APPENDIX

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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEWOYNE CURTIS POTTS, Petitioner-Appellant, v. JOHN GARZA, Respondent-Appellee.	No. 17-56410 D.C. No. 2:07-cv-01312-PSG-AJW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted August 14, 2019
Pasadena, California

Before: CALLAHAN, CHRISTEN, and R. NELSON, Circuit Judges.

Dewoyne Potts appeals from the district court's denial of his habeas petition that alleged that the prosecutor's peremptory challenge to an African-American juror in his state robbery trial was racially motivated. The district court, on remand from the Ninth Circuit, held an evidentiary hearing allowing the state to proffer a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

racially neutral basis for the challenge and for petitioner to rebut that showing. The prosecutor asserted he had excused Juror 2405 because her son had recently been misidentified as a criminal suspect and held overnight by the police. The district court concluded that this was an adequate race-neutral reason, and that Potts had not demonstrated that race was a substantial motivating factor behind the peremptory challenge. We affirm.[1]

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court set out a three-step burden-shifting framework for evaluating claims of discriminatory peremptory strikes. At step one, the defendant (petitioner) bears the burden of producing sufficient evidence to permit the trial judge to draw an inference of discrimination; at step two, the burden shifts to the state to explain the racial exclusion by offering permissible race-neutral justifications for the strike; and at step three the trial court must determine "whether the opponent of the strike has proved purposeful racial discrimination." *Shirley v. Yates*, 807 F.3d 1090, 1095 (9th Cir. 2015).

Our prior memorandum disposition in this case, *Potts v. Harman*, 588 F. App'x 620 (9th Cir. 2014), established first that because the state court applied an

[1] The facts are familiar to the parties and are restated here only as necessary to resolve the issues presented by this appeal.

improper standard ("strong likelihood"), the federal courts had to apply *Batson* de novo. Second, we determined that Potts had met his burden of establishing a prima facie case of purposeful discrimination. Accordingly, on remand, the district court held an evidentiary hearing to allow the state to offer race-neutral justifications for striking Juror 2405, and for Potts to rebut any such showing. The district court concluded at step three that Potts "had not demonstrated that 'race was a substantial motivating factor' in [the prosecutor's] strike of Juror 2405."

The denial of a habeas petition is reviewed de novo, *Hunton v. Sinclair*, 732 F.3d 1124, 1125 (9th Cir. 2013), but the district court's determination concerning purposeful discrimination at the third step of the *Batson* inquiry is a question of fact that is reviewed for clear error. *Shirley*, 807 F.3d at 1107; *Paulino v. Harrison*, 542 F.3d 692, 699 (9th Cir. 2008). The petitioner has the ultimate burden of proving purposeful discrimination by a preponderance of the evidence. *Currie v. McDowell*, 825 F.3d 603, 605 (9th Cir. 2016). To prove a *Batson* violation, a petitioner must demonstrate that race was a substantial motivating factor in the prosecutor's use of the peremptory challenge. *Id*. at 606. However, the district court's evaluation of the prosecutor's state of mind is entitled to considerable deference. *Hernandez v. New York*, 500 U.S. 352, 365 (1991); *Cook v. LaMarque*, 593 F.3d 810, 815 (9th Cir. 2010).

The prosecutor maintains that he excused Juror 2405 because, within a year of the trial, her son had been misidentified as a criminal suspect and held in jail overnight. The district court determined that this was a race-neutral reason even though Juror 2405's son was African-American and the woman who misidentified him was white. This determination is reasonable, particularly as the trial judge in 2002 questioned whether Juror 2405, despite being "very honest and candid," could put the incident out of her mind.

The prosecutor's failure to further question Juror 2405 does not show pretext, nor does his questioning of Jurors 7027 and 1612. Once Juror 2405 revealed the incident with her son and stated that she did not think it would affect her performance as a juror, there was no apparent need for the prosecutor to ask additional questions. Also, there were race-neutral reasons for the prosecutor's questioning of other potential jurors, such as Jurors 7027 and 1612, because their answers revealed incidents that, although more remote in time than Juror 2405's son's mistaken arrest, might have created bias against the police.

Finally, the record adequately supports the district court's determination that the prosecutor was credible despite his apparent misstatement of Juror 2405's position to the trial court in 2002 and a "sloppy or misleading" declaration some thirteen years later concerning his remembrance of allegedly comparative jurors.

The district court found the prosecutor "to be a conscientious and earnest witness who attempted to answer questions designed to finely parse his memory of events that occurred more than a decade earlier as honestly and precisely as possible," and commented that, "in critical respects, his testimony was both internally consistent and consistent with his prior deposition testimony." Potts has not shown that the district court's credibility determination was clearly erroneous.

Following our remand the district court held an evidentiary hearing on Potts' prima facie showing of purposeful discrimination and determined that Potts had failed to show that race was a substantial motivating factor in the recusal of Juror 2405. As the district court's determinations are reasonably supported by the record, under the applicable standard of review, the district court's denial of Potts' habeas petition is **AFFIRMED**.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DEWOYNE CURTIS POTTS,	**Case No. CV 07-1312-PSG(AJW)**
Petitioner,	
v.	**JUDGMENT**
JOHN GARZA, Warden,	
Respondent.	

It is hereby adjudged that the petition for a writ of habeas corpus is denied.

Dated: 9/8/17

Philip S. Gutierrez
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DEWOYNE CURTIS POTTS,	
Petitioner,	**Case No. CV 07-1312 PSG (AJW)**
v.	
JOHN GARZA, Warden,	**ORDER ACCEPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**
Respondent.	

The Court has reviewed the entire record in this action, the Report and Recommendation of Magistrate Judge ("Report"), and petitioner's objections. The Court accepts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a de novo determination of the portions to which objections were directed.

DATED: 9/8/17

Philip S. Gutierrez
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DEWOYNE CURTIS POTTS, **Petitioner,** **v.** **JOHN GARZA, Warden,** **Respondent.**	**Case No. CV 07-1312-PSG(AJW)** **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

Background

In 2002, petitioner was convicted of three counts of second degree robbery, one count of assault with a firearm, and one count of misdemeanor assault. He was sentenced to state prison for a term of twenty-three years and eight months.[1]

In 2007, petitioner filed a petition for a writ of habeas corpus in this Court alleging, among other things, that the prosecutor excluded a prospective juror on the basis of race in violation of Batson v.

[1] The facts surrounding the crime are included in the report and recommendation issued on April 27, 2012. [Dkt. 134]. Because they are not relevant to the single remaining claim, the Court does not repeat them here.

Kentucky, 476 U.S. 79 (1986). [Petition at 5]. On June 18, 2012, the petition was denied.

Petitioner appealed, challenging only the denial of his Batson claim. [Ninth Cir. Case No. 12-56193]. The Ninth Circuit found that petitioner had made a prima facie showing of discrimination under Batson, and remanded the case so that this Court could hold an evidentiary hearing. Potts v. Harman, 588 Fed. Appx. 620 (9th Cir. 2014). An evidentiary hearing was conducted on December 4, 2015. Petitioner's post-hearing brief was filed on June 20, 2016, and respondent's post-hearing brief was filed on August 30, 2016.

For the following reasons, petitioner is not entitled to relief.

Discussion

A. The Batson Framework

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." Foster v. Chatman, 136 S.Ct. 1737, 1747 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 478 (2008)) (internal quotation marks omitted). In Batson, the Supreme Court established a three-step process for determining when a strike runs afoul of the Constitution: "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." Foster, 136 S.Ct. at 1747 (quoting Snyder 552 U.S. at 476–477).

B. Jury Selection

There were two African-American prospective jurors in petitioner's jury panel: Juror 9350 and Juror 2405. During voir dire, Juror 9350 said

that she had prior negative experience with police officers, during which she and her friends had been accused of something that they had not done; she believed the police "could just kill [her] and nothing would happen"; and she was not sure she could be fair. [Reporter's Transcript on Appeal ("RT") 153-156]. Deputy District Attorney James Toro ("Toro" or "the prosecutor"), moved to strike Juror 9350 for cause, and trial court granted the motion. [RT 158].

During voir dire, Juror 2405 said that she lived in the San Fernando Valley, worked as a flight attendant and as a college professor teaching child development, was married, and had two sons. Her husband was an engineer. She had relatives in the Los Angeles Fire Department, the Los Angles Police Department, and the Sheriff's Department. When the prospective jurors were asked whether any had been involved in a case similar to the present one, Juror 2405 asked for a sidebar. She told the trial court that her son had been picked up by police in the last year. He had been mistakenly identified as the perpetrator of a crime that he did not commit. The trial court asked her how long her son was detained, and Juror 2405 answered, "overnight." [RT 148]. When asked if there was anything about the incident that would make it difficult for her to sit as a juror in the case, Juror 2405 answered, "No." [RT 148].

The trial court permitted the parties to ask Juror 2405 questions, and the prosecutor asked three:

> MR. TORO: Do you think it was a case of racial profiling or being in the wrong place at the wrong time?
>
> [JUROR 2405]: I don't know. The lady thought he was the person and picked him out of the mall.
>
> MR. TORO: Do you know what her race was?
>
> [JUROR 2405]: She was white, but I never saw her. I don't know

anything about her.

MR. TORO: Now, the fact that this case, identification is probably going to be the issue. If you are picked as a juror in this case, are you going to think oh, my God, you know, my own son was misidentified and I wonder if this is the case here before you even heard any of the evidence?

[JUROR 2405]: No, I wouldn't do that. I would be completely unbiased.

[RT 148-149].

Based upon the foregoing, Toro moved to strike Juror 2405 for cause, explaining the basis for his motion as on the ground that her son "had been accused of a crime and it was a case of mistaken identity." [RT 159]. The trial court denied the motion. [RT 159]. Toro then used a peremptory strike to excuse Juror 2405. [RT 161]. Petitioner's trial counsel objected, arguing that the strike appeared to be based upon race. Trial counsel pointed out that there had been only two African-American prospective jurors, the first of which was excused for cause. He argued that "the mere fact her son was picked up on mistaken identity [taken together] with police relatives and all that and being a teacher, I would make a Wheeler challenge at this time." [RT 162].[2]

The trial court denied the motion. It explained:

> Well, she certainly has good qualifications about being a professional individual. And I think were it in any other situation where ID was not a key issue, but based on all the voir dire of counsel throughout this, since I know nothing of

[2] An objection at trial under People v. Wheeler, 22 Cal. 3d 258 (1978) is the equivalent of an objection under Batson and is sufficient to preserve the federal constitutional claim. Boyd v. Newland, 467 F.3d 1139, 1142 n.2 (9th Cir. 2006), cert. denied, 550 U.S. 933 (2007).

> the facts of the case, I must assume that it is all about witness identification. It's robbery identification by the victims.
>
> I think the fact this happened to her son and so recent it's going to be a thought in the back of her mind that there but for the grace of God goes my son. The same thing happened to him.
>
> And I feel that even though she was very honest and candid, I think she would try, but I do not feel that she could put that out of her mind.
>
> So I'm not going to ask the People to – you have not stated a prima facie case for a Wheeler [sic].

[RT 162-163].

C. The Relevant State Court Determination and the Standard of Review

The California Court of Appeal rejected petitioner's claim, finding that he failed "to meet [his] burden of showing a *strong likelihood* that juror No. 2405 was challenged because she was African-American. On the contrary, the prosecutor could reasonably conclude that juror No. 2405 would be unduly influenced by the recent experience of her son." [Motion to Dismiss, Ex. C at 81 (emphasis in original) (citation omitted)].

As discussed in the original report and recommendation and in the Ninth Circuit's order, because the state court's decision required petitioner to demonstrate a "strong likelihood" of discrimination, it was contrary to clearly established Supreme Court law. Consequently, this Court reviews petitioner's claim de novo. See Johnson v. California, 545 U.S.162, 168-169 (2005); Shirley v. Yates, 807 F.3d 1090, 1101 (9th Cir. 2015); Crittenden v. Ayers, 624 F.3d 943, 954 (9th

Cir. 2010).

D. Batson Step One

To establish a prima facie case of purposeful discrimination, the defendant must show that the prosecutor used a peremptory strike to remove a prospective juror who is a member of a cognizable racial group and that "the totality of the circumstances raises an inference that the strike was on account of race." Crittenden, 624 F.3d at 955 (citing Batson, 476 U.S. at 96). The "burden at step one is one of production, not of persuasion," Johnson, 545 U.S. at 171, which means that whether "discrimination actually occurred ... is left to the third step of the Batson analysis." Crittenden, 624 F.3d at 957. As the Supreme Court has made clear, the burden at Batson's first step was not intended to be onerous: "Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Johnson, 545 U.S. at 170. The burden has been described as "minimal." Johnson v. Finn, 665 F.3d 1063, 1071 (9th Cir. 2011).

The Ninth Circuit concluded that three factors combined to satisfy petitioner's burden: (1) the excused juror was the only African-American juror who remained on the panel after the other African-American prospective juror had been excused for cause, (2) the prosecutor misstated the juror's voir dire testimony when he sought to excuse her for cause, and (3) two other jurors who were not African-American had similar experiences with identification but were not excused by the prosecutor. Potts, 588 Fed. Appx. at 620. Because petitioner has made a prima facie showing of discrimination, the Court proceeds to step two.

E. Batson Step Two

Once a prima facie case has been made, the "burden shifts to the

State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes." Johnson, 545 U.S. at 168; Miller-El v. Dretke, 545 U.S. 231, 239 (2005) ("Miller-El II"). A race-neutral explanation means "an explanation based on something other than the race of the juror." Hernandez v. New York, 500 U.S. 352, 360 (1991). "Step Two is an opportunity for the prosecution to explain the real reason for [its] actions." Shirley, 807 F.3d at 1103 (quoting Yee v. Duncan, 463 F.3d 893, 8999 (9th Cir. 2006), cert. denied, 552 U.S. 1043 (2007)). To meet its burden, the State "must offer evidence probative of the *actual* reason that a prosecutor exercised the strike at issue. Evidence that a *good* reason for a strike existed is insufficient in itself at Step Two." Shirley, 807 F.3d at 1104; see Johnson, 545 U.S. at 172 ("[I]t does not matter that the prosecutor might have had good reasons ...[¶] [w]hat matters is the real reason they were stricken") (quoting Paulino v. Castro, 371 F.3d 1083, 1090 (9th Cir. 2004)); Williams v. Runnels, 640 F. Supp. 2d 1203, 1218 (C.D. Cal. 2009) (the state must "articulate the actual reason jurors were removed; mere conjecture cannot satisfy the state's burden"). Whether those reasons are credible or plausible is determined at step three. Purkett v. Elem, 514 U.S. 765, 768-769 (1995) (per curiam).

The state court erroneously failed to require the prosecutor to articulate the reason for his peremptory challenge against Juror 2405 and, consequently, did not assess the legitimacy and sincerity of that reason. As a result, that task falls to this Court. See Johnson, 665 F.3d at 1072 (explaining that in order "to replicate on habeas review the inquiry that the state trial court should have conducted in the first place – requiring the prosecutor to assert race-neutral reasons for the strike (at Batson step two) and determining (at Batson step

three) whether the asserted reasons were in fact genuine rather than pretextual").

On July 22, 2015, petitioner's counsel deposed the prosecutor, and the transcript of the deposition was admitted as evidence. [Dkt. 173; see Dkt. 186 at 54, 61; Dkt. 180].[3] During his deposition, Toro testified that generally, he did not rely on any single factor to decide whether a juror was favorable or unfavorable, but that a juror's negative experience with law enforcement was "very important." [Dkt. 173 at 26-28]. Toro testified that after reading the voir dire transcript, he recalled that Juror 2405 had told the trial court that her son had been falsely accused of a crime and arrested. [Dkt. 173 at 39]. He also recalled why he struck Juror 2405, explaining that he did so because her son had a "very negative experience, and I didn't think she could put that behind her and be fair to me, as the prosecutor, or the police, or the justice system." [Dkt. 173 at 42-43]. He clarified that his concern about Juror 2405's ability to be fair was not focused on the issue of how she might weigh eyewitness identification evidence, but rather based upon the likelihood that she would be unable to "forgive or forget" what he "presumed was a horrible experience." [Dkt. 173 at 43].

Prior to the evidentiary hearing, respondent filed Toro's declaration, which was admitted as his direct testimony. [Dkt. 170]. Toro states that the declaration was made "from [his] personal knowledge and to the best of [his] recollection, after reviewing the transcript from the jury selection proceedings." [Dkt. 170 at 2]. After recounting Juror 2405's request for a sidebar where she informed the trial court that one year earlier her son had been misidentified as a crime suspect,

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[3] The Court utilizes that page numbers assigned by the electronic case file.

Toro stated that notwithstanding the juror's assertion that she could be unbiased, he believed that "her experience would not allow her to be fair and unbiased; she would or could be biased against law enforcement, the prosecution, and/or the judicial system based on her son's experience." [Dkt. 170 at 2-3]. Based upon this belief, he challenged Juror 2405 for cause. After the trial court denied his challenge, Toro used a peremptory challenge to strike her. [Dkt. 170 at 3]. Toro reiterated that despite Juror 2405's assertion to the contrary, he did not believe that she could be fair to the prosecution. This was the reason he struck her, not her race. [Dkt. 170 at 3].

Finally, at the evidentiary hearing, Toro testified consistently with his deposition. In particular, he testified that his recollection regarding Juror 2405 had been refreshed by reading the voir dire transcript and that he remembered believing that Juror 2405 would have been biased against the police and prosecution as a result of her son's negative experience. Toro struck her based upon his concerns about her ability to put the experience behind her and be fair, not because of her race. [Dkt. 186 at 26-28, 33, 63-64].

Petitioner argues that the State has failed to meet its burden of production at step two because Toro did not have an independent recollection of his reason for striking Juror 2405, but merely inferred those reasons from the voir dire transcript. [Dkt. 193 at 11-13]. In support of this argument, petitioner points to the following portions of Toro's deposition testimony:

1. Petitioner's habeas corpus counsel asked Toro, "do you have an independent recollection of the discussion that you had with her and that the court had with her regarding the incident with her son?" [Dkt. 173 at 41]. After Toro asked, "You mean independent of reviewing the

transcript?" and petitioner's habeas counsel answered "yes," Toro responded:

> No, I think the transcript refreshed my recollection. But without that transcript, would I had remember [sic] specifically what she said and that discourse, no.

[Dkt. 173 at 41].

2. After Toro testified that his concern was that Juror 2405 would be biased against the police, prosecution, and justice system (and was not simply a concern about the identification issue), petitioner's habeas corpus counsel asked him whether he "recall[ed] having those thoughts" or if his testimony was "based on [his] review of the transcript." Toro answered: "When I read the transcript and what she said, I know why I kicked her. That was almost an automatic for me." [Dkt. 173 at 43].

3. Petitioner's habeas corpus counsel followed up, asking: "When you say you know why you kicked her, I'm asking, do you remember having those thoughts at the time or are you just assuming based on the transcript?" [Dkt. 173 at 43]. Toro answered: "I don't think I'm assuming. I believe, based on the transcript, I know that's why I kicked her." [Dkt. 173 at 43].

In addition, petitioner argues that even at the evidentiary hearing, the prosecutor never clearly testified that he independently recollected why he struck Juror 2405; instead, he continued to testify that his explanation was "based on the transcript." [Dkt. 186 at 28].

Petitioner's argument is unpersuasive. Most importantly, Toro clearly testified at the evidentiary hearing that the voir dire transcript refreshed his recollection as to why he struck Juror 2405. [Dkt. 186 at 32]. Toro testified similarly, if less clearly, at his

deposition when he was asked whether, after reviewing the transcript, he had an independent recollection of his reasons for striking Juror 2405 or merely recalled what he read in the transcript. Toro answered: "I think a little of both. I – I mean, I have a recollection." [Dkt. 173 at 39]. As an example, at both the deposition and the evidentiary hearing, Toro testified that he had an independent recollection about the sidebar – including details of the that were not included in the transcript – even though he recalled it only after he read the voir dire transcript. [Dkt. 173 at 39-40; Dkt. 186 at 25].

Toro's refreshed recollection "is clearly sufficient" for the purposes of step two. See Shirley, 807 F.3d at 1104 (stating that a prosecutor's recollection refreshed by the voir dire transcript is sufficient to meet the state's burden at step two); see generally 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:93 (4th ed. 2013). After refreshing his recollection, Toro offered a race-neutral reason for striking Juror 2405 – namely, his concern that she would be biased against the prosecution as a result of her son's experience. See Shannon v. Giurbino, 2013 WL 4501479, at *12 (C.D. Cal. Aug. 22, 2013) ("The prosecution may legitimately strike jurors based on their views about the judicial system, or because their relatives were arrested or convicted.") (citing Mitleider v. Hall, 391 F.3d 1039, 1048 (9th Cir. 2004) (holding that striking a prospective juror because her brother had been convicted of cocaine possession was a facially neutral reason). In light of the prosecutor's testimony, the Court finds the state has met its burden of offering evidence "probative of the *actual* reason that [the] prosecutor exercised the strike at issue." Shirley, 807 F.3d at 1104; see Purkett, 514 U.S. at 768 (stating that at Batson's second step, the issue is the facial validity of the explanation; any

determination about the credibility of the explanation is reserved for the third step of the analysis).

F. Batson Step Three

At step three, the Court determines whether petitioner has carried his burden of proving purposeful discrimination by a preponderance of the evidence. See Batson, 476 U.S. at 98; Crittenden, 624 F.3d at 958. Simply put, the question is whether the prosecutor's race-neutral explanation for his peremptory challenge of Juror 2405 should be believed. Snyder, 552 U.S. at 477; Hernandez, 500 U.S. at 365. In making this determination, the Court evaluates all relevant evidence in the record, including the prosecutor's demeanor, the reasonableness of the explanation, and the nexus between the explanation and accepted trial strategies. Miller-El v. Cockrell, 537 U.S. 322, 339-340 (2003) ("Miller-El I"); see Currie v. McDowell, 825 F.3d 603, 610 (9th Cir. 2016)(step three requires an inquiry into "the totality of the relevant facts about a prosecutor's conduct"). The inquiry may include "side-by-side comparisons of the African-American panelists who were struck with the non-African-American panelists who were allowed to serve." Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir. 2010). So, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El II, 545 U.S. at 241; see Crittenden, 624 F.3d at 956 (stating that comparative juror analysis is an established tool at step three of the Batson analysis).

Finally, to carry his burden, petitioner need not prove that "all of the prosecutor's race-neutral reasons were pretextual, or even that the racial motivation was 'determinative.'" Currie, 825 F.3d at 605-606

(citing Snyder, 552 U.S. at 485). Rather, petitioner must demonstrate that "race was a substantial motivating factor" in the prosecutor's use of the peremptory strike. Currie, 825 F.3d at 606 (quoting Cook, 593 F.3d at 815).

First and foremost, the reason Toro provided for striking Juror 2405 is plausible. It is reasonable that the prosecutor would be concerned that the overnight detention of her son for a crime he did not commit could cause Juror 2405 to be wary of the prosecution. See Mitleider, 391 F.3d at 1048 (finding that the prosecutor articulated facially reasonable race-neutral grounds for challenging a juror when he explained that he based his challenge on the juror's indication that he had a brother who had been convicted of possession of cocaine); Jones v. Harrington, 2013 WL 2350185, at *12 (C.D. Cal. May 28, 2013) (stating that "a family member's arrest, conviction, or incarceration constitutes a reasonable, race-neutral reason for striking a prospective juror"), rev'd on other grounds, 829 F.3d 1128 (9th Cir. 2016); Cazares v. Evans, 2010 WL 6195247, at *18 (C.D. Cal. Nov. 8, 2010) (the fact that some prospective jurors had "family members and/or friends who had been arrested or convicted of a crime" constituted a race-neutral and non-pretextual reason for striking jurors), report and recommendation adopted, 2011 WL 941387 (C.D. Cal. Mar. 14, 2011). Indeed, even the trial court remarked that notwithstanding her assurance, Juror 2405 probably could not put her son's experience out of her mind and was likely to think, "there, but for the grace of God, goes my son." [RT 163].

The prosecutor's demeanor during the evidentiary supports his credibility. In particular, the Court found the prosecutor to be a conscientious and earnest witness who attempted to answer questions

designed to finely parse his memory of events that occurred more than a decade earlier as honestly and precisely as possible. Further, in critical respects, his testimony was both internally consistent and consistent with his prior deposition testimony.

The record supports Toro's stated reason for striking Juror 2045. Specifically, Toro moved to excuse Juror 2405 for cause because "her son was accused of a crime and it was a case of mistaken identity." [RT 159]. The fact that Toro argued to the trial court that there was a legitimate basis to challenge Juror 2405 based upon her son's experience constitutes circumstantial evidence that he subsequently struck Juror 2405 based upon her son's experience. See Shirley, 807 F.3d at 1105 n. 14 ("It is ... possible that a transcript itself may contain circumstantial evidence of the actual reasons for peremptory strikes. For example, a prosecutor might have stated, on the record at trial, a reason for striking a particular venire member, such as in the context of an unsuccessful strike for cause.").

Petitioner argues that the record refutes Toro's asserted reason for striking Juror 2405 because Toro did not ask her specific questions about anti-police bias. As discussed, prior to striking Juror 2405, Toro asked her three questions about her son's experience and whether it would affect her. [RT 148-149]. Petitioner, however, points out that Toro asked other prospective jurors questions about potential anti-police bias. [Dkt. 193 at 18-20]. Contrary to petitioner's argument, Toro's questions about anti-police bias posed to other jurors do not suggest that his asserted reason for striking Juror 2405 is pretext because the other jurors are distinguishable from Juror 2405.

Juror 7027: After Juror 7027 reported that his sister had been murdered and that the police had not solved the crime, Toro asked him

six or seven specific questions related to his potential anti-police bias, including whether the juror believed that the police could have done more. [RT 52-53]. Juror 7027's experience of being a close relative of a crime victim generally suggested that he might be a pro-prosecution juror. See Ali v. Hackman, 584 F.3d 1174, 1184 (9th Cir. 2009) (noting that "to the extent that the attempted molestation of her daughter might affect [the juror's] impartiality, any bias ... logically would favor the prosecution, not the defense"), cert. denied, 559 U.S. 1045 (2010). In order to determine if this was so, Toro naturally inquired about Juror 7027's views of the police. Juror 7027's answers suggested that he blamed the police. As petitioner concedes, Toro eventually struck Juror 2072. [Dkt. 193 at 18]. That Toro asked more probing questions of Juror 7027 made sense given the circumstances and it does not diminish the credibility of his otherwise reasonable concern about Juror 2405's potential bias.

Juror 1612. Juror 1612 had responded affirmatively to a general question posed to the venire about whether any prospective juror had had a negative experiences with police officers. [RT 57-58]. After she explained that she lost her job because of a police officer, Toro asked Juror 1612 a total of four questions, including how long ago the event occurred and whether it would affect her ability to be a fair juror. [RT 58]. His questioning of Juror 1612 was not significantly more extensive than his questioning of Juror 2405, and it was primarily in response to a statement volunteered by Juror 1612 that she did not have a good impression of the police. [RT 58].

Juror 7838. Juror 7838 said that he had a 19-year old grandson who had been charged with receiving stolen property and that criminal proceedings against the grandson were in the early stages. [RT 80]. Toro

asked Juror 7838 whether he thought it would be appropriate for his grandson to go to prison if the evidence showed that he committed the crime, and Juror 7838 answered:

> Yeah. To be honest, yes I do. I hope it is not an extensive amount of time, but I do, you know, he was stupid enough to get involved and I just hope it is not as long as he may have to serve.

[RT 82]. Toro then asked some questions about police officers and their motivation in arresting suspects, questions which appeared designed to educate the entire venire. [See RT 82-83]. Perhaps most critically, unlike Juror 2405, Juror 7838 believed that if his grandson was guilty and should be sentenced to prison. This experience is not similar to the experience of a mother whose son is wrongly accused of a crime.

Juror 2942. Toro asked Juror 2942 how she felt about police officers. The juror answered: "So far they represent the law and they are good. Only a few are bad, you know, like the recent, you know, all the scandals, but I believe they are good." [RT 111]. After Juror 2942 said that she had been arrested for traffic violations, Toro asked follow up questions about her views of the police. [RT 111-112]. Juror 2942 clarified that she had not been arrested, but merely received a traffic citation. [RT 111]. The prosecutor did not use a peremptory challenge to strike Juror 2942, but she eventually was excused for hardship reasons. [RT 138-139]. Unlike Juror 2405, Juror 2942's experience with the police was not inherently negative, so the prosecutor reasonably needed to ask further questions before he could assess any potential bias she might harbor.

Juror 5147. Juror 5147, who was a pastor, said that he had contact with the police, and explained that he had made police reports after one

car was broken into and another one was stolen. [RT 157]. Toro asked Juror 5147 a single question: "Did you feel that the police treated you with respect?" [RT 157]. Juror 5147 answered, "Yes." [RT 157].

The voir dire reflects that Toro was concerned about bias against the police and that, when a prospective juror's answers indicated that additional inquiry could be useful, he asked relevant questions. Although Toro did not ask Juror 2405 specific questions about her views of the police, he did ask her questions related to her son's experience with the police – and that is the issue which he later explained concerned him. See Shannon, 2013 WL 4501479, at *13 (distinguishing cases where the prosecutor engages in no meaningful questioning of jurors before excluding them, stating that "[p]rior to striking them, the prosecutor questioned each of the struck jurors about matters related to the reasons she later gave the trial court for her exercise of peremptory challenges").

Further, Toro asked Juror 2405 if her son's experience would affect her ability to be impartial, and she answered that it would not. [RT 149]. It is not improper to disbelieve a prospective juror's assertion that he or she could be fair. See Foster, 136 S.Ct. 1753 ("A prosecutor is entitled to disbelieve a juror's *voir dire* answers, of course."). Toro had a legitimate basis to believe that Juror 2405 would not be favorable to the prosecution and he was not required to delve more deeply into Juror 2405's feelings toward the police in an attempt to confirm or dispel his otherwise reasonable belief.

Petitioner also points out that Juror 2405 had relatives who worked for the fire department, the LAPD, and the sheriff's department, suggesting that she would be a pro-prosecution juror. [Dkt. 193 at 11]. Notwithstanding any purported pro-prosecution characteristics Juror 2405

might have possessed, it is not implausible or illogical to believe that her son's experience of being wrongly accused of a crime might have a detrimental effect on her perception of the prosecution. More importantly, whether or not the prosecutor accurately weighed Juror 2405's potential bias is irrelevant. Whether or not the prosecutor was mistaken in his belief, it is a legitimate reason for his challenge, so long as it is not pretextual. See Mitleider, 391 F.3d at 1049 (explaining that "the prosecutor's belief that Miss B.'s tardiness was a sign of immaturity is a legitimate reason for his challenge, even if mistaken, as long as the reason is not pretextual").

When Toro challenged Juror 2405 for cause because her son was wrongly accused of a crime, defense counsel countered, "[h]e was released." [RT 159]. Toro responded, "But she said it would leave her with an affect. And I would make a motion –." [RT 159]. The trial court interrupted the prosecutor before he finished, stating "I will deny your motion for cause...." [159].

Petitioner argues that Toro mischaracterized Juror 2405's testimony because Juror 2405 had actually said that her son's experience would not affect her, and that his mischaracterization is evidence of discrimination. [Dkt. 193 at 20-21].[4]

Petitioner is correct that Toro's credibility would be suspect if he intentionally offered an explanation for striking Juror 2405 that was contrary to what she said during voir dire. See Aleman v. Uribe, 723 F.3d 976, 982 (9th Cir. 2013) ("A prosecutor's credibility is undermined when he or she offers an explanation for a juror's testimony in a manner completely contrary to the juror's stated beliefs."), cert. denied, 134

[4] The Ninth Circuit also indicated that the prosecutor's misstatement was one of three facts supporting an inference of discrimination. Potts, 588 Fed. Appx. at 620.

S.Ct. 903 (2014). In determining whether a prosecutor's misstatement undermines his credibility, the Court considers "whether, based on the facts of the case, the mistake indicates purposeful discrimination instead of innocent error." Aleman, 723 F.3d at 982; see Mitleider, 391 F.3d at 1049(stating that Batson is not violated by prosecutor's honest, but mistaken belief as long as it is not pretextual).

In both his declaration and during the evidentiary hearing, Toro said that he did not recall making the comment attributed to him and suggested that the transcript may have been inaccurate. [Dkt. 170 at ¶10; Dkt. 186 at 35-36]. Nevertheless, Toro explained that assuming he made the comment, he did not intend to mislead the trial court or opposing counsel, and he simply misspoke. [Dkt. 170 at ¶¶ 9-10; Dkt. 186 at 36-37].[5] The Court finds his testimony credible. Assuming that the transcript is accurate, Toro's honest, unintentional misstatement is not evidence of pretext. See Aleman, 723 F.3d at 982 ("After all, Batson prohibits purposeful discrimination, not honest, unintentional mistakes.") (citing Batson, 476 U.S. at 98).

Petitioner argues that the credibility of Toro's asserted reason for striking Juror 2405 is undermined by Toro's poor memory. [Dkt. 193 at 23-24]. As petitioner correctly points out, Toro testified that he did not remember much about the voir dire in petitioner's case. In particular, he conceded that he did not recall what factors he was looking for in jurors in petitioner's case, he did not recall anything about any of the other five prospective jurors he excluded, he did not

[5] The prosecutor also suggested that there may have been an inaccurate transcription because the use of "affect" is not one he ordinarily makes. [Dkt. 186 at 35]. As petitioner's habeas corpus counsel pointed out, it is possible that the prosecutor said "effect," but the court reporter used an "a" rather than an "e." [Dkt. 186 at 35].

recall any other characteristics of Juror 2405, and that reading the voir dire transcript did not refresh his recollection about his reasons for striking any of the prospective jurors other than Juror 2405. [Dkt. 186 at 21-24].

Notwithstanding petitioner's characterization, however, the prosecutor's admissions do not render his testimony unreliable. It is natural that thirteen years after voir dire, Toro would not recall details about jurors about whom no issue was made but would recall salient facts about the juror who was the focus of a Wheeler motion. See generally, Turner v. Marshall, 121 F.3d 1248, 1251 (9th Cir. 1997) ("we do not fault the prosecutor for her diminished memory six years after jury selection"), cert. denied, 522 U.S. 1152 (1998).

Petitioner argues that Toro's credibility is eroded by "his shifting testimony about what he remembers about Jurors 5147 and 1612," – the two jurors petitioner initially relied upon for comparative juror analysis. [Dkt. 193 at 25-26]. As petitioner points out, during both his deposition and the evidentiary hearing, Toro testified that he was unable to remember anything about these two jurors. [Dkt. 173 at 37-38, 44-45; Dkt. 186 at 42, 44-45, 47-51]. Yet, Toro's declaration contains statements in which he compares Jurors 5147 and 1612 to Juror 2405 and uses language implying that he actually remembered facts about those two jurors and why he chose not to exercise strikes to exclude them. [See Dkt. 170 at ¶ 13 ("I did not believe that Juror 5417's experience of believing he had misidentified someone many years before was the same type of experience that happened to Juror 2405's son, who was the victim of misidentification.") & ¶ 14 ("I thought that Juror 1612's experience in viewing photographs could be useful in explaining or being able to understand the difficulty that my victims had in making

identifications.")].

At the evidentiary hearing, petitioner's habeas corpus counsel cross-examined Toro about the arguably misleading statements in his declaration. Toro explained that prior to signing his declaration, he had reviewed the voir dire transcript with these two jurors in mind because respondent's counsel had brought the issue of comparative juror analysis to his attention. [Dkt. 186 at 38, 41]. The declaration then was prepared in collaboration with respondent's counsel, who provided Toro with "a framework" that included comparing and contrasting Jurors 5147 and 1612 to Juror 2405. [Dkt. 186 at 41, 47-48]. Toro reiterated that he did not actually have any independent recollection of either Juror 5147 or 1612, and explained why his memory with respect to Juror 2405 would be better than his memory of the other jurors: "As I stated, I think a juror that you keep, there's probably nothing that memorable going on there. There is a reason why you exercise peremptories for the most part, more so when it's a – in this case, the Wheeler challenge an being accused of doing it for inappropriate reasons." [Dkt. 186 at 45].

The paragraphs of Toro's declaration discussing Jurors 5147 and 1612 were, at best, sloppily phrased, and at worst, misleading. Without excusing the conduct of either Toro or respondent's counsel, the Court does not believe that those inaccuracies significantly undermine Toro's credibility or the credibility of his asserted reason for striking Juror 2405.

Other than the jurors to whom Toro asked questions about potential anti-police bias, petitioner does not conduct a comparative juror analysis. Petitioner does not contend that any juror who remained on the jury had a negative experience with the police similar to the one Juror 2405 raised during sidebar, and a review of the record does not reveal

any such juror. That is, Juror 2405's experience as a mother of a son who was misidentified as a criminal and detained overnight was significantly different than the experiences of the other jurors whom the prosecutor did not excuse. As the trial court recognized, Juror 2405's recent experience – one she felt compelled to discuss at sidebar, suggesting it was emotionally charged – was one that had the potential to remain in the back of her mind and – perhaps unwittingly – to influence her behavior. Accordingly, there are no other jurors upon which a useful comparative analysis can be performed.[6] See Murray v. Schriro, 745 F.3d 984, 1008 (9th Cir. 2014) (finding that the prospective jurors the petitioner compared to the juror excused by the prosecutor were not similarly situated to the juror excused by the prosecutor, so comparative analysis was not probative of pretext).

Statistical evidence can be relevant to a Batson inquiry. Indeed, the Ninth Circuit noted that the prosecutor's striking the sole African-American prospective juror was one of the three facts that made out a prima facie showing in petitioner's case. Potts, 588 Fed. Appx. at 620.

In light of the fact there was only one African-American in the venire who was not excused for cause, the probative value of the statistics in this case is minimal. See United States v. Collins, 551 F.3d 914, 921 (9th Cir. 2009) ("The lack of other African-Americans in the jury pool renders mathematical trends and patterns meaningless."); Wade v. Terhune, 202 F.3d 1190, 1198 (9th Cir. 2000) (stating that the

[6] The comparative juror analysis the Court performed when this case was originally decided addressed petitioner's argument that the prosecutor failed to strike two jurors whom petitioner contended had expressed opinions regarding cross-racial identification similar to Juror 2405. In light of the evidence developed on remand, however, it is now clear that the prosecutor did not strike Juror 2405 because he believed she was troubled by cross-racial identification. Thus, comparing her to other jurors who made comments about identification is no longer warranted.

statistical significance of small samples is "limited"); Chavez v. Terhune, 2010 WL 2854426, at *5 (C.D. Cal. June 25, 2010) (same), report and recommendation adopted, (C.D. Cal. July 20, 2010). Furthermore, considering the totality of the circumstances discussed above, the fact that Toro struck the only African-American on the panel is insufficient to justify a finding of discrimination.

Conclusion

The Court is mindful that the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." Foster, 136 S.Ct. at 1747. Nevertheless, after a careful review of the record, including all of the evidence presented in this case, the Court finds that the race-neutral reason the prosecutor provided for striking Juror 2405 is credible. Because petitioner has not demonstrated that "race was a substantial motivating factor" in the prosecutor's use of the peremptory strike, see Currie, 825 F.3d at 606, he is not entitled to relief. See Gholston v. Barnes, 2015 WL 10124299, at *15-16 (C.D. Cal. July 31, 2015)(finding that the petitioner had failed to show that the prosecutor's race-neutral reasons for excluding jurors were pretext, noting that the jurors or their family members had a direct negative encounter with law enforcement and stating that the court "need not strain to see the potential bias inhering in such a situation") (quoting Murray, 745 F.3d at 1008), report and recommendation adopted, 2016 WL 633852 (C.D. Cal. Feb. 16, 2016).

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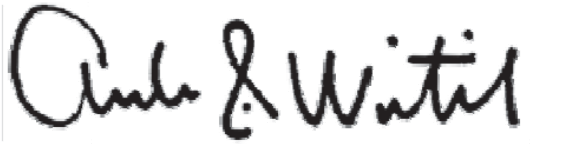
For the foregoing reasons, it is recommended that the petition for a writ of habeas corpus be denied.

Dated: May 11, 2017



Andrew J. Wistrich
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DEWOYNE CURTIS POTTS,	**Case No. CV 07-1312-PSG(AJW)**
Petitioner,	
v.	**[PROPOSED] JUDGMENT**
JOHN GARZA, Warden,	
Respondent.	

It is hereby adjudged that the petition for a writ of habeas corpus is denied.

Dated:_____

_____
Philip S. Gutierrez
United States District Judge

S131041

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DEWYONE CURTIS POTTS on Habeas Corpus

Petition for writ of habeas corpus is DENIED.

Chin, J., was absent and did not participate.

SUPREME COURT
FILED
FEB - 8 2006
Frederick K. Ohlrich Clerk
DEPUTY

Chief Justice

Ex. K-0270

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COURT OF APPEAL - SECOND DIST.
FILED
DEC 30 2004
JOSEPH A. LANE Clerk
C. HON Deputy Clerk

In re

DEWYONE CURTIS POTTS

on Habeas Corpus.

B180040

(Super. Ct. No. LA039756)

(Darlene E. Schempp, Judge)

ORDER

THE COURT*:

We have read and considered the petition for writ of habeas corpus filed on December 23, 2004.

The petition is denied.

*COOPER, P.J. RUBIN, J. BOLAND, J.

Ex. I-0212

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 09/14/04

CASE NO. LA039756

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: DEWYONE CURTIS POTTS

COUNT 02: 211 PC FEL - ROBBERY.

COUNT 03: 211 PC FEL - ROBBERY.
COUNT 04: 211 PC FEL - ROBBERY.
COUNT 05: 240 PC MISD - ASSAULT.
COUNT 06: 245(A)(2) PC FEL - ASSAULT WITH FIREARM ON PERSON.

ON 09/14/04 AT 400 PM IN DEPT NWS

CASE CALLED FOR HABEAS CORPUS PETITION

PARTIES: DARLENE E. SCHEMPP (JUDGE) GLENN COVEY (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

THE COURT HAS READ AND CONSIDERED THE DEFENDANT'S PETITON FOR WRIT OF HABEAS CORPUS AND NOW MAKES THE FOLLOWING ORDER:

DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS IS DENIED.
DEFENDANT'S OFFER OF DECLARATION OF A DEFENSE WITNESS UNTIMELY.

ALL ISSUES RAISED COULD OR WERE RAISED ON APPEAL. CASE AFFIRMED ON APPEAL.
A COPY OF THIS ORDER IS SENT VIA U.S. MAIL AS FOLLOWS:

DEWYONE CURTIS POTTS,
CDC # T-75473 B-1-236U
CALIPATRIA STATE PRISON
7018 BLAIR ROAD
P.O. BOX 5002
CALIPATRIA, CA 92233-5002

COURT ORDERS AND FINDINGS:

-PETITIONS FOR WRIT OF HABEAS CORPUS IS DENIED.

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

Ex. H-0182

2004 WL 616311
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Second District,
Division 8.

The PEOPLE, Plaintiff and Respondent,
v.
Dewyone Curtis POTTS and Demond Willie Potts, Defendants and Appellants.

No. B163396.
|
(Los Angeles County Super. Ct. No. LA039756).
|
March 30, 2004.

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene E. Schempp, Judge. Affirmed.

Attorneys and Law Firms

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Defendant and Appellant Dewyone Curtis Potts.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant Demond Willie Potts.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and April S. Rylaarsdam, Deputy Attorneys General, for Plaintiff and Respondent.

Opinion

RUBIN, J.

***1** Defendants and appellants Dewyone Curtis Potts (Dewyone) and Desmond Willie Potts (Desmond) [1] appeal from the judgment entered following a jury trial that resulted in each of them being convicted of three counts of second degree robbery, misdemeanor assault, and assault with a firearm. [2] Both contend the prosecutor committed *Wheeler* error. In addition, Desmond contends that a pre-trial identification procedure was unduly suggestive. After review, we affirm the judgment.

1 Because the defendants and several witnesses have the same last names, we refer to them by their first names.

2 Defendants were jointly charged by information with first degree robberies of Emmett Richardson (Emmett), Rick Barlowe (Rick) and Lorena Martinez (Lorena) (Pen.Code, § 211) (counts 2, 3 and 4) (all further undesignated section references are to the Penal Code); assault upon Emmett (§ 245) (count 5); and assault with a firearm upon Emmett, Rick, and Lorena (§ 245, subd. (a)(2)) (count 6).

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that defendants Dewyone and Demond are brothers. Several years before the date of the charged offenses, Dewyone dated Courtney Richardson (Courtney), daughter of Emmett. Emmett operated a company known as Tour Accessories with his brother, Gordon Richardson, and Rick. Tour Accessories obtained licenses from performers and sold t-shirts, hats and posters at concerts. Lorena worked as the receptionist at the Tour Accessories office in Los Angeles.

Over the weekend of July 21 and 22, 2001, Emmett, with Courtney as his assistant, sold Tour Accessories merchandise at several concerts, resulting in gross sales of about $220,000 in cash. Courtney was present when Emmett paid some, but not all of the vendors. After paying all of the vendors, the weekend's net proceeds were $140,000 in cash, which Emmett brought to the Tour Accessories office on Monday morning, July 23, 2001.

That morning, Gordon had not yet arrived and Emmett and Rick were in a back office preparing the cash for deposit when Lorena, who was at her desk, saw two Black men outside the front window. Both men came into the office, pointed guns at Lorena and instructed her to be quiet. One of the men, whom Lorena later identified as Dewyone, told Lorena to stand up and grabbed her by the elbow. Dewyone and the

other man, whom Emmett later identified as Demond, brought Lorena into the office where Emmett and Rick were working. Demond pointed his gun in Emmett's face while Dewyone pointed his gun at Rick's head. At Dewyone's direction, Rick got down on the ground. Demond yelled at Emmett to get down but before Emmett could comply, Demond hit him on the side of the head, knocking him out of his chair. Demond kicked Emmett in the head and ribs.

Emmett, Rich, and Lorena were all on the floor when one of the two robbers said, "Where's the money? Where the fuck is the money. They said there would be a lot of money here." Although Rick directed the robbers to the $140,000, they seemed dissatisfied with that amount and repeatedly demanded the "rest of the money." In addition to the $140,000 in cash belonging to Tour Accessories, the robbers took Emmett's pager, cell phone, and wallet containing credit cards and $6,000 in cash; as well as Rick's cell phone and jewelry; and Lorena's car keys. Several days later, a distinctive plaque was discovered missing. Before leaving, Desmond and Dewyone tied the three victims up with duct tape and disabled the telephone. Eventually, Emmett broke loose from his restraints and untied Rick and Lorena. The police were called.

***2** Rick identified Dewyone as one of the two robbers from a photographic lineup (six-pack) shown to him by the police, and at a subsequent physical lineup. Lorena was unable to identify Dewyone from any six-pack, but did so at the physical lineup. Rick and Lorena never saw the second robber well enough to identify him. Emmett initially failed to identify defendant from a six-pack, but did so at trial as we explain more fully below.

In January 2002, police found the missing plaque on a wall in the home of Demond's mother, where Demond lived several days a week. In a car parked in front of the house, police found a photograph of Demond and his cousin, Vale, covered in money and sitting on a couch. The car in which the photograph was found had been given to defendants' sister, Evangeline Ziegler, by her boss. The car was originally registered in Demond's name, but had been transferred to Ziegler sometime in 2001. Defendants' mother, Rosalyn Potts, testified that she saw the photograph of Demond and Vale in Evangeline's car for the first time in approximately October 2001. Rosalyn had never seen Demond with the kind of money seen in the photograph.

At the home of Everrett Gray, an old friend of Demond's and Dewyone's older brothers, police found some of the property taken from Emmett in the robbery. Gray testified that Demond had told him that Emmett's ex-wife and daughter provided him with the information necessary to carry out the robberies.

At trial, the defense presented evidence that both Demond and Dewyone were elsewhere at the time the robberies occurred. [3]

3 Various gun use enhancements were also alleged as to counts 2, 3 and 4. (§§ 12022.5, subd. (a)(1); 12022.53, subd. (b).) Following a jury trial, they were convicted of three counts of second degree robbery with true findings on the gun use allegations, simple assault upon Emmett, and assault with a firearm upon Emmett, Rick, and Lorena. Defendants were each sentenced to a total of 23 years, 8 months in prison.

Defendants filed timely notices of appeal.

DISCUSSION

Wheeler Motion

Dewyone contends he was denied due process as a result of the prosecutor's use of a peremptory challenge to exclude an African-American woman from the jury in violation of his right to be tried by a jury drawn from a representative cross-section of the community. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*).) He argues that juror No. 2405 was the only African-American left on the prospective jury panel when the prosecutor peremptorily challenged that juror. Demond joins in this contention. We are unpersuaded.

It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions. (*Wheeler, supra,* 22 Cal.3d at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*).) Under *Wheeler* and *Batson,* " ' "[i]f a party believes his opponent is using the peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group

within the meaning of the representative cross-section rule. Third, from all the circumstance of the case he must show a *strong likelihood* that such persons are being challenged because of their group association." ' [Citations.]" (*People v. Turner* (1994) 8 Cal.4th 137, 164-165 (*Turner*), original italics.) This "strong likelihood" standard is the same as the "reasonable inference" standard announced in *Batson.* (*People v. Johnson* (2003) 30 Cal.4th 1302, 1312-1313 (*Johnson*); *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7 (*Box*).) "[T]o state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*Johnson, supra,* at p. 1318.) It is insufficient to show merely that all of the challenged prospective jurors are from a cognizable group and indicated during voir dire that they could be fair and impartial. (*Turner, supra,* at pp. 167-168; *Box, supra,* at pp. 1188-1189 [insufficient to show only that excused jurors, like the defendant, were Black].)

***3** " 'When a *Wheeler* motion is made, the party opposing the motion should be given an opportunity to respond to the motion, i.e., to argue that no prima facie case has been made. At this point no explanation for the exercise of the peremptory challenges need be given. After argument, the trial court should expressly rule on whether a prima facie showing has been made.' [Citation.]" (*Turner, supra,* 8 Cal.4th at p. 167.) Because a ruling that no prima facie case of purposeful discrimination has been made calls upon the trial judge's personal observations, such rulings are reviewed with considerable deference. Deference, however, does not imply abandonment or abdication of judicial review. "Accordingly, we review the entire record for evidence supporting the trial court's ruling. But if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors, we affirm that ruling. [Citation.]" (*Johnson, supra,* 30 Cal.4th at p. 1324; see also *Box, supra,* 23 Cal.4th at p. 1188.)

Only if the trial court finds that the defendant has established a prima facie case does the burden shift to the prosecution to "provide 'a race-neutral explanation related to the particular case to be tried' for the peremptory challenge. [Citations.] However, the explanation need not be sufficient to justify a challenge for cause. [Citations.] Jurors may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias. [Citation.] [¶] There is a presumption that a prosecutor uses his or her peremptory challenges in a constitutional manner. [Citation.] We give great deference to the trial court in distinguishing bona fide reasons from sham excuses. [Citations.]" (*Turner, supra,* 8 Cal.4th at p. 165; *People v. Crittenden* (1994) 9 Cal.4th 83, 117 ["Because the resolution of a *Wheeler* motion is highly dependent upon the judge's personal observations of the attorneys and the prospective jurors, we approach the court's ruling with ' "considerable deference." ' "].)

Here, voir dire established that juror No. 2405 was a resident of the San Fernando Valley, married to an engineer, with two teenage sons. She worked both as a flight attendant and a college professor teaching child growth and development. She had no prior jury experience. Although she had relatives in the fire department, the Sheriff's Department and the Los Angeles Police Department, juror No. 2405 would judge all witnesses by the same standards. About a year prior to trial, juror No. 2405's son was detained and held overnight after a white woman in the mall identified him as a suspect in an unnamed crime. Juror No. 2405 did not know whether the incident was a result of racial profiling. In any case, juror No. 2405 felt that nothing about the incident would make it difficult for her to sit as a juror on this case. Juror No. 2405 believed herself capable of being completely unbiased.

***4** After the prosecutor exercised a peremptory challenge as to juror No. 2405, counsel for Dewyone's counsel made a *Wheeler* motion, stating: "[T]he lady appears from her makeup to be an Afro-American woman. There has only been two African-Americans on the panel. The other was juror 9350 which the court granted a cause challenge for. [¶] The juror that was just excused by the People told us here at sidebar that her son was picked up and was found out to be a case of mistaken identity. He was released the next morning. [¶] She also informed us during voir dire from Your Honor's question that she has police relatives. And asked about that would affect her she said it would not. [¶] I don't feel, Your Honor, that there is any justifiable grounds for excusing this particular juror number 2405. The mere fact her son was picked up on mistaken identity with police relatives and all that and being a teacher, I would make a *Wheeler* challenge at this time." Counsel for Demond joined in the *Wheeler* motion.

Observing that the case hinged primarily on witness identification, the trial court found defendants had failed to make the requisite prima facie showing. The trial court reasoned: "I think the fact this happened to her son and so

recent it's going to be a thought in the back of her mind that there but for the grace of God goes my son. The same thing happened to him. [¶] And I feel that even though she was very honest and candid, I think she would try, but I do not feel that she could put that out of her mind. [¶] So I am not going to ask the People to-you have not stated a prima facie ... case for a *Wheeler.*"

We agree with the trial court. Defendants failed to meet their burden of showing a *strong likelihood* that juror No. 2405 was challenged because she was African-American. (*Turner, supra,* 8 Cal.4th at pp. 164-165.) On the contrary, the prosecutor could reasonably conclude that juror No. 2405 would be unduly influenced by the recent experience of her son.

That other jurors also described experiences related to misidentification, or professed a belief that misidentification was a possibility, but were not excused, does not compel a different result. In *Johnson,* the court observed: "[E]ngaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie." (30 Cal.4th at p. 1318, original italics.) This is true for both stages of the *Wheeler* analysis: whether a prima facie case of discrimination has been established and, if so, whether the party's reasons for excusing the jurors pass constitutional muster. (*Id.* at p. 1319.) Here, such a comparative analysis was not made by defense counsel as part of its efforts to make a prima facie case and was not done by the trial court in analyzing whether a prima facie case had been made. Accordingly, it is inappropriate to do so for the first time here.

The In-Court Identification Was Not Tainted By an Unduly Suggestive Out-of-Court Identification

***5** Demond contends the judgment must be reversed because Emmett's in-court identification of defendant was the product of an unduly suggestive pre-trial identification procedure. He argues that Emmett was only able to identify Demond from a photo lineup after he was shown a highly suggestive photograph of defendant and another man "sitting on a couch, covered in a large amount of cash." We are unpersuaded.

"An identification may be so unreliable that it violates a defendant's right to due process under the Fourteenth Amendment. [Citations.]" (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 37 (*Nguyen*).) In determining whether an identification violates a defendant's due process rights, " '... the court must ascertain (1) "whether the identification procedure was unduly suggestive and unnecessary," and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances....' [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 366-367.) In considering the totality of the circumstances, the court examines, " 'the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, [and] the level of certainty demonstrated at the confrontation....' [Citations.]" (*Nguyen, supra,* at p. 37.)

It is well settled that initial identification by photograph is constitutionally permissible. (*People v. Bethea* (1971) 18 Cal.App.3d 930, 937.) A conviction based on eyewitness identification at trial following a pretrial identification by photograph will be set aside " '... only if the photographic identification procedure was so impermissibly suggestive as to give rise to a *very substantial likelihood of irreparable misidentification.*' " (*Id.* at pp. 937 938, italics added.) Only after the defendant makes such a showing does the burden shift to the People to show that the procedure was not unduly influential. "Whether an identification procedure is suggestive depends upon the procedure used as well as the circumstances in which the identification takes place." (*Nguyen, supra,* 23 Cal.App.4th at p. 38.) Generally, a pretrial identification procedure is deemed unfair only if it suggests the identity of the person suspected by the police before the witness has made an identification. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) In *In re Carlos M* . (1990) 220 Cal.App.3d 372, the court held that a one-person showup, during which the defendant was handcuffed, was not unduly suggestive where the record was "devoid of any indication that police told the victim anything to suggest the people she would be viewing were in fact her attackers." (*Id.* at p. 386.)

A witness's failure to identify the defendant even after being exposed to an allegedly unduly suggestive identification procedure tends to show that the procedure was not, in fact, unduly suggestive. (See, e.g., *People v. Hernandez* (1988) 204 Cal.App.3d 639, 652 [that pretrial identification

procedure was not unduly suggestive demonstrated by fact that witness could only tentatively identify the defendant from a photographic lineup, even after being shown a single picture of the defendant].)

***6** " 'It is unsettled whether suggestiveness is a question of fact (or a predominantly factual mixed question) and, as such, subject to deferential review on appeal, or a question of law (or a predominantly legal mixed question) and, as such, subject to review de novo. [Citations.]' [Citations.] Factual determinations by the trial court will be upheld on appeal if supported by substantial evidence. [Citations.]" (*Nguyen, supra,* 23 Cal.App.4th at p. 38.) Here, under either standard, we find the procedure used was not unduly suggestive.

The record before the trial court at the time it denied Demond's motion to exclude the identification established that, when interviewed by police immediately after the robbery, Emmett described the only assailant he was able to see as a Black male between the ages of 26 and 30, between six feet and six-foot-two, weighing about 200 pounds, with a mustache and goatee. Emmett told the police that he could identify his assailant. The next day, Emmett and Lorena met with a police composite artist, resulting in one composite drawing of a suspect.[4] On November 5, 2001, Emmett was shown a six-pack identified as six-pack A. Six-pack A did not include a photograph of Demond or Dewyone. On the admonition form of six-pack A Emmett wrote: "I am not 100% positive, but the eyes of # 1 look the most like the man that put a gun in my face on 7-22-01."

4 Emmett and Lorena were each able to describe one of the two assailants, but not the same one. The sketch artist, however, produced just one composite drawing.

On December 20, 2001, Emmett was shown two more six-packs: six-pack B included Dewyone's photograph in position No. 3 and six-pack E included Demond's photograph in position No. 4. Emmett did not identify Demond on six-pack E as his assailant, but identified the person in position No. 5 on six-pack B as "a possibility. I only saw the eyes nose and mouth and they look 50 percent like the guy that put a gun in my face."[5]

5 At trial, Emmett was able to identify Demond in position No. 4 of six-pack E as his assailant. Emmett explained that he was initially unable to identify Demond from six-pack E because he had only been able to see his assailant's eyes, nose, and mouth, and the photograph was dark. When he saw Demond in court, however, he recognized Demond's eyes.

On January 29, 2002, the police showed Emmett the photograph of defendant and his cousin Vale sitting on a couch, covered with money, which they had found in Evangeline's car. From that photograph, Emmett identified Demond as his assailant. The police then showed Emmett Exhibit E again. On the acknowledgment of admonition card Emmett wrote: "Upon viewing an additional photograph of the person in # 4, I immediately recognize him as the person who put a gun in my face."

At a physical lineup on March 13, 2002, Demond was placed in position No. 1 of lineup No. 5.[6] Emmett was unable to identify anyone with any certainty from physical lineup No. 5. Regarding the person in position No. 3 of physical lineup No. 5, however, Emmett stated: "Number 3 looks a lot like the man that put a gun in my face, but I am not a hundred percent sure." At the preliminary hearing, Emmett identified Demond as the man who robbed and assaulted him on July 23, 2001.[7]

6 Emmett viewed several live lineups that day, including lineup No. 6. Dewyone was placed in position No. 5 of lineup No. 6. Emmett was unable to identify anyone from live lineup No. 6.

7 At trial, Emmett was able to identify Demond from a photograph of lineup No. 5. Emmett explained that he was unable to identify Demond at the physical lineup because, while his assailant's hair was concealed under a hooded sweatshirt, Demond's hair was visible and it distracted Emmett from focusing on his facial features.

At trial, Demond moved to suppress Emmett's January 29, 2002, identification of Demond from the photographic lineup, as well as any subsequent in-court identification, on the grounds that the January 29 identification was made only after Emmett viewed the unduly suggestive photograph of Demond and Vale. The trial court denied the motion. On its own motion, however, the trial court suppressed the photograph of Demond and Vale and precluded the prosecutor from eliciting evidence of Emmett's identification of Demond from the six-pack shown to him after he was shown the photograph of Demond and Vale. The prosecutor was not precluded from obtaining Emmett's in-court identification of Demond. Counsel for Demond agreed to that procedure.

***7** At trial, Emmett identified Demond as his assailant. He was extensively examined about his ability to observe Demond during the incident, as well as his failure to identify Demond from the six-pack and the live lineup. Emmett testified that he was absolutely certain of his identification of Demond as his assailant.

After both sides rested, the trial court denied Demond's renewed motion to suppress Emmett's in-court identification. The trial court reasoned that, although the photograph of Demond and Vale was suggestive, enough time had lapsed between Emmett's viewing of the photograph and his identification of Demond at the preliminary hearing, that any taint from the photograph was dissipated.

We agree with the trial court. Under these circumstances, we cannot say that Emmett's in-court identification of Demond was a result of an unduly suggestive out-of-court identification arising from Emmett's viewing of the photograph of Demond and Vale. On the contrary, the strong inference is that Emmett, who was unable to identify Demond in the physical lineup even after he had seen the photograph of Demond and Vale, was not influenced by the photograph in selecting Demond either from the six-pack, the preliminary hearing, or at trial. Thus, pre-trial identification was not made under circumstances so unduly suggestive as to create a substantial likelihood of misidentification. Because the pretrial identification procedure was not unduly suggestive, Emmett's in-court identification was not tainted and is not subject to attack.

DISPOSITION

The judgment is affirmed.

We concur: COOPER, P.J., and BOLAND, J.

All Citations

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