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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME TYRONE CARTER,

Defendant and Appellant.

F048285

(Super. Ct. No. BF106054C)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jerome Tyrone Carter was convicted of three counts of second degree robbery and one count of receiving stolen property, and the jury found true special allegations relating to the possession and use of firearms. In bifurcated proceedings, the trial judge found true the allegations involving his two prior prison terms. The trial judge

also dismissed the count of receiving stolen property in the interest of justice. Carter was sentenced to prison for a total prison term of 17 years, and was required to pay certain fines and fees. He appeals, claiming the trial court erred in finding that he had not established a prima facie case of group bias during jury selection. He also appeals his sentence on the ground that it violates *Blakely v. Washington* (2004) 542 U.S. 296. Because we find that Carter cannot establish a prima facie case of group bias during jury selection based on the record on appeal, we affirm his convictions. Given that the California Supreme Court determined that California's sentencing scheme is constitutional in *People v. Black* (2005) 35 Cal.4th 1238, we affirm his sentence.

FACTS

I.

Underlying Offense

On April 16, 2004, three African-American males with semi-automatic pistols and wearing masks took about $14,000 from two tellers and a briefcase from a customer at San Joaquin Bank in Bakersfield, California. Subsequent investigation led to the arrest of Carter, Terrell Jamison Woodward and Carl Edward Jones. An information alleging four counts arising out of the robbery was filed, and jury trial commenced on April 27, 2005.

II.

Jury Selection

The jurors were selected from a panel of 90 potential jurors. Three potential jurors were African-Americans. At the outset of jury selection, 12 potential jurors were seated in the jury box, including Prospective Jurors Nos. 5 and 12 who were African-Americans.

The court and counsel questioned the group of 12 potential jurors. In response to the questioning, Prospective Juror No. 12 provided the following information. He was single, and worked for a construction company in the oil fields. He had an A.S. degree in electronics and was familiar with cell phone technology. He knew that DNA stood for

deoxyribonucleic acid, but did not know much more about it other than how to pronounce it.

When the prospective jurors were asked if any of them thought that if someone is accused of a crime and is innocent, he should get up on the stand and testify and deny the accusation, Prospective Juror No. 12 said: "Well, you know, if you want to tell your side of the story, you should go ahead and tell it." He said that he would not hold it against the defendant if the attorney advised him not to testify and that he could follow an instruction not to consider any failure not to testify in his deliberations. He also agreed to keep an open mind and not formulate any opinions until he heard all the evidence. He also knew something about communications, including how cell phones worked, although he stated that he would listen to what the witnesses said rather than substituting what he knew.

After the voir dire of the first 12 people was concluded, the People began their peremptory challenges. The prosecutor exercised its third peremptory challenge to excuse Juror No. 12, prompting a *Wheeler* motion by defense counsel. [1] After an unreported sidebar conference, the court denied the motion.

Later, the trial court stated on the record that it found there was one African-American female juror, then-prospective Juror No. 5 in the jury box of 12, and there was one prospective black female juror in the courtroom. The court found no prima facie *Wheeler* case. The trial court made this ruling after considering the presence of the remaining two African-American jurors and the personal "factors including the personal information that [Prospective Juror No. 12] provided, the other makeup of the jury, [and] the personal characteristics that related to [Prospective Juror No. 12] including his age,

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[1] Although the defense only raised a *Wheeler* motion, for the purposes of this appeal, we review whether there has been reversible error under both *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). (*People v. Yeoman* (2003) 31 Cal.4th 93, 117).

occupation." Defense counsel stated that there were only three African-Americans on the entire panel, and that there was no reason to excuse Prospective Juror No. 12, since he is a "very articulate young man with a AA [*sic*] degree in science. He was the only one that knew DNA. He works with computer electronics. DNA is a very big part of the prosecution's case."

The prosecution passed repeatedly as to Juror No. 5, and she sat on the jury during trial. The third African-American prospective juror never made it to the jury box.

The defense made a total of three *Wheeler* motions: one challenging the exclusion of Juror No. 12, an African-American male, and two challenging exclusions of Hispanic prospective jurors. The prosecution made a *Wheeler* motion relating to the defense's exclusion of a white male, one of only four white males in the jury pool. The trial court denied all four *Wheeler* motions, finding that there was no prima facie case of group bias in each instance.

III.

Verdict and Sentencing

During trial, Jones reached a plea agreement with the police, and the trial proceeded as to Carter and Woodward only. The jury found Carter and Woodward guilty as charged.

Carter was sentenced to five years on the three counts of second degree robbery, plus 12 years on the enhancements. He also was ordered to pay $12,855 in restitution and fees. He was given credit for 489 days in custody.

After sentencing, Carter timely appealed on the grounds that the trial judge had committed reversible error in ruling that Carter had not established a prima facie case of group bias with respect to the excusal of Prospective Juror No. 12, and that his sentence was unconstitutionally excessive.

DISCUSSION

I.

Wheeler/Batson Challenges

The California Constitution and the United States Constitution prohibit the exercise of peremptory challenges solely because of group bias. (*Wheeler, supra*, 22 Cal.3d 258; *Batson*, *supra*, 476 U.S. 79.) When a defendant believes the prosecution is exercising peremptory challenges in violation of the Constitution, the trial court must follow this procedure: "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 2416], fn. omitted.)

A. Test For Prima Facie Case

Carter contends his case should be reversed for a new trial because the application of an incorrect standard for purposes of determining a prima facie case on a *Wheeler/Batson* motion is sufficient, by itself, to constitute reversible error. At the time of the trial, California's standard for establishing a prima facie case was different from the standard now required by the United States Supreme Court. Because the trial court was bound at that time to follow the California standard, Carter asserts that we must presume that the trial court applied the incorrect standard and thus there was reversible error. We disagree. The California Supreme Court was presented with the same argument and rejected it. (*People v. Cornwell* (2005) 37 Cal.4th 50, 73.)

At the time of the trial, in *People v. Johnson* (2003) 30 Cal.4th 1302, the California Supreme Court held that the test for establishing a prima facie case of group bias is that "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." (*Id.* at p. 1306.)

Subsequently, the United States Supreme Court granted certiorari and in *Johnson v. California*, *supra,* 545 U.S. 162 (*Johnson*), held that "California's 'more likely than not' standard is at odds with the prima facie inquiry mandated by *Batson*." (*Johnson*, *supra*, 545 U.S. at p. 173.) The court found the appropriate standard to be that "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." (*Id.* at p. 170.)

The record is silent as to what standard the trial court applied in denying appellant's *Wheeler/Batson* motion. In a similar situation, the appellant in *People v. Cornwell*, *supra*, 37 Cal.4th 50 (*Cornwell*), argued that "reversal is required on the ground that the trial court determined (or may have determined) whether defendant established a prima facie case" under an incorrect standard. (*Cornwell*, *supra*, 37 Cal.4th at p. 72.). The California Supreme Court rejected the argument. (*Id*. at p. 73.) Instead, it reviewed the record, applied the *Johnson* standard, and resolved the legal question of "whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*Cornwell*, *supra*, 37 Cal.4th at p.73; accord, *People v. Gray* (2005) 37 Cal.4th 168, 187; *People v. Avila* (2006) 38 Cal.4th 491, 554.) Accordingly, we decline to find reversible error on the sole basis that the trial court may have applied the wrong legal test in determining whether a prima facie case has been shown.

B. Application Of Prima Facie Test

Carter next contends that the prosecution's exercise of one of 10 peremptory challenges to exclude one of the three African-Americans in the prospective juror pool

establishes a prima facie case of group bias and requires that we reverse this case for a new trial. As discussed previously, because it is unclear from the record whether the trial court applied the correct legal test in determining whether a prima facie case has been made, we will review the appellate record, apply the *Johnson* test, and resolve the legal question of "whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*Cornwell*, *supra*, 37 Cal.4th at p. 73.) Our review is necessarily limited to "matters adequately raised in the record." (*People v. Buchanan* (2006) 143 Cal.App.4th 139, 141.)

As an initial matter, no party has disputed that the *Wheeler*/*Batson* challenge was raised timely, that African-Americans are a cognizable group, and that the record is as complete as feasible on appeal. (*Wheeler*, *supra*, 22 Cal.3d at p. 280; *People v. Buchanan*, *supra*, 143 Cal.App.4th at p. 142.) Thus, we will assume that appellant has satisfied these requirements, and turn to an examination of the record for evidence supporting an inference of illegal discrimination in the prosecution's use of peremptory challenges.

Appellate courts have examined a wide variety of evidence to determine whether there is evidence to support an inference that a prosecutor excused a juror on the basis of race. Such evidence has included the trial court's statements (see, e.g., *Johnson*, *supra*, 545 U.S. 162) and statistical circumstances (see, e.g., *Cornwell, supra*, 37 Cal.4th 50.).

A trial court's observations and statements concerning the exercise of peremptory challenges have been very persuasive to reviewing courts in determining whether a prima facie case has been made. An example is *Johnson*, *supra*, 545 U.S. 162. In *Johnson*, the defendant was Black and the victim was a 19-month-old White child. After prospective jurors had been removed for cause, 43 eligible jurors remained. Of the 43 remaining prospective jurors, three were Black. After the prosecutor exercised "the second of his three peremptory challenges against the prospective [B]lack jurors, defense counsel objected on the ground that the challenge was unconstitutionally based on race."

(*Johnson*, *supra*, 545 U.S. at p. 165.) The trial judge found that a prima facie case had not been established. The judge warned the prosecutor that "'"we are very close."'" (*Ibid*.)

The next day the prosecutor struck the final remaining prospective Black juror and defense counsel made another motion. Although the trial court did not specifically find that there was a prima facie case, the *Johnson* court found that a prima facie case had been shown. "In this case the inference of discrimination was sufficient to invoke a comment by the trial judge 'that "we are very close,"' and on review, the California Supreme Court acknowledged that 'it certainly looks suspicious that all three African-American prospective jurors were removed from the jury.' [Citation.] Those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson.*" (*Johnson*, *supra*, 545 U.S. at p. 173.)

In the case here, there are no comments by the trial court indicating that a prima facie case was close to being made. Instead, the trial court found (albeit, possibly under an incorrect standard) that Carter had not established a prima facie case.

Reviewing courts also have examined statistical circumstances to determine whether appellants have shown a prima facie case. In *Wheeler*, *supra*, the California Supreme Court suggested that an appellant could provide supporting evidence for a prima facie case by showing "that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group." (*Wheeler*, *supra*, 22 Cal.3d at p. 280.)

Thus, in *People v. Allen* (1999) 21 Cal.4th 846, the Supreme Court found there was a prima facie case where all of the African-American prospective jurors were

excused.[2] (Accord, *People v. Gore* (1993) 18 Cal.App.4th 692 [prima facie case where all three African-American prospective jurors were excused].) Likewise, in *People v. Fuentes* (1991) 54 Cal.3d 707, the Supreme Court held that the trial court had impliedly found a prima facie case where 14 of 19 peremptory challenges were used on African-American prospective jurors. (Accord, *People v. Hall* (1983) 35 Cal.3d 161 [prima facie case where five of eight peremptory challenges were used to excuse African-Americans, leaving none on the jury].)

However, the California Supreme Court has noted that the fact that all excluded jurors were African-American is not necessarily dispositive in establishing a prima facie case. (*People v. Box* (2000) 23 Cal.4th 1153, 1188-1189). Moreover, the fact that the prosecutor accepted a jury containing minorities "may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection, [although] it is not a *conclusive* factor." (*People v. Snow* (1987) 44 Cal.3d 216, 225.)

Here, only one of the prosecution's 10 peremptory challenges was used to excuse an African-American juror. Moreover, the prosecution repeatedly passed on challenging an African-American prospective juror and that juror served on the jury. Thus, this case is akin to *Cornwell*, *supra*, 37 Cal.4th 50.

In *Cornwell*, the defendant, "who is African-American, contend[ed] the prosecutor exercised a peremptory challenge against Juror T., who also is African-American, because of her race." (*Cornwell*, *supra*, 37 Cal.4th at p. 66.) On the record, the Court found that the defendant had not shown a prima facie case. "The circumstance that the prosecutor challenged one out of two African-American prospective jurors does not

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[2] While the cases cited in this paragraph all predate *Johnson*, *supra*, 545 U.S. 162, the fact that a prima facie case was found under a more rigorous standard implies that a prima facie case would be found under the less rigorous, correct standard.

support an inference of bias, particularly in view of the circumstance that the other African-American juror had been passed repeatedly by the prosecutor from the beginning of voir dire and ultimately served on the jury." (*Id*. at pp. 69-70.).

Similar, in *People v. Gray, supra*, 37 Cal.4th 168, the Supreme Court rejected a *Wheeler/Batson* claim where "[t]he prosecutor excluded one African-American juror from the regular jury, but left another on, and struck one African-American from the panel of alternates, but left another on." (*Id.* at p. 188.)

Therefore, in the case here, the statistical circumstances of the prosecution's peremptory challenge against Prospective Juror No. 12 were not sufficient to raise an inference of illegal discriminatory purpose.

Carter also contends that comparative analysis is a tool that may be used on appeal to determine if appellant has made out a prima facie case, regardless of whether such analysis occurred in the trial court. The California Supreme Court has not determined this issue. (*Cornwell*, *supra*, 37 Cal.4th at p. 71; *People v. Lewis* (2006) 39 Cal.4th 970.) We decline to do so as well. Nevertheless, assuming without deciding that a comparative juror analysis should be undertaken, we conclude that comparative analysis does not support Carter's argument that there was a prima facie case.

When using comparative analysis to show a prima facie case of race discrimination, the appellant must identify "prospective jurors of other ethnicities who were not challenged but had a similar background and views." (*Cornwell*, *supra*, 37 Cal.4th at p. 71).

As discussed previously, Prospective Juror No. 12 worked for a construction company out in the oilfields. He received an A.S. degree in computer electronics. He knew what DNA stood for, and he had special knowledge about cell phone technology. The record does not indicate that any other prospective juror had this technical background. The prospective juror who was not challenged that is most similar in background to Prospective Juror No. 12 is Prospective Juror No. 9 who does maintenance

work at gas stations, and used to do electro-mechanical repair on missiles when he was in the military. However, there is no indication that the previous military work gave this juror special knowledge about cell phone technology. Cell phone technology was a part of the prosecution's case against the appellant. Thus, it is plausible that the prosecution excused Prospective Juror No. 12 on the basis of that prospective juror's special knowledge about cell phone technology and out of fear that the other jurors would rely on that special knowledge as opposed to the evidence presented in court.

The fact that the prosecution had a very strong case against Carter even if it did not introduce the evidence about cell phone technology does not detract from this possibility because a prosecutor may wish to rely on all of the evidence in the case, even extraneous or weak evidence.

Therefore, the circumstances do not support an inference that the prosecutor challenged Prospective Juror No. 12 because of race.

We find no other evidence in the record supporting an inference of bias. Thus, we reject the *Wheeler/Batson* claim.

II.

***Blakely* Challenge**

Carter also contends that his sentence was unconstitutionally excessive in light of *Blakely v. Washington*, *supra*, 542 U.S. 296. Carter admits that the California Supreme Court has upheld the constitutionality of California's sentencing scheme. (*People v. Black*, *supra*, 35 Cal.4th 1238.) We are bound by the California Supreme Court's holding in *Black* unless and until the U.S. Supreme Court decides that *Black* was wrongly decided. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Thus, we deny appellant Carter's challenge to his sentence.

DISPOSITION

The judgment is affirmed.

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Ardaiz, P.J.

WE CONCUR:

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Levy, J.

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Hill, J.