Filed 12/3/01

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIAN JESUS REYNOSO,

Defendant and Appellant.

F034709

(Super. Ct. No. 42048)

O P I N I O N

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Kim Malcheski, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Stan Cross and David A. Lowe, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Julian Jesus Reynoso was convicted of first degree murder, assault with a firearm, knowingly and maliciously dissuading a witness, and with being an accessory after the fact. In addition, it was found that a principal in the murder was armed with a firearm; as to the other convictions, it was found that defendant was personally armed with a firearm. Defendant appeals, claiming improper denial of his *Wheeler*[1] motion,

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1 *People* v. *Wheeler* (1978) 22 Cal.3d 258.

insufficiency of the evidence that he aided and abetted his brother John in the murder,[2] instructional error, error in the calculation of his conduct credits, and the erroneous imposition of an excessive restitution fine. We reverse for *Wheeler* error.

FACTS

Defendant and his brother John[3] were at the home of Monica Perez on the evening of December 11, 1998. Also present were Mario Martinez (the victim), Mona Estrada (a friend of the victim), Marcela (Monica's daughter), Amador Estrada IV (a neighbor of Monica's), Elizeth Manjarez (Amador's girlfriend), and several others.

Defendant and John were outside when Enrique Mayorga drove by and threw a bottle at Mario's car. Defendant and John went inside to tell Mario. Mario came out but ignored the incident. Defendant and John left in their car to try and find Enrique. They were unsuccessful and, when they returned, John asked Mario why he had not taken care of Enrique. Mario said he was not going to do anything about the incident. John and Mario argued.

Later that evening, defendant and John went into the bedroom and closed the door. The only entrance to the one bathroom in the house was through this bedroom. Defendant and John had been in the bedroom approximately five minutes when Mario knocked on the door because he needed to use the bathroom. Defendant stuck his head out, and Mario told him he wanted to use the bathroom. Defendant said no and shut the door.

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[2] Defendant's brother John was a codefendant at trial. John was also convicted of first degree murder and has filed a separate appeal in F034873. Defendant has filed supplemental briefing asking to join in certain arguments raised by John in John's appeal. We have taken judicial notice of John's appeal and shall treat the issues raised in John's briefs, which defendant seeks to join, as if defendant personally raised them.

[3] Defendant was tried with his brother John Reynoso. John has filed a separate appeal (F034873) in which we likewise reverse in a published opinion.

Mario waited a while and then tried to open the door, again saying he needed to use the bathroom. John and defendant told him to wait. Mario stood by the door as defendant came out. Defendant grabbed Mario by the coat and asked him if he had a gun. Mario asked, "what are you doing?" Defendant patted Mario down for a gun and again asked Mario if he had a gun; he said no. Mario was not reaching for anything in his pockets. Defendant told John that Mario had a revolver.

John came out of the bedroom, pointed a shotgun at Mario, and shot him. Mario fell to the floor mortally wounded by a gunshot wound to the left side of his chest. The gunshot left a large hole in Mario's chest and caused major destruction to his heart. The wound was a nonsurvivable wound.

Defendant and John left. As they exited defendant pointed a gun at Juan and told him to shut up. John told Monica to not mess around with them or she would get it too. The shotgun and a handgun were found in a field several months later. On the evening of the shooting, before the shooting occurred, Amador Estrada Jr. (the father of Amador Estrada IV) met John and defendant. Defendant had something black tucked in his waistband. Defendant closed his coat when he saw Amador looking in that direction. Also earlier in the evening Amador Estrada IV saw a shotgun under a pillow in the bedroom.

John claimed he shot Mario because he was in fear for defendant's life. Defendant's defense was he did not aid or abet John and had no knowledge that John was going to shoot Mario.

DISCUSSION

I.

Wheeler Error

During jury selection, the People challenged four prospective jurors. The last two challenges were to Hispanic jurors. After the jury and alternates had been selected but had not yet been sworn, John made a *Wheeler* motion, claiming the prosecutor had

systematically excluded Hispanics from the jury. Defendant joined in the motion. Counsel for John noted that "the jury as it's constituted now has twelve whites as the twelve jurors and three white alternates."

Initially the court stated it believed the motion was not timely,[4] but it proceeded with the motion. The court noted the People had exercised three or four challenges and two of those were to Hispanics. The court asked the People to give their reasons why the two Hispanics were excused. The People questioned whether the court was finding a prima facie case. The court stated it was. The People then gave their reasons for excluding the two Hispanic prospective jurors.

As their first challenge of a prospective juror of Hispanic background (exercising their third peremptory challenge), the People excused a Mrs. Lopez. The court had asked each juror to state his or her name, general address, occupation, length of occupation, marital status, spouse's occupation, prior jury service, involvement in a criminal case, and legal or medical training. Lopez gave the following response to the court's inquiry: "My name's [Mrs.] Lopez. I live in Earlimart, California. I've lived there most of my life. I'm a case manager for at risk youth. My husband is a foreman for farm labor. I've never been selected for jury. I've never been involved in a criminal charge or victim. I have no legal or medical training. Never been involved in law enforcement. And I do have relatives that are in law enforcement."

The prosecutor's reasons for excluding Lopez were: "Your Honor, the People dismissed Miss Lopez based upon her being a counselor for at-risk youth. The People feel that Miss Lopez would have an undue sympathy for both defendants in this case because they are young and definitely if not at risk, past risk. [¶] The People feel that she

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[4] Jury selection is not complete until the panel is selected and sworn. A *Wheeler* motion must be made, at the latest, before jury selection is completed. (*People v. Gore* (1993) 18 Cal.App.4th 692, 703.) Respondent does not contend that the motion was untimely.

would associate with the people she works with and she would probably would have pity on them."

A Mrs. Guerrero was the second Hispanic excused by the People (the People's fourth and final peremptory challenge). During the standard questioning by the court, Guerrero gave the following response: "My name is [Mrs.] Guerrero. I just moved to Porterville for four months. My occupation I'm a customer service rep. I've been there for eight and a half years. My spouse, he's a construction supervisor. And he's been that for over 18 years. I've never served on a jury before. I've never been involved in any criminal [*sic*] or been a victim. I don't have any legal or medical training. Never been involved in any law enforcement. As far as a friend, I have a friend who's an officer in Porterville. As far as the relative, he's a brother who is a correctional officer."

The People gave the following reasons for their peremptory challenge of Guerrero: "In terms of Mrs. Guerrero, the People dismissed Mrs. Guerrero because she was [a] customer service representative. In terms of that, we felt that she did not have enough educational experience. It seemed like she was not paying attention to the proceedings and the People felt that she was not involved in the process. The People felt she would not be a good juror."

The court then stated: "And I accept those reasons as being not based upon race or ethnicity. And I don't find that there has been a violation of Wheeler and that the--there was not a systematic exclusion of a recognized ethnic group, i.e., Hispanics in this case. So the motion is denied."

John's counsel then asked to speak to the matter, the court gave him permission to do so. He stated: "And a couple points for the record is that counsel for the People passed on Mrs. Guerrero about seven or eight times. Then when I think he sensed that the defense was getting ready to pass, then it excused Mrs. Guerrero. There's nothing about what Miss Guerrero said in terms of her background that would make her be sympathetic to the defendants in this case. When she said she was a customer service

rep. Her husband is a construction supervisor. [¶] She's got friends in the Porterville PD, her brother or brother-in-law works for the California Department of Corrections. There was nothing in her responses or her demeanor that would justify just excusing her other than it being a race-based exclusion is our position."

The court noted that the defendants had excluded a Hispanic prospective juror.[5] John's counsel replied that there was a legitimate reason for that. There was a discussion regarding the exclusion of that juror and connections to law enforcement.

John's counsel reiterated that there was no legitimate reason to exclude Guerrero based on her responses; the fact she is Hispanic must have caused her exclusion. As to Lopez, John's counsel commented: "Counsel's argued that Miss … Lopez would be sympathetic because she works with at risk youth. That's his reason for excusing her. But for the record also the reason Miss Guzman [a prospective juror excused by defendant] was excused, as I understand it from Mr. Terrell [counsel for defendant], is because she was a victim of violent crime where guns were involved. That's what we have here."

The court made no further comments regarding the *Wheeler* motion.

Defendant argues that the trial court abdicated its duty to inquire into the prosecutor's explanations to test their genuineness, especially where there appears to be some question of disingenuousness. He claims that the peremptory challenges were based on group bias rather than specific bias and that the *Wheeler* motion was erroneously denied.

Respondent contends the trial court properly found no *Wheeler* violation. The People argue that the court's findings are supported by substantial evidence. Respondent acknowledges that the trial court's statement regarding the prosecutor's stated reasons

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5 As discussed *infra*, the trial court should not consider the defendant's challenges when ruling on a *Wheeler* motion.

was brief, but "it apparently independently assessed the prosecutor's reasons for peremptorily challenging the jurors." Respondent continues that there is no reason to conclude that the trial court did not make a sincere and reasoned effort to evaluate the credibility of the prosecutor's nondiscriminatory justifications.

When a party alleges that an opponent has improperly discriminated in the exercise of peremptory challenges, a three-step process to evaluate the claim is employed. "[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." (*Purkett v. Elam* (1995) 514 U.S. 765, 767.) "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

The trial court ruled in defendant's favor when it found a prima facie case of improper discrimination (step one). Respondent does not challenge this initial ruling and we assume that substantial evidence supports that determination. The prosecutor then defended his challenges with reasons that were facially neutral as to Hispanic ancestry or surname (step two).[6] "Our concern here is with step three: whether the record as a whole shows purposeful discrimination." (*People v. Silva, supra,* 25 Cal.4th at p. 384.)[7]

We start by evaluating the prosecutor's reasons. The prosecutor first reasoned Guerrero was a customer service representative, thus lacking enough educational

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[6] "'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (*Purkett v. Elem, supra,* 514 U.S. at p. 768.)

[7] While our analysis here primarily focuses on step three, our discussion necessarily includes aspects of step two insofar as the explanations given in that step need some support in the record before us.

experience. While the record supports Guerrero was a customer service representative, there is nothing in the record about her educational experience other than speculative inference. While some professions , for example doctors, lawyers, teachers, require a certain level of education, the same cannot be said for a customer service representative. Furthermore, the prosecutor did not explain how Guerrero's occupation or education related to this case. In *People v. Turner* (1986) 42 Cal.3d 711, a prospective juror stated that she was employed as a "'supervising hospital unit coordinator.'" (*Id.* at pp. 725-726.) The prosecutor's reason for excluding her was, "'I think it was something in her work as to that she was doing that from our standpoint, that background was not--would not be good for the People's case. And I excused her, along with quite a few other people, too, for the same reason.'" (*Id.* at p. 725.) The Supreme Court found this explanation to be unsatisfactory. "To begin with, the assertion that 'something in her work' would 'not be good for the People's case' is so lacking in content as to amount to virtually no explanation. If such vague remarks were held to satisfy the prosecution's burden of rebutting a prima facie case of group discrimination, the defendant's constitutional right to trial by a jury drawn from a representative cross-section of the community could be violated with impunity." (*Ibid.*)

In contrast, in *People v. Barber* (1988) 200 Cal.App.3d 378 the prosecutor exercised a peremptory challenge against a kindergarten teacher. One of the reasons given for excluding this teacher was "'many teachers have somewhat of a liberal background and are less prosecution oriented.'" (*Id.* at p. 394.) We found the explanation to be a valid reason. First we stated, "[p]eremptory challenges are often exercised against teachers by prosecutors on the belief they are deemed to be rather liberal." (*Ibid.*) We noted that the prosecutor relied on her past experience that teachers tend to be liberal and less prosecution oriented and thus we distinguished this employment-based reason from the unsatisfactory vague explanation given by the prosecutor in *Turner.*

For the People to say they excluded Guerrero because she was a customer service representative and lacked educational experience bears similarity to the hollow reason given in *Turner*. The prosecutor offered no explanation why, on the facts of this case, Guerrero's occupation and presumed lack of educational experience would tend to make her an unfavorable juror for the prosecution. In contrast, the prosecutor's reasons for excluding Lopez [she was a counselor for at risk youth and would have an undue sympathy for both defendants because they are young and at risk] included "a neutral explanation related to the particular case to be tried." (*Batson v. Kentucky* (1986) 476 U.S. 79, 98.) As to Guerrero, the prosecutor "did not articulate how these failings [being a customer service representative and lacking education] related to jury service in this case." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.) While trivial reasons are not per se invalid and the validity of peremptory challenges should not be elevated to challenges for cause, "[w]hat is required are reasonably specific and neutral explanations that are related to the particular case being tried." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1218.)[8]

The prosecutor also stated that "[i]t seemed like she [Guerrero] was not paying attention to the proceedings and the People felt that she was not involved in the process. The People felt she would not be a good juror." A prospective juror's body language or manner of answering questions can be a proper basis for justifying a peremptory challenge and rebutting a prima facie case. (*People v. Fuentes*, *supra*, 54 Cal.3d at pp.

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[8] Defendant points out that other jurors who appeared to have little educational background were not excluded from the jury. The California Supreme Court has repeatedly stated that a reviewing court should not engage in a comparative analysis of prospective jurors' responses. Comparative analysis of jurors' responses "to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220.)

714-715.) It is, of course, impossible from a cold record for us to definitively determine whether Guerrero was or was not paying attention or was or was not involved in the process. On the one hand, there is nothing in Guerrero's responses which indicated she was not paying attention. She competently answered the questions posed to all jurors, and did so in a manner not significantly different from other jurors' "cold" responses contained in the record. "[C]redibility determinations require a personal presence that a cold transcript cannot convey." (*Abbott v. Mandiola* (1999) 70 Cal.App.4th 676, 683.) "This is, of course, one reason why appellate courts in this area of law generally give great deference to the trial court, which saw and heard the entire voir dire proceedings." (*People v. Perez* (1994) 29 Cal.App.4th 1313, 1330.)

Defendant claims that the prosecutor's proffered reasons--that Guerrero was inattentive and not involved in the process--are too vague and general to be valid here. On this, we disagree; a somewhat inattentive prospective juror would be an appropriate concern, especially in a case of this magnitude. These particular reasons, if supported by the record, would be valid. The critical question becomes whether the record supports this reasoning.

Acknowledging that the trial court was present in the courtroom and in the best position to determine the credibility of the prosecutor's reasoning, we would, in the absence of other circumstances, reasonably assume that either the trial court observed the behavior itself and therefore found it to be true, or evaluated the overall circumstances and the credibility of the prosecutor and determined that his proffered reason was valid. The trial court was required to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily…." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

Because we are not afforded a record of one's body language or demeanor, we find it helpful to review any statements the trial court may have made reflective of its observations for the record regarding the prospective juror in question and any discussion that followed the trial court's ruling. The California Supreme Court has recognized that *Wheeler* hearings generally should be adversarial and defense counsel's contribution might make a difference in the ultimate ruling. (*People v. Ayala* (2000) 24 Cal.4th 243, 268.)

After the prosecutor gave his reasons and the court accepted the reasons as not based on race or ethnicity, the court made no statements of its impressions of Guerrero's responses or demeanor. Counsel for John then argued as to Guerrero that there was nothing in terms of her background that would make her sympathetic to the defense, she had friends and relatives in law enforcement, and "[t]here was nothing in her responses or her **demeanor** that would justify just excusing her other than it being a race-based exclusion." (Emphasis added.)

The following exchange took place:

"THE COURT: And I believe that there was another Hispanic that was excused not by the People, but by the defense and that was Mrs. Guzman.

"MR. RUMERY [John's counsel]: That was a legitimate reason. I didn't excuse her.

"THE COURT: I'm not saying it wasn't legitimate. You just brought up – I'm not arguing with you, but I want the record to be clear, you argued that even a person who the People should want to have on, namely law enforcement background may still kick off because of being Hispanic. I'm just pointing out that Miss Guzman was another person that is Hispanic background but they did not kick off and I believe her background was that she had been the one who had been kidnapped.

"MR. RUMERY: Right. I would say she would want to be kept on by the People because she's been a victim of a violent crime at gunpoint.

"THE COURT: But your argument was that so should the other person because they had law enforcement background.

"MR. RUMERY: I didn't say she was law enforcement background.

"THE COURT: I thought you said –

"MR. RUMERY: I was looking over my notes in terms of what she said in answer to the nine questions that are up on the little poster. She responded that she has friends in the Porterville PD.

"THE COURT: Right. Law enforcement people.

"MR. RUMERY: And a brother who works for California Department of Corrections. So I'm just saying that based on those responses, there's no legitimate reason to exclude her based on those responses other than the fact that she has her – she's Hispanic. I'm trying to make that for the record."

During general questioning of all jurors, Guzman indicated that she had been kidnapped at gunpoint coupled with an attempt to rape her and cause bodily harm. She stated that she thought she could judge the case fairly.[9] During individual questioning she revealed that she had a brother-in-law who worked for the Merced Police Department. She was peremptorily challenged and excused by defendant.

We begin by noting that the trial court's discussion regarding prospective juror Guzman was erroneous for two reasons. First, the court erred when, for whatever reason, it commented on the fact that the defense had challenged a Hispanic prospective juror [Guzman].[10] "[T]he propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges." (*People v.*

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[9] Although during this questioning the record does not identify Guzman by name and refers to her only as "a juror," later discussions on the record leave no question that Guzman was the prospective juror previously not identified by name.

[10] We note that the prosecutor also commented to the court that the defense had challenged an additional Hispanic prospective juror.

Snow (1987) 44 Cal.3d 216, 225.) Second, the court noted that Guzman was another Hispanic prospective juror that the People did not excuse. "Although the passing of certain jurors [within a cognizable group] 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 [the prima facie portion of] a *Wheeler* objection" (*ibid*.), the court had already made it's prima facie finding. Whether the people would have challenged Guzman cannot be known because she was eliminated from the jury pool by the defense and at the time the *Wheeler* motion was made here there were no Hispanic jurors remaining. Furthermore, the inclusion of one member of a cognizable group "'ignores the fact that other members of the group may have been excluded for improper, racially motivated reasons.'" (*People v. Motton* (1985) 39 Cal.3d 596, 607-608.) Thus, the trial court should not have considered the circumstances regarding Guzman in assessing whether the reasons given for Guerrero were valid.

Next, we note that although the court felt compelled to comment on defendant's[11] statement regarding Guerrero's ties to law enforcement, it did not respond to or even acknowledge defendant's comment that there was nothing in Guerrero's demeanor that would justify excusing her. Defendant's statement demonstrated his disagreement with the prosecutor's assessment that Guerrero was not paying attention and was not involved in the process. Neither the trial court's initial comments nor its subsequent comments contain any particularized assessment of the prosecution's justifications.

The California Supreme Court recently discussed the trial court's duty to make a sincere and reasoned attempt to evaluate the justifications of the prosecutor as applied to each juror in *People v. Silva, supra,* 25 Cal.4th 345. In *Silva*, the defendant was being

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11 Although the motion was argued by John's counsel, defendant joined in the motion. We shall hereafter attribute statements made by John's counsel as if they were made by defendant's counsel.

retried for the penalty phase of his capital murder case; the first penalty phase had resulted in a hung jury with seven voting in favor of death and five voting for a sentence of life imprisonment without parole. Twice during jury selection for the retrial, the prosecutor commented that the first penalty trial had hung up on racial grounds. The defense made its first *Wheeler* motion to dismiss the panel after the prosecutor had exercised peremptory challenges against three prospective jurors with Hispanic ancestry or surnames. The court found a prima facie case and asked the prosecutor to explain the reasons for the challenges.[12]

The record in *Silva* reflected the following as to juror Jose M.

"During the ex parte hearing, the prosecutor said he challenged M. because, during the death qualification voir dire, M. said 'he would look for other options' when the prosecutor 'asked him could he exercise his discretion to impose the death penalty,' and M. 'indicated that he thought it was the toughest penalty, and he would look for other options.' The prosecutor said he 'also felt that [M.] was an extremely aggressive person and might hang the jury with his thoughts at that point ... .'

"Defendant alleges, and we agree, that the transcript of the death-qualification voir dire provides no support for either of these reasons. When defense counsel asked M. for his opinion on the death penalty, M. answered: 'Well, I guess I have an opinion on it. I mean, it's the most -- the hardest -- oh, what's the word I'm looking for -- punishment you can give.' When defense counsel asked M. to clarify whether he was for or against the death penalty, he replied: 'I would say I'm mixed. I would, you know, consider it and I would consider opposition to it.' Defense counsel then explained how a jury is

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[12] The court allowed the prosecutor to explain his reasons in an ex parte hearing out of the presence of defendant and defense counsel. The Supreme Court found this was error but the effect of the error was partially alleviated when the transcripts were unsealed and the defense was allowed to bring a new trial motion based on the contents of the transcripts. (*People v. Silva*, *supra*, 25 Cal.4th at pp. 384-385.)

supposed to decide the penalty in a capital case, and M. said he could do that. Defense counsel asked: 'So you're saying you don't think you would have a problem returning either verdict?' M. replied: 'No.'

"In answer to further questioning by defense counsel, M. promised that he would engage in deliberations, that 'after doing that process' he would 'definitely' stand by his decision if he was convinced he was right and the others were wrong, but also that he would reanalyze his own decision if other jurors convinced him he was wrong.

"In reply to the prosecutor's questions, M. said he did not consider himself an 'overly sympathetic person,' and he assured the prosecutor that he would 'listen to all the evidence that's presented' from 'both sides,' that he would attempt to arrive at a fair and impartial verdict 'whatever it is,' that if the jury was 'hung up one way or the other' he would 'back off' and 'listen to the other jurors and ask [him]self "Was I right or was I wrong?"' In response to the prosecutor's question asking whether he was 'a strong enough person' if he felt he was wrong 'to admit this out loud and change [his] vote,' M. answered 'Certainly.'

"The prosecutor then asked: 'Do you lean one way or the other on the death penalty, do you think?'

"M. answered: 'Possibly slightly for it.'

"Finally, the prosecutor asked M. whether he could return a death verdict against defendant 'if he's earned the death penalty.' M. answered 'Yes.'" (*People v. Silva, supra,* 25 Cal.4th at pp. 376-377.)

"[T]he trial court did not ask the prosecutor any questions and did not remark on any discrepancies between the prosecutor's stated reasons and the prospective jurors' responses on voir dire or on their questionnaires. When proceedings resumed in the presence of defendant and defense counsel, the trial court denied the first *Batson/Wheeler* motion. The court said only that the prosecutor 'did provide an explanation with regard

to' the three peremptory challenges and that 'I think that there was a good excuse with regard to all of these people.'" (*People v. Silva, supra,* 25 Cal.4th at p. 382.)

A second *Batson/Wheeler* motion was made after the prosecutor challenged two more Hispanic prospective jurors. Again "the trial court did not question the prosecutor or remark on the apparent disparity between the prosecutor's stated reasons and what the record shows to have occurred during voir dire." The court informed defense counsel that the reasons given by the prosecutor "'appear to very valid reasons for those excuses.'" (*People v. Silva, supra,* 25 Cal.4th at p. 383.)

At the motion for new trial, the defendant claimed that almost all of the prosecutor's reasons for excluding the challenged Hispanic prospective jurors were either unsupported by the record or inherently implausible. Without commenting on the reasons the trial court reiterated that it found the reasons sufficient. (*People v. Silva, supra,* 25 Cal.4th at p. 384.)

Defendant Silva appealed, challenging the validity of the denial of his *Batson/Wheeler* motion at the penalty phase of his trial. The Supreme Court reviewed all of the challenges and found numerous discrepancies between the prosecutor's reasons and the responses of the challenged jurors in the record. The Supreme Court then focused on prospective juror Jose M. The court found that the trial court erred in its review of the reasons given to support the prosecutor's challenge to Jose M: "[W]e agree with defendant that the court erred in denying the motion as to Prospective Juror Jose M. Nothing in the transcript of voir dire supports the prosecutor's assertions that M. would be reluctant to return a death verdict or that he was 'an extremely aggressive person.' Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent [citation], it is another matter altogether when, as here, the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue [citations]. We find nothing in the trial court's remarks indicating it was aware

of, or attached any significance to, the obvious gap between the prosecutor's claimed reasons for exercising a peremptory challenge against M. and the facts as disclosed by the transcripts of M.'s voir dire responses. On this record, we are unable to conclude that the trial court met its obligations to make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation] and to clearly express its findings [citation]." (*People v. Silva, supra,* 25 Cal.4th at p. 385.)

The Supreme Court concluded: "We conclude that the trial court's ultimate determination—that defendant failed to meet his burden of proving intentional discrimination with respect to the prosecutor's peremptory challenge of Prospective Juror M.—is unreasonable in light of the evidence of the voir dire proceedings. Although we generally 'accord great deference to the trial court's ruling that a particular reason is genuine,' we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. [Citations.] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient. As to Prospective Juror M., both of the prosecutor's stated reasons were factually unsupported by the record. Because the trial court's ultimate finding is unsupported -- at least as to Prospective Juror M. -- we conclude that defendant was denied the right to a fair penalty trial in violation of the equal protection clause of the federal Constitution [citation] and was denied his right under the state Constitution to a trial by a jury drawn from a representative cross-section of the community [citation]." (*People v. Silva, supra,* 25 Cal.4th at pp. 385-386.)

The *Silva* case was applied in *People v. Gomez* (2001) 92 Cal.App.4th 1. After the prosecutor excused three prospective jurors who appeared to be of Hispanic descent, defense counsel made a *Wheeler* motion. The court found a pattern of group bias. The

prosecutor explained his exclusions as follows: "Ornelas was a very young man who might not have 'given the fingerprint evidence the weight it would have deserved.' The prosecutor expressed concern of Saldana, a cable technician, who was required to be in other people's homes, 'might put himself in the defendant's shoes' and be difficult to persuade. Concerning Ramirez, the prosecutor stated, 'her husband is a painter. He's a little bit too liberal for me so I kicked her off.' Apparently confused by this response, the court stated, 'Wait. I'm sorry. The painter? Who is too liberal?' The prosecutor responded, 'Her husband is a painter. I just got off a jury where her husband was a philosopher and anyone close to painting, philosophy, acting, I don't like to keep. I don't care. I'll kick them off.' The court then stated, 'I'm sorry, Did she say he was a house painter or a painter of works of art.' The prosecutor replied, 'She said painter. I took it as works of art.' Defense counsel stated, 'I took it as house painter.' The prosecutor responded, 'We didn't go into it' No further inquiry was conducted." (*Id*. at p. 3.)

The trial court denied the motion. "The court agreed Ornelas appeared 'quite young.' With regard to Saldana, the court commented that '[it] could see why the prosecutor feels the way he does ….' As to Ramirez, the court stated, 'Whether or not Ms. Ramirez [*sic*] husband paints, you know, be it seascapes or houses, I don't know. I guess that will just remain a mystery, but it's not unreasonable for the people to infer that he was a painter of art and that somehow that brand [*sic*] him as a liberal." (*People v. Gomez, supra*, 92 Cal.App.4th at p. 4.)

Gomez claimed on appeal that the trial court erred in denying his *Wheeler* motion because the explanations were unsupported by the record and the trial court failed to seriously evaluate the genuineness of those explanations. Relying on a *Silva* type analysis the appellate court agreed. "'"The trial court has a duty to determine the credibility of the prosecutor's proffered explanations" [citation], and it should be suspicious when presented with reasons that are unsupported or otherwise implausible [citations] ….' [Citation.] Though obviously puzzled by the prosecutor's explanation,

the court simply took it at face value. The court remarked that 'it's not unreasonable for the people to infer that [Mr. Ramirez] was a painter of art and that somehow that brand [*sic*] him as a liberal.' But the prosecutor's reasoning is not only illogical, the factual premise for it is unsubstantiated in the record. The court failed to question the factual bases for the prosecutor's explanation: whether the prosecutor was actually familiar with Ms. Ramirez's husband; whether Mr. Ramirez painted canvases or homes; and whether Ms. Ramirez shared her husband's ideology. The absence of factual support for the prosecution's explanation, combined with the prosecutor's illogical assumptions, reflect that the court failed to adequately determine the credibility of the proffered justification. Further, Cesena's [a juror challenged by the People who commented on the exclusion of Hispanics] objective and lay observation that jurors of Hispanic descent and with Hispanic surnames were being unfairly eliminated lends itself to support a determination that the prosecutor's conduct was highly questionable.

"Ramirez's voir dire disclosed little. When questioned by the court, she stated, 'My name is Ms. Ramirez. I work as a shipping clerk. I'm married. My husband is a painter. I have four children [*sic*] eleven, eight, five, and six months. And this is my first time as a juror.' No further information was elicited from her.

"Nothing in this voir dire supports the prosecutor's proffered justification. It was unreasonable for the prosecutor to assume her husband is involved in works of art, rather than the applying of paint to buildings and such. Nothing in the record supports this inference; the prosecutor failed to inquire what Mr. Ramirez painted. Instead, responding to defense counsel's statement that he understood Mr. Ramirez to be a house painter, the prosecutor admitted that 'We didn't go into it.' His explanation amounted to pure speculation. The prosecutor's logic is almost surreal: A 'painter' must be assumed to be an artist, artists must be assumed to be 'liberal,' and liberals must be assumed to be antagonistic to the prosecution. Furthermore, one who is married to a liberal spouse must

be assumed to share his or her ideology. Take that, Mary Matalin and James Carville!" (*People v. Gomez*, *supra*, 92 Cal.App.4th at p. 5.)

The appellate court concluded "[b]ecause the prosecutor's explanation for exercising a peremptory challenge against Ramirez was not supported by the record, we conclude that defendant's right to a fair trial was violated."[13] (*People v. Gomez*, *supra*, 92 Cal.App.4th at p. 6.)

The reasons given by the prosecutor in *Silva*, *supra*, 25 Cal.4th 345 were contradicted by the record and were thus implausible and unsupported by the record. While the record does not contradict the reasons given here, neither does the record on appeal support them. Although the reasons given here by the prosecutor were not as far-fetched as the reasons in *Gomez*, *supra*, 92 Cal.App.4th 1, the record here does not engender confidence in a finding that the trial court engaged in a sincere and reasoned attempt to evaluate the prosecutor's justification for challenging Guerrero. First, as previously discussed, the initial reason given by the prosecutor [Guerrero was a customer service representative with a lack of educational experience] was not supported by the record and lacked any content related to the case being tried. Second, the demeanor reason given by the prosecutor, which is not reflected within the cold record on appeal, was disputed by the defense yet not clarified in any way by the court. Finally, in rejecting defendant's argument, rather than focusing on the question of validity of the People's justifications, the trial court attempted to buttress its finding by analyzing a

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[13]The concurring opinion set forth reasons for reversal that it found even more compelling than the majority opinion indicated. The concurring justice found support for a pattern of racial bias in the "one truly ludicrous excuse, and two so flimsy that, in context with the first, there is a clear basis to conclude that the prosecutor was using his peremptories in an ethnically biased manner." (*People v. Gomez*, *supra*, 92 Cal.App.4th at p. 7, conc. opn. of Sills, J. The dissenting justice believed that the majority had substituted their judgment of credibility for the trial courts. The dissenting justice found that nothing in the record conflicted with the prosecutor's reasons and the trial court found the prosecutor's reasons to be sincere. (*Id*. at pp. 8-10, dis. opn. of O'Leary, J.)

Hispanic juror not challenged by the People but excused by the defense. The court's comments regarding Guzman could appropriately have come into play during the court's initial screening of whether a prima facie case had been shown, but not during its analysis of whether the prosecutor's justifications were valid. (See *People v. Granillo* (1987) 197 Cal.App.3d 110, 121.)

Trial courts should not relieve prosecutors of their burden during a *Wheeler* motion by readily accepting vague explanations. On this record, we are unable to conclude that the trial court satisfied its obligation under *Silva* to evaluate the prosecutor's explanation. (*People v. Silva, supra,* 25 Cal.4th at p. 385.) "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*Id*. at p. 386.) In light of the reversal, we will not discuss the remaining issues, other than the matter of sufficiency of evidence.

II.

Sufficiency of the Evidence

Defendant claims the evidence is insufficient to establish that he aided and abetted the first degree murder of Mario. First we determine if there is sufficient evidence of first degree murder.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"Categories of evidence which are typically sufficient to sustain a finding of premeditation and deliberation include: (1) facts about a defendant's behavior before the incident that show planning; (2) facts about any prior relationship or conduct with the victim from which the jury could infer a motive; (3) factors about the manner of the killing from which the jury could infer the defendant intended to kill the victim according

to a preconceived plan." (*People v. Vorise* (1999) 72 Cal.App.4th 312, 318.) These are typically referred to as the *Anderson* (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27) factors. "The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

Although one version of the facts might have resulted in a finding that John was acting under some form of self-defense, the facts are also susceptible to the interpretation that the killing of Mario was a premeditated and deliberate killing absent any self-defense or defense of others. We must accept that version of the facts that support the judgment.[14]

Defendant and John went into the bedroom and remained there for approximately five minutes. The shotgun was in the bedroom under a pillow. They refused to let Mario enter the room when he first sought entrance. This is evidence of planning. Earlier in the evening John argued with Mario because Mario had not taken any action against Enrique.[15] This is evidence of motive. Mario was shot at close range in the heart, a clearly fatal wound. "[T]he method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) The method of killing clearly implies John intended to kill the victim according to a preconceived plan. There was substantial evidence of planning, motive, and manner of killing to support a first degree murder conviction.

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[14] Although John and defendant argued at trial that defendant took a gun from Mario after the killing, and that Mario was armed, there was also evidence that no one saw defendant remove a gun from Mario, and defendant was seen earlier in the evening with something tucked in his waistband.

[15] Defendant claims we should ignore the testimony supporting this point because only one witness testified to it; it is not our task on appeal to determine the credibility of the witnesses.

"[A]n aider and abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent either of committing, or of encouraging or facilitating commission of, the offense. [Citation.] … [I]f the aider and abettor undertakes acts 'with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense.' [Citations.] Thus, the basis of liability for the perpetrator applies to the aider and abettor and extends to 'the natural and reasonable consequences of the acts he knowingly and intelligently aids and encourages.'" (*People v. Sanchez* (1995) 12 Cal.4th 1, 33.)

Defendant and John arrived at the Perez residence together, with defendant armed with a handgun; at some point in time the shotgun was hidden in the bedroom. Defendant and John went after Enrique after he threw a bottle at Mario's car. Although John was the only one who argued with Mario about Mario's failure to respond to the bottle-throwing incident, defendant was present during this argument and it could be inferred from their earlier outing together to find Enrique that they shared their feelings regarding Enrique and Mario's failure to respond. Defendant and John were in the bedroom where the shotgun was hidden under a pillow for approximately five minutes. When Mario first sought entrance to the room, defendant would not let him in. When defendant came out of the bedroom he grabbed onto Mario and patted him down. John then shot Mario as defendant held him. The two threatened others in the house as they were leaving; they left together, and disposed of both weapons. From this it was reasonable for the jury to conclude that defendant acted with the knowledge of John's purpose and with the intent of committing, encouraging or facilitating the commission of the offense. Sufficient evidence supports defendant's conviction of first degree murder.

DISPOSITION

The judgment is reversed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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HARRIS, J.

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WISEMAN, J.