Filed 6/2/04 P. v. Cruz CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RUBEN JONATHAN CRUZ, Defendant and Appellant.	F042958 (Super. Ct. No. SC084881A) **OPINION**

THE COURT*

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

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

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and Michelle L. West, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Before Dibiaso, Acting P.J., Buckley, J., and Levy, J.

-ooOoo-

Defendant, Ruben Jonathan Cruz, was convicted by jury trial of Penal Code section 187, subdivision (a) (murder). On appeal, he contends the court committed reversible error by denying his "Wheeler"[1] challenge. We will affirm.

DISCUSSION

During voir dire, after the prosecutor had exercised a peremptory challenge to excuse Mr. Musquez, defendant made a *Wheeler-Batson* motion (*Wheeler, supra,* 22 Cal.3d 258*; Batson v. Kentucky* (1986) 476 U.S. 79). In making the motion, defense counsel noted the first three peremptory challenges of the People were of people who "seemed" to be Hispanic and the seventh overall was of Mr. Musquez.[2]

The court ruled that:

> "The Court is not going to ask Mr. Magner to respond to the Wheeler-Batson motion. Again, I have considered all the factors. I have considered the answers that the various jurors had given both in individual questioning as well as the questioning once called into the box.
>
> "And I find that there are reasons that would reasonably explain the peremptory challenges for Hispanic jurors, including [230116448], that cause the Court to find there has not been a prima facie showing that the People are making a systemic or other effort to exclude Hispanic jurors."

Cruz contends the court erred by finding no prima facie case had been made. He also contends, pursuant to federal authority, that this court must conduct a comparative juror analysis. As we shall briefly explain, he is wrong on both assertions.

---

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

2 Actually, at the time the motion was made, only Corinna Ramos, Jerry Cardenas and Ramon Musquez had been excused. The fourth, Charles Aquilera, was excused after the motion was made.

The general principles under *Wheeler* are well settled and are set forth in *People v. Garceau* (1993) 6 Cal.4th 140.

> "'If a party believes an opponent is improperly using peremptory challenges for a discriminatory purpose, that party must make a timely objection and a prima facie showing that the jurors are being excluded on the basis of group bias. [Citation.] To establish a prima facie case, the moving party should first make as complete a record as possible; second, the moving party must establish that the persons excluded are members of a cognizable group; and third, the moving party must show a strong likelihood that the persons are being excluded because of group association.' [Citation.] Once the moving party has established a prima facie case, the burden shifts to the other party to come forward with a group-neutral explanation for the exercise of the challenges related to the particular case being tried. [Citations.]" (*People v. Garceau, supra*, 6 Cal.4th at p. 171.)

Hispanics are a cognizable group under *Wheeler-Batson*. (*People v. Ayala* (2000) 23 Cal.4th 225, 256.)

When a trial court denies a *Wheeler* motion without finding a prima facie case of bias, we consider the entire record of voir dire. We give the trial court's ruling considerable deference and if the record suggests reasonable grounds of challenge to the jurors excused, we affirm. (*People v. Garceau, supra*, 6 Cal.4th at pp. 171-172.) A review of the responses each of the three prospective jurors gave furnish a race-neutral basis for excusing each.

Ms. Ramos expressed serious reservation about being able, at her age of 19 years, to "have someone's life in my hands." She repeated her reservation by saying she was scared to do that. Youth and immaturity is a race-neutral basis. (*People v. Sims* (1993) 5 Cal.4th 405, 431.)

Mr. Cardenas, when asked if there were any reason why he could not be on the jury, responded that he had two children. When he was later asked if there were any reason he could not give the case his full attention, he again responded that he had small kids and day care was a problem. However, it was later revealed that the children did not

live with him and there was no indication he had been responsible for their day care. Other somewhat nonresponsive answers were made by Cardenas. These responses were a race-neutral basis for excuse. (Cf. *People v. Turner* (1994) 8 Cal.4th 137, 169.)

Finally, Mr. Musquez gave several responses raising potential troublesome areas. He had been abused as a child. He discussed with his wife that it was strange that children would attack one of their parents. He admitted that he had a "pretty bad temper at times" and that "kids will test you." Given that the circumstances of this case alleged murder of a mother by her child, it would be understandable why a prosecutor would not want such a person on this jury. The record supports the court's denial of defendant's *Wheeler* motion. We find no error in the court's conclusion a prima facie case had not been made.

No Comparative Analysis Was Required

As defendant recognizes, California courts do not require comparative analysis, either by the trial court, sua sponte,[3] or the reviewing court, for the first time on appeal. In *People v. Johnson, supra*, 30 Cal.4th 1302, our Supreme Court reversed an appellate court which had conducted its own comparative analysis of challenged and unchallenged jurors, something the trial court had not done. It noted: "We have observed that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case." (*Id*. at p. 1318.) In part, this is because "[a] comparison of the jurors' answers is unreliable when divorced

---

[3] "[M]idtrial, we cannot expect, and do not demand, trial courts to engage sua sponte in … comparative juror analysis …." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1323.)

from the context of the trial. A trial court, but not a reviewing court, is able to place the answers into context and draw meaning from *all* the circumstances, including matters not discernable from the record." (*Id.* at p. 1320.) The court reviewed the recent United States Supreme Court decision in *Miller-El v. Cockrell* (2003) 537 U.S. 322, and noted it involved "a reviewing court considering evidence of comparative juror analysis *after* it had been presented to the trial court." (*People v. Johnson, supra*, 30 Cal.4th at p. 1321, italics added.) It found nothing in that decision to suggest a reviewing court must engage in comparative juror analysis for the first time on appeal (*id.* at p. 1322), and went on to state its belief that, whatever procedures might be adopted by other courts (such as federal courts which do engage in comparative juror analysis), comparative juror analysis for the first time on appeal is not constitutionally compelled (*id*. at p. 1324).

The court went on to explain that "[w]e have … said that comparative juror analysis is 'largely beside the point' because of the legitimate subjective concerns that go into selecting a jury. [Citation.] But it is not *irrelevant*. Although such analysis, by itself, proves little, properly presented to the trial court, it can be among the 'all relevant circumstances' [citation] or 'all the circumstances of the case' [citation] that the trial court must consider in making its determination." (*People v. Johnson, supra*, 30 Cal.4th at p. 1323.) "Certainly, the trial court should consider obvious matters, and it can consider any other circumstances it finds relevant to the particular case. But, midtrial, we cannot expect, and do not demand, trial courts to engage sua sponte in the sort of comparative juror analysis that appellate lawyers and courts can do after scouring the often lengthy appellate record during the appeal. And, given the inability of reviewing courts to reliably conduct such analysis on a cold record, those courts are not required to do for the first time on appeal." (*Ibid.*) The court concluded: "Accordingly, we maintain our long-standing practice. When the objecting party presents comparative juror analysis in the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an

analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal …. While we decline to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate." (*Id*. at pp. 1324-1325.)

The record below indicates no comparative juror analysis was conducted. Accordingly, we decline to do so here.

DISPOSITION

The judgment is affirmed.