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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DARYL LAMAR JOHNSON, Defendant and Appellant.	A170640 (Contra Costa County Super. Ct. No. 2003355435)

Daryl Lamar Johnson was placed on probation for five years following his conviction by a jury of two counts of driving under the influence of alcohol. On appeal, he contends his convictions must be reversed because the trial court erroneously denied his objection under Code of Civil Procedure[1] section 231.7 to the prosecutor's allegedly discriminatory use of a peremptory challenge to excuse a prospective juror. We find no error and affirm the judgment.

BACKGROUND

Johnson was charged by information with driving under the influence of alcohol causing injury (Veh. Code, § 23153,

[1] Undesignated statutory references are to the Code of Civil Procedure.

subd. (a); count 1) and driving with a .08 percent blood alcohol content causing injury (Veh. Code, § 23153, subd. (b); count 2). As to both counts, the information included a blood alcohol enhancement that Johnson's blood alcohol concentration was .15 percent or more (Veh. Code, § 23578) and that he personally inflicted great bodily injury upon the victim. (Pen. Code § 12022.7, subd. (a).) The information alleged that Johnson was presumptively ineligible for probation based on his two prior felony convictions. (Pen. Code § 1203, subd. (e)(4).)

The jury found Johnson guilty on both counts and found the enhancement allegations to be true.

At sentencing, the trial court stayed imposition of sentence on count 1 pursuant to Penal Code section 654. As to count 2, the court sentenced Johnson to state prison for the total determinate term of five years, but suspended execution of sentence and granted formal probation for a term of five years.

As Johnson's argument on appeal only involves the trial court's ruling during voir dire, recitation of the trial evidence is not necessary. The factual record of voir dire is set forth below.

DISCUSSION

Section 231.7, subdivision (a) prohibits the "use [of] 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." Section 231.7 prohibits not only purposeful discrimination but also discrimination involving "unconscious

bias," which includes "implicit and institutional biases." (§ 231.7, subd. (d)(1), (2)(C).)

The statute sets forth the process through which a trial court should consider an objection to an allegedly discriminatory use of a peremptory challenge: Once an objection is made, the party seeking to exercise the peremptory challenge must state "the reasons the peremptory challenge has been exercised." (§ 231.7, subd. (c).) The trial court then evaluates the proffered reasons "in light of the totality of the circumstances" to determine if "there is a substantial likelihood that an objectively reasonable person would view [actual or perceived membership in a cognizable group under subdivision (a)] as a factor in the use of the peremptory challenge." (*Id.*, subd. (d)(1).) The court analyzes only the actual reasons given by the party seeking to exercise the peremptory challenge and may not speculate about additional possible justifications. (*Ibid.*)

Certain reasons for exercising a peremptory challenge, however, are presumptively invalid. (§ 231.7, subd. (e).) As relevant here, a peremptory challenge is presumed invalid when based on the prospective juror's "close relationship with people who have been stopped, arrested, or convicted of a crime" or "[e]mployment in a field that . . . that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a)." (*Id.*, subd. (e)(3) & (10).) To overcome a presumption of invalidity, the party exercising the peremptory challenge must 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).) Clear and convincing evidence exists where the court "determine[s] 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." (*Id.*, subd. (f).)

If the party exercising the peremptory challenge overcomes the presumption of invalidity, the court reverts to a consideration of the stated reason for the challenge under section 231.7, subdivision (d)(1), as previously described. (*People v. Jimenez* (2024) 99 Cal.App.5th 534, 541 (*Jimenez*).) Specifically, the court considers whether, in light of the stated reason for exercising the peremptory challenge and the totality of the circumstances, it is substantially likely that a reasonable person would consider that race was a factor in the challenge. (*People v. Ortiz* (2023) 96 Cal.App.5th 768, 805.) " '[S]ubstantial likelihood' " means "more than a mere possibility but less than a standard of more likely than not." (§ 231.7, subd. (d)(2)(B).) In conducting this analysis, the court may consider whether the objecting party is a member of the same cognizable group as the challenged juror; the alleged victim, witnesses, or other parties are not members of that cognizable group; whether cognizable groups bear on the facts of the case; the nature of the questioning of, and answers

from, the challenged juror, particularly with respect to the stated reason for the challenge or in comparison to questioning of other prospective jurors; and where the party exercising the peremptory challenge disproportionately challenged prospective jurors who are members of a cognizable group. (*Id.*, subd. (d)(3).)

I.

Prospective Juror No. 19 stated on voir dire that she was a legal secretary in the criminal unit of the Alameda County Public Defender's Office. She stated that she works for a team of about seven attorneys and assists with things such as transcriptions, pleadings, and motions to suppress. She acknowledged that public defenders talk to the legal secretaries about their cases and that they "perhaps" talk about opposing counsel. She explained that attorneys in the office sometimes "talk amongst themselves" about prosecutors, and she stated, "we are sitting at our desks listening, not giving judgment."

When asked whether she had ever heard any negative or disparaging remarks about prosecutors or prosecution work in general, Prospective Juror No. 19 again responded, "perhaps." She then added, "we are doing other things while they're talking amongst themselves so I don't hone in on their conversations. So while we are working, they're talking. If I'm focused, it would be like if I asked them a question, not them having conversation amongst their peers talking about a case. I don't hone in like that." She denied that any disparaging remarks she may have overheard about prosecutors have shaped her views about the criminal justice system. When asked by the prosecutor whether

she believed either "consciously or possibly unconsciously you are already tilted a bit towards the defense because of your current role," Prospective Juror No. 19 replied, "Absolutely not. It's just my job." She added, "I am a listener. So I have to hear everything that's going on before I even try to make a judgment, if you would say, or an opinion or my thoughts. So I have to hear what's inside the realm. I don't form judgments like that." She confirmed that despite her employment, she could give the People a fair trial in this case.

After the prosecutor exercised a peremptory challenge to excuse Prospective Juror No. 19, defense counsel objected under section 231.7, subdivision (a) noting, among other things, that the prospective juror appeared to be a Black woman. Preemptively, defense counsel argued that the prosecution could not rely on the prospective juror's employment to justify the challenge because exercising a peremptory challenge based upon employment in a field that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a) of section 231.7 is a presumptively invalid reason under the statute.

The prosecutor stated that he exercised the challenge on Prospective Juror No. 19 not "solely" because she worked for the public defender's office but because of her "employment at a defense-oriented agency" where "she works in close proximity with other defense attorneys who have made negative comments about prosecutors that she's overheard." The prosecutor added that Juror No. 19 "describes herself, on one hand, as someone who is just a listener and she just listens before making

judgment; on another hand she alluded to the fact that she wasn't listening to those remarks, so that equivocation gave me pause." The prosecutor added, "she's around many legal documents. And I believe that she, as part of her duties, reads them and is familiar with them. Her agency serves only criminal clients, and I have concern about someone who works for a criminal defense agency serving on the jury. I don't believe that she can give the People a fair trial. And she works for an agency that's diametrically opposed to the party I represent."

Defense counsel reiterated that the reason proffered by the prosecutor was presumptively invalid and argued that the prosecution had not presented clear and convincing evidence to overcome the presumption. Counsel emphasized further that there was no equivocation by Prospective Juror No. 19 about her ability to be fair and impartial in this case.

The court overruled the objection, finding "by clear and convincing evidence, that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, given that [Prospective Juror No. 19] works at the Public Defender's Office. She regularly reviews legal documents. She works directly with public defenders and writes motions and provides support to attorneys, defending clients who are accused of crimes. [¶] If she were a public defender and not a legal secretary, the Court would not be surprised at all if it were the same issue." The trial court added that "this has nothing to do with her race whatsoever and that, again, it is related solely to the job that she does and who she works for and that an objective,

reasonable person would not be surprised that a District Attorney would exercise a challenge against somebody who works in a defense office."

II.

We review the trial court's factual findings underlying a ruling under section 231.7 for substantial evidence, while we review a court's denial of an objection under the statute de novo. (§ 231.7, subd. (j).) In conducting our review, we "consider only the reasons actually given by the party exercising the peremptory challenge and . . . avoid imputing [factual] findings on the trial court not expressly stated on the record." (*Jimenez, supra*, 99 Cal.App.5th at p. 543; § 231.7, subd. (j).)[2] Error in denying an objection under the statute is not subject to harmless error review. (§ 231.7, subd. (j).)

A.

The parties agree that the prosecutor's reliance on the prospective juror's employment was presumptively invalid under section 231.7, subdivision (e)(10).[3] The parties dispute, however,

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[2] The Attorney General departs from this rule by suggesting that the prosecutor "could reasonably believe" that a prospective juror who works in the legal system might exercise an undue influence over other jurors. Because the prosecutor did not advance such a reason, we disregard it.

[3] In the trial court, the prosecutor argued that to establish that the proffered reason was presumptively invalid, defense counsel was required to make a showing that the Alameda County Public Defender's Office primarily serves a class of people described in subdivision (a) of section 231.7 and that defense counsel failed to make any such showing. The Attorney General, however, has not reasserted this argument on appeal and instead "concedes that the prosecutor's rationale was presumptively

whether the trial court correctly determined that the presumption was overcome because "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).)

Here, the trial court found that a reasonable person would not view the prosecutor's reliance on the prospective juror's employment with the public defender's office as related to her race or the prosecutor's conscious or unconscious bias. We agree. Initially, we note that employment as a legal secretary or in the public defender's office in general are not jobs that are stereotypically associated with race and thus, her employment cannot reasonably be viewed as a proxy for her race. (See Stats. 2020, ch. 318, § 1, subd. (b) [§ 231.7, subd. (e) enumerates presumptively invalid reasons because historically "many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination"].)

More broadly, any racial bias that might be associated with her employment because of the makeup of the office's clients was dispelled by the prosecutor's explanation of what in particular about the prospective juror's employment led him to believe she might hold a bias against prosecutors. The prosecutor was concerned that she may have heard negative comments about

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invalid pursuant to section 231.7, subdivision (e)(10)." For purposes of this appeal, we accept that concession.

prosectors from the defense attorneys and that she was familiar with a variety of legal documents drafted by that office. This is not a far-fetched concern. Nor is it unsupported or in conflict with the record.

The prospective juror acknowledged that she worked with a team of criminal defense attorneys who talked about their cases, including sometimes disparaging prosecutors, and that she assists with things such as pleadings and motions to suppress. Although she claimed that nothing she heard in the office would impact her ability to be fair and impartial, the prosecutor was not required to credit her response. The prosecutor's concern about the juror's equivocation during voir dire is supported by the record. She twice responded "perhaps" to the prosecution's questions and her answer about being a listener was arguably equivocal. We emphasize that the prosecutor was not required to prove that the prospective juror was in fact unable to be fair and impartial. Section 231.7, subdivision (e) only requires proof that "an objectively reasonable person would view . . . that the reasons articulated *bear on* the prospective juror's ability to be fair and impartial." (§ 231.7, subd. (e), italics added.) That requirement was met.

For these reasons, *People v. Jaime* (2023) 91 Cal.App.5th 941, cited by Johnson, is distinguishable. In that case, the trial court applied the framework established by *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 to evaluate a peremptory challenge against a prospective juror because she had a negative experience with the criminal justice

system related to a relative's conviction, apparently overlooking that section 231.7 had been enacted specifically to improve upon this prior standard and the prosecution's reasoning was presumptively invalid under the new statute. (*Jaime,* at pp. 943–945.) The People, too, presented argument applying " 'the previous [*Batson*/*Wheeler*] standard' " and, while they later informed the court the law had changed, "stuck by their previously stated reasons" without addressing the new statute in any meaningful way. (*Id.* at p. 946.) *Jaime* does not indicate that the prosecution attempted to challenge the prospective juror for cause or ever actually articulated a concern with bias. Rather, it merely cited the prospective juror's experience with the legal system and stated that it "did affect and bother her." (*Id.* at p. 945.) In reversing the judgment, the Court of Appeal briefly observed that "[a]llowing a party to use the presumptively invalid reasons to overcome the presumption would render section 231.7, subdivision (e) meaningless." (*Id.* at p. 947.) That observation is correct in the context in which it was made, where the prosecution relied on presumptively invalid reasons on their face, without explaining how the reasons bore on the prospective juror's ability to be fair and impartial. Here, however, as discussed above, the prosecutor explained what specifically about the prospective juror's employment bore on her ability to be fair and impartial in this case. The prosecutor did not merely reiterate his reliance on the prosecutive juror's employment.

Accordingly, the trial court did not err in finding that the presumption of invalidity arising from the prosecution's reliance on the prospective juror's employment was overcome.

B.

Johnson argues for the first time on appeal that the proffered reason is also presumptively invalid under section 231.7, subdivision (e)(3), because as an employee of a public defender's office she has a " 'close' relationship with people who have been stopped, arrested, or convicted of a crime." The Attorney General has not responded to this argument. Putting aside whether a legal secretary has a "close relationship" with the office's clients, the prosecutor did not justify the challenge based on the prospective juror's relationship with the clients who are served by the public defender's office, but by her "close proximity" with "defense attorneys who have made negative comments about prosecutors." Having a close relationship with attorneys is not a presumptively invalid reason under section 231.7, subdivision (e).

C.

Having determined that the presumption of invalidity was rebutted, we would ordinarily determine de novo whether, in light of the totality of the circumstances, there is a substantial likelihood that an objectively reasonable person would view prospective juror's cognizable group membership as a factor in the use of the peremptory challenge. (§ 231.7, subds. (d)(1), (j); *Ortiz*, *supra*, 96 Cal.App.5th at pp. 805–807 [reviewing de novo trial court's § 231.7, subd. (d)(1) conclusion]; *Jimenez, supra,* 99 Cal.App.5th at p. 546 [same].) In his opening brief, however,

Johnson makes no such argument. Accordingly, the argument has been forfeited. We note, however, that on the limited record before us, no consideration enumerated in subdivision (d)(1) suggests that the prospective juror's race was a factor in the decision. To the contrary, as the Attorney General notes, the prosecutor also exercised a peremptory challenge to excuse Prospective Juror No. 21, who was presumed to be White and who was a civil attorney who had once represented a criminal defendant.

DISPOSITION

The judgment is affirmed.

GOLDMAN, J.

WE CONCUR:

BROWN, P. J.
STREETER, J.