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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARENE ELEANOR AUSTIN,

Defendant and Appellant.

B266558

(Los Angeles County
Super. Ct. No. MA051956)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric P. Harmon, Judge. Affirmed.

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

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan J. Kline and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Larene Eleanor Austin appeals from the judgment entered following her conviction by jury for first degree murder, with personal use of a firearm, personal and intentional discharge of a firearm, and personal and intentional discharge of a firearm causing great bodily injury and death. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b) – (d).) Her sole contention on appeal is that the trial court erroneously denied her multiple *Wheeler/Batson* motions[1] alleging the prosecution exercised peremptory challenges to prospective jurors solely based on their race or ethnicity. We affirm.

FACTUAL SUMMARY

A detailed presentation of the facts of the present offense is unnecessary. The evidence established that on June 16, 2010, appellant, using a firearm, shot and murdered LaNell Barsock in Los Angeles County. The court sentenced her to 50 years to life in prison. Appellant and the victim were African-Americans. The sworn jury consisted of six Hispanics, five Caucasians, and one African-American, and the alternate jurors consisted of three African-Americans and one Caucasian.

DISCUSSION

Six *Wheeler* motions were made during jury selection in this case: appellant made the first five motions, and the prosecutor brought the sixth. The motions at issue on appeal are appellant's first, third, fourth, and fifth motions asserting that the prosecutor's peremptory challenges of prospective jurors were

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[1] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*). Subsequent references to *Wheeler* motions imply *Batson* claims as well.

motivated by racial or ethnic bias. As to the first *Wheeler* motion, we find no error in the trial court's ruling that appellant failed to establish a prima facie showing that the prosecutor's first four challenges were based on the race or ethnicity of the challenged jurors. As to the third, fourth and fifth motions, we uphold the trial court's determination that the prosecutor provided genuine, neutral justifications for his excusal of the jurors subject to those motions, and that appellant failed to prove purposeful discrimination on the basis of race or ethnicity.

1. *First* Wheeler *Motion* (Jurors 8238, 5709, 8520 & 8392).

Appellant's first *Wheeler* motion was based on the prosecutor's challenge to one African-American prospective juror and three Hispanics.

a. *Pertinent Facts.*

(1) Voir Dire of Challenged Prospective Jurors.

(a) Juror 8238 (an African-American man).

Juror 8238 (Juror 1 in the jury box), whom the court later identified as an African-American man, worked at a Rite Aid warehouse. During voir dire, the following confusing colloquy occurred regarding Juror 8238's response to a question on the jury questionnaire about his marital status[2]: "The Court: Okay.

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[2] The juror questionnaires referenced during voir dire are not part of the record on appeal. Although we granted appellant's request to augment the record to include these questionnaires, the superior court reported that a search of the court file failed to yield them. However, we glean from the record that one of the questionnaire items asked for the jurors' marital status.

Staple.[3] [¶] The Reporter: Sorry? [¶] The Court: Say that one more time. What staple? [¶] [Juror 8238]: Mental state is fine, normal. [¶] The Court: One sec. Your marital status. That's what we're looking for. You married? Single? Divorced? [¶] [Juror 8238]: Single. Sorry. Single still. I have one child." Juror 8238 also stated that he lacked jury experience. He told the prosecutor he would not have a problem convicting the defendant if the prosecutor proved his case. When defense counsel asked if he would be more likely to credit the testimony of a police officer over that of a lay witness, this juror responded, "I honestly wouldn't know. This is my first time here."

(b) Juror 5709 (a Hispanic man).

Juror 5709 (Juror 6), whom the court later identified as a Hispanic man, "stock[ed]" at the 99 Cent Store, was single without children, and lacked jury experience. During voir dire by the court concerning his responses on the questionnaire, Juror 5709 stated he did not remember and was "not too sure" if he answered "yes" to any questions. During voir dire by the prosecutor, the prosecutor indicated Juror 5709 had given "yes" answers to certain questions, including question No. 12, which asked if jurors or their family members had been crime victims. Juror 5709 explained that he "probably just got mixed up and I was throwing 'yeses' and 'no's' out there."

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[3] Although the court reporter transcribed the word "staple," it appears from the context that the word "stable" should have been transcribed.

Juror 5709 indicated he would be able to convict the young female defendant if the prosecutor proved his case, and Juror 5709 denied having any positive or negative experiences with law enforcement. When asked if he had strong feelings about the criminal justice system, he responded, “Everything is made up of good ones and bad ones,” and then clarified that he was referring to police officers.

(c) Juror 8520 (a Hispanic woman).

Juror 8520 (Juror 4), whom the court later identified as a Hispanic woman, was a single student who was studying psychology and who provided in-home health care for her mentally ill sister.

Juror 8520 had experienced negative contact with law enforcement. On over 50 occasions, the police were summoned as a result of her sister’s mental health problems; sometimes officers acted appropriately and other times they did not. After Juror 8520 stated that the police did not treat her sister poorly, the court asked, “why is it negative to you?” Juror 8520 replied, “Oh, I was negative and I mean it was not a good thing.”

(d) Juror 8392 (a Hispanic man).

Juror 8392 (first Juror 17, then another Juror 4), whom the court later identified as a Hispanic man, was a student studying mechanical engineering. He was single without children, and lacked jury experience. His father and brother each had been arrested for driving under the influence. During voir dire by the prosecutor, Juror 8392 opined that in 15 percent of criminal cases, innocent people are convicted.

(2) Appellant's First Wheeler *Objection and the Trial Court's Ruling.*

The prosecutor exercised his first four peremptory challenges against Jurors 8238, 5709, 8520, and 8392. Appellant's counsel then made his first *Wheeler* motion.

Appellant's counsel initially argued the prosecutor improperly challenged Jurors 8238, 5709, and 8392 (the three men, consisting of one African-American and two Hispanics) because they were all "very young" and "minorities."[4] Appellant's counsel then modified his *Wheeler* motion to include Juror 8520, the Hispanic woman, but commented, "However, my focus is really on the three."[5]

The court concluded all four jurors were in "a protected class" by virtue of their race or ethnicity. The court asked appellant's counsel, "in terms of a prima facie case, do you believe that there's evidence of their systematic exclusion? It's more than just saying they're all part of a protected class." Appellant's counsel argued that he believed the prosecutor wanted to keep minorities off the jury for unspecified strategic reasons.

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[4] The parties below disputed whether challenging jurors based on their youth violates *Wheeler*. On appeal, appellant challenges only the alleged exclusion of jurors based on race or ethnicity, and thus we do not address the propriety of a *Wheeler* motion regarding peremptory challenges based on age.

[5] Although respondent contends that appellant abandoned her *Wheeler* motion as to Juror 8238, the African-American man, the record is ambiguous as to which particular three jurors of the four were the intended focus of appellant's modified *Wheeler* motion. We decline to find any forfeiture with respect to the *Wheeler* motion as to Juror 8238.

The court found that at that point the panel of 12 jurors was very diverse and included two African-Americans, at least two Asians, and a Hispanic. The court indicated that, of the 20 people in the gallery, "probably, maybe 25 percent . . . maybe more" were not Caucasians. The court stated, "I don't find that the exclusion of these jurors or . . . the peremptories against them meets a prima facie showing at this time." The court then stated, "I do invite the prosecutor to justify them if he chooses." The prosecutor proffered justifications as to the four jurors. The court did not comment on the reasons. After a recess, the prosecutor tendered additional reasons relating to the jurors' youth, and lack of life and work experience. The prosecutor relayed that he had researched whether age was a prohibited basis for a peremptory challenge and concluded that it was not. After accepting the prosecutor's augmenting of the record, the court reiterated that it had not found a prima facie showing as to the prosecutor's first four peremptory challenges.

b. ***Analysis.***

(1) Legal Framework and Standard of Review When Trial Court Found No Prima Facie Case.

In *Wheeler*, our Supreme Court held that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (*Wheeler, supra,* 22 Cal.3d at pp. 276-277.) *Batson* reached the same conclusion based on the federal equal protection clause. (*People v. Huggins* (2006) 38 Cal.4th 175, 226.)

When a defendant asserts at trial that the prosecution made a peremptory challenge solely based on race or ethnicity, first the defendant must make a prima facie case by showing the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, assuming the defendant produces evidence sufficient for the trial judge to draw such an inference, the burden then shifts to the prosecutor to provide a nondiscriminatory explanation for the challenges. Third, if a neutral explanation is tendered, the trial court must decide whether the defendant has proven purposeful discrimination. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*); *People v. Cowan* (2010) 50 Cal.4th 401, 447.)

"A trial court's ruling on a *Wheeler* motion is reviewed for substantial evidence. . . . 'Because of the trial judge's knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, we must give "considerable deference" to the determination that appellant failed to establish a prima facie case of improper exclusion. [Citation.]' [Citation.]." (*People v. Rushing* (2011) 197 Cal.App.4th 801, 809; see *People v. Lenix* (2008) 44 Cal.4th 602, 621 (*Lenix*).)

Where, as here, "[p]rior to soliciting the prosecutor's reasons justifying his challenges, the court expressly ruled that it did *not* find a prima facie case, and that it only asked the prosecutor for his justifications for purposes of completing the record . . . , the issue of whether a prima facie case has been established is not moot. . . ." (*People v. Turner* (1994) 8 Cal.4th 137, 167 (*Turner*).) Thus, "an appellate court properly reviews the first-stage ruling if the trial court has determined that no prima facie case of discrimination exists, then allows or invites

the prosecutor to state reasons for excusing the juror, but refrains from ruling on the validity of those reasons." (*People v. Scott* (2015) 61 Cal.4th 363, 386 (*Scott*); see *People v. Sattiewhite* (2014) 59 Cal.4th 446, 470 (*Sattiewhite*) [unless trial court explicitly or implicitly evaluated prosecutor's stated justifications, appellate review should begin with trial court's first stage finding of no prima facie case].)

In determining whether the trial court correctly found there was no prima facie case, the appellate court may not rely on the reasons volunteered by the prosecutor, as those asserted justifications have no relevance to the analysis at this first stage. (*Scott, supra,* 61 Cal.4th at p. 390.) Only if the appellate court determines that the trial court erred in finding no prima facie case of discrimination does the court proceed to the "third stage" and examine the prosecutor's asserted reasons for excusing the jurors. (*Id.* at p. 391.)[6]

Although appellant acknowledges that the above described legal framework typically applies, she suggests that *Scott* prescribes a different approach for the instant appeal because it involves multiple *Wheeler* motions. Specifically, she argues that because the trial court reached the third stage of the *Wheeler* review with respect to appellant's third, fourth and fifth *Wheeler* motions (discussed below), *Scott* requires us to begin our review of her first motion at the third stage as well, even though the trial court never got there. Appellant is wrong.

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6 Because, as further discussed below, we affirm the trial court's finding of no prima facie showing as to the first *Wheeler* motion, we have no need to recite the prosecutor's asserted justifications for each of these four peremptory challenges.

Scott merely held that "[w]here the appellate court is already evaluating the sincerity of the proffered reason for excusing one juror as part of its review of all the evidence as it bears on the question whether the excusal of *another* juror constituted unlawful discrimination [citations], the appellate court may likewise begin its review of the denial of the *Batson/Wheeler* motion as to the first juror by evaluating the sincerity of the proffered reason." (*Scott, supra*, 61 Cal.4th at p. 392.) *Scott* describes an exception applicable in a limited procedural context not present here -- namely, where the prosecutor's reasons for dismissing one juror, for whom no prima facie showing was found, subsequently become the subject of another *Wheeler* motion for a different juror whose dismissal is analyzed at the third stage, and the court then *appears to accept* the prosecutor's reasons for dismissing both jurors.

In the context of evaluating the third, fourth, and fifth *Wheeler* motions, the trial court here never examined the prosecutor's asserted reasons for excusing any of the first four jurors who were the subject of appellant's first motion. Consequently, we have no reason to evaluate the prosecutor's stated reasons for dismissing the jurors at issue in the first motion. Rather, in considering whether the first *Wheeler* motion was properly denied, we apply the typical framework, beginning with the trial court's first-stage ruling that there was no prima facie showing of discrimination on the basis of race or ethnicity.

(2) Appellant Failed to Make the Requisite Prima Facie Showing.

"[T]he existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made." (*Scott, supra*, 61 Cal.4th at p. 384.) The

challenged juror's "racial identity, standing alone, is not dispositive" in determining whether a defendant has made a prima facie showing of discrimination by the prosecution in its juror challenge. (*Sattiewhite, supra*, 59 Cal.4th at p. 470.) Relevant factors include "whether the prosecution (1) struck most or all of the members of an identifiable group from the venire, (2) used a disproportionate number of its peremptory challenges against that group, or (3) engaged in little more than desultory voir dire." (*Ibid*.) Evidence that the defendant is a member of the identified group, or that the victim is a member of the group to which the majority of the remaining jurors belong, is also relevant to the inquiry. (*Scott,* at p. 384.) At this first stage, " '[a] court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record.' " (*People v. Sanchez* (2016) 63 Cal.4th 411, 434 (*Sanchez*).)

Tellingly, appellant makes no argument on appeal that the trial court should have found a prima facie case of discrimination as to these four prospective jurors. Below, appellant also failed to articulate factors that supported an inference of impermissible bias by the prosecutor in the exercise of the four peremptory challenges. The trial court told appellant's counsel, "It's more than just saying they're all part of a protected class," and effectively invited counsel to present evidence to support an inference that the peremptory challenges were based on the jurors' race or ethnicity. Nonetheless, appellant's showing consisted of little more than the bare allegation that the prosecutor challenged four jurors who were all minorities.

To the extent appellant attempts to lump together the African-American and the three Hispanic jurors into one protected group consisting of "people of color" or "minorities," that effort fails. As our Supreme Court has held, "[n]o California case has ever recognized 'people of color' as a cognizable group" for purposes of a *Wheeler* motion. (*People v. Davis* (2009) 46 Cal.4th 539, 583; *see People v. Neuman* (2009) 176 Cal.App.4th 571, 575-579 (*Neuman*).)

Nor did the trial court err in concluding that appellant failed to make a prima facie showing as to the prosecutor's use of his first peremptory challenge to excuse an African-American juror (Juror 8238). It is plainly relevant that a defendant and the challenged juror are members of the same protected class (*People v. Reynoso* (2003) 31 Cal.4th 903, 914 (*Reynoso*)), but "that fact alone does not establish a prima facie case of discrimination." (*People v. Kelly* (2007) 42 Cal.4th 763, 780.) Appellant is African-American, which potentially could support an inference that the prosecutor struck an African-American juror for fear he would be unduly sympathetic to appellant, but in this case the victim was also African-American, a circumstance which could be viewed as canceling out any perceived bias by an African-American juror in favor of appellant. (See *Sanchez, supra*, 63 Cal.4th at p. 436 [finding "[i]t is not clear prosecutors would be motivated to excuse prospective jurors who self-identified as Mexican-American in a case involving . . . Hispanic victims"]; *People v. Hoyos* (2007) 41 Cal.4th 872, 815 (*Hoyos*) [finding it "unlikely the prosecutor would be concerned about minorities unduly identifying with the defendant" when the victim belonged to the same minority group].) Further, because Juror 8238 was the only African-American to be dismissed to that point, it is difficult to

draw an inference that his race was the reason the prosecutor dismissed him, particularly when, as the trial court noted, two other African-Americans remained on the panel. (See *People v. Manibusan* (2013) 58 Cal.4th 40, 83-84 [finding no inference of purposeful discrimination arose where there was "no showing that the prosecution had excused any other prospective juror of the same ethnicity"]; *Turner, supra,* 8 Cal.4th at p. 168 ["While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection"]; *People v. Jones* (2017) 7 Cal.App.5th 787, 803-804 [noting the difficulty in discerning a pattern of discrimination when only a few members of a cognizable group have been challenged].) A review of the record also satisfies us that the prosecutor's questioning of this African-American juror was more than perfunctory.

Further still, we discern from this record that Juror 8238 wrongly interpreted the juror questionnaire item asking about his "marital status" as a request to describe his "mental status." Given his misreading of this simple question, a reasonable prosecutor might well have had concerns about this juror's cognitive abilities and ability to process the evidence and apply the jury instructions. (Cf. *Turner, supra,* 8 Cal.4th at p. 169.) Thus, nondiscriminatory reasons for striking Juror 8238 are apparent from the record.

Likewise, the trial court did not err in concluding that appellant failed to raise an inference that the prosecutor's challenge to the three Hispanic jurors was based on their ethnicity. As noted, appellant is African-American, not Hispanic. (*Neuman, supra,* 176 Cal.App.4th at p. 581 [defendant's

membership in different racial group than excused juror's was factor supporting trial court's ruling of no prima facie case of racial discrimination].) The prosecutor undoubtedly used a disproportionate number of his peremptory challenges against Hispanics, with three of his first four challenges exercised against Hispanics. However, this fact alone does not compel a finding of a prima facie case. (*Hoyos, supra,* 41 Cal.4th at p. 901 [excusal of three out of four Hispanics, *where defendant was Hispanic*, did not state a prima facie case where the record disclosed nondiscriminatory reasons for challenges]; *People v. Farnam* (2002) 28 Cal.4th 107, 136 [no prima facie case shown even where four of first five challenges were to Black prospective jurors and "a very small minority of jurors on the panel were Black"]; *Neuman*, at pp. 584-585.)

The prosecutor devoted significant time to each of these prospective jurors on voir dire and the questioning revealed reasonable grounds for challenging each of them. Juror 5709 indicated he got "mixed-up" when filling out the jury questionnaire, and suggested he had thrown out " 'yeses' and 'no's' " in answering those written questions, resulting in responses that were incorrect. Such willy-nilly responses reasonably would raise concerns about his ability to understand the proceedings (cf. *Turner, supra,* 8 Cal.4th at p. 169) or to pay attention (cf. *Reynoso, supra,* 31 Cal.4th at pp. 925-926). "When, as here, a prospective juror exhibits obvious signs of being unsuitable for the jury, the inference that the prosecutor excused the juror on an improper basis becomes less tenable and a correspondingly greater showing is required to support that inference." (*Sattiewhite, supra*, 59 Cal.4th at p. 470 [even though prosecutor struck the only African-American juror, and defendant

was African-American, that juror's confused answers on voir dire demonstrated nondiscriminatory basis for his excusal].)

As to Juror 8520, during voir dire she revealed that she and her mentally ill sister had negative experiences with law enforcement, with her sister experiencing approximately 50 contacts with deputies, some of whom did not act appropriately. It was thus apparent from the record that this prospective juror had negative experiences with law enforcement that could cloud her judgment in evaluating testimony and conduct by police officers in this case. (*People v. Panah* (2005) 35 Cal.4th 395, 442; *People v. Avila* (2006) 38 Cal.4th 491, 554-555.) She also was a single student. (*Neuman, supra*, 176 Cal.App.4th at p. 582 [fact that excused jurors were all "young students, inexperienced at life" supported trial court's finding of no prima facie case]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328.)

Juror 8392 also was a single student but, even more significantly, he displayed a distrust of the criminal justice system, opining that 15 percent of the time, innocent people are convicted. " 'A prospective juror's distrust of the criminal justice system is a race-neutral basis for excusal.' " (*People v. Winbush* (2017) 2 Cal.5th 402, 439 (*Winbush*); see *People v. Calvin* (2008) 159 Cal.App.4th 1377, 1386 (*Calvin*) ["skepticism about the fairness of the criminal justice system is a valid ground for excusing jurors"].)

In light of the revelations on voir dire by each of these Hispanic jurors, we find that the totality of the circumstances at the time did not support an inference of a discriminatory purpose on the part of the prosecutor. The trial court did not err by denying appellant's first *Wheeler* motion.

(3) Comparative Analysis.

Appellant invites us to engage in comparative analysis in connection with her first *Wheeler* motion by considering Juror 2578, whom appellant asserts was a Caucasian man who was not challenged even though, according to appellant, he was similarly situated with respect to the four jurors. "When a court undertakes comparative juror analysis, it engages in a comparison between, on the one hand, a challenged panelist, and on the other hand, similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group." (*Gutierrez, supra*, 2 Cal.5th at p. 1173.) We decline the invitation because a comparative analysis is neither necessary nor appropriate when the trial court has correctly found no prima facie showing of an improper challenge. " 'Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales . . . .' " (*People v. Bonilla* (2007) 41 Cal.4th 313, 350; *People v. Taylor* (2010) 48 Cal.4th 574, 617; *Gutierrez,* at p. 1173 [reconfirming that "comparative analysis may be probative of purposeful discrimination at *Batson's* third stage" only].)

(4) Ineffective Assistance Claim.

Appellant argues she received ineffective assistance of counsel by her trial counsel's failure to renew her *Wheeler* claim as to the four jurors "once the judge found a prima facie case of discrimination" as to later-challenged jurors. Appellant suggests her counsel should have renewed the claim as to the four jurors each time the trial court considered the remaining three *Wheeler* motions.

However, appellant concedes that her trial counsel, having failed to renew the claim, forfeited the issue of renewed consideration of that claim in connection with the remaining motions. (*People v. Dunn* (1995) 40 Cal.App.4th 1039, 1053 (*Dunn*); accord, *People v. Irvin* (1996) 46 Cal.App.4th 1340, 1352.) Having found that nondiscriminatory reasons for the excusal of each of the four jurors were apparent from the record, we reject appellant's ineffective assistance claim. The record affords no basis for concluding that trial counsel's omission was not based on an informed tactical choice. (Cf. *People v. Anderson* (2001) 25 Cal.4th 543, 569; *Dunn,* at p. 1055.)

2. *Appellant's Third* Wheeler *Motion* (Juror 4247: an African-American man).

a. *Pertinent Facts.*

The trial court's initial voir dire of Juror 4247 proceeded as follows:

"Prospective Juror No. 4247: I stay in Lancaster since 2001. I'm a customer-service manager at Walmart. I'm single. I have two kids. Never been a juror. Twelve, yes. I've had a -- I've lost a friend before.

"The court: To violent crime?

"Prospective Juror No. 4247: Yes.

"The court: And what was the nature of that? Were they murdered?

"Prospective Juror No. 4247: Yes.

"The court: What were the circumstances? Domestic violence? Random robbery?

"Prospective Juror No. 4247: Random.

"The court: How would that affect you? Can you still be fair?

"Prospective Juror No. 4247: Yes.

"The court: How long ago was that?

"Prospective Juror No. 4247: [2004].

"The court: Did they catch the killer?

"Prospective Juror No. 4247: Yes.

"The court: Did you go to court at all?

"Prospective Juror No. 4247: Yes.

"The court: Do you feel like the system worked in that case?

"Prospective Juror No. 4247: Yes.

"The court: Okay. Any other 'yes' answers?

"Prospective Juror No. 4247: [13].

"The court: Go ahead.

"Prospective Juror No. 4247: I was arrested for a D.U.I. back in 2009.

"The court: Do you feel like you were treated fairly?

"Prospective Juror No. 4247: Yes.

"The court: Anything about that that would affect you here?

"Prospective Juror No. 4247: No. And no more yeses.

"The court: Thank you very much, Juror 12."

The prosecutor's subsequent voir dire with Juror 4247 went as follows:

"[The prosecutor]: . . . I just want to know if I ask you in four weeks to convict the person and you believe I have proven my case under the law, would you convict the person?

"[¶] . . . [¶]

"[The prosecutor]: How about Juror No. 12, sir?

"Prospective Juror No. 4247: Yes.

“[The prosecutor]: Would you have any problem with that at all?

“Prospective Juror No. 4247: No.

“[The prosecutor]: Okay. The fact that she’s a lady, she looks relatively young, if I prove my case, would that be a problem for you?

“Prospective Juror No. 4247: No.

“[¶] . . . [¶]

“[The prosecutor:] Also, on that same line of questioning, is anyone going to have a problem -- are they going to not be able to get punishment out of their head because you say to yourself, ‘Okay. If the prosecutor proves his case, what’s going to happen to the person?’ Would that be a problem for you, number -- let’s go to No. 12, sir? Is that ‘yes’?

“Prospective Juror No. 4247: No. Wouldn’t be a problem.”

“[¶] . . . [¶]

“[The prosecutor]: Okay. . . . Do you have any strong feelings about the criminal justice system?

“[¶] . . . [¶]

“[The prosecutor]: . . . How about No. 12, sir. Any feelings on it to [*sic*]?

“Prospective Juror No. 4247: Say it’s about 50/50. Somewhere -- some get justified, some don’t.

“[The prosecutor]: When you say, ‘some,’ are we talking about police officers or the system itself?

“Prospective Juror No. 4247: Just the system itself.

“[The prosecutor]: Can you be a little more specific so I understand what you mean?

“Prospective Juror No. 4247: There are some cases that -- that the evidence is presented and the jurors side with that evidence, and it might not necessarily be what actually happened--

“[The prosecutor]: Okay.

“Prospective Juror No. 4247: -- But the . . . prosecutor proved their case; so that’s why they went that way.

“[The prosecutor]: You’re saying there’s evidence the jury may not have seen?

“Prospective Juror No. 4247: Not haven’t seen but just -- I don’t -- led to believe another thing.

“[The prosecutor]: Like the prosecution might skew the evidence in a certain way or not?

“Prospective Juror No. 4247: Not skew it, just present it in a way where it works for their case.

“[The prosecutor]: Okay. And do you feel that sometimes the person being charged, is that unfair for them?

“Prospective Juror No. 4247: Sometimes, yes.

“[The prosecutor]: You do feel that. Okay. Have you seen that happen directly or is that just --

“Prospective Juror No. 4247: No. Probably not directly.

“[The prosecutor]: But you do believe it does happen?

“Prospective Juror No. 4247: Yes.

“[The prosecutor]: You feel that the prosecution is doing that wrongfully?

“Prospective Juror No. 4247: Not wrongfully. They have -- that’s their case to prove.

“[The prosecutor]: Okay. And why are they -- they’re just presenting it in a certain way that’s, like, favorable for them?

"Prospective Juror No. 4247: Yes.

"[The prosecutor]: Okay. And you think that sometimes it hurts the defendant?

"Prospective Juror No. 4247: Sometimes, yes.

"[The prosecutor]: Sometimes.

"Prospective Juror No. 4247: And then other instances vice versa.

"[The prosecutor]: Meaning that the defense puts evidence or --

"Prospective Juror No. 4247: Yeah. That somebody that might have been guilty have the evidence prove that they weren't when they might have been.

"[The prosecutor]: So you do feel that sometimes people are wrongfully convicted, vice versa --

"Prospective Juror No. 4247: Yes.

"[The prosecutor]: And sometimes guilty people are let go; so there are problems in terms of that part of it at least.

"Prospective Juror No. 4247: Yes."

The following afternoon, the prosecutor exercised his sixth challenge to excuse Juror 4247, and appellant made her third *Wheeler* motion. Appellant's counsel represented that Juror 4247 was a young African-American man. The court, noting five of the prosecutor's six challenges were to "people of color," found appellant had made a prima facie showing. The court asked the prosecutor to proffer race-neutral justifications.

The prosecutor provided the following reasons:

"That juror stated several things. First of all, I spoke to him about the criminal justice system and he said that he does see flaws in it. He believes that innocent people get convicted,

and also believes that guilty people go free. This could impact his ability to determine whether [the defendant] is guilty or not guilty in this case. If he thinks something is fair, he might attempt to protect someone in this matter by protecting her and determine the evidence contrary to what it may actually show based on his belief that innocent people are convicted. When he was asked about, I guess a friend was called [*sic*], and [defense counsel] or the judge asked, did the system work; he said: in that case, yes. Which, to me implies that he believes that it doesn't work in other cases. I also believe that this was him. And if I'm incorrect, I apologize, but he indicated that wealthy defendants had better outcomes. I think he was the one that said that sometimes people who have more money . . . may profit more from the system and he might proceed. Anyone also who is not wealthy, he didn't say that. Then I can recall because my first position was there.

"I'd also like to make the comparison to the lady currently seated, seat number eight, who appears to be African-American. I have no intention of kicking her from this panel. And her statements regarding the criminal justice system were simple. She stated, 'I believe it's fair.' She didn't stress that innocent people are convicted wrongly, or guilty people are let free. [¶] So based on those reasons, that's why he was dismissed."

Defense counsel responded, "I just would like to bring up that he is a young black male. So he falls, I believe, within two protected class characteristics. [¶] And submitted."

The court then denied the *Wheeler* motion, stating, "I don't think it was this juror who spoke of the disparity . . . in criminal justice between rich and poor defendants; but the other proffered reasons I do find to be race-neutral, it's respectfully denied."

b. ***Analysis.***

The court having found a prima facie basis for this *Wheeler* motion, the prosecutor assumed the burden to provide " 'a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.]." (*Gutierrez, supra,* 2 Cal.5th at p. 1158.) This second step of the framework " 'does not demand an explanation that is persuasive, or even plausible. ". . . [T]he issue is the facial validity of the prosecutor's explanation." ' " (*Id.* at p. 1168.) " ' "[U]nless a discriminatory intent is inherent in the prosecutor's explanation," ' the reason will be deemed neutral." (*Id.* at p. 1158.)

Thereafter, "the trial court must decide whether the movant has proven purposeful discrimination" and the movant must show it was " ' "more likely than not that the challenge was improperly motivated." ' " (*Gutierrez, supra,* 2 Cal.5th at p. 1158.) "To satisfy herself that an explanation is genuine, the presiding judge must make 'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges." (*Id.* at p. 1159.)

" 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges " 'with great restraint.' " [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications

offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.]." (*Winbush, supra,* 2 Cal.5th at p. 434; see *Gutierrez, supra*, 2 Cal.5th at p. 1159.)

In explaining the basis for his peremptory challenge to Juror 4247, the prosecutor attributed three different statements or sentiments to Juror 4247 from voir dire the previous day: (1) Juror 4247 saw flaws in the criminal justice system, and believed innocent people are convicted and guilty people go free; (2) when asked if the system worked in the court case about his friend, Juror 4247 said, "in that case, yes," leading the prosecutor to infer that Juror 4247 did not believe the system worked in other cases; and (3) Juror 4247 indicated wealthy defendants had better outcomes in the system. The prosecutor acknowledged he might have been incorrect that Juror 4247 made the statement about wealthy defendants.

The trial court addressed the third stated justification first, correctly noting that Juror 4247 was *not* the juror who spoke of the disparity in outcomes in the criminal justice system for wealthy versus poor defendants.[7] The court found the two other proffered reasons "to be race-neutral" and denied the *Wheeler* motion.[8]

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[7] The juror who made the statements about differing outcomes for rich and poor defendants was Juror 3345, who also stated he could not be fair and impartial and was dismissed by stipulation of the parties.

[8] We conclude the trial court's ruling included an implied finding that the prosecutor's asserted justifications were genuine. (See *People v. Jones* (2011) 51 Cal.4th 346 360, italics added (*Jones*) [affirming denial of *Wheeler* motion where "[t]he trial court denied defendant's motion, *implicitly* finding the

As to the second statement which the prosecutor attributed to Juror 4247, appellant correctly points out that Juror 4247 did not *himself* use the words "in that case" when discussing the trial regarding his friend. The record on voir dire indicates that during the discussion of the trial on his friend's murder, the *court* asked, "Do you feel like the system *worked in that case*?" Juror 4247 answered, "yes."[9] (Italics added.)

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prosecutor's explanation credible and expressly finding his reasons to be race neutral"]; *Reynoso, supra,* 31 Cal.4th at p. 926 [deferring to the trial court's "implied finding" that prosecutor's reasons for excusing juror were sincere and genuine].)

[9] What is missing from the cold written record, of course, is the manner in which the court asked the question, "Do you feel like the system worked in that case?" and the manner in which Juror 4247 responded "yes." We do not know what, if any, emphasis the court placed on the words "in that case," and when Juror 4247 responded, we do not know if he hesitated, or if by his tone or body language he may have communicated that although he believed the system worked in that case, he did not believe it always worked. Such nonverbal forms of communication would have been detectable by the trial court, the prosecutor, and the defense attorney, but are not able to be discerned on appeal. (*People v. O'Malley* (2016) 62 Cal.4th 944, 980 (*O'Malley*) [" ' "On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." ' [Citation.]"].) Defense counsel failed to identify the issue of who used the phrase, "in that case," suggesting that the prosecutor may have fairly inferred that Juror 4247 implied by the way he answered that he did not think the system worked in every case.

Appellant argues that the prosecutor misstated the record as to his second and third reasons, with the trial court only acknowledging one of the mischaracterizations, and appellant further argues that the first stated reason -- appellant's belief that the criminal justice system was flawed and allowed innocent people to be convicted and guilty people to go free -- was "suspect." Appellant contends that the court was obligated to ask follow-up questions of the prosecutor or to make more specific findings about which reasons the court deemed genuine. Because of these purported shortcomings in the trial court's ruling, appellant asserts that the trial court did not make a sincere and reasoned effort to assess the credibility of the prosecutor's stated reasons, and thus no deference is due to the trial court's conclusion that the asserted justifications were genuine.

In support of his argument that reversal is required, counsel for appellant relies on *Gutierrez*[10] and *People v. Silva* (2001) 25 Cal.4th 345 (*Silva*). However, for the reasons discussed below, neither *Gutierrez* nor *Silva* supports appellant's position or requires reversal here. The record reflects that the trial court made a sincere and reasoned attempt to evaluate whether the prosecutor's asserted justifications for excusing Juror 4247 were genuine. Because the prosecutor's overarching reason -- skepticism of the criminal justice system -- was supported by the record, and it was a well-accepted, self-evident justification for challenging a juror, it needed no further exploration or explication by the court.

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[10] The Supreme Court decided *Gutierrez* after the instant appeal was fully briefed, but the parties addressed the effect of *Gutierrez* on this case at oral argument.

(i) Gutierrez.

During voir dire in *Gutierrez*, the Hispanic prospective juror in question (Juror 2723471) said she was unaware that gangs were active in the Wasco area, which was where she resided. (*Gutierrez, supra*, 2 Cal.5th at p. 1160.) The prosecutor asked no follow-up questions of the juror. The prosecutor subsequently exercised a peremptory challenge against her and, when defense counsel made a *Wheeler* motion, the prosecutor proffered the following reasons in response: " '[s]he's from Wasco and she said that she's not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that [Trevino, a prosecution witness] is from a criminal street gang, a subset of the Surenos out of Wasco."[11] (*Ibid.*) The prosecutor did not specify which "other answers" concerned him, the People did not identify any such responses on appeal, and the Supreme Court noted it was unable to find any other such answers in the record. (*Ibid.*)

In evaluating the prosecutor's justification, the trial court had remarked that the prosecutor passed on challenging this juror several times. The court also noted that the juror " 'was excused as a result of the Wasco issue and also lack of life experience.' " (*Gutierrez, supra*, 2 Cal.5th at p. 1161.)

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[11] A few minutes earlier, the prosecutor had explained that he struck another juror due to her unawareness of Wasco gang activity, given that "Trevino freely admits that he's a member of the Varrio Wasco [gang]." (*Gutierrez, supra*, 2 Cal.5th at p. 1161.)

The People conceded on appeal that the prosecutor had not enumerated lack of life experience as a reason for striking the juror. (*Gutierrez, supra*, 2 Cal.5th at p. 1161.) The Supreme Court found the prosecutor's actual stated justification -- the juror's unawareness of gang activity -- was facially valid, but the court took issue with the trial court's failure to elucidate the reasoning behind the challenge. Although it was possible to speculate after the fact as to the prosecutor's potential thought process, the court emphasized that it was "far from self-evident" why the challenged juror's unawareness of gang activity would cause the prosecutor concern as to her suitability to sit on the jury. (*Id.* at p. 1171.)[12]

The Supreme Court took care to note that "[s]ome neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explanation." (*Gutierrez, supra*, 2 Cal.5th at p. 1171.) An example is a panelist excused because she was previously a victim of the same crime at issue in the case to be tried. (*Ibid.*) "Yet when it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith

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12 The court further noted that "[t]he prosecutor's swift termination of individual voir dire of this panelist . . . at least raises a question as to how interested he was in meaningfully examining whether her unawareness of gang activity in Wasco might cause her to be biased . . . ." (*Gutierrez, supra*, 2 Cal.5th at p. 1170.) Further, voir dire had revealed that the juror had relatives in corrections and law enforcement positions, a characteristic that the prosecutor had generally viewed as an "offsetting force against characteristics he perceived as negative" with respect to other panelists. (*Ibid.*)

becomes more pressing." (*Ibid.*) The court found that was particularly so when a prosecutor has used a considerable number of challenges to exclude a large proportion of members of a cognizable group, such as in that case where, at the time of the motion, 10 of the prosecutor's 12 peremptory challenges had been used against Hispanics. (*Ibid.*)

The Supreme Court faulted the trial court for "never clarif[ying] why it accepted the Wasco reason as an honest one." (*Gutierrez, supra,* 2 Cal.5th at p. 1171.) The court noted the trial court did not address the prosecutor's reference to the juror's "other answers" that supposedly gave him pause, i.e., "other answers" the existence of which was totally unsupported by the record. And the trial court had improperly stated that the prosecutor relied on the jurors' lack of life experience. The court thus held:

"On this record, we are unable to conclude that the trial court made 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' regarding the strike of Juror 2723471. [Citation.] The court may have made a *sincere* attempt to assess the Wasco rationale, but it never explained why it decided this justification was not a pretext for a discriminatory purpose. Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one." (*Id.* at p. 1172.) The court thus found that the trial court erred in denying the *Wheeler* motion and that reversal was required. (*Ibid.*)

Gutierrez thus particularly addressed the responsibility of the trial court when a prosecutor provides a justification for

striking a prospective juror that is facially race-neutral, but the prosecutor does not elaborate and it is not self-evident from the stated reason why the prosecutor would harbor a concern about the juror. In that scenario, *Gutierrez* instructs that trial courts must probe the proffered reason further, and the failure to do so precludes a finding that the trial court has made a reasoned effort to analyze the credibility of the prosecutor's stated justifications. (*Gutierrez, supra*, 2 Cal.5th at p. 1172.)

The instant case is distinguishable from *Gutierrez* in that the prosecutor articulated a well-accepted, self-evident basis for his challenge: Juror 4247's professed skepticism about the criminal justice system. Courts have recognized that "[p]rosecutors are understandably concerned about retaining . . . on criminal juries" jurors who have evinced "skepticism about the fairness of the criminal justice system." (*Calvin, supra,* 159 Cal.App.4th at p. 1386; see *Winbush, supra,* 2 Cal.5th at p. 439, quoting *People v. Clark* (2011) 52 Cal.4th 856, 907 [" 'A prospective juror's distrust of the criminal justice system is a race-neutral basis for excusal.' "]; *People v. Hamilton* (2009) 45 Cal.4th 863, 901-902 [juror's skepticism regarding fairness of treatment of minorities within criminal justice system was nondiscriminatory basis for peremptory challenge].)

Further, this justification was supported by the record. When asked about his feelings about the criminal justice system, Juror 4247 stated that "it's about 50/50 . . . some get justified, some don't," then clarified that by "some" he was talking about the "system," then further clarified his belief that sometimes innocent people are wrongfully convicted and sometimes guilty people are let go. Juror 4247 thus explicitly verbalized his distrust of the justice system, expressing a lack of confidence that

the right people ended up being convicted, and the prosecutor fairly described the sentiments expressed by this juror.

From this statement by the prosecutor, the trial court had sufficient information to evaluate whether the reason was genuine. Because the prosecutor provided a neutral reason that was supported by the record and was "sufficiently self-evident, if honestly held, that [it] require[d] little additional explanation," the trial court was not required to probe the reason any further or to make additional statements on the record explaining precisely why the court accepted the prosecutor's reason as credible. (*Gutierrez, supra*, 2 Cal.5th at p. 1171.)

Moreover, in this case, the prosecutor *did* explain to the court the concern underlying his challenge on the basis of the juror's skepticism about the criminal justice system -- namely, that this juror's mindset could affect his ability to properly determine appellant's guilt, as he might attempt to protect appellant based on his belief that innocent people are convicted, even if the evidence demonstrated appellant's guilt. Given the clear way the prosecutor spelled out his concerns, there was even less of a need for the trial court to explore the basis for the prosecutor's stated reason. Accordingly, we find the trial court's findings were comfortably within the parameters articulated in *Gutierrez.*

(ii) Silva.

Nor do we agree with appellant that *Silva* compels a finding that the trial court failed to make a sincere and reasoned effort to evaluate the prosecutor's motives because the court overlooked the prosecutor's mistaken reference to the record in providing his second justification. In *Silva*, the prosecutor had provided two justifications for exercising a peremptory challenge

against a Hispanic juror: (1) the juror stated during voir dire that " 'he would look for other options' " when asked if he could vote for the death penalty; and (2) the prosecutor felt the juror was " 'an extremely aggressive person' " and might cause the jury to deadlock. (*Silva, supra*, 25 Cal.4th at p. 376.) However, the Supreme Court found that *neither* of these asserted reasons was supported by the record of voir dire. (*Id.* at p. 385.) The Supreme Court concluded that "when the prosecutor gave reasons that misrepresented the record of voir dire, the trial court erred in failing to point out inconsistencies and to ask probing questions. '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." (*Ibid.*)

The court held: "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 [the juror] and the facts as disclosed by the transcripts of [the juror'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]." (*Silva, supra*, 25 Cal.4th at p. 385, italics added.)

The court further held: "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 [the juror in question], both of the prosecutor's stated reasons were factually unsupported by the record." (*Silva, supra,* 25 Cal.4th at pp. 385-386, italics added.) Because the trial court's ultimate finding that the prosecutor had provided a credible race-neutral justification was unsupported, the court found that the trial court had not made a sincere and reasoned effort to evaluate the prosecutor's stated reasons for challenging the juror. (*Id.* at p. 385.)

Silva is easily distinguished in two ways. First, *neither* of the reasons stated by the prosecutor in *Silva* was supported by the record, and thus it could be fairly inferred that the prosecutor's true motivation might well have been race-based. Thus, the trial court's global acceptance of the stated reasons as sufficient and credible, without further probing, was troubling. By contrast, as discussed above, the prosecutor in the instant case gave another justification that was well supported in the record and well accepted as a reason to strike a juror. Second, whereas in *Silva* there was an "obvious gap" between the prosecutor's representation of the juror's statements and the voir dire record itself, in the present case the mischaracterization was

much more subtle and much more easily attributable to an honest mistake on the part of the prosecutor. The fact that it was the court which asked if the system worked "in that case," and not Juror 4247 who spoke those words, is not a mistake of great magnitude in this particular context.

Critically, *all three* of the prosecutor's proffered reasons for excusing Juror 4247 were iterations of the same general concern: that the juror did not trust the criminal justice system. Even if the trial court failed to detect that Juror 4247 did *not* state that the system worked "in the case" of his friend's murder, and therefore cannot fairly be found to have implied at that point that the system did *not* work in other cases, this juror subsequently made perfectly clear during the prosecutor's questioning that he in fact *did* believe that often the system does not work.

We do not believe that *Silva's* holding that the trial court must make a "sincere and reasoned attempt to evaluate *each stated reason*" given by the prosecutor requires rote reversal of a conviction whenever a trial court has overlooked a misstatement of the voir dire record by the prosecutor. (*Silva, supra,* 25 Cal.4th at pp. 385-386, italics added.) In cases like this one, trial courts may fail to discuss a mistake by the prosecutor and yet there still can be a sufficient basis to find that the court *did* make a sincere and reasoned effort. We do not equate "sincere and reasoned" with "perfect."

(iii) Jones.

In *Gutierrez*, the court cited with approval *Jones, supra*, which distinguished *Silva* on a record similar to the one here. In *Jones,* the defendant was African-American and the murder victims were Caucasian. (*Jones, supra,* 51 Cal.4th at p. 357.) In selecting the jury, the prosecutor exercised two peremptory

challenges against African-American prospective jurors, leaving one African-American on the panel, at which point the defense attorney made a *Wheeler* motion.

To explain his challenge to one of the challenged African-American jurors, N.C., the prosecutor told the court that he was concerned about the juror's answer on the questionnaire about whether he or anyone close to him had been accused of a crime. The prosecutor erroneously represented that N.C. had written that his son was accused of attempted murder or murder, when in fact N.C. had not specified the crime on his questionnaire. The prosecutor explained that he was concerned that the juror might want to help the defendant, based on his son's situation and based on the juror's body language and long pause before answering whether he would want to help the defendant. (*Jones, supra,* 51 Cal.4th at p. 358.)

The court asked, " 'So your primary concern there is because a family member had been charged with a serious offense?' " The "prosecutor responded that the 'conjunction' of these factors 'pushed [N.C.] over on the scale.' " (*Jones, supra,* 51 Cal.4th at p. 358.) The trial court then invited defense counsel to respond, which counsel declined to do, and the trial court, without specifically discussing the reasons asserted, generally found that the prosecutor had dismissed N.C. for race-neutral reasons. (*Id.* at p. 359.)

On appeal, the defendant argued that the prosecutor had misstated N.C.'s answer to the question about his son having been accused of a crime. The Supreme Court concluded that although the prosecutor's misstatement was "relevant, this circumstance is not dispositive." (*Jones, supra*, 51 Cal.4th at p. 366.) The court held: "No reason appears to assume the

prosecutor intentionally misstated the matter. He might have based what he thought on information he obtained outside the record. Or he may simply have misremembered the record. The prosecutor had to keep track of dozens of prospective jurors, thousands of pages of jury questionnaires, and several days of jury voir dire, and then he had to make his challenges in the heat of trial. He did not have the luxury of being able to [double-check] all the facts that appellate attorneys and reviewing courts have. Under the circumstances, it is quite plausible that he simply made an honest mistake of fact. Such a mistake would not show racial bias, especially given that an accurate statement (that N.C. wrote that his son had been accused of, and tried for, a crime but left the rest of the answer blank) would also have provided a race-neutral reason for the challenge.

"The purpose of a hearing on a *Wheeler/Batson* motion is not to test the prosecutor's memory but to determine whether the reasons given are genuine and race neutral. 'Faulty memory, clerical errors, and similar conditions that might engender a "mistake" of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associated with impermissible reliance on presumed group bias.' [Citation.] This 'isolated mistake or misstatement' [citation] does not alone compel the conclusion that this reason was not sincere." (*Jones, supra*, 51 Cal.4th at p. 366.)

The court specifically distinguished *Silva*: "Relying largely on [*Silva*], defendant argues that we should not defer to the trial court's ruling because, after hearing from the prosecutor, it simply denied the motion without further discussion, which, defendant contends, shows that it did not make a sincere and reasoned attempt to evaluate the prosecutor's credibility. We

disagree. . . . [T]he 'court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty.' Here, the court asked the prosecutor one question during his explanation. Additionally, it invited defense counsel to comment on the prosecutor's explanation. Defense counsel declined to comment, thus suggesting he found the prosecutor credible. Under the circumstances, the court was not required to do more than what it did." (*Jones, supra*, 51 Cal.4th at p. 361.)

Jones reinforces our conclusion that *Silva* does not require reversal anytime a trial court fails to acknowledge a prosecutor's mistake in presenting his or her justifications for a peremptory challenge. Just as the Supreme Court found in *Jones* that the trial court had sufficiently analyzed the prosecutor's reasons by asking one question and then providing a global ruling on the *Wheeler* motion, in the instant case, the trial court demonstrated that it was conducting the requisite "sincere and reasoned" analysis by noting that the prosecutor had misidentified Juror 4247 as the juror who made the comment about wealthy defendants, and otherwise finding the given reasons to be race-neutral. Despite the trial court's failure to acknowledge that one of the prosecutor's examples evidencing this juror's distrust of the criminal justice system was not supported by the record, there is no reason to reject the court's determination that the prosecutor was credible in asserting this self-evident reason, which *was* supported by other statements by the juror during voir dire. (See *O'Malley, supra,* 62 Cal.4th at pp. 979-980 [prosecutor's

"mistaken recollection" about a prospective juror's statements on his questionnaire and at voir dire does not establish that prosecutor was acting with a discriminatory purpose . . . . "Even if the prosecutor's concern about the [mistaken reason], considered in isolation, might not provide a compelling reason for a peremptory challenge, the prosecutor's mistaken reference . . . alone does not establish that the prosecutor's stated reasons were pretexts for discrimination."]; *People v. Alvarez* (1996) 14 Cal.4th 155, 194, 198 [where prosecution relied on justification with no basis in record -- that prospective juror said she preferred life imprisonment to death penalty -- denial of *Batson* motion upheld where prosecutor also expressed justification that juror displayed confusion on voir dire; lack of support for one reason "does not undermine the 'genuineness' -- or the sufficiency -- of the other 'neutral explanations' "].)

Rather, we defer to the trial court's assessment that the juror's distrust of the criminal justice system, and not Juror 4247's status as an African-American, was the prosecutor's genuine reason for excusing him.[13] We thus uphold the trial court's denial of appellant's third *Wheeler* motion.

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[13] The dissent includes a limited comparative analysis of Juror No. 4247 and empaneled Caucasian Juror No. 3049, and also compares the prosecutor's questioning of Juror No. 4247 with that of other Caucasian jurors to suggest that the prosecutor was singling out Juror No. 4247 on account of his race by inquiring about his views on the criminal justice system. However, neither at trial nor on appeal did appellant identify these jurors as being comparable to Juror 4247 and appellant has not alleged that the prosecutor questioned Juror No. 4247 differently than the Caucasian jurors. As appellant's counsel conceded at oral argument, "[a]lthough we must consider comparative juror

3. *Appellant's Fourth* Wheeler *Motion* (Juror 3794: a Hispanic woman).

a. *Pertinent Facts.*

Juror 3794 (Juror 6), a full-time nursing student, was single without children and lacked jury experience. During voir dire, the court asked her if she had experienced "[p]ositive or negative law enforcement contact[.]" She replied, "Both." She also stated, "[m]y family member[s] are gang members in L.A." and the family members were "[v]ery close, but they're incarcerated; so not that close."

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analysis evidence raised for the first time on appeal [citation], our focus is limited to the responses of stricken panelists and seated jurors *that have been identified by defendant in his claim of disparate treatment*." (*People v. Lomax* (2010) 49 Cal.4th 530, 572, italics added; see *Lenix, supra*, 44 Cal.4th at p. 624 [comparative analyses conducted by appellate court are "necessarily circumscribed" by the defendant's identification on appeal of particular panelists or seated jurors].) In any event, comparisons with unchallenged Caucasian jurors are probative only if those jurors were "materially similar in the respects significant to the prosecutor's stated basis for the challenge" to Juror No. 4247. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 107.) The dissent notes that Juror No. 3049 stated it would be "hard" for him to decide appellant's fate without actually seeing what happened. Juror No. 3049 further stated he "would be able to do it if [the prosecutor] proved [his] case," but stated that it was "possible" he would "hold [the prosecutor] to that little bit extra something just because of the nature of the charge." This juror's discomfort with deciding appellant's fate on a murder charge is a wholly different issue from Juror 4247's distrust of the criminal justice system. Accordingly, a comparative analysis between these two jurors is not probative.

In response to later questions, Juror 3794 stated she had family members who had experienced negative contacts with law enforcement, but she personally had not had negative contacts. She denied she would have a problem convicting appellant, even if it meant she would serve a lengthy sentence. Juror 3794 opined that some police officers actually help people, while "unfortunately some are hurting," but she was "not siding with either." The prosecutor asked Juror 3794, "Do you feel that the criminal justice system in its current form is still the best we could have?" Juror 3794 replied, "I don't know," and then "[n]ot sure."

After the court denied appellant's third *Wheeler* motion, the prosecutor challenged three jurors, then accepted the panel as constituted, and subsequently challenged Juror 3794. Appellant then made her fourth *Wheeler* motion. The court noted Juror 3794 was a Hispanic woman and the prosecutor previously had accepted the panel with her on it. Finding a prima facie case, the court requested the prosecutor's reasons for the challenge.

The prosecutor noted that he had indeed accepted the panel with Juror 3794 on it. The prosecutor stated his concern that Juror 3794 had limited life experiences, in that she was still a student, she looked quite young, and she had no family or children. He stated he would prefer a juror "who has more life experience to be able to sort out the tangled situations in this case. There is going to be multiple conflicting testimony versus statements . . . that the juror is going to hear of the defendant[,] possibly up to three different interviews which contradict everything that some of the other witnesses are going to say. So I think it's important for her to have life experience."

Additionally, the prosecutor noted that Juror 3794 indicated her family members were gang members in Los Angeles, and "her [viewpoints] and upbringing may be skewed by that fact." Further, the fact that her family members were gang members could intimidate jurors who later might disagree with her. Further still, the prosecutor noted Juror 3794 maintained contact with these gang members, "who likely do not possess positive opinions of police, and she also never disapproved of their choices or lifestyle."

The court denied the *Wheeler* motion, concluding, "I do find it to be race neutral given the consideration of her family member ties to gang members."

b. *Analysis.*

As the trial court noted, the prosecutor earlier had accepted the panel with Juror 3794 on it, and only exercised the challenge to her after defense counsel exercised his own challenge. The fact that the prosecutor had accepted Juror 3794 " ' "strongly suggest[s] that race was not a motive" ' " behind the challenge. (*Gutierrez, supra*, 2 Cal.5th at p. 1170, see *People v. Williams* (2013) 56 Cal.4th 630, 659.)[14] However, this circumstance does

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[14] Appellant asserts, "Though the prosecutor initially accepted the panel with Juror 3794 . . . on it . . . , [the prosecutor] did so when the juror who would have replaced her was a man from Uruguay, Juror 8333." Appellant thereby suggests the prosecutor kept Juror 3794 on the panel because if he had challenged her, she would have been replaced by Juror 8333, a person the prosecutor would *not* have wanted as a juror because he was Hispanic. Additional facts cast a different light on the matter. On July 13, 2015, the prosecutor accepted the panel with Juror 3794 on it. Earlier, on July 8, 2015, Juror 8333 stated during voir dire that his father was a police officer in Uruguay,

not “wholly preclude” a finding that the challenge was based on improper bias (*Gutierrez,* at p. 1170); thus, we still must examine whether the trial court made a sincere and reasoned effort to determine whether the prosecutor’s asserted justifications for challenging Juror 3794 were genuine. We conclude it did.

The prosecutor provided clear and specific justifications for his challenge, including that the juror had close family ties with gang members in Los Angeles, which the prosecutor explained may well have skewed the juror’s viewpoints, including her perception of the police. (See *Lenix*, *supra,* 44 Cal.4th at pp. 628-630 [trial court properly may deny a *Wheeler* motion where the prosecutor challenged a juror on the ground the juror’s family had gang associations].) The trial court accepted the prosecutor’s thorough explanation as genuine, and we defer to its assessment of the prosecutor’s credibility as to this neutral explanation. Thus, we affirm the denial of the fourth *Wheeler* motion.

4. *Appellant’s Fifth* Wheeler *Motion* (Juror 7830: a Hispanic man).

a. *Pertinent Facts.*

Juror 7830 (juror 3) was single, had a daughter, worked in retail, and lacked jury experience. Within the past few years he

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his father-in-law was a police chief, he knew a few sheriff’s deputies here, and he regularly attended church with a Los Angeles police officer. A juror’s ties to law enforcement are characteristics normally considered *favorable* to the prosecution. (*People v. Chism* (2014) 58 Cal.4th 1266, 1321.) We note appellant, not the prosecutor, ultimately challenged Juror 8333.

had a driving under the influence case in Santa Clarita court; he believed the case was handled fairly.

According to Juror 7830, a friend had been shot when he was nearby. Juror 7830 believed it was a gang-related shooting. Juror 7830 appeared to give conflicting answers on whether the shooting would affect him as a juror.

Juror 7830 also stated, “I myself have been shot, I guess, accidental shooting, you could call it. I knew the person. And that’s pretty much it.” The court asked what the circumstances were, and Juror 7830 replied, “you really don’t have a clear head when it happens, but from what I remember, it was someone playing with a gun and shot me.” Juror 7830 was 20 or 21 years old when he was shot in the abdomen. Juror 7830 did not think that experience would affect him as a juror.

During voir dire by the prosecutor, Juror 7830 further explained that he was shot in 2002 or 2003, at close range, and he thought the person wielding the gun “was just . . . being foolish.” The prosecutor asked why the gun was out, and Juror 7830 replied, “they were playing with it. I had nothing to do with the situation. I just came into the situation.” The people involved were friends of Juror 7830 at the time but no longer. He had to undergo surgery, and still had scars from his stomach to his chest. The bullet was left in his body, because it was too close to his spine to try to remove. Doctors had informed him that as a result he might have stomach problems later in life.

The prosecutor told Juror 7830 that the present case involved a firearm allegation and there would be photographs showing gunshots. The prosecutor asked Juror 7830 if it would be difficult for him to view these photographs, and he replied,

"[t]hat could be difficult." The prosecutor challenged Juror 7830, leading to appellant's fifth *Wheeler* motion.

Juror 7830 was a Hispanic man. The prosecutor observed that at the time of the challenge, the jury box contained three Hispanic men (including Juror 7830), two Hispanic women, an African-American woman, and an Asian woman.

Tendering justifications, the prosecutor indicated that Juror 7830 had been shot in the abdomen, still had a scar and a bullet lodged in him, and had gone through a "fairly traumatic experience." The prosecutor would have to present graphic photographs of people being shot, and he was concerned Juror 7830 might not want to view that evidence. The prosecutor stated it was critical jurors be able to view such graphic evidence because the prosecutor had to "prove cause of death."

The prosecutor listed a number of other justifications as well, including: (1) it was possible appellant would present a defense of mistake, and Juror 7830 said he was "potentially mistakenly shot"; (2) Juror 7830 had "numerous tattoos on his arm"; (3) the prosecutor believed he showed poor judgment by associating with people who ended up shooting him in the abdomen; (4) Juror 7830 indicated a friend was the victim in a gang shooting, also leading the prosecutor to question his judgment; and (5) Juror 7830 looked young and worked in retail, leading the prosecutor to conclude he was "probably devoid of a lot of life experiences."

The court stated, "Motion is respectfully denied. I do find there is a race neutral reason. I do find it believable. [¶] As to some of what you said with respect to the bad judgment, it doesn't sound like the shooting had anything to do with him. It sounded completely accidental. The fact that he has tattoos, that

is not on the record, but I do believe it's race neutral. It's respectfully denied."

b. ***Analysis.***

The prosecutor provided detailed explanations for numerous facially valid, race-neutral justifications for challenging Juror 7830. We understand the court's finding that "there is a race neutral reason" that is "believable" to refer to the multiple justifications asserted by the prosecutor. The court demonstrated that it made a sincere and reasoned effort to parse the explanations by noting its disagreement that the juror's accidental shooting suggested bad judgment on his part, and noting that the fact that he had numerous tattoos was not in the record.[15] Thus, we have no basis for disturbing the trial court's findings on appeal.

The trial court properly denied appellant's fifth *Wheeler* motion.

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[15] It is inconsequential that the trial court was not persuaded that the fact that Juror 7830 was accidentally shot reflected poor judgment on his part; the key inquiry is whether the prosecutor's explanation was facially valid, which it was here, and genuine, which the court determined it was. (See *Gutierrez, supra,* 2 Cal.5th at p. 1168.) Further, it is well settled that a trial court properly may deny a *Wheeler* motion where the prosecutor challenged a juror on the ground of the latter's appearance, which could include challenges based on tattoos. (Cf. *People v. Ward* (2005) 36 Cal.4th 186, 202; *Wheeler, supra,* 22 Cal.3d at p. 275 [juror's "clothes or hair length suggest an unconventional life-style"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STONE, J.*

I concur:

EDMON, P. J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

LAVIN, J., Dissenting:

"Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." (*Peters v. Kiff* (1972) 407 U.S. 493, 502–503.) In this case, defendant, who is African-American, was charged with murder. During voir dire of the jury panel, the prosecutor struck the only two African-American men from the panel. When the prosecutor struck the second African-American man, Prospective Juror No. 4247, defendant brought her third *Batson/Wheeler* motion. After noting that four of the five prospective jurors stricken by the prosecutor were Black or Hispanic, the trial court found that defendant made a prima facie showing raising an inference of discriminatory purpose. In response, the prosecutor offered three reasons for striking this prospective juror. But other than suggesting that one of the prosecutor's three stated reasons was probably wrong, the court made no attempt to evaluate whether the prosecutor's explanation was bona fide before it denied defendant's motion. In fact, the record contradicts two of the prosecutor's three proffered race-neutral reasons for striking Prospective Juror No. 4247, and a careful review of the record casts doubt on the credibility of the prosecutor's remaining justification. The court did not discharge its obligations to evaluate the prosecutor's reasons for striking this juror and to "clearly express its findings." (*People v. Silva* (2001) 25 Cal.4th 345, 385 (*Silva*); accord *People v. Gutierrez* (2017) 2 Cal.5th 1150,

1175 (*Gutierrez*).) Because the error is structural, I would reverse the judgment.[1]

DISCUSSION

"When a party raises a claim that an opponent has improperly discriminated in the exercise of peremptory challenges, the court and counsel must follow a three-step process. First, the *Batson/Wheeler* movant must demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. … [¶] Second, if the court finds the movant meets the threshold for demonstrating a prima facie case, the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenges." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.)

Once the prosecutor establishes a race-neutral justification for striking a prospective juror, the court must make a " 'sincere and reasoned attempt' " to evaluate the credibility of the prosecutor's neutral explanation. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.) "This [third step] of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness." (*Id.* at p. 1158.) "[W]hen it is not self-evident why an advocate would harbor a concern [about a particular juror], the question of whether a neutral explanation is genuine and made in good faith becomes more pressing. That is particularly so when, as here, an advocate uses a considerable

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[1] Although I do not address the other asserted *Batson/Wheeler* errors in this case, I do not join either the majority's analysis of or its conclusions about those issues.

number of challenges to exclude a large proportion of members of a cognizable group." (*Id*. at p. 1171; see Covey, *The Unbearable Lightness of Batson* (2007) 66 Md. L.Rev. 279, 346–347 ["Because there is no opportunity to take discovery, no ability to examine the prosecutor directly, and no other way to substantiate a discrimination claim except through reliance on the explanation provided by the prosecutor, *Batson* will be ineffective unless its step-two neutrality requirement is rigorously enforced."].)

In this case, defendant raised her third *Batson/Wheeler* objection in response to the prosecutor's use of its sixth strike to dismiss the second of two black men, Prospective Juror No. 4247. After noting that four of the five prospective jurors stricken by the prosecutor were Hispanic or African-American, the court held that defendant made a prima facie showing that the totality of the circumstances raised an inference of discriminatory purpose in striking this prospective juror.

In response to the court's prima facie determination as to the dismissal of Prospective Juror No. 4247, the prosecutor offered the following reasons for the strike: "First of all, I spoke to him about the criminal justice system and he said that he does see flaws in it. He believes that innocent people get convicted, and also believes that guilty people go free. This could impact his ability to determine whether [the defendant] is guilty or not guilty in this case. If he thinks something is fair, he might attempt to protect someone in this matter by protecting her and determine the evidence contrary to what it may actually show based on his belief that innocent people are convicted. When he was asked about, I guess a friend was [killed] and [defense counsel] or the judge asked, did the system work; he said: in that case, yes. Which, to me implies that he believes that it doesn't

work in other cases." The prosecutor also offered another reason: the prospective juror had stated that wealthy defendants had better outcomes than poor defendants.

Other than suggesting it did not believe that Prospective Juror No. 4247 "spoke of the disparity" between "rich and poor defendants," the court did not state why—or if—it found the prosecutor's reasons to be honestly held before it denied defendant's *Batson/Wheeler* motion. This is the court's complete analysis: "Now, I did a prima facie case and that I'm just examining the proffered race-neutral reasons by the People. And I do find that they are race-neutral and *Batson* and *Wheeler* would be denied. I don't think it was this juror who spoke of the disparity, but in criminal justice between rich and poor defendants; but the other proffered reasons I do find to be race-neutral, it's respectfully denied."

In my view, the court did not discharge its duty to "make 'a sincere and reasoned attempt' to evaluate the prosecutor's justification" in this case. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.) "[A] truly 'reasoned attempt' to evaluate the prosecutor's explanations [citation] requires the court to … determine not only that a valid reason existed *but also* that the reason *actually prompted* the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720 (*Fuentes*), emphasis added.) Other than suggesting that one of the prosecutor's three stated reasons for striking Prospective Juror No. 4247 was probably wrong, the court did not perform *any* analysis of the prosecutor's purported reasons.

Put another way, the court did not **actually conduct** the third step of the *Batson/Wheeler* analysis. Certainly, the court did not explicitly find that the prosecutor's reasons were non-

pretextual; it only concluded the reasons were race-neutral, the issue in step two. "For this reason [alone], the trial court did not satisfy its *Wheeler* obligation of inquiry and evaluation, and the judgment must therefore be reversed." (*Fuentes*, *supra*, 54 Cal.3d at p. 718.) Even if the court's remarks could somehow be construed as addressing the prosecutor's credibility, however, its review was plainly inadequate. (See maj. opn., pp. 24–25, fn. 8.)

Although reviewing courts generally accord great deference to a 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*." (*Silva*, *supra*, 25 Cal.4th at pp. 385–386, emphasis added.) While "an isolated mistake or misstatement [by the prosecutor] that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent," the California Supreme Court instructs that "it is another matter altogether when … 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*." (*Id.* at p. 385, emphasis added.)

Here, the court's abbreviated analysis is particularly striking because, as with the third reason advanced by the prosecutor for dismissing this prospective juror, the second reason—that the prospective juror said that the system had worked *in that case*—is unsupported by the record of voir dire. Instead, after the prospective juror revealed that his friend had been the victim of a random murder, the court asked him, "Do you feel like the system worked in that case?" The prospective juror simply answered, "Yes." Unlike with the erroneous wealth-based rationale, however, the court did not address the

discrepancy or probe the issue. (See *Gutierrez*, *supra*, 2 Cal.5th at pp. 1171–1172 ["Another tendered basis for this strike … was not borne out by the record—but the court did not reject this reason or ask the prosecutor to explain further."].)

As the court failed to probe the prosecutor's misrepresentation of the prospective juror's response, the second reason advanced by the prosecutor cannot serve as a valid basis for upholding the strike. Nor is there any basis in the record to support the majority's view that "the mischaracterization was much more subtle and much more easily attributable to an honest mistake on the part of the prosecutor." (Maj. opn., pp. 33–34; see *Fuentes*, *supra*, 54 Cal.3d at p. 716, fn. 5 ["Notwithstanding the deference we give to a trial court's determinations of credibility and sincerity, we can only do so when the court has clearly expressed its findings and rulings and the bases therefor."].)

This leads me to the prosecutor's first reason for dismissing Prospective Juror No. 4247—that he saw flaws in the criminal justice system. Although the court never mentioned this reason, and the other two rationales advanced by the prosecutor were not supported by the record, the majority insists "that the trial court made a sincere and reasoned attempt" to analyze all of the prosecutor's reasons. (Maj. opn., p. 26.) How? Apparently, by noting that one of the prosecutor's three reasons was probably wrong and then providing a global ruling on defendant's motion. In any event, the majority ultimately concludes that the trial court did not need to probe the prosecutor's explanation because one of the prospective juror's responses provided a "self-evident justification" for his dismissal. I disagree with the majority for the following reasons.

First, even a self-evident justification must be "honestly held" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1171)—and the court below simply failed to evaluate the prosecutor's sincerity.[2] While the majority goes to great lengths to explain why it would have been reasonable for the court to conclude the prosecutor's justification was genuine, the fact remains that the court **did not reach that conclusion**. The majority cannot square this circle—and does not try. (See, e.g., Maj. opn., pp. 24 ["The court found the two other proffered reasons 'to be race-neutral' and denied the *Wheeler* motion"], 26 ["Because the prosecutor's overarching reason … was supported by the record, and it was a well-accepted, self-evident justification for challenging a juror, it needed no further exploration or explication by the court."].) Instead, the majority struggles to defer to a holding that does not exist. (*Id*., p. 38 ["we defer to the trial court's assessment that [the proffered explanation] was the prosecutor's genuine reason for excusing [the juror]."].)

Second, the majority erroneously defers to the court's purported assessment of the prosecutor's justification by suggesting that the prosecutor or the court took the prospective juror's demeanor into account. (Maj. opn., p. 25, fn. 9.) Of course, when assessing the viability of neutral reasons advanced to justify a peremptory challenge by a prosecutor, "both a trial court and reviewing court must examine *only those reasons actually expressed*." (*Gutierrez, supra,* 2 Cal.5th at p. 1167, emphasis added.) Given the lack of *any* evidence or discussion of the

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[2] To reiterate, the court held the prosecutor's reasons were race neutral, the issue in step two. The court offered no opinion on whether they were genuine, the issue in step three.

prospective juror's demeanor, the majority's suggestion is based on pure speculation. (See, e.g., *Snyder v. Louisiana* (2008) 552 U.S. 472, 485 [proffered reason for striking black prospective juror—nervousness during voir dire—was pretextual given "absence of anything in the record showing that the trial judge credited the claim that [the prospective juror] was nervous"].) On this record, deference is not warranted.

Third, when considering all of the relevant circumstances,[3] including the fact that the prosecutor accepted Prospective Juror No. 3049, a white man, despite his views about the case and the prosecution's burden of proof, the prosecutor's first reason for striking Prospective Juror No. 4247 is not credible. (See *Foster v. Chatman* (2016) 136 S.Ct. 1737, 1754 [evidence that prosecutor's reasons for striking a black prospective juror apply equally to an otherwise similar nonblack prospective juror who is allowed to serve tends to suggest purposeful discrimination].) When asked if he would have trouble convicting defendant, a young woman, even if the prosecutor proved his case, Juror No. 3049 replied, "It's going to be hard either way. … It's not easy to decide somebody's fate either way. How actually being there without actually seeing what happened." And when Juror No. 3049 twice suggested he might hold the prosecution to a higher burden than

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[3] At the final stage of *Batson/Wheeler* analysis, courts must consider "all relevant circumstances" in determining whether a strike was improperly motivated, which requires a careful "review of the entire record." (*People v. Lenix* (2008) 44 Cal.4th 602, 616; see *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 266 ["Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."].)

proof beyond a reasonable doubt, the prosecutor responded by asking him to "tell me about that" and explaining, "I appreciate your honesty." He did not ask for Prospective Juror No. 3049's views on the criminal justice system.

Prospective Juror No. 4247, on the other hand, said that when his friend was murdered, the system worked. When No. 4247 was arrested for a DUI, he was treated fairly. As with No. 3049, the prosecutor asked Prospective Juror No. 4247 if he would have any problem convicting defendant if the prosecutor proved his case. But unlike with No. 3049, the prosecutor asked the question three different ways—and unlike No. 3049, who said "it would be hard" to convict, Prospective Juror No. 4247 responded that he would have no trouble convicting defendant.

Despite these unambiguous answers, the prosecutor later asked Prospective Juror No. 4247 for his views on the criminal justice system, a question No. 3049 was not asked. When Prospective Juror No. 4247 acknowledged that sometimes innocent people are convicted and sometimes guilty people go free, the prosecutor aggressively cross-examined him, then kicked him off the jury. Indeed, of the seated jurors, all of the minorities were asked this question. By contrast, only one of the five white jurors, a woman, was asked about the criminal justice system. (See *Miller-El v. Cockrell* (2002) 537 U.S. 322, 344 ["if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual."].)[4]

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[4] Nor can the prosecutor's aggressive questioning be attributed to Prospective Juror No. 4247's DUI. Seated Juror No. 2779, a white man questioned *immediately after* No. 4247, also reported a DUI conviction and also said he was treated fairly. As with the other white jurors,

Fourth, I disagree with the majority's conclusion that where an African-American man answers "yes" when a prosecutor asks him whether innocent people are sometimes convicted and guilty people sometimes go free, his acknowledgement of this inarguable fact provides *such* an obvious basis for striking the prospective juror that the court *need not even rule* on the prosecutor's subjective motivation. In my view, when the prosecutor offers distrust of the criminal justice system as his justification for excluding the *only* remaining African-American man on the jury panel, the constitution requires more. (See, e.g., Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials* (2000) 3 U.Pa. J. Const. L. 3, 42–43 [discussing training video that advised prosecutors to avoid " 'blacks from low income areas' " because of their "resentment" of law enforcement and tendency to resist authority]; Smith et al., *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion* (2012) 35 Seattle U. L.Rev. 795, 819 ["In addition to the stereotype that black citizens are prone to criminality (and thus might sympathize more with those who commit crime), prosecutors might associate black citizens with lack of respect for law enforcement"].)

On this record, the prosecutor's reasons for striking Prospective Juror No. 4247 do not withstand scrutiny. Certainly, the reasons are not self-evident. My finding of improper discrimination as to this prospective juror "is not based on any

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however, the prosecutor did not ask about this juror's views on the criminal justice system. Instead, the prosecutor asked No. 2779 a single question: whether he would be able to decide the case without considering punishment, a question the prosecutor asked every prospective juror in that group.

conduct that is particularly egregious or any evidence that approximates a smoking gun." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1182.) Instead, it is based on the following, which the court did not consider at the third *Batson/Wheeler* hearing or any other:

- the lack of comparable questioning of non-minority jurors;
- the lack of any indication that the prosecutor thought No. 4247 was untruthful or uninformed;
- the prosecutor's disinterest in meaningfully questioning four white prospective jurors on their views of the criminal justice system;
- the fact that the prosecutor kept No. 3049, a white man, as a trial juror notwithstanding his expressed reluctance to convict;
- the fact that the prosecutor ostensibly struck the *only other* African-American man (No. 8238) because he misread the jury questionnaire—yet accepted a trial juror (No. 6526) who had somehow forgotten that one of his cousins murdered another one of his cousins;
- the fact that the prosecutor also ostensibly struck minority jurors—including No. 8238—because they were college students or lacked extensive work experience, but accepted a white trial juror (No. 2578) even though he was a new college graduate who had never held a job; and
- the fact that the prosecutor struck No. 4247 despite his unequivocal assertion that he would have no

> trouble convicting defendant if the prosecution met its burden.

In sum, I conclude defendant was denied her right to a fair trial under the Equal Protection Clause of the federal Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79, 84–89) and her right to a jury drawn from a representative cross-section of the community under our state Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258, 276–277). Accordingly, I respectfully dissent.

LAVIN, J.