Appendix

Andrew Ceballos v. State of California
Petition for Writ of Certiorari
No. _____
California Supreme Court No. S251166
California Court of Appeal No. A148521

Appendix A

California Supreme Court order denying review

November 18, 2018

Court of Appeal, First Appellate District, Division Two - No. A148521

S251166

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ANDREW PAUL CEBALLOS, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Appendix B

California Court of Appeal opinion

August 2, 2018

Filed 8/2/18 P. v. Ceballos CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDREW PAUL CEBALLOS, Defendant and Appellant.	A148521 (Solano County Super. Ct. No. VCR221474)

Eight shots fired at his mother's one-bedroom house by defendant Andrew Paul Ceballos (also known as Andrew Paul Cesar Ceballos) resulted in the death of an occupant, Willie Troy Johnson, who was one of five persons eating breakfast in the bedroom. Defendant and his two-year-old daughter had recently moved into the home. The shots were immediately preceded by an argument between defendant and his mother concerning the wish of his mother's boyfriend, Major Carter—with whom defendant was not on good terms—that defendant should move out. Defendant testified and, while he admitted firing the shots, claimed he had no intent beyond perhaps wanting to scare Carter.

The jury rejected this version and convicted defendant of second degree murder and assault with a semiautomatic firearm, plus various firearm-related enhancements. The trial court then found true the allegation that defendant had a prior serious felony conviction that qualified as a "strike" for purposes of the "Three Strikes" law. Defendant was sentenced to state prison for an aggregate term of 55 years to life for the murder (15 years to life, doubled to 30 years to life by the Three Strikes law), plus consecutive

25 years for personal use of a firearm resulting in death (Pen. Code, § 12022.53,[1] subd. (d)), and a concurrent aggregate term of 28 years for the assault.

Defendant contends he was the victim of various instances of prejudicial error, starting with jury selection, and going all the way to sentencing. We address these claims in the chronological order of their alleged occurrence, concluding that they are without merit. However, there is a question of sentencing, which necessitates a remand.

JURY SELECTION

Defendant first argues that the court erred in holding that the prosecutor did not engage in discriminatory exercise of peremptory challenges in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Batson/Wheeler*), specifically in connection with two prospective jurors, both African-American women: G.B. and V.M.[2]

The Setting

Jury selection began on August 5, 2015, and the court called the first 18 jurors into the jury box. Five of those 18—jurors numbered 1, 4, 6, 7, and 10—remained to serve on the jury that convicted defendant, one of whom, Juror No. 6, was African-American. The court examined each of the jurors itself, comprehensively and at length. And in response to the court's questions, G.B. said she had worked for the federal government for the last 28 years, 20 of them for the Environmental Protection Agency. She had a bachelor's degree in business, and her significant other was a retired PG&E electrician.

Defense counsel asked generally whether any prospective juror had a close friend or acquaintance involved in a criminal case (as either a victim or defendant), and G.B. volunteered that she had been a victim of an unsolved burglary and that her brother had been a defendant. This is the colloquy that ensued:

---

[1] Further statutory references are to this code unless otherwise indicated.

[2] For consistency with the parties' briefs, we will refer to the prospective jurors by their initials.

"[G.B.]: Well, my home was burglarized less than two years ago. Never found out who did it, and then I have a brother who has psychiatric issues, has been arrested multiple times and has served time for rape and attempted murder.

"MR. KEENEY: So you have both experiences. Your brother has been through the court system clearly.

"[G.B.]: Yes.

"MR. KEENEY: Do you think he got treated fairly in that system?

"[G.B.]: Don't know.

"MR. KEENEY: Was this elsewhere or in Vallejo?

"[G.B.]: No. Once was in Pennsylvania, once was in Alabama. Now he's in California.

"MR. KEENEY: Okay. So that as far as you're concerned if you sit on this jury, would have no effect whatsoever?

"[G.B.]: No. It shouldn't have an effect if I serve as a juror.

"MR. KEENEY: And the frustration of the home burglary was not solved wouldn't make you prejudice one way or the other?

"[G.B.]: No. Totally different incident.

"MR. KEENEY: Okay. That's all I would ask you. Your Honor, I have no other questions.

"THE COURT: Okay. Thank you, Mr. Keeney."

That was defense counsel's final questioning, and the prosecutor immediately began by questioning G.B. about her brother:

"MR. KAUFFMAN: Thank you. Good morning can you all hear me? I'll try to talk into the mic. So I have general questions for you and specific questions for individual jurors and I'll just start back with Ms. [B.] because you were talking last. We'll take up the subject of your brother. It sounded like you didn't really follow along with those proceedings.

"[G.B.]: No, I didn't.

"MR. KAUFFMAN: But you kind of know where he is and in general what has happened?

"[G.B.]: Based on what he told me.

"MR. KAUFFMAN: Okay. So you're in contact with him?

"[G.B.]: Yes, I am. Very much so.

"MR. KAUFFMAN: And so your brother being involved in the criminal justice system in another state but having some consequences, that doesn't give you pause sitting as a juror having to decide on a person's guilt or innocence?

"[G.B.]: No. That was his life. Those were his choices.

"MR. KAUFFMAN: Okay. So you don't sort of—obviously wasn't my office that ever prosecuted him or handled any of those matters. It was out of state.

"[G.B.]: Right.

"MR. KAUFFMAN: By the same token, you don't have the attitude of like well, system got my brother and I'm going to make sure anybody else who I think did something remotely bad should also get handled that way?

"[G.B.]: No.

"MR. KAUFFMAN: You don't have those feelings?

"[G.B.]: No, I don't.

"MR. KAUFFMAN: Thank you for your honesty."

The prosecutor's only other direct question to G.B. clarified that the burglary was in Fairfield.

The prosecutor's questioning of prospective jurors continued for several pages, at the conclusion of which both sides passed for cause. The peremptory challenges began, and with his third peremptory challenge the prosecutor excused G.B.

Following that round of peremptory challenges and one challenge for cause, seven new jurors were called. Three of them were excused for cause, and following peremptory challenges, seven new jurors were called into the box. This group of seven included V.M. and also an African-American male, Juror No. 9.

V.M. was an academic support provider for the Vallejo school district, with a bachelor's degree in psychology and a master's degree in social work. The court's questioning of V.M., which went on for six pages, revealed that she had one friend, the daughter of a police officer, who was a former prosecutor who became a corporate lawyer. She also had "about four friends who are correctional officers." V.M. had been the victim of a sexual assault in middle school. She also had a cousin who was convicted of murder in Alameda County, whom she visited while he was in jail, and who, following his release, was himself murdered, with no suspect ever found. V.M. also had an uncle who was convicted of murdering his daughter, V.M.'s cousin, and who was serving a life sentence in Texas.

Defense counsel asked V.M. no questions during his voir dire. The prosecutor, however, elicited information about V.M.'s concerns with law enforcement's failure to locate her cousin's murderer. It went as follows:

"MR. KAUFFMAN: Sure. Just briefly. Ms. [M.], good afternoon.

"[V.M.]: Good afternoon.

"MR. KAUFFMAN: I think I followed along there with some of your unfortunate family history. What I think we didn't cover was your cousin who went to prison for some kind of homicide?

"[V.M.]: Yes.

"MR. KAUFFMAN: Then did his time, was released and then he was murdered.

"[V.M.]: That is correct.

"MR. KAUFFMAN: So where did that occur? Was that in California.

"[V.M.]: That was California.

"MR. KAUFFMAN: Was there anybody ever charged or arrested for that?

"[V.M.]: For his murder?

"MR. KAUFFMAN: Yes.

"[V.M.]: No.

"MR. KAUFFMAN: That's what I thought I missed. So, you know, you've had these experiences with relatives who have been charged and sounds like incarcerated for

various crimes. Do you have any feeling about the fact that your cousin who did his time for a crime was then the victim of a crime and basically that case doesn't sound like it was ever brought to the court system?

"[V.M.]: Well, of course. Because he was convicted of killing someone, and then they never found who actually killed him. So, yeah.

"MR. KAUFFMAN: Right. So let's talk about that for a second. I mean, there are two ways you can go there, right? You can say well, you know, maybe someone should have been brought out and at least tried. But they weren't, so now I hold resentment and I will hold say anyone who tries to prosecute somebody for a similar crime to a higher standard because they never got the person who killed my cousin. Do you think you feel that way?

"[V.M.]: No. I don't feel that way.

"MR. KAUFFMAN: The other way you can go with that, you can say well, I mean, if you're charged with this crime and you made it this far, certainly you must have done something because my cousin's case, they never got anybody and I'm going to make sure whoever gets this far will be held responsible because I have this person, my cousin, murdered and nobody held responsible for that. Do you have that kind of perspective or potentially bias in a case like this?

"[V.M.]: Maybe a little bit, but of course I would try as much as possible not to allow that to bias.

"MR. KAUFFMAN: Right. That's all we can ask, but that sort of seemed to strike a chord with you a little bit.

"[V.M.]: Uh-huh.

"MR. KAUFFMAN: That is good to know. I appreciate your honesty, and I appreciate you telling us about your family history. All right. I think that's all I have, Your Honor. Thank you."

Following one challenge for cause, peremptory challenges resumed, after which seven new jurors were seated. Following questioning of these new jurors, peremptory challenges resumed, at which time the prosecutor excused V.M. It was his ninth

peremptory challenge. It was also his last, as the jury was sworn shortly thereafter, with the prosecutor having 11 challenges remaining.

Immediately after the prosecutor challenged V.M., defense counsel made a *Batson/Wheeler* motion, which the trial court ultimately denied. The entire argument on the motion was as follows:

"MR. KEENEY: I would like to make a motion, *Batson Wheeler.*

"THE COURT: Okay.

"MR. KEENEY: He's excused three.

"MR. KAUFFMAN: Yes.

"MR. KEENEY: And I have the notes back at my table. I didn't see any reason to excuse any of the three black jurors, and the defendant is black in this case.

"THE COURT: The *Batson Wheeler* motion as to Ms. [M.] at this point.

"MR. KAUFFMAN: You have to look at the others I suppose.

"THE COURT: As to Ms. [M.] hang on one second. Everyone don't talk over one another. As to Ms. [M.], I'm not inclined to find a prima facie at this point. She did have the family members who are involved in several murder incidents, but at the same time she did say—I recognize she said she could be fair. There was one question where she said—sounds like she might actually be on the fence. It's not entirely clear, but, Mr. Kauffman, let me hear your reasons. I'm not at this point finding a prima facie in light of the fact that her family members are involved in these murder incidents. I will give you an opportunity to state your reasons on the record.

"MR. KAUFFMAN: Sure. The reasons for asking her to be excused, based on her answers I didn't feel—I had a for cause challenge. Based on her history, she has a cousin who was in prison for murder who was then murdered. That was never solved by the police and an uncle currently incarcerated in prison also I believe for murder or another serious crime in another state. She knows a bit about these cases, and I'm concerned any person irrespective, any class or group she might belong to, with that history would have trouble being fair in this case. I'm concerned about her ability to

process, separate that out from our situation because she did seem to have a significant amount of knowledge about what happened in those situations involving her family.

"THE COURT: Go ahead, Mr. Keeney.

"MR. KEENEY: The cousin's case I believe was that the police didn't work the case at all. Am I right about that? I think I'm right. I'm pretty sure I'm right, and this case is a case where the police worked a lower class, very lower class homicide very intensely. And they put a case together, and so the fact that another department dropped the ball, if she wants to see police—a lower class minority homicide and the DA's office gave it the Cadillac treatment by charging it very heavily, so we've had five jurors in the jury box that are black people. And three of them are gone now. I see more going.

"THE COURT: Let me take a look at my notes real quick. As to [V.M.] I won't find a *Batson Wheeler* violation. I [accept] Mr. Kauffman's representations, find it very credible that there was a non-race reason for the preemptory challenge. There are two other African Americans still in the panel. I would note that for the record, and you said there was two others who were excused.

"Mr. Kauffman, did you—sounds like you wanted to put on the record your reasons for those.

"MR. KAUFFMAN: If I could quickly. It was Ms. Moss who said she was uncomfortable judging guilt, and that was morale [*sic*] reasons. Also said she didn't think she was qualified to do that, and the third was [G.B.]. And she was the person who was the victim of a 459 first. Her brother has some I think psychological issues and was charged with a serious crime, I believe an attempted robbery. So experience with the criminal justice system I viewed as her portraying negatively.

"THE COURT: Let me take a look at something here. I wanted to confirm my notes. I have [G.B.], who was juror number 16 at that time, looks like her brother was—I have in my notes rape and attempted murder charge, mental issues. Does not know if he was treated fairly, but didn't know either way. Okay. Again, I think there are non-race base[d] reasons for the peremptory challenges. So I'm not finding any *Batson Wheeler* at this point. Mr. Keeney, did you wish to say anything further?

"MR. KEENEY: No.

"THE COURT: I'll just note juror number 6 and juror number 9 are both African Americans at this point. Thank you both."

The Law

We review defendant's *Batson/Wheeler* contention under well settled principles, set forth, for example, in *People v. Manibusan* (2013) 58 Cal.4th 40, 75–76:

"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. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) 'The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant].' (*Id.* at pp. 612–613.)

"On appeal, we review the trial court's determination deferentially, 'examining only whether substantial evidence supports its conclusions. [Citation.]' (*Lenix, supra,* 44 Cal.4th at p. 613.) 'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)" (Accord, *People v. Williams* (2013) 56 Cal.4th 630, 653.)

Lenix expressed it this way: "At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' (*Miller-El* [*v. Cockrell* (2003)] 537 U.S. [322,] 339.) In assessing credibility, the court draws upon

its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. (See *People v. Wheeler, supra,* 22 Cal.3d at p. 281.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. (*People v. Bonilla* [(2007)] 41 Cal.4th [313,] 341–342.) 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges " 'with great restraint.' " ' " (*Lenix, supra,* 44 Cal.4th at p. 613, fn. omitted.)

The Trial Court Was Right

As indicated above, the trial court concluded there was no prima facie showing. We agree, and apparently so does defendant, who in his reply brief acknowledges that the explanations for the prosecutor's challenges were "race neutral." Nevertheless, the prosecutor put his reasons on the record. In light of this, we will follow the practice suggested in *People v. Scott* (2015) 61 Cal.4th 363, where the Supreme Court explained that even when a trial court finds no prima facie case, the preferred practice is to allow the prosecutor to state his reasons for the challenge on the record, a practice that permits the reviewing court to resolve the matter even if it finds that the trial court erred in finding there was no prima facie case. (*Id.* at p. 388.) We find no error.

We start with the presumption that " 'a prosecutor uses peremptory challenges in a constitutional manner.' " (*People v. Williams, supra*, 56 Cal.4th at p. 650.) It was defendant's burden to rebut that presumption, a task that is exceptionally difficult in circumstances such as here, where there were only two challenges, as the Supreme Court confirmed in its most recent *Batson/Wheeler* case: *People v. Parker* (2017) 2 Cal.5th 1184. There, the Supreme Court rejected defendant's challenge, concluding that the "record does not support an inference of discriminatory intent . . . in peremptorily challenging Prospective Jurors Nos. 719 and 213," who, defendant contended, were the only two African-Americans in the 136-person jury pool. This was insufficient, the court held, with language particularly pertinent here: "Even assuming the basis of defendant's

argument is factually accurate—that Prospective Jurors Nos. 719 and 213 were the only two African-Americans in the 136-person jury pool, a fact neither conceded nor confirmed at trial—the bare circumstance that *all* African-American prospective jurors were struck from the pool would be insufficient in this case to support an inference that the two were challenged because of their race. ' "[T]he small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. '[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.' " ' [Citations.]" (*Id.* at p. 1212.)

Or, as the Supreme Court put it earlier, "While no prospective juror may be struck on improper grounds, we have found it ' "impossible," ' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears." (*People v. Garcia* (2011) 52 Cal.4th 706, 747 [three challenges]; also see *People v. Bonilla, supra,* 41 Cal.4th at pp. 342–343 & fn. 12 [two challenges]; *People v. Bell* (2007) 40 Cal.4th 582, 597–598 [two challenges]; *People v. Box* (2000) 23 Cal.4th 1153, 1188–1189 [three challenges].)

Also weighing heavily against defendant's claim is the fact that when V.M. was challenged and removed, two African-American jurors remained—and remained on the jury that in fact convicted defendant, with the prosecutor having 11 unused peremptory challenges remaining. In the words of *Lenix*: "The prosecutor's acceptance of the panel containing a Black juror strongly suggests that race was not a motive in his challenge . . . ." (*Lenix, supra,* 44 Cal.4th at p. 629, citing *People v. Kelly* (2007) 42 Cal.4th 763, 780, and *People v. Cornwell* (2005) 37 Cal.4th 50, 69–70.) In *People v. Kelly*, the prosecution originally passed on a jury with two African-Americans, and later, after a challenge by the defense, dismissed one of the African-Americans. In *People v. Cornwell, supra*, the final jury had one African-American. Or as *People v. Williams* put it, while " ' "the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection." ' "

(*People v Williams, supra,* 56 Cal.4th at p. 663, quoting *People v. Stanley* (2006) 39 Cal.4th 913, 938, fn. 7.) Indeed, this point is confirmed a few months ago in *People v. Reed* (2018) 4 Cal.5th 989, 1000, the case cited by defendant himself in his post-briefing letter.

Defendant's fundamental premise is that the trial court did not make a " 'sincere and reasoned' " effort to evaluate the situation. We disagree. Indeed, our review of the record reveals a trial court that was particularly involved, from beginning to end, in conscientiously selecting a proper jury. It began with the court's comprehensive questioning. It included the court taking extensive notes—to which, not incidentally, it referred in ruling on the motion. It extended to the point that on its own motion it brought to the attention of defense counsel a possible bias issue of a juror, leading to his being challenged for cause, a fact acknowledged in defendant's brief. Indeed, even before the prosecutor provided his reasons for excusing V.M., the trial court anticipated his concerns, noting not only that V.M. had family members "involved in several murder incidents," but also that V.M. was "on the fence" in responding to one question about her ability to be fair as a result. And after the prosecutor provided his reasons for the challenge, and after hearing argument by defense counsel, the trial court reviewed its notes concerning V.M.'s responses and found the prosecutor's representations about V.M. accurate and "very credible." There was no error.

Past experiences with law enforcement is well recognized as a race-neutral reason to exercise a peremptory challenge, even if that experience is not necessarily negative. (*People v. Farnam* (2002) 28 Cal.4th 107, 138 [upholding challenge of prospective juror who had visited an incarcerated nephew the previous year but believed he could be impartial]; *People v. Turner* (1994) 8 Cal.4th 137, 170–171 [juror had feelings about unsolved murder of her child's father and prosecutor could not determine if that favored the prosecution or the defense], disapproved on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

People v. Gutierrez (2017) 2 Cal.5th 1150, which defendant heavily relies on in a supplemental letter brief, is easily distinguishable. There, the prosecutor exercised 10 of

16 peremptory challenges to remove Hispanic individuals from the jury, with the result that the final jury included only one Hispanic. The trial court denied the *Batson/Wheeler* motion, finding the prosecutor's reasons to be neutral and nonpretextual. (*Id.* at p. 1150.) The Court of Appeal affirmed. The Supreme Court reversed, concluding that the prosecutor's proffered reasons for the challenge of one juror—unawareness of gang activity in Wasco, where the challenged juror lived—was pretextual, that it was difficult to give credence to the prosecutor's concern about how the prospective juror would respond when she heard that a witness from Wasco was in a criminal street gang, given that the prosecutor's brief questioning of the panelist failed to shed light on the nature of the apprehension or otherwise indicate an interest in meaningfully examining the topic. Moreover, the trial court never explained why it decided the justification was not a pretext.

As Justice Liu's concurring opinion sums up *People v. Gutierrez*: "Today's opinion explains how the trial court and the Court of Appeal ran afoul of these principles in evaluating the prosecutor's strike of Prospective Juror No. 2723471 (Juror 2723471). The trial court did not discharge its duty to make a sincere and reasoned attempt to evaluate the prosecutor's reason for striking this juror. In upholding the strike, the trial court relied on a reason ('lack of life experience') that the prosecutor did not give. The Court of Appeal accorded deference to the trial court's ruling even though no deference was warranted. Neither the trial court's ruling nor the Court of Appeal's opinion provided the careful and thorough examination of the record that today's opinion does in determining whether the prosecutor's stated reason was credible. And the Court of Appeal improperly refused to conduct the comparative juror analysis urged by defendants." (*People v. Gutierrez, supra,* 2 Cal.5th at p.1176.) The situation here is a far cry.[3]

---

[3] Defendant's counsel did not perform a comparative analysis below, and does not do so here, so this is a nonissue. That said, we note that the prosecutor challenged juror Kelley, who was not African-American, who noted that the boyfriend of her friend was

Defendant makes an argument, a claim of *Batson/Wheeler* violation based on race and gender. This argument was not raised below. It necessarily fails here. It also fails on the merits, for the reasons discussed above.[4]

THE ASSAULT CONVICTION

The jury was instructed with CALCRIM No. 875 as follows: "The defendant is charged in Count Two with assault with a semiautomatic firearm in violation of Penal Code section 245(b). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a semiautomatic firearm that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] . . . [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to . . . hurt someone . . . . [¶] . . . [¶] No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault . . . ."

Defendant contends the evidence is insufficient to support his conviction because "the prosecution did not present sufficient evidence to prove that Mr. Ceballos was aware that any person was behind the closed door of his mother's bedroom when he shot into that door." He is wrong.

As a reviewing court, we are required to view the trial record most favorably in support of the jury's verdict, "review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the [trier of fact] could reasonably have deduced from the evidence. [Citation.] "Conflicts and

---

the victim of an unsolved murder and she was not sure whether she could put her bias aside.

[4] Defendant's alternative argument, ineffective assistance of counsel for failing to raise the gender claim below, is fatuous.

even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. . . . [Citations.]" A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the [trier of fact's decision.] [Citation.]' " (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 87.) " 'We "must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" . . . . Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. [Citation.]' " (*Ibid.*)

And a defendant's mental state or intent is almost always an issue decided on the basis of circumstantial evidence. (See, e.g., *People v. Thomas* (2011) 52 Cal.4th 336, 355; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) " 'A jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.' " (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831.)

According to our Supreme Court, "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

Defendant says he fired through the bedroom door, not thinking anyone was in the bedroom. He talks about not seeing any specific person "in the line of fire." He incorrectly maintains the prosecution was obliged "to prove that Mr. Ceballos knew that there was, in fact, a person behind the door." The jury had the plenary—and unreviewable—power to disbelieve defendant's testimony "that he was not aware that anyone was in the bedroom, with the possible exception of Major Carter, who he thought would be on the bed, out of the line of fire." Here, the evidence showed that defendant

fired the shots knowing there were multiple persons inside. Given this, the jury could reasonably conclude defendant was aware of the likelihood that firing eight shots into a small, crowded home—whose dimensions and configuration he knew from living in it—could, in the language of the instruction, "directly and probably result in the application of force to someone."

Moreover, defendant fails to take account of the jury also finding him guilty of second degree murder, which, *Batson/Wheeler* notwithstanding, he does not otherwise challenge. In finding him guilty of second degree murder, the jury concluded that he had acted with implied malice, that is, in the language of CALCRIM No. 520, he had intentionally committed an act "the natural and probable consequences" of which he knew were "dangerous to human life," and in so doing he had "deliberately acted with conscious disregard for human life."

In light of the foregoing, we conclude there was ample, if not abundant, substantial evidence to support the jury's verdict that defendant was in fact guilty as charged of committing assault with a semiautomatic firearm.

PROSECUTOR MISCONDUCT

During final argument, the prosecutor made the following remarks:

"Now, there was some suggestion made that the assault with the semiautomatic firearm wasn't proven because somehow the defendant didn't actually know this was someone behind the door or there were other people in the room other than Major Carter. Well, I'm not required to prove that. . . .

" . . . He's shooting through the door in order to show Major Carter hey, I can harm you. And this is how I would harm you. That's the whole reason he's doing it. He doesn't know Tynez Johnson is sitting there, who is the subject of this charge. All four people in that room if Willie Troy Johnson habit [*sic*] been shot and killed could be victims of a 245(b), Count Two. Major Carter and Terrance Woods were on the other side of the room. That's not charged here. Tynez Johnson is definitely the most lucky person that he wasn't struck by one of the eight shots through the door.

"That's why that charge is alleged as to him, and I would submit to you the defendant's motive for doing this, scaring Major Carter, is proof that he knew and any reasonable person would have known shooting a gun that way could result in the application of force to somebody. Those elements are met. It's just confusing here because I can't prove the defendant knew Tynez Johnson was sitting there and he was trying to do this to him. That doesn't matter."

Defendant argues these remarks constitute misconduct, specifically, misstatements of law, in that "As explained in [his preceding argument], the prosecution was required to prove that the defendant was aware of facts which would lead a reasonable person to believe that his action probably *would* result in a battery. If Mr. Ceballos was not aware that there was anyone behind the closed bedroom door, then he was not aware of facts that would lead a reasonable person to believe his action would directly and probably result in a battery." (Italics omitted.)

We reject this argument on two independent grounds. First, the point was not preserved for review because the defense did not object to the remarks and request that the jury be admonished to disregard them. (E.g., *People v. Blacksher* (2011) 52 Cal.4th 769, 829; *People v. Hinton* (2006) 37 Cal.4th 839, 863.)

Second, the prosecutor's remarks were not legally incorrect. Under *People v. Williams*, *supra*, 26 Cal.4th at p. 790, the prosecution was required to prove a reasonable person in defendant's position would have had "actual knowledge" of the presence of the occupants of the house. But this standard employs an objective standard, and only requires "actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Ibid.*) *People v Williams* did not hold that an assailant must be aware of the presence of all potential victims in order for that standard to be met.

The Attorney General cites *People v. Trujillo* (2010) 181 Cal.App.4th 1344 for the proposition that defendant "did not have to have a specific victim in mind when he shot through the bedroom door." The defendant in *Trujillo* fired shots at a moving vehicle, for which he was convicted of two counts of assault with a semiautomatic firearm. The

convictions were affirmed, the Court of Appeal noting, "a person with actual knowledge that he is shooting indiscriminately at a moving vehicle would realize that his conduct would directly, naturally, and probably result in a battery to anyone and everyone inside the Civic. Passengers in cars are no less foreseeable than the pedestrian who was hit in [*People v. Riva* (2003) 112 Cal.App.4th 981]. Indeed, because the bullets were shot directly at the car from behind the car, the likelihood that a backseat passenger such as Arias would be hit was at least as great as the probability of hitting the pedestrian in *Riva.* Whether defendant was subjectively aware of such risk or had the specific intent to injure any occupant of the car is irrelevant." (*People v. Trujillo,* at p. 1357.) There is no reason why this sound logic should not be extended to residences.

In short and in sum, there was no misconduct because the prosecutor was not required to prove defendant intended to harm a specific person.

SENTENCING

In his opening brief, defendant makes two largely pro forma challenges to his sentence.

He first argues the use of his "juvenile adjudication as a strike prior violated his right to a jury trial under the Sixth Amendment," but he acknowledges he cannot prevail because our Supreme Court has decided otherwise (*People v. Nguyen* (2009) 46 Cal.4th 1007) and this court is thus bound by stare decisis.[5]

Defendant next argues his sentence, "which does not afford a meaningful opportunity for release in his lifetime, violates the Eighth Amendment and Article I, section 17, of the California Constitution." There are two preliminary points. First, the Attorney General argues this claim was forfeited because it was not raised at the time of sentencing. The point is well taken. (See *People v. Speight* (2014) 227 Cal.App.4th 1229, 1247–1248 and decisions cited.) And we could elect to address the merits in order to forestall a claim of ineffective assistance of counsel, "to show counsel was not

---

[5] Defendant's supplemental authorities filed after the close of briefing are not persuasive.

constitutionally ineffective by failing to make a futile or meritless objection." (*People v. Reyes* (2016) 246 Cal.App.4th 62, 86.) We chose to do so.

Defendant is unable to cite a single instance where a sentence for second degree murder involving the personal use of a firearm by an adult has been struck down as cruel and/or unusual punishment. We note that defendant makes no attempt to show that his sentence qualifies as excessive under the three-part analysis spelled out in *In re Lynch* (1972) 8 Cal.3d 410, 425–427. "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) This is not such a case.

Finally, during the pendency of this appeal, the Governor signed Senate Bill No. 620, which as relevant here, amends section 12022.53 to give the trial court the authority to strike in the interests of justice a firearm enhancement allegation found true under that statute. Effective January 1, 2018, section 12022.53, subdivision (h) was amended to state: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2(h).) Prior to this amendment, an enhancement under section 12022.53 was mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h); Stats. 2010, ch. 711; *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

In a supplemental brief, defendant argues the amendment to section 12022.53 applies to him because his case is not yet final on appeal, citing the rule of *In re Estrada* (1965) 63 Cal.2d 740, 746. Under *Estrada*, courts presume that absent evidence to the contrary, the Legislature intends an amendment reducing punishment under a criminal statute to apply retroactively to cases not yet final on appeal. (*Id.* at pp. 747–748; *People v. Brown* (2012) 54 Cal.4th 314, 324.) The *Estrada* rule has been applied not only to amendments reducing the penalty for a particular offense, but also to amendments giving the court the discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 76; cf. *People v. Superior Court* (*Lara*) 4 Cal.5th 299, 303 ["Proposition 57 reduces

the possible punishment for a class of persons . . . . For this reason, *Estrada*'s inference of retroactivity applies"].) Defendant argues that because his case is not yet final, it must be remanded to afford the trial court the opportunity to exercise its discretion to strike the enhancement that is no longer mandatory under section 12022.53.

The Attorney General does not contest most of defendant's reasoning. But he does believe that comments made by the trial court at the time of sentencing establish that it would not exercise its new discretion in defendant's favor. The Attorney General's logic is not sufficiently persuasive.

As the Attorney General points out, at the time of sentencing the court denied defendant's motion to strike his juvenile prior in accordance with *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, concluding: "From his juvenile probation, he had an opportunity to rehabilitate himself or seek some sort of rehabilitation. His crimes continued, undeterred. Also, he had a lengthy 76-month term at CYA. That did not deter him from continued criminal conduct as an adult. [¶] So for those reasons, in terms of applying the applicable law here, the *Romero* motion is denied."

Still, we cannot agree that remand would be an idle act as a matter of law. The court "recognize[d] that the defendant did not intend to kill this particular victim." And it ran the sentence on the assault conviction concurrently with the murder sentence. It may not be likely that the court will give defendant another break, but it may. At bottom, this court feels a deep reluctance to assume that it knows how a trial court would have exercised a discretion it did not know it possessed. In short, we are loathe to put words in the trial court's mouth.

DISPOSITION

The cause is remanded for the sole purpose of allowing the trial court to exercise its discretion under subdivision (h) of section 12022.53. The judgment of conviction is affirmed in all other respects.

Richman, J.

We concur:

Kline, P.J.

Miller, J.

A148521; *P. v. Ceballos*

Appendix C

Voir dire of G.B.
Voir dire of V.M.
***Batson* hearing**

August 5, 2015

Voir dire of G.B.

THE COURT: While in the Air Force did you have any other duties, including MP or any law enforcement duties at all?

MR. ENFIELD: MP, no. More in computer science and management.

THE COURT: Okay. Juror 16.

MS. BROWN: I currently work for the Environmental Protection Agency. I've been working for the federal government 28 years. The first eight years I was in the Army reserves as a personnel specialist, and then I moved over to work for EPA in 1994. My significant other is retired from PG&E as an electrician. I have a bachelor's, business administration. And no to the last two questions.

THE COURT: Thank you. Mr. Boggs.

MR. BOGGS: Yes. I'm currently an employee at Larry's produce in the Suisun area for about five months. I'm not married. I have completed my first year of college and second year of Chico State. I feel for the first one that's a no, but the second one I am biased because my father is currently an officer for the Fairfield Police Department. My uncle is retired from Fairfield Police department as well as we're good family friends with about a third of the Fairfield Police Department.

THE COURT: All right. So that's important point to raise. We appreciate you raised that, so you heard what I talked about in terms of officers and evaluating their testimony just like anyone else. They don't get a leg up or start in the hole. Do you think you can do that or do these relationships cause you problems in doing that?

be too hard of a -- too difficult of a burden to place on the prosecution in a criminal case? How about you, Ms. Nicoli? What do you think of that burden of proof? In other words, I'm asking you in the criminal trial you were asked to decide whether the prosecution case, whether the case has been proved beyond a reasonable doubt. Well, there is one further instruction I won't say at this time but beyond a reasonable doubt. Do you have any reservations about the justice system that requires that high standard of proof from the prosecution?

MS. NICOLI: No.

MR. KEENEY: Again, I'd like to ask any of you have any feeling whatsoever that that level of proof, which will be defined more thoroughly later but has been stated at least up until now, is more than should be required to prove the ultimate criminal case? Anybody have any reservations about that? I see no hands, so I would assume the answer is no. Anybody in here who's had a close friend or acquaintance who has been involved in a criminal case as a victim or as a defendant? Ms. Nicoli, which was it? Victim, defendant, both?

MS. NICOLI: She was a victim near Vallejo.

MR. KEENEY: Did it end up in a court case?

MS. NICOLI: No.

MR. KEENEY: Okay. Never solved?

MS. NICOLI: The police never even came. They don't respond to home burglaries.

MR. KEENEY: All right. Must be some other people in here who have been crime victims or relatives that were crime victims. Okay. Ms. Brown.

MS. BROWN: Yes.

MR. KEENEY: Tell me about it.

MS. BROWN: Well, my home was burglarized less than two years ago. Never found out who did it, and then I have a brother who has psychiatric issues, has been arrested multiple times and has served time for rape and attempted murder.

MR. KEENEY: So you have both experiences. Your brother has been through the court system clearly.

MS. BROWN: Yes.

MR. KEENEY: Do you think he got treated fairly in that system?

MS. BROWN: Don't know.

MR. KEENEY: Was this elsewhere or in Vallejo?

MS. BROWN: No. Once was in Pennsylvania, once was in Alabama. Now he's in California.

MR. KEENEY: Okay. So that as far as you're concerned if you sit on this jury, would have no effect whatsoever?

MS. BROWN: No. it shouldn't have an effect if I serve as a juror.

MR. KEENEY: And the frustration of the home burglary was not solved wouldn't make you prejudice one way or the other?

MS. BROWN: No. Totally different incident.

MR. KEENEY: Okay. That's all I would ask you. Your Honor, I have no other questions.

THE COURT: Okay. Thank you, Mr. Keeney.

Mr. Kauffman.

MR. KAUFFMAN: Thank you. Good morning can you all hear me? I'll try to talk into the mic. So I have general questions

for you and specific questions for individual jurors and I'll just start back with Ms. Brown because you were talking last. We'll take up the subject of your brother. It sounded like you didn't really follow along with those proceedings.

MS. BROWN: No, I didn't.

MR. KAUFFMAN: But you kind of know where he is and in general what has happened?

MS. BROWN: Based on what he told me.

MR. KAUFFMAN: Okay. So you're in contact with him?

MS. BROWN: Yes, I am. Very much so.

MR. KAUFFMAN: And so your brother being involved in the criminal justice system in another state but having some consequences, that doesn't give you pause sitting as a juror having to decide on a person's guilt or innocence?

MS. BROWN: No. That was his life. Those were his choices.

MR. KAUFFMAN: Okay. So you don't sort of -- obviously wasn't my office that ever prosecuted him or handled any of those matters. It was out of state.

MS. BROWN: Right.

MR. KAUFFMAN: By the same token, you don't have the attitude of like well, system got my brother and I'm going to make sure anybody else who I think did something remotely bad should also get handled that way?

MS. BROWN: No.

MR. KAUFFMAN: You don't have those feelings?

MS. BROWN: No, I don't.

MR. KAUFFMAN: Thank you for your honesty. So a subject

THE COURT: That was juror 18 for the record.

MR. KAUFFMAN: Ms. Kirsch, this is a case that happened in Vallejo, involve the Vallejo Police Department. You heard names of officers that might testify. Does anybody have any particular issues with the Vallejo Police Department in any way? Mr. Garcia Marcus, you're shaking your head. Your dad was employed there. You didn't ever live here in Vallejo?

MR. GARCIA MARCUS: No. I lived in Vacaville my whole life.

MR. KAUFFMAN: Ms. Brown, I don't mean to pick on you. But your house was broken into unfortunately. That happened in Vallejo?

MR. GARCIA MARCUS: Fairfield.

MR. KAUFFMAN: Okay. Anybody else here victim of crime where Vallejo Police Department was involved or witness or anything like that? Nothing. All right. I don't want to get too deep into your personal lives in any way, and the Judge probably wouldn't let me in any case. But I like to ask jurors if anybody, spouse, somebody in your household regularly watches, you know, these crime or legal TV shows at all. I see a nod. Mr. Perry.

MR. PERRY: Yes.

MR. KAUFFMAN: Do you watch one of those shows or someone you know?

MR. PERRY: Yes.

MR. KAUFFMAN: Okay. Can I ask you which one?

MR. PERRY: Usually People's Court, Judge Judy, the Hot Table or something like that. There is like three different

THE COURT: Thank you, Ms. Puckett. If you're excused, this will apply to anyone excused, just go back to jury services. They'll give you final instructions. I thank you in advance for coming and serving as a juror, Ms. Puckett. Thank you very much.

THE COURT: Ms. Theisen, seat number two please. Preemptory challenge with the defense.

MR. KEENEY: I would ask the Court to excuse juror one, Mr. Arabos.

THE COURT: Thank you, sir. Ms. (Juror no. 1,) seat number one. peremptory challenge with the People.

MR. KAUFFMAN: Thank you. The People would ask the Court to thank and excuse juror eight, Mr. Perry.

THE COURT: Thank you, Mr. Perry. Mr. Enfield, seat number eight. Preemptory challenge with the defense.

MR. KEENEY: Your Honor, the defense would ask the Court to excuse juror number eight, Mr. Enfield.

THE COURT: Thank you, sir. Ms. Brown, seat number eight. Preemptory challenge with the People.

MR. KAUFFMAN: Thank you, Your Honor. The Court could please thank and excuse juror eight, Ms. Brown.

MS. BROWN: I guess this is the lucky seat.

THE COURT: Mr. Boggs, seat number eight. Let me ask the lawyers to approach briefly.

(Sidebar conference held on the record.)

THE COURT: I'm just going to bring it up, I had in my notes, I'm not sure if I misheard, but I thought I heard Mr. Boggs said he could not set aside his police affiliations.

Voir dire of V.M.

to the questions?

MR. OWENS: No.

THE COURT: If you'll go through the five questions please.

MR. OWENS: So I work at the American Canyon Walmart. I'm a trucking loader. I've been there -- it will be four years August 27. I have no spouse or significant other. My highest grade level completed is high school, and no to the other questions.

THE COURT: Okay. No and no other than what you told us?

MR. OWENS: Yeah.

THE COURT: Okay. Thank you, Mr. Owens. Mr. Owens, if you'll pass the mic down to juror 13, Ms. Moore. Ms. Moore, good afternoon.

MS. MOORE: Good afternoon.

THE COURT: Able to hear all the questions that I and the lawyers have asked?

MS. MOORE: Yes.

THE COURT: Any yes answers to those?

MS. MOORE: Yes.

THE COURT: What's that?

MS. MOORE: I have a friend who is a lawyer. Her dad is former police officer for Vacaville. I also have friends that are correctional officers at Vacaville and San Quentin.

THE COURT: So you have a friend who's dad is a lawyer?

MS. MOORE: A friend's father is a former police officer. He retired, and then I have a friend, about four friends who are correctional officers.

THE COURT: Did I hear you say someone is a lawyer?

MS. MOORE: She is a lawyer. Her dad is a police officer.

THE COURT: Okay. Any other yes answers to the questions?

MS. MOORE: Yes. I have been a victim of a crime about 30 years ago. It was sexual assault. I was a junior in high school, middle school.

THE COURT: Sorry to hear that.

MS. MOORE: And I have a cousin who was convicted of murder. He served his time, and then a few years later after that he was murdered. And they never found the person who actually killed him, and then I actually have an uncle who was convicted of murder last year. He actually was convicted of killing my cousin, and so he has a life sentence that he is serving in Texas right now.

THE COURT: Sorry to hear all that. Was there any other yes answers to the questions?

MS. MOORE: That's it.

THE COURT: Let me start then your friend who was an attorney, what type of attorney is she?

MS. MOORE: She used to be criminal. Now she is corporate.

THE COURT: When she did criminal law was she prosecution or defense?

MS. MOORE: Prosecution.

THE COURT: Did she work for a local district attorney's office?

MS. MOORE: Solano, Fairfield.

THE COURT: She worked here in Solano DA's office? What is her name?

MS. MOORE: Lindsay Sprowel.

THE COURT: Okay. She was the deputy D.A.

MS. MOORE: Yes.

THE COURT: And her dad is I think Charlie Sprowel?

MS. MOORE: Yes.

THE COURT: All right. Anything about those relationships with people in law enforcement, also the other I think you said the COs, correctional officers, anything about that where you feel like you'd be biased in favor of law enforcement in any way? They get an automatic leg up?

MS. MOORE: No.

THE COURT: How about based on that do law enforcement officers start in the hole in any way?

MS. MOORE: No.

THE COURT: Just start ground zero, neutral? You'll wait until you hear evidence, including police officer testimony, and decide what you believe?

MS. MOORE: Yes.

THE COURT: Fair enough. This incident where you were the victim of an incident 30 years ago, is that going to effect you in any way here?

MS. MOORE: No.

THE COURT: Okay. Can you completely set it aside, just base your decision only on the evidence and the law that you get in this case?

MS. MOORE: Yes.

THE COURT: Was someone caught and arrested for that crime or charged?

MS. MOORE: Yes. Since it was in school I knew him, and we actually ended up at trial. But before I actually had to testify he confessed, so I didn't have to go through that.

THE COURT: Overall do you think that process worked fairly or not?

MS. MOORE: Yes. I think it worked fairly.

THE COURT: Okay. And these incidents involving your cousin and your uncle and the murders that occurred there, did any of those occur here in California?

MS. MOORE: My cousin occurred here in California.

THE COURT: Where was your cousin incident?

MS. MOORE: Oakland.

THE COURT: Alameda county.

MS. MOORE: That is correct.

THE COURT: How long ago was the most recent murder conviction?

MS. MOORE: Of my uncle or my cousin?

THE COURT: Yes.

MS. MOORE: My uncle last year and my cousin --

THE COURT: How long ago was your cousin?

MS. MOORE: Approximately 12 years ago.

THE COURT: Overall do you think your cousin's incident where he was charged with a crime, overall do you feel the process -- or that he was treated fairly by both the police and/or the Courts?

MS. MOORE: Yes.

THE COURT: Anything whatever about his experience which would in any way cause you to be unfair or biased toward either side here?

MS. MOORE: No.

THE COURT: How about with your uncle's situation? Do you think he was treated fairly by both the police and Courts?

MS. MOORE: Yes.

THE COURT: Anything whatsoever that might cause you to be unfair to either side here?

MS. MOORE: No.

THE COURT: Okay. Do you feel you -- well, did you speak to your cousin and/or uncle about those incidents?

MS. MOORE: Not my uncle, no since he's in Texas. No, I haven't spoken to him. My cousin after he was convicted we would go visit him. He was in Santa Rita, so we would visit him. But to just actually talk about the overall crime and everything, we never had that conversation.

THE COURT: All right. Did you follow the trials and/or the cases?

MS. MOORE: Yes.

THE COURT: And do you feel comfortable you would be able to completely set aside anything you may have learned from those cases, set aside that knowledge, base your decision only on the evidence and the law that you get in this case?

MS. MOORE: Yes.

THE COURT: Okay. Great. Was there any other yes answers? I think I covered the topics.

MS. MOORE: No.

THE COURT: Okay. The questions on the board please.

MS. MOORE: I'm currently an academic support provider for Vallejo City Unified School District. I've been employed with them for one year. I do not have a spouse. I have a master's in social work, and my bachelor's is in psychology. And no to the last two questions.

THE COURT: End of the day you feel you would be a completely fair juror to both sides?

MS. MOORE: Yes.

THE COURT: Okay. One of the witnesses in this case that may testify is a psychologist, and so you yourself have a bachelor's degree in psychology you say?

MS. MOORE: Yes.

THE COURT: Have you ever practiced in that field?

MS. MOORE: No.

THE COURT: All right. The lawyers probably have follow up for you on that. End of the day you feel you could be a fair juror to both sides?

MS. MOORE: Yes.

THE COURT: Great. Thank you. Mr. (Juror no. 3,) able to hear all the questions?

JUROR NO. 3: Yes. The thing that jumped out at me was one of the names you read off as the police witnesses I guess they were, one was a Jason Bauer.

THE COURT: Yes.

JUROR NO. 3: I'm not sure but my youngest son had a friend named Jason Bauer. I'm not sure if he became a policeman

time. I don't know. I ask the group the five up front and Mr. Owens, any of you six people have any negative thoughts about our court system that requires proof of guilt beyond a reasonable doubt before anybody gets convicted? If so, raise your hand.

MS. KELLEY: The little thing I mentioned there.

MR. KEENEY: Yeah. You explained that pretty well. Okay. Thank you. Do you understand that the defense can simply rely on the burden of proof, and if there is not sufficient evidence presented when you consider the whole case, you can acquit a person? I'm sort of putting it backwards from the way I was phrasing it the first time. The defense doesn't have to prove anything to have a case where there is insufficient evidence. Anybody choral with that idea? You don't know what kind of case you're dealing with until you hear the case of course. Okay. I don't have any questions beyond those, Your Honor.

THE COURT: Okay. Thank you, Mr. Keeney.

Mr. Kauffman.

MR. KAUFFMAN: Sure. Just briefly. Ms. Moore, good afternoon.

MS. MOORE: Good afternoon.

MR. KAUFFMAN: I think I followed along there with some of your unfortunate family history. What I think we didn't cover was your cousin who went to prison for some kind of homicide?

MS. MOORE: Yes.

MR. KAUFFMAN: Then did his time, was released and then

he was murdered.

MS. MOORE: That is correct.

MR. KAUFFMAN: So where did that occur? Was that in California.

MS. MOORE: That was California.

MR. KAUFFMAN: Was there anybody ever charged or arrested for that?

MS. MOORE: For his murder?

MR. KAUFFMAN: Yes.

MS. MOORE: No.

MR. KAUFFMAN: That's what I thought I missed. So, you know, you've had these experiences with relatives who have been charged and sounds like incarcerated for various crimes. Do you have any feeling about the fact that your cousin who did his time for a crime was then the victim of a crime and basically that case doesn't sound like it was ever brought to the court system?

MS. MOORE: Well, of course. Because he was convicted of killing someone, and then they never found who actually killed him. So, yeah.

MR. KAUFFMAN: Right. So let's talk about that for a second. I mean, there are two ways you can go there, right? You can say well, you know, maybe someone should have been brought out and at least tried. But they weren't, so now I hold resentment and I will hold say anyone who tries to prosecute somebody for a similar crime to a higher standard because they never got the person who killed my cousin. Do you think you feel that way?

MS. MOORE: No. I don't feel that way.

MR. KAUFFMAN: The other way you can go with that, you can say well, I mean, if you're charged with this crime and you made it this far, certainly you must have done something because my cousin's case, they never got anybody and I'm going to make sure whoever gets this far will be held responsible because I have this person, my cousin, murdered and nobody held responsible for that. Do you have that kind of perspective or potentially bias in a case like this?

MS. MOORE: Maybe a little bit, but of course I would try as much as possible not to allow that to bias.

MR. KAUFFMAN: Right. That's all we can ask, but that sort of seemed to strike a cord with you a little bit.

MS. MOORE: Uh-huh.

MR. KAUFFMAN: That is good to know. I appreciate your honesty, and I appreciate you telling us about your family history. All right. I think that's all I have, Your Honor. Thank you.

THE COURT: Thank you, Mr. Kauffman. Let me ask the lawyers to approach again.

(Sidebar conference held on the record.)

THE COURT: Mr. Kauffman, any cause challenges?

MR. KAUFFMAN: I'd say Mr. Owens, number five.

THE COURT: Mr. Keeney, did you have any cause challenges?

MR. KEENEY: Any what?

THE COURT: Cause.

MR. KEENEY: Yes. I think Ms. Darbazanjian. Maybe not.

Batson/Wheeler hearing

reasonable doubt and the case was not proved beyond a reasonable doubt? Any of you have trouble with that? You all understand what I'm saying? I have no other questions, Your Honor.

THE COURT: Thank you, Mr. Keeney. Mr. Kauffman.

MR. KAUFFMAN: Thank you. So to the new folks we have here, you heard everything I asked the other jurors earlier today. Anything you wanted to add or share based on those questions? I know it's been a lot of information here today. You have a little bit of common sense. Not going to forget about that, right? Okay. And none of you have any kind of legal training of any kind or maybe a spouse or significant other or somebody close to you that has legal training? No defense lawyers that, sort of thing? All right. Sounds like you've been paying good attention. That's all I have.

THE COURT: Thank you. Both sides pass for cause?

Mr. Kauffman?

MR. KAUFFMAN: Yes.

THE COURT: Mr. Keeney?

MR. KEENEY: I do.

THE COURT: All right. So at this point preemptory challenge is with the defense.

MR. KEENEY: I would pass, Your Honor.

THE COURT: Defense passes. Peremptory with the People.

MR. KAUFFMAN: Thank you, Your Honor. The People would ask the Court to thank and excuse juror five, Ms. Moore.

THE COURT: Thank you, Ms. Moore. Mr. (Juror no. 5,) seat number five please.

MR. KEENEY: Can we approach the bench, Your Honor?

THE COURT: Yes. Ms. Moore, if you can have a seat there. Let me talk to the lawyers real quick.

(Sidebar conference held on the record.)

MR. KEENEY: I would like to make a motion, Batson Wheeler.

THE COURT: Okay.

MR. KEENEY: He's excused three.

MR. KAUFFMAN: Yes.

MR. KEENEY: And I have the notes back at my table. I didn't see any reason to excuse any of the three black jurors, and the defendant is black in this case.

THE COURT: The Batson Wheeler motion as to Ms. Moore at this point.

MR. KAUFFMAN: You have to look at the others I suppose.

THE COURT: As to Ms. Moore hang on one second. Everyone don't talk over one another. As to Ms. Moore, I'm not inclined to find a prima facie at this point. She did have the family members who are involved in several murder incidents, but at the same time she did say -- I recognize she said she could be fair. There was one question where she said -- sounds like she might actually be on the fence. It's not entirely clear, but, Mr. Kauffman, let me hear your reasons. I'm not at this point finding a prima facie in light of the fact that her family members are involved in these murder incidents. I will give you an opportunity to state your reasons on the record.

MR. KAUFFMAN: Sure. The reasons for asking her to be

excused, based on her answers I didn't feel -- I had a for cause challenge. Based on her history, she has a cousin who was in prison for murder who was then murdered. That was never solved by the police and an uncle currently incarcerated in prison also I believe for murder or another serious crime in another state. She knows a bit about these cases, and I'm concerned any person irrespective, any class or group she might belong to, with that history would have trouble being fair in this case. I'm concerned about her ability to process, separate that out from our situation because she did seem to have a significant amount of knowledge about what happened in those situations involving her family.

THE COURT: Go ahead, Mr. Keeney.

MR. KEENEY: The cousin's case I believe was that the police didn't work the case at all. Am I right about that? I think I'm right. I'm pretty sure I'm right, and this case is a case where the police worked a lower class, very lower class homicide very intensely. And they put a case together, and so the fact that another department dropped the ball, if she wants to see police -- a lower class minority homicide and the DA's office gave it the Cadillac treatment by charging it very heavily, so we've had five jurors in the jury box that are black people. And three of them are gone now. I see more going.

THE COURT: Let me take a look at my notes real quick. As to Ms. Moore I won't find a Batson Wheeler violation. I except Mr. Kauffman's representations, find it very credible that there was a non-race reason for the preemptory challenge. There are two other African Americans still in the panel. I

would note that for the record, and you said there was two others who were excused.

Mr. Kauffman, did you -- sounds like you wanted to put on the record your reasons for those.

MR. KAUFFMAN: If I could quickly. It was Ms. Moss who said she was uncomfortable judging guilt, and that was morale reasons. Also said she didn't think she was qualified to do that, and the third was Ms. Brown. And she was the person who was the victim of a 459 first. Her brother has some I think psychological issues and was charged with a serious crime, I believe an attempted robbery. So experience with the criminal justice system I viewed as her portraying negatively.

THE COURT: Let me take a look at something here. I wanted to confirm my notes. I have Ms. Brown, who was juror number 16 at that time, looks like her brother was -- I have in my notes rape and attempted murder charge, mental issues. Does not know if he was treated fairly, but didn't know either way. Okay. Again, I think there are non-race base reasons for the peremptory challenges. So I'm not finding any Batson Wheeler at this point. Mr. Keeney, did you wish to say anything further?

MR. KEENEY: No.

THE COURT: I'll just note juror number 6 and juror number 9 are both African Americans at this point. Thank you both.

(The following proceedings were held in open court in the presence of the jury.)

THE COURT: All right. Ms. Moore thank you. You're excused. If you will go to jury services. They'll give you

further instruction. Mr. (Juror no. 5,) in seat number five. Preemptory challenge with the defense.

MR. KEENEY: I would pass, Your Honor.

THE COURT: Defense passes. Peremptory with the People.

MR. KAUFFMAN: People pass, Your Honor.

THE COURT: Okay. Both sides have now passed. If all 12 of you would please stand. Raise your right hand, face the clerk. We'll have you sworn in.

(Juror oath given.)

THE COURT: Okay. Thank you. You can have a seat there. As for our alternates, we'll select at this point -- I will seat three alternates, so we'll start with Ms. (Alternate A,) seat number 15 as alternate number one. Peremptory with the People.

MR. KAUFFMAN: The People pass, Your Honor.

THE COURT: Peremptory with the defense as Ms. (Alternate A,) alternate number one.

MR. KEENEY: I pass.

THE COURT: Okay. So, Ms. (Alternate A,) you'll be alternate number one. As to alternate number two, Ms. (Alternate B,) in seat 16, peremptory with the defense.

MR. KEENEY: I would pass.

THE COURT: Peremptory with the People.

MR. KAUFFMAN: People also pass.

THE COURT: Ms. (Alternate B,) you will be our second alternate. As for the third alternate, Mr. (Alternate C,) in seat 17, peremptory with the People.