could convict based solely on a victim's testimony they believed beyond a reasonable doubt. L.R. agreed that he could consider a child witness's testimony just as that of any other witness. Later, L.R. stated without qualification that he could follow the trial court's instruction and that he could listen to testimony that was not "clear and concise." L.R. agreed with the prosecutor that his answer to question 33 had changed since completing the questionnaire and that he was "okay with rather generic testimony" if it proved guilt beyond a reasonable doubt.

As discussed above, the prosecutor did not challenge several jurors who expressed similar or stronger concerns on questionnaires about rendering a guilty verdict based solely on the complaining witness's testimony. Unlike L.R., some of these jurors maintained a level of concern regarding this issue in voir dire, including a juror and an alternate juror who said they would "prefer" additional evidence, and a juror who said it

would be "impossible not to speculate" about other potential evidence not presented. By exercising a peremptory challenge of L.R., the prosecution treated him in a manner that was markedly different from the way it addressed similarly situated prospective jurors who had expressed reservations about their willingness and ability to follow the law – and who ultimately sat on the jury.

Neither does the prosecutor's exercise of other peremptory challenges provide clear and convincing evidence to rebut the presumption that the challenge was invalid. The other three prospective jurors peremptorily excused all expressed much stronger concerns about convicting a defendant based solely on a complaining witness's testimony. One prospective juror stated on the questionnaire that "for me witness testimony from one person is not beyond a reasonable doubt," and maintained in voir dire that without corroborating evidence, it would "be very difficult for me to see beyond a reasonable doubt based on what we know about witness reliability." A second prospective juror, a scientist, wrote that she would like to see physical evidence. In voir dire, she stated that she still felt this way and that while she would try to follow the law, she was "not sure" if she would be fair to the People and it would be "difficult" to convict in this situation based on her scientific training. The third prospective juror stated on the questionnaire that he had no concerns about potentially convicting a defendant based solely on the complaining witness's testimony, but in voir dire, he stated that he had changed his mind because he worried "that such a law is tilted too far for the prosecution to have that much power." L.R.'s questionnaire responses and voir dire answers stand in stark contrast to positions taken by the other prospective jurors the prosecution peremptorily challenged.

The prosecution's statement that one seated juror and one prospective juror the defense peremptorily challenged might also have been Filipino also does not rebut the presumption of invalidity. The prosecution did not allege that these two people were Filipino or were perceived to be Filipino; it simply alleged that they "may be part of the

same cognizable group" as L.R. When the trial court gave the parties the opportunity to question seated jurors about their "race," the prosecutor did not do so. Thus, the prosecution did not rebut the presumption of invalidity concerning its first articulated basis for peremptorily challenging L.R.

We likewise conclude that the prosecution did not rebut the presumption of invalidity regarding its second articulated reason: L.R.'s "limited life experience," particularly regarding children. Again, three seated jurors in Espejo's trial had no children and stated that they had no other experience interacting with children. In addition, L.R. stated in voir dire that he was a part-time music teacher assistant at a school, suggesting he had experience with children of some age.[4] The Attorney General cites several cases stating that a prospective juror's experience or occupation can be a permissible nondiscriminatory reason for a peremptory challenge. (See, e.g., *People v. Trevino* (1997) 55 Cal.App.4th 396; *People v. Landry* (1996) 49 Cal.App.4th 785; *People v. Barber* (1988) 200 Cal.App.3d 378.) However, these cases all predate section 231.7, which imposes a more exacting standard for evaluating the use of peremptory challenges.

The Attorney General also argues that the prosecution challenged L.R. not for his lack of experience with children, but because of his inability "to follow potentially 'generic' and non-linear testimony from a child victim witness." However, the Attorney General does not articulate how L.R. allegedly lacked the ability to follow the child victim witness's testimony. Numerous jurors were deemed able to serve on this case without any reported experience with children. In addition, the trial court made no finding of fact that L.R.'s ability to serve impartially was impaired in this way. The prosecution did not ask L.R. if he would be able to follow K.D.'s testimony despite any lack of experience with children or purported lack of life experience. (See *Hinojos, supra*, 110 Cal.App.5th at p. 546 [counsel's failure to question prospective juror about

[4] Espejo references Internet sites to assert that the school at which L.R. worked had students in grades K4 through 12. We decline to take judicial notice of this matter.

views on gangs and then offering lack of knowledge about gangs as the reason for the peremptory challenge "raises the inference that the reason was pretextual"].) L.R. agreed that he was "okay with listening to evidence that's not as clear and concise" and that he was "okay with rather generic testimony" as long as it proved guilt beyond a reasonable doubt. Thus, the prosecution did not rebut the presumption that the second articulated basis for the peremptory challenge was invalid.

Finally, to the extent the Attorney General suggests that the combination of the two reasons justified the prosecution's peremptory challenge against L.R., this argument does not rebut the presumption of invalidity. The prosecution's lack of challenge to another juror demonstrates that the combination of these two reasons was not a concern. Juror No. 1 initially wrote on his questionnaire that he could not convict based solely on one witness's allegation before changing his position in voir dire. Juror No. 1 also had no children and reported no other experience interacting with children, yet the prosecution did not challenge him. In addition, both reasons the prosecution gave for challenging L.R. were individually invalid under section 231.7, and the Attorney General does not explain how the combination of the two reasons overcomes the presumption of invalidity.

The trial court made no findings of fact relevant to whether the prosecution rebutted the presumption of invalidity under section 231.7, subdivision (e), and we are precluded from imputing any findings by the statute itself. The trial court merely observed that because several prosecution witnesses, including K.D., were or were likely to also be of Filipino ethnicity, L.R. "would probably help the People more than it would the Defense." However, the trial court did not explain why this conclusion rebutted the presumption of invalidity, and the ethnicity of prosecution witnesses does not by itself satisfy the clear and convincing standard necessary to rebut a presumption of invalidity under section 231.7. (See *People v. SanMiguel* (2024) 105 Cal.App.5th 880, 896 (Cody, J., concurring and dissenting) [prosecutor's assertion that the victim was the same race and ethnicity as the challenged prospective juror does not explain why the challenged

prospective juror was undesirable from the prosecutor's perspective], review granted Dec. 18, 2024, S287786.)

The prosecution exercised a peremptory challenge against a member of the same ethnic group or perceived ethnic group as Espejo based on two articulated reasons. Non-Filipino jurors who presented the same articulated concerns were allowed to sit on the case. Thus, the prosecution's articulated reasons were presumptively invalid under section 231.7, subdivision (e)(13). The prosecution did not rebut this presumption. Section 231.7 thus requires us to deem the error prejudicial, reverse the judgment, and remand the case for a new trial. We emphasize that our conclusion section 231.7 has been violated does not require a finding that the prosecution engaged in purposeful discrimination, as the statute covers "both conscious and unconscious bias in the use of peremptory challenges." (Stats. 2020, ch. 318, § 1, subd. (b).)

Because we reverse and remand based on the section 231.7 issue, we need not address Espejo's argument that the trial court violated his constitutional rights in overruling the defense objection to the peremptory challenge. We also need not address Espejo's argument that he received ineffective assistance of counsel for the failure to object to the prosecutor's statements regarding consideration of lesser included offenses.

B. *Sufficiency of Evidence for Witness Dissuasion Counts*

Espejo further argues that substantial evidence does not support his convictions for counts 10 and 11, attempting to dissuade a victim or witness from prosecuting a crime, because no dissuasive conduct occurred after the filing of the criminal complaint. The Attorney General concedes that Espejo's convictions on these counts must be reversed. We accept the concession.

In counts 10 and 11, Espejo was convicted of violating Penal Code section 136.1, subdivision (b), which states that an offense occurs when a person "attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime"

from taking certain actions, including "assisting in the prosecution" of a complaint or information. (*Id.*, subd. (b), (b)(1).) In *People v. Reynoza* (2024) 15 Cal.5th 982, which was decided after the trial in this case, the California Supreme Court held that this statute "does not permit a conviction to be based solely on proof of dissuasion from 'assisting in the prosecution' of an already-filed charging document." (*Id.* at p. 987.) Thus, the court held: "Where criminal charges have already been filed, postcharging dissuasion alone does not constitute an offense under section 136.1(b)(2)." (*Id.* at p. 1013.)

As the Attorney General concedes, the prosecution charged Espejo by criminal complaint on January 10, 2019, and Espejo's communications with K.D. and K.D.'s mother did not begin before this date. Thus, Espejo's convictions for the two witness dissuasion counts must be reversed. Because we reverse the judgment on these two counts for insufficient evidence, the prosecution may not retry Espejo on these counts. (*People v. Eroshevich* (2014) 60 Cal.4th 583, 591.)

III. DISPOSITION

The judgment is reversed, and the case is remanded to the superior court. The People may retry Espejo as to counts 1 through 9, 12, and 13 only.

Greenwood, P. J.

WE CONCUR:

Danner, J.

Bromberg, J.