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Opinion on remand from United States Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DON EVERETT ALLEN, Defendant and Appellant.	A101086 (Solano County Super. Ct. No. FCR 193532)

Our previous judgment affirming appellant's conviction has been vacated and the case remanded to us by the United States Supreme Court for further consideration in light of *Johnson v. California* (2005) 545 U.S. ___ [125 S.Ct. 2410] (*Johnson*). Upon reconsideration we are persuaded that the trial court applied the wrong standard in determining whether there had been a prima facie showing of bias in the selection of the jury. We remand the case to permit the trial court to inquire into the prosecutor's reasons for removing a disproportionate number of minority jurors from the panel.

BACKGROUND

Appellant was convicted of the bungled robbery of a Vacaville bar where he had recently been employed. The robbery was thwarted when, after demanding money and brandishing a pistol, he was recognized through his disguise by his former coworkers. A jury found him guilty of attempted second degree robbery (Pen. Code, §§ 211, 664) and found the enhancing allegations of personal firearm use to be true. He was sentenced to a mitigated term of 16 months for the robbery attempt, plus 10 years for the more serious

firearm enhancement (Pen. Code, § 12022.53, subd. (b)), and another enhancement was stayed (Pen. Code, § 12022.5, subd. (a)(1)).

On appeal he claimed there had been reversible error in jury selection under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).[1] Our previous opinion in *People v. Allen* (May 25, 2004, A101086 [nonpub. opn.]) stated that we were compelled to reject appellant's argument because our state high court had conceived the proposition that under: "*Wheeler*'s terms, a 'strong likelihood' and a 'reasonable inference,' refer to the same test and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to 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." Accordingly, we could only remark that "until and unless the federal high court rules otherwise, we are bound by our state high court['s holding]. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)"

In *Johnson* the United States Supreme Court concluded that the California Supreme Court's combination of a presumption of proper exercise of peremptory challenges with a need to overcome that presumption by a more-likely-than-not standard, contravened the rule of *Batson.* The United States Supreme Court's mandate and judgment were transmitted to us on July 22, 2005.

We begin our review with the facts described in our prior opinion:

The bar was in the Starz Bowling Alley (Starz), and the offense occurred in the early hours of August 11, 2001 (further unspecified dates are in that year). The four victims were bartenders appellant had worked with until being fired some days earlier. Victims Richard Malgieri and Kenneth Neubert testified, giving fairly consistent accounts: Appellant had been drinking in the bar earlier. Malgieri had first seen him around 9:00 or 10:00 p.m. and served him a shot of tequila around 2:00 a.m. Nuebert had

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[1] We are not similarly persuaded to retreat from our rejection of appellant's second contention that he had been denied due process by the trial court's exclusion of "suicide by cop" evidence offered to corroborate a state-of-mind defense to robbery.

seen him there since 7:00 p.m. and had served him a Long Island Iced Tea, which, as explained by Malgieri, contained about two and a half ounces of liquor. Malgieri had seen appellant drunk on the job before, as well as high on methamphetamine, but appellant did not seem drunk or high that night. Appellant hung around for awhile after the bar closed, and then apparently left.

Around 4:00 a.m., the bartenders had finished cleaning up and were sitting around one end of the bar "B.S.ing about the night" with the lights down, having "dropped" their "banks" (cash register contents) in the safe and split up their tips. Malgieri thought they were alone until he heard somebody say, "This is a stick-up." About 15 feet away stood a man with a revolver in his hand pointed in their direction, disguised in a chef's outfit and wearing something over his head with eye holes torn in it. He tossed a bag to the floor and, motioning with the gun, said, "Put the money in the bag." No one knew what to do; and Malgieri had his hands up. Then one of the bartenders said, "Don, is that you?" And it gradually dawned on them that the man with the gun was appellant.

Once recognized, appellant lowered the gun and said, in a tone of resignation, "Uh, the heck with this," or "What the hell, I don't know what I'm doing." He had been very calm, but now slammed the gun down on the bar and unloaded it, leaving the bullets on the bar (which Nuebert swept to the floor). He set the gun down on the floor and began taking off his disguise. As he did so, Malgieri took the gun, unnoticed by appellant, and put it on a cabinet behind the bar. With the "banks" already dropped in a locked safe, the only money remaining out of the safe was the bartenders' tips (about $187 each), and as appellant doffed his hood, he shook his head saying, "I don't want your tips. I want the banks."

Malgieri implored him, "Don nobody has to know about this. Just get the hell out of here." Appellant said he wanted his gun back, but Malgieri refused. Appellant then stormed around the room, irate, and took a swig from a wine bottle behind the bar before leaving the bar. Malgieri secured the door, but appellant returned a couple of minutes later, knocking on the door to demand his gun. When Malgieri told him he was not going to give up the gun, appellant yelled through the door that he had "another gun" or "a

shotgun" in the car. He did not produce another firearm but started kicking at the door, whereupon Malgieri yelled to the other guys to call 911. Appellant took off running.

While testifying that the robbery attempt was frightening and felt absolutely real, Malgieri at first wondered whether it might be some kind of joke, because it was so completely out of character for appellant. There was some controversy at trial as to why appellant would not have known that the "banks" (perhaps $4,000) had already been dropped in the safe by 4:00 a.m. Testimony from Nuebert showed, however, that the closing procedure had changed, since appellant last worked there, so that the banks were dropped early.

Appellant was arrested on August 18, and Vacaville Police Detective Joseph McElligott interviewed him. Asked why he went into the bar with a gun, appellant said it was "[f]or the purpose of committing a robbery" and that he had lost his job there two weeks earlier and "needed money to pay for rent and additional methamphetamine." He said he wore "a hooded sweatshirt with the drawstring on the hood drawn tight" and that he had drunk "six Long Island Iced Teas."

Appellant stated that he had two daughters by ex-wife Stacey Nelson, and a young son by another woman. He had been separated from Nelson since 1996 or 1997, and was divorced due to his drinking. Until August 7, just days before the incident, he had remained living in Fairfield in what had been the family home during his marriage. Now aged 34 years, appellant had been drinking since age 15 or 16, and had acquired an addiction to methamphetamine since he resumed tending bar in the Vallejo area after a four-year stint as a patient-transport worker at Berkeley's Alta Bates Medical Center that ended when he pulled a muscle.

He got work at Starz with the help of Charlie Lonergan, his longtime neighbor, but had begun showing up late because of his methamphetamine habit. He was evicted from his home as of August 7, a month after the electricity and water had been shut off, thus bringing an end to visits with his daughters. Near the same time, he was fired from Starz. Rather than go live with his parents, he had opted to live out of his truck, working at Starzs for a brief time. He owned two guns—an inoperative 12-gauge shotgun that was

in storage and a .357 magnum revolver that he kept in the truck. The closing practice as of the time he ceased working at Starz, he said, was for bartenders to take their "banks" from the drawers, "drop 'em first thing" (always by 3:00 or 4:00 o'clock in the morning), clean up and then sit around and "B.S." for a while. He drank everyday preceding the incident.

Appellant said he drank heavily at Starz on August 10 through 11 and used methamphetamine (in toilet stalls and his truck) until closing, and then stayed after closing time. As he sat watching the employees clean up like he used to do, he "felt invisible," friendless and "pretty alone." The next thing he knew he was standing there with his .357 in his hand, in disguise. He didn't recall putting on the disguise or retrieving the gun from his truck. He remembered that when somebody called out his name, he emptied the bullets from the gun onto the counter, put the gun down on the floor, backed up and took off his disguise.

Appellant said that "Richie" (Malgieri) told him to "get the F out of here," adding: " 'Just go home, Don. Call me in the morning. I'm not going to call the police. Just leave.' " Appellant remembered grabbing a bottle of wine from behind the bar, drinking from it and saying: " 'I'm not here to rob or hurt anybody, I just want to see my daughters. My life is ruined.' " He said that he "just wanted to die" and kept saying "Why me[?]" He didn't remember putting a bag on the counter, saying it was a stick-up, telling anyone to put money in the bag, becoming irate, or anyone telling him the money was already in the vault.

He remembered leaving the bar when someone called 911. He also remembered coming back to ask for his gun (which was a gift from his dad) and saying, when Richie refused to return the revolver, that he had a shotgun "anyways" in his truck. He said this (although the shotgun was in storage) "in hopes that he would give it back to me, but in hopes that the police would consider me armed and shoot me when they found me."

Appellant later said, for the first time, that he had spoken to a Vacaville police detective about turning himself in. He was scared and talked to "other dope-fiend people" around him. He was "caught" and arrested a week later. He stated that the

comments he made to Detective McElligott about getting his gun in order to rob the place, getting disguised and needing money for drugs were "lies." Although he was not working, and had been living on about $100 from his last check at Starz and was using $100 worth of methamphetamine a day, he said he needed no money because he lived in his truck, got drugs free from a dealer he knew, and got his drinks free from Starz bartenders. Testifying at first that he had never been arrested before, he backtracked, conceding a prior arrest for domestic violence and three arrests for driving under the influence. He had no felony priors.

Clinical Psychologist Carlton Purviance, retained by the defense to evaluate appellant, had read some reports and examined appellant in jail for one hour. Purviance was not a medical doctor and relied solely on appellant's own accounts of his substance abuse that night and previously (including appellant's statements in police reports). Purviance consulted no others. He concluded that appellant had alcohol and methamphetamine dependence disorders (addictions) plus a "very severe depressive disorder," "sometimes to a suicidal degree." Based on appellant's claimed poor recall and account of having consumed four drinks that night, each containing five to six ounces of 80-proof distilled spirits (and hence a total of 20 to 24 ounces), Purviance opined that appellant "was in a spotty blackout" that night, induced by alcohol.

Purviance conceded that such things as appellant's use of disguise, post-arrest statements, commands to the victims, apparent desire to take only the bar's money (and not the tips), and his flight upon someone calling 911, etc., were consistent with an intent to rob and to avoid getting caught. Purviance conceded that his assessment of appellant's intoxication would be altered if he knew that each of the self-reported drinks contained less alcohol (totaling about one ounce per hour over a 10-hour period). He felt, however, that the facts were also consistent with a "very suicidal" person "wanting very much to be controlled, certainly stopped, arrested, maybe even shot." He said, "I think there were other issues in the picture influencing this man other than his attempt to rob," and he found it significant that appellant "was so easily dissuaded from his parent mission" and had not recalled, for example, also drinking a shot of tequila.

Character witness Charlie Lonergan, appellant's neighbor for five years at the duplex and the coworker who got him the job at Starz, considered him to be truthful, honest and not violent, and considered the charged incident to be out of character. Drugs and alcohol had made him withdrawn and less outgoing, changing his personality and making him unpleasant to be around. Lonergan saw him drinking at Starz that evening and, before leaving near 3:00 a.m., offered him a ride home because "he looked pretty wasted."

Longtime friend Sheldon Winkfield, who had helped appellant get his Alta Bates job, similarly knew him to be truthful and nonviolent and testified that the charged behavior was out of character. He had not seen appellant often in recent years and was unaware of any drug problem, but knew of appellant's drinking problem. He knew nothing about the August 11 incident. Although appellant had changed, Winkfield testified that he would trust appellant to watch his own kids (provided he wasn't drinking or using drugs).

Wayne Sandoe, appellant's former father-in-law, believed him to be honest and had never seen him behave violently. Sandoe and his wife had lived abroad and out-of-state, however, for all but six to eight months of appellant's marriage to their daughter. They were not close, and he "hadn't seen him really since '98." Sandoe also felt the charged incident was "out of character."

Defense counsel argued lack of specific intent to rob due to intoxication (CALJIC No. 4.21) and an overall depressed and suicidal mental state. The jury deliberated for three to four hours on a Friday and, at day's end, expressed some impasse but also the need for further deliberation on the effect of the drugs and alcohol. On Monday, after the weekend recess, they returned verdicts after only one hour of further deliberations.

DISCUSSION

During jury selection, as the prosecutor used his third and sixth peremptory challenges against African-American prospective Juror Nos. 12 and 1, defense counsel raised objections based on *Batson, supra,* 476 U.S. 79, and the court both times

responded, "Overruled," explaining later, outside the jury's presence, that no prima facie case had been shown.

The United States Supreme Court opinion in *Johnson* reviewed a similar record. In that case, after the prosecutor exercised the second of three peremptory challenges against prospective Black jurors, defense counsel objected on the ground that the challenge was improperly based on race under both the California and United States Constitutions. Defense counsel alleged that the prosecutor had no apparent reason to challenge the prospective juror other than racial identity. As in the case at bar, the trial judge did not ask the prosecutor to explain the rationale for his strikes (although in this case the prosecutor did volunteer comments as to one stricken juror). Instead, the judge summarily found that petitioner had failed to establish a prima facie case under *Wheeler, supra,* 22 Cal.3d 258, because there had not been shown a "strong likelihood" that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The objection was renewed after the third prospective Black juror was excused; but the trial judge again found that no prima facie case had been made.

A differently constituted panel of this court set aside the conviction. (*People v. Johnson* (Apr. 5, 2001, A085450) review granted Jul. 18, 2001, S097600.) The majority ruled that the trial judge had erred by requiring petitioner to establish a "strong likelihood" that the peremptory strikes had been impermissibly based on race and that the trial judge should have required the defendant to proffer only enough evidence to support an "inference" of discrimination. Applying the proper "reasonable inference" standard, the majority concluded that the defendant had presented a prima facie case.

The California Supreme Court reinstated petitioner's conviction (over the dissent of two justices) stressing that *Batson* left to state courts the establishment of standards to evaluate the sufficiency of defendants' prima facie cases. The California high court reviewed *Batson* and *Wheeler*, and concluded that the terms: "strong likelihood" and "reasonable inference" stated the "same" standard and one that was entirely consistent with *Batson*. In the court's view, although a prima facie case under *Batson* established a " 'legally mandatory, rebuttable presumption,' " it did not consist merely of "enough

evidence to permit the inference" that discrimination has occurred. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1315). Accordingly, the California Supreme Court held that *Batson*, "permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent *more likely than not* if the challenges are not explained." The court considered this burden to be "substantial" but not "not onerous," (*Id*. at p. 1316, italics added.)

The United States Supreme Court granted certiorari and disagreed, stating that "in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. 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, supra,* 545 U.S. at p. __ [125 S.Ct. at p. __].)

Writing for the majority (Justice Thomas dissented) Justice Stevens observed that *Batson* itself provides no support for California's "strong likelihood" rule: "There, we held that a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.' [Citation.] We explained that [¶] 'a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to

discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.' " (*Johnson, supra,* 545 U.S. at p. __ [125 S.Ct. at p. __].)

The opinion in *Batson* spoke of the methods by which prima facie cases could be proved in permissive terms: "A defendant may make a prima facie showing," the Supreme Court said, "by relying solely on the facts concerning [the selection of the venire] *in his case*." The court expressly declined to require proof of a pattern or practice because " '[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " (*Batson, supra,* 476 U.S. at pp. 94-95.)

It has long been recognized in California that "the unconstitutional exclusion of even a single juror on improper grounds or racial or group bias requires the commencement of jury selection anew, or reversal of the judgment where such error is established on appeal." (*People v. Reynoso* (2003) 31 Cal.4th 903, 927, fn. 8.) We observed in our previous opinion that although the trial court in this case apparently did not doubt the unconstitutionality of a single group-bias challenge, but concluded that, as a "practical consideration" (*ante,* fn. 1), it is hard to show a "strong likelihood" of group bias upon the first challenge to a group member[2] (cf. *People v. Buckley* (1997) 53 Cal.App.4th 658, 662, fn. 16, 665, fn. 18).

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[2] We must presume that the trial court applied the standard which had been pronounced by the California Supreme Court. The court stated: "During voir dire, Mr. Tamayo, you made two motions. And just as a practical consideration, if you read the case law, the fact that somebody exercises a challenge against a member of a particular class or race of individual on the first challenge, that doesn't prove anything. And I think it's, quite frankly, inappropriate the very first time that your opponent exercises a challenge against somebody of African-American background to make the motion, because I don't think, at this point, you can show that there's been a systematic exclusion of anybody.

"But in any event, you objected when he excused [Juror Nos. 12 and 1]. For the record, they were both African-Americans, and based upon what I observed during the voir dire, you cannot make out a prima facie case that the District Attorney was systematically excluding people of African-American background.

The United States Supreme Court has now made it clear that a showing of a "strong likelihood" is not required; but it is possible with this correction that the formula long established in California can still be applied: In order to establish a prima facie case of group bias, a litigant must raise the issue in a timely fashion, make as complete a record as feasible, establish that the persons excluded are members of a cognizable class, and show a "[an inference] of group rather than individual bias." (*People v. Boyette* (2002) 29 Cal.4th 381, 421-422.) Allowing or even asking a party to explain his challenges, without stating that a prima facie case was shown, does not waive the no-prima-facie case issue for appeal. (*Id.* at p. 422 [court sought reasons without stating a ruling on the prima facie showing].) Here, where neither party disputes timeliness of the objections or the adequacy of the record, and the jurors in question were of a settled cognizable class, the dispositive question is whether appellant demonstrated a prima facie case—by pointing to a reasonable inference—of group bias.

As in *Johnson*, appellant's objections in this case were directed to the disparity of peremptory challenges between African-Americans and others. It is evident in this case

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"I would note, for the record, that . . . Juror Number 3 [actually prospective Juror No. 20, evidently seated in the third jury seat], is an African-American, and I'm not quite sure if anybody else is or not. But is there something else you wanted to tell me, Mr. Tamayo, other than you were just making the motion?" Tamayo added only that Juror No. 1 "seemed to be more of a prosecution juror" given "his views on alcohol," and the court responded: "And so you think that somebody who says basically they are not going to follow the law, even if it is in your opponent's favor, that we should leave that kind of person on the jury? I mean, that's why I denied your motion. There is no prima facie case."

The court nevertheless allowed the prosecutor to "put something on the record" if he chose. The prosecutor declined at first, except to say he thought "the record was clear with [Juror No. 1's] responses as it relates to his abilities to be fair and impartial," but then added: "[O]ne thing I should put on the record is I was satisfied with the composition of the jury on two separate occasions prior to me bouncing [Juror No. 1], and had the defense passed, [Juror No. 1] was satisfactory. But after passing twice and receiving a new batch of seven jurors, they were ultimately, in my opinion, much stronger in their responses and their ability to follow the law, and their demeanor just seemed more open to listening strictly to the facts and not being swayed by personal opinions like [Juror No. 1] was. So I then chose to challenge him."

that the trial court, certainly after the second challenge, was confronted with evidence of disproportionate use of peremptory challenges against African-American potential jurors. The prosecutor used six in all, two against members of the group in question. Even given the small number of total challenges, the court could reasonably view the disparity as suggesting the possibility of group bias. This is true even though the trial court observed that a third member of the same group was left on the jury by the prosecutor, who still had unused challenges (Code Civ. Proc., § 231, subd. (a) [10 for each side]). This might have tended to disprove group bias (*People v. Turner* (1994) 8 Cal.4th 137, 168), as might the fact that the prosecutor passed the challenge twice before removing Juror No. 1 (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 926).

However, we also note appellant's contention that the prosecutor conducted merely "desultory" voir dire of the challenged jurors. Indeed, the prosecutor conducted no individual voir dire of Juror No. 12; but this was a post-Proposition 115 trial in which voir dire was left primarily to the judge, not counsel, and therefore lack of personal questioning by counsel might have "little or no significance." (See *People v. Reynoso*, *supra*, 31 Cal.4th at p. 928.) Appellant relies on his being African-American, like the challenged jurors, and this might also add something to his showing, as might the ethnicity of the victims of the attempted robbery, which is not reflected in the record and thus cannot be compared to the ethnic group to which the majority of potential jurors belonged. (See *Johnson*, *supra*, 30 Cal.4th at p. 1309; see also, e.g., *People v. Reynoso*, *supra*, 31 Cal.4th at p. 926, fn. 7 [striking all African-American jurors where a victim is white merits careful scrutiny; but if victim and stricken jurors sharing group membership, this may "neutraliz[e] any suspected untoward belief" regarding the group].)

However, having failed to find a prima facie showing sufficient to support an inference of group bias, the trial court examined none of these factors. We conclude that the evidence supports a reasonable inference that a prima facie case of group bias had been shown. We will not speculate how the prosecutor's challenges might have been justified or whether such justification would have been convincing given the initial responses, written and oral, and given the likelihood of observable signs not discernible

from the cold appellate record.[3] We also offer no opinion on whether the trial court can conduct such a review post conviction.[4] The case must be remanded to the trial court for

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[3] Our review of the record demonstrates why the trial court was best suited to undertake such an evaluation: Juror No. 12 was an insurance claims adjuster who wrote that she had seven children (ages 3 to 30), a high school education and, apparently, a seven-year marriage to a "pastor." When the court asked all 18 of the first-called jurors whether they or family members or close friends had "ever been a victim of . . . a robbery or been charged with something like this," Juror No. 12 said that she "had a relative that was charged" but that "the charges were dismissed." She did not think this would have any effect on her in this case but also indicated, in her questionnaire, that she or a relative or close friend had been a victim in a criminal case. That circumstance was not individually probed by anyone, but Juror No. 12, with all the other jurors, sat mute when the court asked the "personal" question whether anyone had been "a victim of violent crime." One possible inference was that the victim was either friend or family or, if it was Juror No. 12, the crime had not been violent. Juror No. 12 was also among four jurors who raised their hands when defense counsel asked if there was "anything about alcohol, if it comes out in the trial, that you think that you will not be able to be fair to Mr. Allen." Counsel asked each one individually whether they could follow the court's instructions notwithstanding "personal feelings about alcohol," and when he got to Juror No. 12, she replied, "Yes. I just don't like the taste." Then, contrary to the implication of her affirmative response to whether she would "not be able to be fair" to appellant, she said she had nothing against people who drink and could follow the court's instructions.

Juror No. 1 had been married 33 years, had two adult children, and listed himself as a "Design Drafter" with 15 years education but no current employer. He wrote "yes" to the questionnaire queries whether he had "moral or religious principles" or "any opinions or feelings" "which make it difficult or impossible to judge whether someone is guilty or not guilty of a crime." In response to defense counsel's question whether jurors could put aside their personal feelings about alcohol and follow the court's instructions on how alcohol relates to a criminal offense *ante*, he said "No" and confirmed ("Right") that he could *not* put his feelings aside. The prosecutor then addressed this same juror, acknowledging his "fairly strong religious beliefs" but carefully explaining that the trial would require him to follow "rules" based not on "religion," but on "the law" covering alcohol and drugs. Juror No. 1 then said that, while he did not like to drink, he did not "care" whether others did and did not think it would "affect" his ability to be fair and impartial.

[4] The issue of the appropriate remedy for *Wheeler/Batson* error in this context (i.e., whether there should be outright reversal of defendant's conviction or a limited remand to permit the trial court to inquire into the prosecutor's reasons for removing minority jurors) was taken up by the California Supreme Court on November 16, 2005, in *People v. Johnson*, S127602, on remand from the United States Supreme Court. (See *Johnson v.*

further proceedings consistent with the correct standard reiterated by the United States Supreme Court in *Johnson*.

II. *"Suicide-by-Cop" Evidence*

Our view and rejection of the second issue raised by appellant remains unchanged.

Pretrial, the prosecution sought to exclude, and the defense to admit—each citing Evidence Code section 352[5]—evidence of statements appellant assertedly made to his ex-wife two days after the offense, and some facts surrounding his later arrest (and separate charges for resisting; Pen. Code, § 248). Defense counsel argued: "[W]e intend to show that Mr. Allen went into the bar, not to rob or to take property, but as a cry for help. His life was spiraling out of control due to alcohol and drugs; that he was suicidal; that when he left the bar, he came back to retrieve a revolver. When he was told he wasn't gonna get it and to leave, he made comments to the effect 'That's all right, I have a shotgun in my truck anyway,' so as to lead people to believe that he was armed and dangerous. And that when the officers go to arrest him in Fairfield on August the 18th, the officers write in their report that when they approached him, they ordered him to turn around and put his hands behind his back. He did not, and that he made this movement towards his waistband as if he were going for a gun. [¶] . . . [¶] We think that shows a continuing pattern of suicidal conduct stemming from his abuse of alcohol and drugs." Counsel added that appellant also made "a call to his ex-wife, Stacey Nelson, . . . about August the 13th, making statements about what happened at the Starz Bowling Alley . . . ." The prosecutor objected that the evidence would lack relevance and consume an undue amount of time.

The court asked defense counsel: "But, see, what you are really saying here is the realization of what he had done the week prior perhaps caused this problem a week later. But how does something that happens on August 18th relate back to whether or not he formed a specific intent a week earlier[?] That's where I'm having trouble." Counsel

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California (2005) ___ U.S. ___ [162 L.Ed.2d 1229, 125 S.Ct. 2410], reversing *People v. Johnson* (2003) 30 Cal.4th 1302.)

[5] All further unspecified section references are to the Evidence Code.

added: "Well, he let it be known that he had the shotgun in the car when he left the Starz Bowling Alley." "[H]e calls Stacey Nelson. She then . . . goes to her children's school on August the 16th and warns the principal that 'my husband might be armed with a shotgun.' [¶] . . . [¶] And then on August the 17th, Mr. Allen goes to her daughter's school. She's then picked up and transported to Vacaville P.D. and makes a statement. The first thing she tells . . . Detective Carey is that 'my husband, the first thing he said is that he wanted to be killed by the police' essentially. That's the first thing that he said— [¶] . . . [¶] —that he was planning on committing suicide by 'letting the cops kill me when they catch me.' And then that occurs on August the 18th. [¶] . . . [¶] [W]e believe it's the same type of behavior and it shows the same type of intent. . . ."

The court ultimately disagreed, saying: "I don't hear any evidence of that. All I hear is he attempted to commit a robbery and then post that event, for whatever reason, he tells apparently his estranged wife that he wants them to kill him. How does . . . what happened after the attempted 211 go to what happened during the attempted 211?" Told that it was "relative to his state of mind and his specific intent," the court asked whether counsel had any case authority for that position and was told, "No." Having read the preliminary hearing transcript, the court ruled that, absent further order of the court, evidence of appellant's intent after the August 11 event would be excluded, reasoning that the evidence lacked relevance to his state of mind at the time of the offense and, in any event, should be excluded under section 352.[6]

The issue arose again during the redirect defense testimony of character witness Sheldon Winkfield. Defense counsel had asked him whether he had noticed depression in appellant, but the prosecutor objected, successfully, "no foundation that he has that experience or expertise." Counsel then elicited that the witness, who worked as an "ER

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[6] "At this time, absent further order of the court, there will be no information presented concerning what occurred on August 18th or anything he may or may not have said to his wife or his estranged wife after the August 11th date, absent further order of the court. I just don't find that it's relevant, and it's certainly time consuming. We'd end up with two different trials. And like I said, I don't see how something that occurred on August 18th is reflective of what was in his mind relative to the specific intent on August 11th."

Tech" at a hospital facility, had some exposure to troubled kids and adults. He then asked, "Do you know if Mr. Allen had any suicidal ideations?" but this drew the same successful objection ("no foundation"). His next question—"Has he ever talked to you about committing suicide?"—then drew a "hearsay" objection, upon which the court elaborated: "What is relevant is what happened on the day in question. If you want to lay a foundation, that's what we are objecting to here. You've got to lay a foundation as to on or about the event. This broad-ranging question is, under 352, irrelevant, too time-consuming, confusing, and the objection is sustained." Counsel then tried, "Did he speak to you about committing suicide on or about the time period of August the 11th?" which was met with a "hearsay, irrelevant" objection that the court sustained on the former basis ("It is hearsay"). Defense counsel then ceased questioning without an offer of proof.

Appellant complains now that these rulings denied him a fair trial and the right to present a defense because, echoing trial counsel's view below, "Evidence of Mr. Allen's ongoing desire to commit 'suicide by cop' on August 13 and 18, 2001, was relevant to prove the truth of his testimony at trial that his intention on August 11, 2001, was to do precisely that act." He acknowledges that the trial court allowed him to present evidence of his drug use, intoxication and otherwise depressed mental state as going to the issue of specific intent to rob, but reasons, "If his actions were actually a 'cry for help'—if he was merely trying to provoke a situation which would result in his being shot by the police—then he was not guilty of attempted robbery." Moreover, he relies on what he terms "the 'continuing mental state' exception to the hearsay rule," grounded in *People v. Hamilton* (1961) 55 Cal.2d 881 (*Hamilton*), to dispute the trial court's reluctance to admit evidence of mental state two to seven days after the charged event.[7]

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[7] Appellant raised variants of this issue on an unsuccessful motion for new trial, with which he produced transcripts and other documents to support alternative claims that (1) the court denied him a fair trial through its rulings against post-event intent evidence or (2) trial counsel rendered ineffective assistance by not getting the evidence in by moving to consolidate the current case with the resisting-arrest case.

A problem for our review is that the documents submitted with the new trial motion do not appear to have been submitted for the court's perusal at the times it ruled, pretrial or

The court based its rulings on section 352. "[We] appl[y] the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative (see Evid. Code, § 352) if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.' " (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) "[A]n appellate court will not find an abuse of discretion . . . except upon a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner." (*People v. Coddington* (2000) 23 Cal.4th 529, 619.) Although section 352 " 'must bow to the due process right of [an appellant] to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense[,]' " this does not mean he " 'has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value . . . .' " (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) When the ruling involves application of the state-of-mind exception to the hearsay rule, as it does here, this also demands use of the abuse of discretion standard. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 386.)

Appellant relies on *Hamilton* for the general proposition that " 'under certain circumstances declarations are admissible to prove a state of mind at a particular time

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during Winkfield's testimony, on the issue. Fairness and order command that we review rulings only based on those matters before the trial court when it ruled, later matters are legally irrelevant to the correctness of the ruling. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405; *People's Home Sav. Bank v. Sadler* (1905) 1 Cal.App. 189, 193-194.) Appellant, in attacking the trial court's "evidentiary rulings," indiscriminately cites to the new trial motion materials, as does the Attorney General in response, but we are forced to ignore those citations (*People v. Keligian* (1960) 182 Cal.App.2d 771, 774; *Weller v. Chavarria* (1965) 233 Cal.App.2d 234, 246).

We could review them, of course, if appellant argued against denial of the new trial motion, but while his notice of appeal indicates a possible such challenge, his briefing does not. He abandons the issue by citing only the "evidentiary rulings" and not citing any new-trial precedent. Accordingly, we confine ourselves to the offers of proof and other matters before the court when it made the evidentiary rulings. In any event, a quick perusal of the later materials does not reveal any serious inconsistency with the showings as made before and during trial.

although uttered before or after that time, apparently on the theory that under these particular circumstances "[t]he stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current." ' " (*Hamilton*, *supra*, 55 Cal.2d at p. 894.) We acknowledge the People's briefing that some rigid limitations imposed in *Hamilton* on the use of such evidence have since been held abrogated by enactment of the Evidence Code (including § 352) and constitutional amendment. (*People v. Ortiz*, *supra*, 38 Cal.App.4th at pp. 387-389.) However, we need not quibble with the just-quoted general proposition to uphold the rulings in this case, for the requisite *continuity* was not shown here between appellant's state of mind during the charged offense and his suicidal thoughts two days to a week later. (Cf. *People v. Cruz* (1968) 264 Cal.App.2d 350, 358-359 [statements made to police after shooting a woman, although shortly after the event, found too untrustworthy for admission].)

At the time of the rulings, appellant had not yet testified and the only showing of a direct statement from him was his counsel's representation that on August 13, two days after the incident, appellant "was planning on committing suicide by 'letting the cops kill me when they catch me.' " Clearly, "when they catch me" referred to a *future* scenario, not an intent harbored days earlier. Nor did the preliminary hearing transcript read by the court provide any hint of a death wish in the way the robbery attempt proceeded. There was only the testimony of victim Malgieri, who had related that appellant, after drinking at the bar earlier that day, entered in disguise at closing time brandishing a revolver, said "This is a stick-up" or "hold-up" and, when identified as by one of the employees (all of whom had their hands up), "just said, 'Hell with it, screw it' or whatever," lowered and emptied the gun, set it down and took off his disguise. Malgieri then urged: "Don, get out of here. Nobody has to know about it. Nobody is hurt." Appellant left and "didn't have the gun anymore." Nothing in those facts suggests an intent to have a shootout with police there at Starz. Indeed, the opposite appeared, for appellant left when implicitly assured by Malgieri that the police would *not* be called if he would just leave. The inference is strengthened by the facts that he came disguised and felt defeated when

identified, facts showing that he had planned *not* to be identified—or be identifiable by police.

By the time the issue arose again during the defense testimony of Winkfield, the prosecutor's full case-in-chief had been presented and, similarly, did not show any intent to have a police shootout there at Starz. Appellant stresses that the facts showed him to have asked for his revolver back and, not getting it, left but said he had a shotgun in the truck. But, if this might reasonably suggest that he wanted it known that he was armed, perhaps anticipating a later confrontation with police (or, conversely, that he just wanted his gun for other holdups or to avoid detection through fingerprints or tracing), it hardly supports a desire to commit suicide-by-cop right there at the bar. We note that the court's rulings, both in limine ("absent further order of the court") and during Winkfield's testimony ("You've got to lay a foundation as to on or about the event"), allowed the defense to make further showings for admitting the evidence. While defense counsel finally did ask Winkfield a potentially relevant—but vague as to *Hamilton* "continuity"—question about suicide statements made "on or about" August 11, he made no offer of proof and so cannot complain now of the answer's exclusion (§ 354, subd. (a)). Even after appellant testified about August 11—he "just wanted to die," was not there "to hurt or rob anybody" and wanted his gun back "in hopes that the police would consider him armed" and "shoot me when they found me"—no further attempt was made to alter the rulings.

Appellant also overstates the law when he argues: "If his actions were actually a 'cry for help'—if he was merely trying to provoke a situation which would result in his being shot by the police—then he was not guilty of attempted robbery." To the contrary, he was still guilty of attempted robbery if he *attempted to take property* in order to set up a violent and suicidal confrontation with police. His *motive* for the offense, jurors were correctly instructed, was "not an element of the crime charged" but, if shown, could actually "tend to establish" his guilt (CALJIC No. 2.51). This is not acknowledged in appellant's briefing. His *motives* for committing the robbery—whether monetary or suicidal—could only operate as a mental state defense if they somehow blinded him to

what he was doing, which was taking money from people at gunpoint. He cites no case on point, but at the very least, it appears that he would have to show that his suicidal motive prevented him from actually forming an intent to permanently deprive his victims of money (cf. *People v. Leever* (1985) 173 Cal.App.3d 853, 862-863, 865-866 [evidence suggested a despondent appellant robbed a bank in order to get money to rent a room in which to commit suicide]). Clearly one can rob, murder, or otherwise assault people in a "cry for help" yet still be guilty of those crimes.

These principles were obviously not lost on the trial court, whose rulings do not appear to have been so arbitrary, capricious, or patently absurd (*People v. Coddington*, *supra*, 23 Cal.4th at p. 619) that we may call them abuses of discretion. Based on the showings made at the times when the court ruled, the court could have reasonably concluded that any marginal probative value of the "continuing intent" evidence was substantially outweighed by its tendency to prejudice, confuse, or consume undue time (§ 352) or, more broadly stated, posed an intolerable risk to the fairness of the proceedings or the reliability of the outcome (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724).

DISPOSITION

The judgment is remanded to the trial court for further proceedings consistent with this opinion.

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Ruvolo, J.