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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ASENCION NEVAREZ, Defendant and Appellant.	B209232 (Los Angeles County Super. Ct. No. BA327691)

APPEAL from a judgment of the Superior Court of Los Angeles County. Morris B. Jones, Judge. Affirmed.

Catherine Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Asencion Nevarez appeals from the judgment entered following two jury trials in which he was convicted of stalking, vandalism over $400, vandalism under $400, and two counts of criminal threats. Defendant contends the trial court erred by admitting irrelevant and prejudicial gang evidence and denying his *Batson*[1] motion. We affirm.

BACKGROUND

Sometime in 2007, defendant's estranged wife, Deserie Duran, moved in with her friend Robert Jankalski, who lived with his parents in a house in Commerce. The friendship between Jankalski and Duran later became a romance.

After Duran filed for divorce and obtained a restraining order against defendant, defendant began making threatening telephone calls to Jankalski's home phone and Duran's mobile phone. During 5 to 10 calls on the home phone that Jankalski answered, defendant told Jankalski that he should "watch his back," that defendant was "going to get" him, and that defendant was going to kill him and his parents. Immediately after Jankalski received such a call on June 23, 2007, he found his jacket on the porch of the house. It had been "cut up" and inscribed with messages to Duran. Duran recognized the writing as defendant's. Duran had worn the jacket and left it at her cousin's home. Duran answered at least 20 calls by defendant to the Jankalski's home phone. During these calls, defendant threatened to kill Jankalski and Duran. Defendant also called Duran's mobile phone numerous times a day and left messages calling Jankalski a "rata," threatening to "kick [Jankalski's] ass," and warning that he would "catch [them] slipping." Jankalski heard about 50 voicemail messages defendant left on Duran's phone. These messages included statements that defendant knew where they were and what they were doing and threats to "get" Jankalski, kill Jankalski, and "fuck [Jankalski] like a dog." A recording of one message in which defendant said he would be "catching you guys on the streets soon" was played at trial.

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712] (*Batson*).

On May 15, 2007, Jankalski's mother Virginia opened the back door of the house and was startled to see defendant standing just outside the door, inches away from her. Virginia did not know who defendant was. He told her he wanted his wife. Virginia and her husband each spent about 15 minutes talking to defendant. When Duran returned to the house, she talked to defendant. Later that day, defendant returned to the Jankalski backyard, even though Virginia had told him not to. Virginia called the police. Five days later, Virginia again saw defendant in the backyard, and again called the police. The next day, Virginia noticed that her Lexus, which was parked in the driveway, had been scratched extensively and the "number" on the car had been twisted. Large potted palm trees had been overturned and dragged from their pots. "Dee Dee [Duran's nickname] not true" had been written on a wall in the backyard. There was also writing on the front porch. Virginia again called the police.

About 6:00 a.m. on June 24, 2007, Jankalski heard a noise outside the house. He looked out a window and saw defendant near a car that belonged to Jankalski's sister Janel. Jankalski opened the door and saw defendant bending down by the car. Jankalski heard air escaping from the car's tires. Defendant looked at Jankalski and said, "I told you I would be back, and I will be back to kill you. You fuckin punk, I will be back to kill you and your mom and dad. You are going to die." Jankalski locked the door and called the police. After defendant left, Jankalski went outside and saw scratches all over his sister's car. The tires had been punctured and the logo had been broken off. Another car in the driveway had also been scratched and its interior "completely torn up."

On one occasion, defendant punched and kicked Jankalski in a park near the Jankalski home. Other people in the park intervened and called the police.

Jankalski testified that defendant's threats placed him in fear for his own safety and that of his parents. Defendant's conduct, including the visits to the Jankalski home, the vandalism at the home, and the attack in the park; defendant's gang membership; the placement of the name of defendant's gang on the wall at the Jankalski home; and the behavior of "guys from [defendant's] neighborhood, his gang" in attempting to dissuade

Jankalski from testifying also contributed to Jankalski's fear. The entire Jankalski household was so frightened that they kept watch around the clock in case defendant returned to the house.

At defendant's first trial, the jury convicted him of vandalism and found the amount of damage to be less than $400. (This count pertained to the damage to the jacket.) The jury could not reach a verdict on the remaining four counts. At the retrial, the jury convicted defendant of stalking, vandalism with damage in excess of $400 (to Janel's car), and two counts of criminal threats. The trial court sentenced defendant to four years in prison.

DISCUSSION

1. Admission of gang evidence

At defendant's original trial, the court precluded the prosecutor from introducing evidence that defendant was a member of the Brown Brotherhood gang and that he carved "BBH" (a reference to the gang) on the porch of the Jankalski house.

The retrial was before a different judge and involved a different prosecutor. The prosecutor sought to introduce evidence that defendant's gang affiliation was a factor causing Jankalski to experience fear for his safety and that of his family as part of the proof of the criminal threats charges. The trial court conducted an Evidence Code section 402 hearing at which Jankalski testified that he believed defendant was an active member of the Brown Brotherhood gang and that defendant's gang membership played into the fear Jankalski suffered as a result of defendant's threats and conduct. Jankalski's belief regarding defendant's gang status was based upon the statement of a police officer, the tattoos he had seen on defendant, defendant's conduct in carving "BBH" on the porch, and the efforts people made to dissuade Jankalski from testifying. Defendant argued that he was not an active gang member and his gang affiliation ended 20 years prior to trial. He further argued that the statement of the police officer to Jankalski was hearsay and that the prosecutor needed to establish how Jankalski knew the meaning of defendant's tattoos. The trial court ruled that Jankalski had "no actual knowledge that [defendant] is

a gang member. He said he saw tattoos with gang stuff on his arm. If that, is something he saw, and he determined that there is a possibility he is in a gang, that is admissible. But the other things what the police officer told him, that is hearsay, and he is not competent to testify to that. All that is is rank speculation because the officer . . . might have been a rookie patrolman. He might have been a detective, or he might have been a gang officer. We don't know. We can't put this out before the jury that this man is a gang member and that is why he is afraid of him. He doesn't know this."

After Jankalski testified regarding the various acts and threats, the prosecutor asked him how the threats made him feel. Jankalski replied that he was scared. The prosecutor asked if he was concerned, and Jankalski said he was concerned for himself, his parents, Duran, and the house and then added, "I mean, some gang member makes threats like that towards you—" Defendant objected that the statement was nonresponsive and moved to strike it. The trial court overruled the objection.

When the prosecutor asked Jankalski, "What else about these statements caused you to be fearful for yourself and your family," Jankalski referred to "the writings on the wall on the house." The prosecutor asked Jankalski if he remembered what was written. Jankalski replied, "They were his gang neighborhood written on the wall on the front of the house." Defendant objected that this was hearsay, speculation, and without foundation. The trial court sustained the objections.

Jankalski later testified that he still feared defendant. The prosecutor asked him why. Jankalski replied, "Just because of the threats, because I have been approached by his homeboys. They have come and talked to me—" The trial court sustained defendant's hearsay objection and struck the portion of the answer referring to "homeboys." Jankalski spontaneously continued, "Okay. How can I refer to it? Guys from his neighborhood, his gang." Defendant did not object.

Jankalski then testified that "people in the neighborhood" had approached him and referred to the problems he was having with defendant. Defendant did not object. Jankalski then testified that "those interactions with those people in the neighborhood"

also caused him to experience fear. Defendant objected on the grounds of relevance and hearsay. The court overruled the objections. The prosecutor asked if that was one of the reasons Jankalski continued to fear defendant. Jankalski replied, "Yes. Because I have been told not to come to court." Defendant did not object.

Defendant contends that the trial court abused its discretion and violated his right to due process by admitting "a tremendous amount of evidence" that was irrelevant, improper propensity evidence, hearsay, or "highly inflammatory" and "more prejudicial than probative." Defendant appears to address his contention to the following portions of Jankalski's testimony: (1) "some gang member makes threats like that towards you," (2) "[g]uys from his neighborhood, his gang," (3) "people in the neighborhood" had approached Jankalski, (4) those people had referred to the problems Jankalski was having with defendant, (5) the interactions with those people frightened Jankalski, and (6) those people told Jankalski not to go to court.

Defendant objected that Jankalski's "some gang member makes threats like that towards you" statement was nonresponsive, but he did not assert any of the grounds for exclusion that he raises on appeal. He thereby forfeited all of his appellate claims regarding this testimony. (*People v. Partida* (2005) 37 Cal.4th 428, 434 (*Partida*).) Although defendant successfully raised his hearsay objection in the Evidence Code section 402 hearing, he was required, at a minimum, to ask the trial court to strike the reference to "some gang member" based upon its prior ruling. The trial court has no sua sponte duty to exclude evidence. (*People v. Montiel* (1993) 5 Cal.4th 877, 918 (*Montiel*).) By failing to either object to Jankalski's gang reference or ask the court to strike it on the grounds raised on appeal, defendant deprived the trial court of an opportunity to cure the alleged error.

Defendant did not object at all to four of the matters he appears to challenge on appeal: Jankalski's reference to "guys" from defendant's gang and his testimony that "people in the neighborhood" had approached him, referred to the problems he had been having with defendant, and told him not to go to court. Defendant's failure to object

forfeited all of his state and constitutional claims with respect to these matters. His prior successful hearsay objection during the section 402 hearing was insufficient to preserve that objection to Jankalski's reference to defendant's gang absent some effort on defendant's part to enforce his prior success, such as moving to strike the testimony.

With respect to Jankalski's testimony that his interactions with "people in the neighborhood" had frightened him, Jankalski raised in the trial court only two of the four grounds for exclusion he asserts on appeal. He thereby forfeited his claims other than relevance and hearsay. Relevant evidence includes evidence bearing on witness credibility. (Evid. Code, § 210.) These interactions were relevant to Jankalski's credibility, in that he testified notwithstanding the fear instilled by the "people in the neighborhood." "A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat. . . . [¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368–1369.)

Jankalski's testimony that his interactions with "people in the neighborhood" instilled fear was not hearsay. Although the "interactions" no doubt included one or more statements by the "people in the neighborhood," the portion of testimony in issue neither related the content of any such statement nor attempted to prove its truth. Even the later, unchallenged testimony that these people told Jankalski not to go court was nonhearsay, as it was introduced solely to show its effect upon Jankalski's mental state.

(*People v. Marsh* (1962) 58 Cal.2d 732, 737–738; *People v. Bolden* (1996) 44 Cal.App.4th 707, 715.)

Defendant did not raise his due process claim in the trial court, but even if some aspect of the claim is cognizable on appeal (*Partida*, *supra*, 37 Cal.4th at pp. 435–436), it has no merit. The admission of evidence violates due process if there is no permissible inference a jury may draw from the evidence and its admission makes the trial fundamentally unfair. (*Id*. at p. 439; *People v. Steele* (2002) 27 Cal.4th 1230, 1246; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) The evidence in controversy gave rise to permissible inferences and did not make the trial fundamentally unfair.

2. Denial of *Batson* motion

Defendant contends that the trial court erred by denying his *Batson* motion contesting the prosecutor's use of a peremptory challenge against Prospective Juror No. 10.

A party violates both the California and the United States Constitutions by using peremptory challenges to remove prospective jurors solely on the basis of group bias, that is, bias presumed from membership in an identifiable racial, religious, ethnic, or similar group. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276–277 (*Wheeler*); *People v. Lancaster* (2007) 41 Cal.4th 50, 74; *Batson*, *supra*, 476 U.S. at pp. 85, 96–98.) A party who believes his opponent is doing so must timely object and make a prima facie showing of exclusion on the basis of group bias. (*Wheeler*, at p. 280.)

If a prima facie case is shown, the burden shifts to the other party to show that the peremptory challenge was not based solely upon group bias, but upon a "specific bias," that is, one related to the case, parties, or witnesses. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276, 281–282.) This showing need not rise to the level of a challenge for cause. (*Ibid.*) Although a party may exercise a peremptory challenge for any permissible reason or no reason at all, implausible or fantastic justifications are likely to be found to be pretexts for purposeful discrimination. (*People v. Huggins* (2006) 38 Cal.4th 175, 227; *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769].)

The trial court must then make a sincere and reasoned attempt to evaluate the explanation for each challenged juror in light of the circumstances of the case, trial techniques, examination of prospective jurors, and exercise of peremptory challenges. (*People v. Fuentes* (1991) 54 Cal.3d 707, 718.) It must determine whether a valid reason existed and actually prompted the exercise of each questioned peremptory challenge. (*Id.* at p. 720.) The proper focus is the subjective genuineness of the nondiscriminatory reasons stated by the prosecutor, not on the objective reasonableness of those reasons. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924 (*Reynoso*).) "[N]either *Wheeler* nor *Batson* overturned the traditional rule that peremptory challenges are available against individual jurors whom counsel suspects even for trivial reasons." (*Montiel*, *supra*, 5 Cal.4th at p. 910, fn. 9.) "To rebut a race- or group-bias challenge, counsel need only give a *nondiscriminatory* reason which, under all the circumstances, including logical relevance to the case, appears *genuine* and thus supports the conclusion that race or group prejudice *alone* was not the basis for excusing the juror." (*Ibid.*)

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029].) "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*).)

Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with considerable deference, provided that the trial court makes a sincere reasoned effort to evaluate the justifications offered. (*Lenix*, *supra*, 44 Cal.4th at pp. 613–614.) "On appeal, a trial court's ruling on the issue of discriminatory intent must be

sustained unless it is clearly erroneous." (*Snyder v. Louisiana* (2008) 552 U.S. 472, __ [128 S.Ct. 1203, 1207] (*Snyder*).)

Prospective Juror No. 10 was a single, childless "young woman" from Los Angeles without prior jury experience and whose occupation was "in-home support." Defense counsel asked no questions of her, and the prosecutor only asked her if she would "not just instantly disbelieve the testimony" of a witness who had a prior conviction. She agreed she would not.

The prosecutor exercised his seventh peremptory challenge against Prospective Juror No. 10, and defendant immediately made a *Batson* motion, stating that the prosecutor had excused two of three Black prospective jurors. The court asked the prosecutor to explain his rationale. The prosecutor responded, "Well, my issue is that we know very little about Juror Number 10. All we know is that she is from Los Angeles, that she is [*sic*] does in-home support. I was watching her during jury selection. She was sitting, facing forward, and she kept on looking at me, and I'm concerned if she can be a fair juror." The court denied defendant's motion, stating, "Your client is Hispanic. There are four Black jurors, and you still have Black jurors on the panel, even though that is a very weak excuse given by the People in this matter, the court is going to accept it. I didn't see her looking at him, but he would be in a better position to make that determination." The court also warned counsel that it would not tolerate any "selective type of removal of jurors on this case."

We infer a prima facie finding of group bias where, as here, the trial court solicits an explanation of the challenged excusal without explaining its views on the sufficiency of the prima facie showing. (*People v. Arias* (1996) 13 Cal.4th 92, 135.)

Defendant argues that "the court accepted the prosecution's rationale for excusing a Black juror even while expressing skepticism that the rationale was complete, true, or accurate." He argues that under *Batson*, the trial court had "a duty to probe further" and to "critically evaluate the prosecutor's proffered race-neutral reasons to determine if

those reasons were actually the motivating reasons for the challenged peremptory strikes."

Defendant misstates the trial court's task. In *Snyder*, upon which defendant relies, the United States Supreme Court recounted the *Batson* analysis as follows: "'"First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination."' [Citations.]" (*Snyder*, *supra*, 552 U.S. at p. __ [128 S.Ct. at p. 1207].) *Snyder* also noted, "The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, [citation], and 'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge,' [citation]." (552 U.S. at p. __ [128 S.Ct. at p. 1208].)

Here, the prosecutor provided a race-neutral reason for excusing Prospective Juror No. 10. The trial court evaluated the prosecutor's explanation and found it weak, but credible. The important point was the trial court's opinion of the "subjective *genuineness*" of the nondiscriminatory reasons stated by the prosecutor, "not . . . the objective *reasonableness* of those reasons." (*Reynoso*, *supra*, 31 Cal.4th at p. 924.) A prosecutor's "explanation need not be sufficient to justify a challenge for cause." (*People v. Turner* (1994) 8 Cal.4th 137, 165, overruled on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Even a hunch is sufficient, so long as it is not based on impermissible group bias. (*Turner*, at p. 165.) Subjective matters, such as a prospective juror's body language or the way in which he or she answered questions are adequate specific bias or race-neutral grounds for a peremptory challenge. (*Wheeler*, *supra*, 22 Cal.3d at p. 276 ["'bare looks and gestures'" cited as an example of a permissible specific bias]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1217–1219 ["tired" appearance, defensive body position, sympathetic looks at defendant].) *Snyder* noted that

"race-neutral reasons for peremptory challenges often invoke a juror's demeanor . . . ." (*Snyder*, *supra*, 552 U.S. at p. __ [128 S.Ct. at p. 1208].) What matters here is not whether the prosecutor articulated a highly persuasive ground for excusing Prospective Juror No. 10, but that the ground was race-neutral and the trial court concluded that the prosecutor's explanation was genuine. In assessing the subjective genuineness of the prosecutor's explanation, the trial court had the benefit of its contemporaneous observations of both voir dire and the prosecutor's demeanor as he explained his reason for excusing Prospective Juror No. 10. The trial court's remarks indicate it was quite sensitive to the possibility of group bias. It faithfully performed its duties in accordance with the *Batson* and *Wheeler* lines of authority, and its ruling was not clearly erroneous.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.