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Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE IBARRA, Defendant and Appellant.	E031542 (Super.Ct.No. RIF96585) OPINION

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach, Judge. Reversed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez, Supervising Deputy Attorney General, and Garrett Beaumont, Senior Deputy Attorney General, for Plaintiff and Respondent.

A jury found Jose Ibarra, defendant and appellant, (hereafter, defendant) guilty of second degree murder in connection with the killing of his wife and further found true the special allegation that defendant personally used a deadly weapon, specifically an axe. The trial court sentenced defendant to serve a term of 16 years to life in state prison based on that verdict and true finding.[1]

Defendant raises three claims of error in this appeal. First, he contends that the trial court erred in denying his so-called *Wheeler/Batson*[2] motions. Next, he contends the trial court erred in denying his motion for mistrial which defendant contends he based on misconduct committed by both the trial court and the prosecutor. As his final claim, defendant contends the trial court committed reversible error by refusing defendant's request to instruct the jury on involuntary manslaughter as a lesser included offense to the charged crime of murder.

We agree, for reasons we explain below, that the trial court committed various errors in ruling on defendant's *Wheeler* motions. Therefore, we will reverse the judgment.

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[1] Correctly stated, the trial court sentenced defendant to a determinate term of one year on the weapon's use enhancement to be followed by an indeterminate term of 15 years to life on the second degree murder conviction.

[2] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

FACTS

The factual details are undisputed. Defendant admitted killing his wife by hitting her in the head with an axe. The only issue at trial was defendant's mental state at the time. According to his statement to the police, and his testimony at trial, defendant suspected that his wife was seeing another man. Based on that suspicion, on the morning of April 11, 2001, defendant left the house to go to work but changed his mind and returned home around 5:00 a.m. Defendant found his wife about to leave the house. When defendant confronted her, his wife told him that she was just going for a walk. Defendant did not believe her and later, as the two were in the garage about to leave for work, defendant again asked his wife why she had been leaving the house so early. When she again said that she had been about to go out for a walk, defendant told her that he would hit her if she did not tell him the truth. As he made that statement, defendant grabbed the first thing that he saw, a small axe or hatchet, and hit his wife on the back of the head with it. Defendant told the police that he did not know how many times he struck his wife but that he continued to hit her with the axe because he did not believe her.

When he did stop striking her, defendant either fainted or fell asleep and when he awoke, after about an hour, he saw only a small amount of blood on his wife's hands. Defendant believed his wife had fainted and did not think that she was dead. Defendant told a neighbor what had happened after which he went home and told his three daughters. One of defendant's daughters went to the garage and screamed after spotting

her mother's body on the garage floor. Two neighbors rushed over in response to the scream. One of the neighbors performed CPR on Mrs. Ibarra while the other spoke with the 911 operator. Mrs. Ibarra died as a result of the blows to her head.

Additional facts will be discussed below as relevant to the issues defendant raises on appeal.

DISCUSSION

We first address defendant's claim that the trial court erred in denying his *Wheeler/Batson* motions.

1.

WHEELER/BATSON MOTION

During jury selection, defendant made three motions to dismiss the prospective jury panel based on what defendant claimed was the prosecutor's systematic exclusion of Hispanic and African American jurors. The trial court denied each of those motions. Defendant contends the trial court, for various reasons, erred. We agree and therefore will reverse the judgment, for reasons we now explain.

A. Procedural Background

Defense counsel first moved to dismiss the jury panel after the prosecutor excused Mr. F. who is Hispanic. In that motion, defense counsel pointed out that the prosecutor had previously used peremptory challenges to dismiss Ms. D.-R., also Hispanic, and Mr. D., an African American. The trial court, without finding that defense counsel had made the requisite prima facie showing, offered explanations for the prosecutor's action -- that

Mr. D. and Mr. F. both had "unpleasant and unfavorable experiences with law enforcement." After noting that defense counsel had also excused a prospective juror of "Hispanic origin," the trial court denied defense counsel's motion, without addressing defendant's challenge regarding Ms. D.-R.

Defense counsel again moved to dismiss the jury panel after the prosecutor used a peremptory challenge to dismiss another Hispanic prospective juror, Ms. V. This time defense counsel objected not only to the prosecutor's use of the peremptory challenge but also to the trial court's procedure for addressing the *Wheeler* claim.[3] With respect to the procedure, defense counsel noted that the trial court allowed the motion to be made at sidebar but did not rule on the merits of the claim until the jury took a regularly scheduled break. Defense counsel complained that in the interval between the time the issue was raised and the trial court ruled, other jurors had been excused and the composition of the jury had changed. In that regard, the prosecutor had excused Ms. S., another female Hispanic juror, in the interval between defendant's objection regarding Ms. V. and before the trial court ruled on that objection.

The trial court justified the procedure by explaining that the court had not been inclined to grant the *Wheeler* motion and therefore continued with jury selection until "it was a convenient and appropriate time to take a recess and have this discussion on the record." As for the prosecutor excusing Ms. V., the trial court noted, first, that defense

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[3] We use the designation "*Wheeler* motion" generically and intend that term to include defendant's motion under *Batson v. Kentucky*.

counsel had dismissed a female juror with a Hispanic surname, although the court was "not sure if she, herself, is Hispanic or not." After defense counsel noted that the juror in question "certainly didn't appear to be [Hispanic]," the trial court commented, "I'm not certain of that, but nonetheless, it's reasonable to assume that her husband is of Latin or Hispanic descent. So even though she may not be, she's involved in a relationship with someone who is."

In responding to defendant's objection to the prosecutor's peremptory challenge of Ms. V., the trial court again offered a possible explanation for the prosecutor's conduct – that Ms. V. "was involved for 17 years in a very odd, strange relationship with her husband who was continually in and out of prison, and I found her responses and reactions to that somewhat unusual. And eventually, she did divorce him, but she was married to him for 17 years and indicated he was rarely home for more than a few days or weeks before he would be sent back to prison. So I think the People's exercise of the peremptory challenge with respect to her does not constitute a violation of the *Batson-Wheeler* standard as far as disqualifying a class of some ethnic group or having some ethnic basis for the excusal of a juror."

As for Ms. S., after defense counsel pointed out that she was the fourth Hispanic the prosecutor had excused, the trial court stated, "I think with respect to her excusal, I think a prima facie case now does appear in the Court's mind and I'm going to ask the People to give an explanation or justification for her excusal." The prosecutor then offered three reasons for excusing Ms. S. First, the prosecutor stated that another deputy

district attorney had overheard Ms. S. talking outside the courtroom during a recess. That deputy district attorney had warned the prosecutor that he should watch out for Ms. S because she seemed too interested in understanding the attorney's reasons for excusing jurors. Second, the prosecutor noted that Ms. S.'s daughter had been the victim of a "288" but Ms. S. did not know what had happened to the person "who victimized her daughter and that her solution to the problem was simply to ship her daughter to another area of the country, apparently. And [the prosecutor] felt as though that that didn't – she wasn't showing a significant interest in her daughter by not following up with this person who . . . apparently was predatory towards her daughter." Third, the prosecutor noted that Ms. S. was "divorced" and had "no idea" what her ex-husband was doing. To the prosecutor, "that indicated a lack of ability to constructively resolve a dispute, you know, showing that she has no contact with her ex-husband, so those are my reasons. They have nothing to do with her ethnicity."

The trial court shared the prosecutor's view of Ms. S. and stated that "it is somewhat odd or strange" that she did not appear to "show that much concern about what happened to her daughter or what happened to the perpetrator of that offense," and that she "did indicate that she's had no contact with her daughter" who apparently was living "somewhere on the East Coast." The trial court also noted that Ms. S.'s father is a law enforcement officer with Los Angeles Police Department and that she may have had another relative involved in law enforcement, which "makes one wonder even more when she has that background." In the trial court's opinion, "It's all very strange and very odd

and unusual at best for a mother to conduct herself that way." The trial court then denied defendant's *Wheeler* motion.

Defense counsel made a third *Wheeler* motion when the prosecutor excused Mr. T., an African American. As with the previous motions, the trial court did not address this motion on the record until a later break in the proceedings at which time the jury had been accepted by both sides and sworn. In addressing defendant's motion, the trial court noted that defense counsel had excused an African American and a Hispanic just before the prosecutor excused Mr. T. After noting that the jury included two Hispanics and one Asian, the trial court denied defendant's motion. Defendant later renewed each of his *Wheeler* objections in a motion for new trial, which the trial court also denied.

B. Analysis

Defendant contends that the trial court's procedure for addressing the *Wheeler* issues was unfair and that the trial court erroneously denied defendant's motions because the prosecutor failed to offer race neutral reasons for excusing the challenged jurors. It does appear from the record that the trial court applied the wrong legal standard in assessing the merits of defendant's *Wheeler* objections and, as a result, failed to conduct the pertinent inquiry.

"'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.' [Citations.] Under *Wheeler* and *Batson*, '"[i]f a party believes his opponent is using his 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 circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association . . . .'" [Citations.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188.)

If the trial court finds that the moving party, the defendant in this case, has made the required prima facie showing, then the burden shifts to the opponent, in this case the prosecutor, to present group-neutral reasons for "each suspect excusal." (*People v.* Arias (1996) 13 Cal.4th 92, 135; *People v. Fuentes* (1991) 54 Cal.3d 707, 715 ["every questioned peremptory challenge must be justified."].) We review the trial court's acceptance of the prosecutor's explanations "with great restraint. The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried. [Citations.] The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice. [Citations.]" (*People v. Arias*, *supra*, 13 Cal.4th at p. 136.) "'If the trial court makes a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. . . .' [Citation.]" (*Ibid*.) In short, if the trial court made a "sincere and reasoned" assessment of the

prosecutor's explanation and the excused juror's responses support the prosecutor's explanation and the trial court's findings, we must affirm. (*Id.* at p. 187.)

i. First *Wheeler* Motion

Defendant's first *Wheeler* motion was directed at the prosecutor's peremptory challenges of two Hispanics and an African American. The trial court did not determine whether defendant had made a prima facie showing but, as set out above, offered explanations for the prosecutor's action. The trial court denied defendant's motion after noting that defense counsel also had excused a prospective juror of "Hispanic origin."

The trial court's comments set out above suggest the trial court is of the view that *Batson* and *Wheeler* require the defendant to make a prima facie showing of "systematic exclusion" based on race or ethnicity. No such showing is required. (*People v. Arias*, *supra*, 13 Cal.4th at p. 136.) A single peremptory challenge based on race or group bias violates *Wheeler* and *Batson*. (*People v. Montiel* (1993) 5 Cal.4th 877, 909.) Nor is the fact that defendant dismissed minority jurors relevant in determining whether the defendant has made a prima facie showing that the prosecutor has engaged in the discriminatory use of peremptory challenges. (*People v. Arias*, *supra*, 13 Cal.4th at pp. 136-137.) What is required is that the moving party make a prima facie showing that the prospective juror was challenged because of bias against the cognizable racial or ethnic group to which the juror belongs rather than because of specific bias pertinent to the individual juror. (*People v. Box*, *supra*, 23 Cal.4th at p. 1188.)

If the trial court finds that the moving party has made the required showing, the burden shifts to the opposing party to offer a race neutral explanation. Here, however, the trial judge provided the explanation based on the judge's view that, if a race neutral reason could be provided, then no prima facie showing had been made.[4] The trial court's view is wrong. As discussed above, once a trial court finds that a prima facie showing has been made, the burden shifts to the prosecutor to offer a race neutral justification. The crucial factors in assessing the validity of that justification are whether the prosecutor's explanation is not only race neutral but also genuine. (*People v. Arias*, *supra*, 13 Cal.4th at p. 136.) Therefore, the prosecutor, not the trial court, must provide the explanation. In short, the pertinent inquiry is not whether any race neutral explanation can be offered but rather whether the prosecutor actually has a neutral and specific basis, other than race or ethnicity, for excusing the prospective juror.

Viewed according to the correct legal principles, the trial court properly denied defendant's first *Wheeler* motion because defendant failed to make the requisite prima facie showing. Defendant, as set out above, showed only that Ms. R.-D. and Mr. F. were both Hispanic and Mr. D. was African American. Demonstrating only that the excused jurors were members of cognizable groups is insufficient to establish a prima facie showing of group bias. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154.) Thus, the trial

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[4] According to the trial court, "If there is an independent justification with respect to a specific juror, whether it be of Hispanic descent, an African-American, or a Caucasian, then I don't believe that a prima facie case has necessarily been raised."

court properly denied defendant's first *Wheeler* motion even though the court relied on the wrong standard.

ii. Second *Wheeler* Motion

In his second *Wheeler* motion, which defendant made after the prosecutor excused Ms. V. and Ms. S., both of whom are Hispanic, defendant asserted that neither of these two jurors had "expressed any sympathy for Mr. Ibarra or any inclination based on their own experience or the experience of those close to them to have any sort of bias or partiality in favor of Mr. Ibarra or for that matter, against the prosecution." The trial court found defendant made a prima facie showing as to Ms. S. but then denied defendant's motion after the prosecutor offered his explanations for excusing her.

The trial court's finding that defendant made a prima facie showing of group bias shifted the burden to the prosecutor to explain not only his excusal of Ms. S., but also of each of the previously questioned excusals, namely those of Ms. V., Ms. R.-D., Mr. F., and Mr. D. (*People v. Arias*, *supra*, 13 Cal.4th at p. 135; *People v. Fuentes*, *supra*, 54 Cal.3d at p. 715.) By requiring the prosecutor only to explain his excusal of Ms. S., the "trial court short-circuited the proper procedure for a *Wheeler* motion." (*People v. McGee* (2002) 104 Cal.App.4th 559, 571.)

iii. Defendant's Third *Wheeler* Motion

The trial court erred again in denying defendant's third *Wheeler* objection made when the prosecutor used a peremptory challenge to excuse Mr. T., an African American juror. In making that objection, defense counsel stated that Mr. T., "who was a black

man, light-skinned black man, indicated nothing in the way of bias, prejudice or any reason why he wouldn't want to sit or serve or anything else. He had prior jury experience. Seemed to be very straightforward, very responsive to the questions, both to Court and counsel." In denying defendant's motion the trial court stated that it did not find "that the People have systematically excluded minorities from the jury" and in any event just before the prosecutor discharged Mr. T., defendant had discharged an African American juror. The trial court also noted "that the jury does consist of at least two Hispanics and one Asian."

The trial court's reasons for denying defendant's *Wheeler* motion are irrelevant. As previously discussed, systematic exclusion is not required. A single improper peremptory challenge violates *Wheeler* and *Batson*. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 909.) Defendant's conduct in excusing jurors as well as the ultimate composition of the jury are equally irrelevant in assessing whether the prosecutor has violated *Wheeler* and *Batson* by making a race-based decision to excuse a juror. (*People v. Arias*, *supra*, 13 Cal.4th at p. 137.) The Supreme Court reiterated the proper procedure for addressing a *Wheeler* motion in *People v. Turner* (1994) 8 Cal.4th 137: "'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.]" (*Id.* at p. 167, citing *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 716-717, fn.

5.) If the trial court finds that a prima facie showing has been made, then the burden shifts to the prosecutor to explain each questioned peremptory challenge. (*People v. Arias*, *supra*, 13 Cal.4th at p. 135.)

Although the trial court did not follow the proper procedure and in fact made irrelevant findings, we nevertheless construe the trial court's action as a finding that no prima facie case had been made. *People v. Howard*, *supra*, 1 Cal.4th at p. 1155 counsels that we must review the entire record of jury selection to determine whether the record supports such a finding and must affirm if the record includes facts which the prosecutor might reasonably have relied on to excuse Mr. T.

Our review of the record of jury selection persuades us that the trial court erred in finding that defendant had not made a prima facie showing that the prosecutor exercised his peremptory challenge of Mr. T. in a racially discriminatory manner. Defendant established that Mr. T., although light skinned, nevertheless is an African American man and therefore a member of a cognizable group.[5] Defendant also made as complete a record as possible, citing Mr. T.'s answers to questions, and in doing so established a strong likelihood that the prosecutor excused Mr. T. because of his race rather than because of a specific bias. (*People v. Howard*, *supra*, 1 Cal.4th at pp. 1153-1154.)

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[5] After the trial court denied defendant's *Wheeler* motion, the prosecutor commented that it was not clear that Mr. T. is an African American, a view the prosecutor believed the trial court shared. The trial court, however, rejected the prosecutor's assertion and agreed with defense counsel that Mr. T. appeared to the court to be a light-skinned African American.

Nothing in Mr. T.'s responses to any of the questioning on voir dire suggests an obvious race neutral basis for excusing him from the jury panel. Mr. T.'s biographical information reveals that he is single, has no children, lives in Riverside and works in Palm Springs for a company that manufactures ventilators and respirators. About 10 years earlier, Mr. T. served on a civil jury that reached a verdict. He stated that he had "no reason not to have an open and impartial mind on the case before us." In response to specific questioning by the prosecutor, Mr. T. stated that he "absolutely" agreed that the People have a right to a fair trial. When the prosecutor asked whether there is any particular way a victim of crime looks or acts, Mr. T. answered, "No, not that I am aware." Mr. T. confirmed that "a victim of crime can be any person at any time" and that the victim's ethnicity does not matter. When the prosecutor asked whether the victim's lifestyle choices would make any difference to him, Mr. T. answered, "It's their choice." Mr. T. also stated that there was nothing in his experience or background that would make him biased against the victim or the prosecution, and sympathetic to defendant, if there was evidence presented that showed the victim was an adulterer. Mr. T. stated, "I'm just looking at the case you present to me. I'm not judging what either one did."

The record on appeal does not disclose an obvious reasonable race neutral basis for excusing Mr. T. from the jury. The absence of such a reason combined with the trial judge's failure to follow the correct procedure, including his reliance on irrelevant and therefore improper grounds to deny defendant's *Wheeler* objections, requires us to reverse the judgment.

Although there is authority for reversal with a limited remand in order to permit the prosecutor to explain his or her reasons for excusing the jurors in question (see, e.g., *People v. Tapia* (1994) 25 Cal.App.4th 984) we are of the view that the procedure is not appropriate in this case. The California Supreme Court has not expressly approved the limited remand procedure but several appellate courts have found tacit approval in *People v. Snow* (1987) 44 Cal.3d 216. There the Supreme Court rejected the People's suggestion that the court "order a 'limited remand' to permit the prosecutor to explain his reasons for excluding the prospective jurors in question." (*People v. Snow*, *supra*, 44 Cal.3d at p. 226.) In doing so the court stated, "We observe that, although our court has rejected such a procedure in prior cases [citations], the United States Supreme Court in the subsequently decided case of *Batson v. Kentucky* . . . employed such a remand. [Citation.]" (*Ibid.*) Broadly stated, the pertinent inquiry is whether it is realistic "'to believe that the prosecutor could now recall in greater detail his [or her] reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor examined the venire and exercised his other challenges.'" (*People v. Snow*, *supra*, at p. 227.)

In determining whether it is realistic to believe that the prosecutor and the judge can adequately recall the details of jury selection so that a meaningful review of *Wheeler* objections can take place on remand, courts have considered various factors. Those factors include not only the passage of time but also whether the case was unusual and

therefore likely to be remembered by both the attorneys and the trial judge. Several appellate courts have ordered limited remand in capital cases because voir dire in such cases generally is extensive and prospective jurors often complete detailed written questionnaires. For example, the Fifth District in *People v. Gore* (1993) 18 Cal.App.4th 692, held limited remand to be appropriate: "Because this was a death penalty case, it is likely counsel and the court paid close attention to and are more likely to remember the specifics of voir dire as opposed to less serious cases. Additionally, the voir dire was detailed and included a 15-page questionnaire." (*Id*. at p. 706; see also *People v. Tapia*, *supra*, 25 Cal.App.4th at p. 1031; *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1023.)

We are aware of three published cases that have ordered limited remand in noncapital cases. In *People v. McGee*, a murder case, Division Seven of the Second District Court of Appeal held that limited remand would be appropriate in that case but the court did not articulate reasons for that holding. (*People v. McGee*, *supra*, 104 Cal.App.4th at p. 571.) Division Four of the Second District ordered limited remand in *People v. Williams* (2000) 78 Cal.App.4th 1118, a case involving spousal abuse and assault with a deadly weapon, at the request of the People and without objection from the defendant. In doing so, the court noted that the "factors to be considered in determining whether remand is appropriate are the length of time since voir dire, the likelihood that the court and counsel will recall the circumstances of the case, the likelihood that the prosecution will remember the reasons for the peremptory challenges, as well as the

ability of the trial judge to recall and assess the manner in which the prosecutor examined the venire and exercised other peremptory challenges." (*Id*. at p. 1125-1126, citing *People v. Rodriguez*, *supra*, 50 Cal.App.4th at pp. 1024-1025.) Finally, Division Three of this court ordered limited remand in *People v. Garcia* (2000) 77 Cal.App.4th 1269, a "garden-variety burglary case," because the case involved the unusual question of whether sexual orientation of prospective jurors could be the basis of a *Wheeler* challenge. The court concluded, in view of the unique issue, that it was possible the parties and the court would recall the details of jury selection. (*Id*. at p. 1282.)

In this case, jury selection occurred nearly two years ago. Although the facts of this case arguably were unusual, the circumstances of jury selection were not. The most unusual aspect of jury selection, in our view, was the trial judge's handling of defendant's *Wheeler* motions. In view of the trial judge's action of offering explanations, we find it unrealistic to believe that the prosecutor could now, more than two years later, provide his own race neutral explanations or that the trial judge could evaluate the sincerity of those explanations. In short, the passage of time combined with the trial judge's error in proffering his own justifications for the prosecutor's actions make it difficult if not impossible to engage in a meaningful assessment of the prosecutor's use of peremptory challenges on remand. Accordingly, we decline to adopt that procedure in this case and instead will reverse the judgment.

iv. Procedure

Because we are reversing the judgment we will only briefly address defendant's challenge to the procedure the trial court used to address defendant's *Wheeler/Batson* motions. We note, at least with respect to defendant's first two *Wheeler* objections, that the trial court ruled during the sidebar conference that defendant had not made the required prima facie showing and that the trial court then waited until the next recess to put the ruling on the record. The procedure is incorrect. As the Supreme Court observed in *People v. Fuentes, supra,* 54 Cal.3d at p. 717, "[T]here is authority for the proposition that once the trial court has ruled, expressly or by implication, that a prima facie case has been made and that the burden has shifted to the prosecution, the court may not then 'return to the screening process. The sole issue then pending is the adequacy of the justifications.' [Citations.]" The same limitation should also apply when the defendant has made an objection under *Wheeler* – the trial court may not return to jury selection without first ruling on whether the defendant has made the required prima facie showing. The trial court may delay putting that ruling on the record but in doing so runs the risk of appearing not to have ruled in the first instance. We encourage the trial judge to modify his procedure in future cases.

Because we are reversing the judgment we need only briefly address defendant's jury instruction issue to assist the trial court on retrial.

2.

INVOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant claims that the trial court committed reversible error by refusing defendant's request to instruct the jury on involuntary manslaughter. The trial court refused defendant's request based on the trial court's view that the evidence did not support an involuntary manslaughter instruction. We agree with the trial court.

The pertinent legal principle is undisputed. A trial court's duty to instruct the jury, whether sua sponte or on request, depends initially on whether there is evidence to support the instruction. Specifically, a trial court must instruct on those legal principles that are "closely and openly connected with the facts before the court." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Defendant contends as he did in the trial court that involuntary manslaughter instructions were warranted based on defendant's testimony that he did not intend to kill his wife and that he did not know what he was doing. According to defendant, that evidence warrants an instruction on involuntary manslaughter according to a theory of that crime that defendant claims is articulated in *People v. Cameron* (1994) 30 Cal.App.4th 591.

Although we do not share defendant's interpretation of *People v. Cameron*, *supra*, we will not address the point. Defendant's argument is based entirely on his assertion that there was evidence to show that defendant did not know what he was doing. There was no such evidence. In his trial testimony, defendant stated, in pertinent part, that he

hit his wife twice in the back of the head with the axe. After the first blow, Mrs. Ibarra asked defendant what he was doing and tried to cover the back of her head with her hands. After the second blow, Mrs. Ibarra screamed and fell to the ground. Defendant testified, "I think that at that moment I had lost my mind by then." When asked what he did next, defendant said that he started to hit his wife with the axe again after she fell to the ground and that he continued to hit her with the axe. When asked whether he thought he might kill Mrs. Ibarra if he continued to hit her, defendant answered, "By that time I snapped. I lost control. And I – I became someone that I – wasn't me." When asked why defendant kept hitting his wife, he stated, "Again, that was the only time that something like this happened to me. And at the time that this was happening, I just lost control. I – it's just I couldn't believe it was me doing that."

The noted testimony shows that defendant knew that he was hitting his wife with the axe. What he was not aware of, or was not thinking about, were the consequences of his action or why he kept hitting his wife after she fell to the ground. That evidence does not support any theory of involuntary manslaughter, even the nonstatutory theory posited by defendant, and at most describes the classic voluntary manslaughter scenario stemming from a jealous rage. The trial court did instruct the jury on voluntary manslaughter as a lesser offense to the charged crime of murder. Because the evidence did not support involuntary manslaughter instructions, we must reject defendant's final claim of error in this appeal.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Gaut
J.

/s/ King
J.