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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JACKSON, Defendant and Appellant.	B177201 (Los Angeles County Super. Ct. No. TA063472)

APPEAL from the judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Reversed and remanded.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury fails to reach a verdict. Three of the four jurors who vote to acquit the defendant are African-American women. Upon retrial, the prosecutor uses four of his first eight peremptory challenges to strike African-American women from the jury. For one of the African-American women whom he strikes, he offers three justifications in response to the African-American defendant's motion under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*): two of those reasons apply to a non-African-American woman in the jury box whom the prosecutor does not strike, and the third reason draws little, if any, support from the record. The court accepts the prosecutor's reasons and denies the defendant's *Wheeler* motion. We reverse.

FACTS AND PROCEEDINGS

In 2002, a jury convicted appellant Michael Jackson on two counts of second degree armed robbery and two counts of false imprisonment for stealing a tractor-trailer from a warehouse in Carson. In an unpublished decision in 2003, we overturned the convictions and remanded the case for retrial because the trial court had erroneously admitted evidence that appellant had committed seven other warehouse robberies. (*People v. Jackson* (Sept. 29, 2003, B160746).)

The People retried appellant. The retrial ended in a mistrial after the jury failed to reach a verdict, with eight jurors voting to convict and four jurors -- three of whom were African-American women -- voting to acquit.

The People retried appellant again. During voir dire of what was to become the third jury to hear appellant's case, the prosecutor exercised four of his first eight peremptory challenges to remove African-American women from the jury. Defense counsel moved under *Wheeler*, arguing the prosecutor was exercising his peremptory challenges against African-American women with a discriminatory intent. Finding

defense counsel had made a prima facie showing under *Wheeler*, the trial court ordered the prosecutor to explain his four peremptory challenges.[1]

The prosecutor's explanation began with rejecting defense counsel's suggestion that the prosecutor was removing African-American women from the jury as a trial tactic intended to prevent repetition of the not-guilty votes by African-American women in the first retrial. The prosecutor told the court the previous jury had hung because four jurors had voted to acquit appellant not based on the evidence, but from sympathy for appellant. Thus, the prosecutor explained, he wanted to remove jurors whom he perceived as "sympathetic." The prosecutor then offered his reasons for excusing the four African-American women. (We examine the prosecutor's stated reasons for excusing one of those jurors, identified by her initials as C.B., *post*, in Discussion.) Finding the prosecutor's reasons were race neutral, the court denied appellant's *Wheeler* motion. Once empanelled, the third jury convicted appellant of the original charges.

Appellant appealed from the renewed convictions. On review, we easily affirmed in an unpublished decision the trial court's denial of appellant's *Wheeler* motion as to three of the four peremptorily challenged African-American female jurors. (*People v. Jackson* (Dec. 27, 2005, B177201).) As for the fourth juror known as C.B., however, we were troubled. (*Id.* at p. 6.) The prosecutor had offered three reasons for removing her from the jury: she wore bright clothing; she was a retired nurse; and, her memory about her prior jury service was allegedly poor. We concluded that the prosecutor's explanation for excusing C.B. "pass[ed] muster – but just barely." (*Ibid.*)

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[1] A three-step process exists for evaluating a defendant's objection to a peremptory challenge. First, the defendant must make a prima facie showing that a challenge was based on an impermissible basis, such as race. (*Batson v. Kentucky* (1986) 476 U.S. 79, 96 (*Batson*).) Second, if the trial court finds the defendant has made a prima facie case of discrimination, the burden then shifts to the prosecution to offer a race-neutral reason for the challenge that relates to the case. (*Id.* at pp. 97-98.) Third, if the prosecutor offers a race-neutral explanation, the trial court must decide whether the defendant has proved the prosecutor's motive for the strike was purposeful racial discrimination. (*Id.* at p. 98.)

In making his *Wheeler* motion in the trial court, defense counsel had engaged in a partial "comparative analysis" of the prosecutor's reasons for excluding C.B. Defense counsel pointed out to the court that the prosecutor had accepted three non-African-American jurors who were wearing bright clothing. (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 241 (*Miller-El*) ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ."].) Defense counsel did not, however, do a comparative analysis in the trial court of the prosecutor's two other reasons for excluding C.B.: her profession as a nurse, and her purportedly poor memory of her prior jury service. As California case law stood in 2005 when we heard appellant's second appeal, we held we could not engage for the first time on appeal in comparative analysis of the prosecutor's two additional reasons for excluding C.B. We noted that federal case law seemed to be moving in the direction of allowing, and perhaps even compelling, comparative analysis for the first time on appeal, but we concluded that our state Supreme Court's decisions prohibiting comparative analysis for the first time on appeal bound us.[2] Accordingly, because C.B.'s career as a nurse and her purportedly poor memory were on their face race-neutral reasons for the prosecutor to exercise a peremptory challenge of her, we affirmed the trial court's ruling as to her exclusion, too.

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[2] We wrote in our 2005 decision: "During the pendency of this appeal, the United States Supreme Court decided *Miller-El v. Dretke* (2005) ____ U.S. ____ (125 S.Ct. 2317) (*Miller-El*). In that decision, the Court's majority engaged in comparative analysis despite the defendant's failure to have pursued that analysis in the trial court. (*Miller-El,* at pp. 2325-2328; see also dissent at pp. 2347-2348.) We invited supplemental briefing on whether *Miller-El* compels (or permits) us to do a comparative analysis for the first time on appeal. After reviewing the supplemental briefs, we find *Miller-El* does not answer our question. (Accord, *People v. Schmeck* (2005) 37 Cal.4th 240, 270 [assumed, but refused to decide, *Miller-El* permits comparative analysis for the first time on appeal].) In the absence of a direct statement by the United States Supreme Court, we must observe our Supreme Court's prohibition of performing comparative analysis for the first time on appeal. (*People v. Heard* [(2003) 31 Cal.4th 946, 971]; *People v. Johnson* [(2003) 30 Cal.4th 1302, 1318]; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)" (*People v. Jackson*, *supra*, B177201, p. 7, fn. 2.)

Appellant filed a petition of habeas corpus in the United States District Court for the Central District of California. In March 2013, the district court granted appellant conditional relief. The district court found that we (and our Supreme Court in denying appellant's petition for review of our 2005 decision) had misapplied federal constitutional law by not engaging in a comparative analysis for the first time on appeal of *all three* of the prosecutor's reasons for excluding C.B (bright clothing, status as a nurse, poor memory). (See, e.g., *Love v. Scribner* (2008 9th Cir.) 278 Fed.Appx. 714, 717 ["the [California] state court of appeal refused to conduct the required [comparative] analysis, citing then-existing California law . . . . This refusal 'was contrary to, or involved an unreasonable application of, clearly established Federal law' "]; *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077 [may cite unpublished decisions from other jurisdictions].) The district court ordered the state of California to release appellant from state prison within 90 days of the district court's March 1, 2013 judgment unless we heard within those 90 days appellant's comparative analysis challenge to the prosecutor's three reasons for excluding C.B. from the jury.

In the meantime, in 2008 our Supreme Court in *People v. Lenix* (2008) 44 Cal.4th 602, 622 (*Lenix*), held that comparative analysis can be performed for the first time on appeal if the record on appeal lends itself to such an analysis. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321 (*McKinzie*) [comparative juror analysis may be considered for first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons].) Accordingly, on the Attorney General's motion and consistent with the district court's order, we recalled our remittitur and ordered supplemental briefing by the parties, and, at the parties' election, set the matter for oral argument. Based on a comparative analysis of the prosecutor's reasons for excluding C.B., we now reverse appellant's convictions and remand to the trial court for further proceedings.

DISCUSSION

The prosecutor gave three reasons for removing C.B., an African-American woman, from the jury: She was a retired nurse, a profession he deemed "sympathetic"; she had poor recall of her prior jury service; and she wore bright clothing, a sign of being a sympathetic person. In explaining his reasons to the court, the prosecutor said:

> "I think she was the retired nurse, she had three prior jury services. And I think she said the last one she thought was four years ago for theft. Now, I found her to be an old — she's an older woman. She's been retired for 12 years as a nurse. In my opinion a nurse is a sympathetic person, sympathetic profession. And I also found that she had poor memory. She couldn't remember the cases that she sat on when the court made inquiry about her priors. And I made inquiry about her prior jury service, and she couldn't remember the facts of the case, the charges or anything like that. She did remember that all three cases resulted in a verdict. [¶] So I had questions about her memory, and her ability to properly serve as a juror. [¶] In addition to that, she was wearing — she both — she wore bright colored clothing on the first day of service and today. On both days, she wore bright colored cloth[es]. I consider people who wear bright colored clothing as warm emotional people. Again, I'm concerned about people who would be sympathetic one way or the other and not decide this case based upon the facts of this case. And that's the basis for my excusing her. [¶] Poor memory, the fact that she's an older woman, she couldn't remember her prior jury service, and then she appears to be a warm, emotional, sympathetic person."

When ruling on a defendant's *Wheeler* motion, the trial court must decide not only whether the prosecutor's stated reasons are race neutral, but whether those stated reasons actually motivated the peremptory challenge, instead of masking purposeful discrimination. (*Batson, supra,* 476 U.S. at p. 98; *Wheeler*, *supra*, 22 Cal.3d at pp. 281-

282.) In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into the available circumstantial and direct evidence of intent. (*Wheeler*, at p. 282; *Batson, supra,* at p. 93.) That evidence includes a comparative analysis of the jurors struck by the prosecutor with the characteristics of other prospective jurors whom the prosecutor did not strike. (*Miller-El, supra,* 545 U.S. at p. 239; *Lenix, supra*, 44 Cal.4th at p. 622.) If a prosecutor's reasons for striking a black panelist apply to an otherwise similar non-black panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination. We consider each reason the prosecutor gave.

A. Bright Clothing

The prosecutor challenged C.B. because she wore bright clothing and had been a nurse, although the prosecutor did not challenge three other jurors – one of whom was also a nurse – who also wore bright clothing. Our Supreme Court tells us that an advocate has an incentive to put in the record all of the advocate's race-neutral reasons for peremptorily challenging a venire member. "Both court and counsel bear responsibility for creating a record that allows for meaningful review. [Citation.] Review is deferential to the factual findings of the trial court, but that review remains a meaningful one. 'Deference does not by definition preclude relief. [Citation.] When reasons are given for the exercise of challenges, an advocate must 'stand or fall on the plausibility of the reasons he gives.' " (*People v. Lenix* (2008) 44 Cal.4th 602, 621.) Defense counsel cited the court to the prosecutor's seemingly inconsistent treatment of brightly clothed jurors. The prosecutor therefore had the opportunity, and incentive, to rehabilitate the three brightly-clad unchallenged jurors with race-neutral reasons that explained their continued presence on the jury after the prosecutor removed C.B. Nevertheless, the prosecutor did not try to explain why the three remaining jurors were acceptable despite wearing bright clothing.

The Attorney General on appeal attempts what the prosecutor did not try by suggesting that two of those jurors -- numbers 7558 and 538 -- may have held favorable

views of law enforcement or robbery victims that overcame their bright clothing. Brightly clad juror 7558 had been robbed twice at gunpoint while working as a bank teller. And brightly clad Juror 538 had relatives and friends in law enforcement. Respondent's effort is proper because a reviewing court may consider on appeal reasons in the record supporting a prosecutor's decision not to challenge a particular juror even if the prosecutor did not cite those reasons. (*People v. Jones* (2011) 51 Cal.4th 346, 365-366 (*Jones*).) Analogous circumstances arose in *Jones, supra*, at page 365. There, the venire panel in a death penalty case had three bus drivers, a profession the prosecutor disfavored. The prosecutor excused the African American bus driver but kept the two white bus drivers. No *Wheeler/Batson* violation occurred, however, because the white drivers were "strongly in favor" of the death penalty, whereas the black driver was only "moderately in favor" – a difference in attitude that plausibly overcame being a bus driver.

Respondent's attempt to rehabilitate the brightly clad jurors does not, however, include the juror of greatest interest here – the nurse identified as juror 2042. And the reason respondent cannot suggest any rehabilitative factors is the prosecutor did not ask that juror a *single* question, even though she had two characteristics – being a nurse and wearing bright clothing – which the prosecutor had stated were his reasons for excusing C.B. (See *People v. Lomax* (2010) 49 Cal.4th 530, 573 (*Lomax*) ["A failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual."]; see also *Miller-El, supra,* 545 U.S. at p. 244.) Only the court asked juror 2042 questions, and her answers offer little, if any basis on which to distinguish her from C.B. in a way making her favorable to the prosecution. Juror 2042's examination by the court began with her answering the court's standard demographic questions posted on a bulletin board and ended with several follow-up questions by the court. Her entire voir dire was the following: "I live in Lakewood. I'm married. And I have one child who is 14 years old. I'm a registered nurse. My husband is a registered nurse too. My hobby is bowling and tennis. [¶] [Court]: Have you ever been on a jury before? [¶] [A.]: No, this is my first

time. [¶] [Court]. Okay. And what facility do you work at, and where does your husband work as well? [¶] [A.]: I work at Long Beach Memorial hospital. My husband works through the registry. He works through Premier Nursing registry. [¶] [Court]: Do you know juror No. 2 [C.B.]? [¶] [A.] No. [¶] [Court]: Okay. Thank you." That's it. That's all we know about Juror 2042 – except that she was not African American. But despite no questions by the prosecutor that might have elicited information that could have allayed his concerns about 2042's nursing profession and bright clothing, the prosecutor accepted her – and rejected C.B., a brightly clad *African-American* nurse.

B. Nursing Profession

The prosecutor's second reason for excusing C.B was her career as a nurse, a profession he considered likely to make her unduly sympathetic to the point where he feared she might not be able to weigh the facts. He told the court, "In my opinion a nurse is a sympathetic person, sympathetic profession." Based on her profession, he explained: "I'm concerned about people who would be sympathetic one way or the other and not decide this case based upon the facts of this case. And that's the basis for my excusing her." But, as we have noted, one of the brightly-clad non-African-American jurors was also a registered nurse. Indeed, that nurse had worked at the same hospital where C.B. had worked before retiring. The prosecutor did not ask either C.B. or the other nurse whether their profession made them sympathetic to the point where, as the prosecutor stated, they could "not decide this case based upon the facts of this case." Our Supreme Court has noted that a "failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual." (*Lomax, supra*, 49 Cal.4th at p. 573.)

Respondent contends the other nurse is not truly comparable to C.B. despite sharing the same profession and taste in clothing because the other nurse did not manifest the same difficulty that C.B. purportedly displayed in recalling prior jury service – a comparison that misses the mark because the other nurse, having had no prior jury experience, had no service to forget. Moreover, respondent's attempt to draw a

distinction additionally fails because it rests, as we explain in the next part, on the prosecutor's misapprehension of C.B.'s purportedly poor recall of her jury experience. Hence, the unchallenged non-African-American nurse was comparable to C.B. for those characteristics -- except for her race --where the record supported the prosecutor: they both were nurses who wore bright clothing.

C. *Poor Memory*

We do not actually engage in a comparative analysis of the prosecutor's stated reason that C.B. had a poor memory of her prior jury experience for the simple reason that the record does not reflect that C.B.'s memory was deficient at all. Thus it could not have been a reason for excluding her.

The prosecutor told the court: "And I also found that she had poor memory. She couldn't remember the cases that she sat on when the court made inquiry about her priors. And I made inquiry about her prior jury service, and she couldn't remember the facts of the case, the charges or anything like that. She did remember that all three cases resulted in a verdict. [¶] So I had questions about her memory, and her ability to properly serve as a juror."

The record does not support the prosecutor. Contrary to the prosecutor's assertion, C.B. answered the court's questions with no lapse of memory. The exchange between the court and C.B. was as follows:

> "[Q.]: How, many times have you served on a jury that deliberated? [¶] [A.]: Three times. [¶] [Q.]: Okay. And without telling us what the verdict was, just tell us was a verdict reached, or did the jury hang, or were you unable to reach a verdict? [¶] [A.]: There was a verdict reached. [¶] [Q.]: Were you the foreperson? [¶] [A.]: No."

And contrary again to the prosecutor's assertion, C.B. did not fail "to remember the facts of the case, the charges or anything like that" when he asked about her jury service. The prosecutor asked her about the charges for two of the three trials on which

she had previously sat, and she recalled both were thefts. Her memory was less than precise only as to how long ago she had served on the first trial, which she believed was "about four years." The exchange between the prosecutor and C.B. was as follows:

> "[Q.]: Now the prior service that you had -- when was the last time that you served on the jury? [¶] [A.]: Last year. [¶] [Q.]: Last year. What type of case was it? [¶] [A.]: Theft. [¶] [Q.]: And can you remember the previous time you served? [¶] [A.]: Yes, I think. I think that was -- about four years ago. [¶] [Q.]: All right. What type of case was it? [¶] [A.]: Same thing, theft. [¶] [Q.]: Theft. And did -- I think you said that each one of those juries that you served on reached a verdict? [¶] [A.]: Yes."

It may have been that the prosecutor had confused C.B. with one or more other jurors who appeared to have poor memories.[3] While we do not engage in comparative analysis with the other jurors because the record is unclear as to their races, obviously C.B.'s asserted poor memory cannot be the basis for the proper exercise of a peremptory challenge because that poor memory did not exist. On the contrary, and in light of our discussion of the nurse and bright clothing factors, the mischaracterization of her memory suggests pretext. (*Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1190, 1192 [prosecutor's mischaracterization of venire answers can be evidence of discriminatory pretext]; *Cook v. Lamarque* (9th Cir. 2010) 593 F.3d 810, 818 [mischaracterization of juror's answer "is evidence of discriminatory pretext"]; but see *People v. Williams* (2013) 56 Cal.4th 630 [156 Cal.Rptr.3d 214, 243] [genuine mistake about a venire person's answers or traits is a race-neutral reason]; *Jones, supra,* 51 Cal.4th at p. 366.)

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[3] Juror Nos. 1, 5, and 6, for example, did not fully remember the specifics of their prior jury service.

D. *Summary*

Respondent correctly notes that comparative analysis may provide circumstantial evidence of discriminatory exercise of peremptory challenges, but is not dispositive. A court must consider the "totality of the record" in assessing whether a party's peremptory challenge rested upon an unlawful group bias. (*McKinzie, supra,* 54 Cal.4th at pp. 1321-1322 [" '[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination.' "].) Moreover, as respondent correctly notes, "Defendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Lenix, supra,* 44 Cal.4th at p. 624; see also *Jones, supra,* 51 Cal.4th at p. 361.)

We presume a prosecutor exercises peremptory challenges in a constitutional manner. (*People v. Taylor* (2009) 47 Cal.4th 850, 886.) Moreover, we must consider reasons in the record that might support a prosecutor's peremptory challenge, for there may exist offsetting reasons that allay a prosecutor's concerns about a particular juror. (*People v. Riccardi* (2012) 54 Cal.4th 758, 788.) "A party concerned about one factor need not challenge every prospective juror to whom that concern applies in order to legitimately challenge any of them." (*Jones, supra,* 51 Cal.4th at p. 365; but see *Green v. LaMarque* (2008) 532 F.3d 1028, 1030 ["[T]he prosecutor is responsible for articulating his own reasons for the challenges exercised. The Supreme Court has stressed that courts must be careful not to substitute their own speculation as to reasons why a juror might have been struck for the prosecutor's stated reasons."].) As evidence of the prosecutor's lack of discriminatory intent here, respondent notes that three, and perhaps four, African-Americans were in the jury box and went on to serve as jurors when appellant made his *Wheeler* motion. (*Jackson v. Evans* (C.D.Cal. 2012) 2012 WL 7637663, *5, fn. 11.) "The prosecutor's acceptance of the panel containing a Black juror strongly suggests that race was not a motive in his challenge . . . ." (*Lenix, supra,* 44 Cal.4th at p. 629.) But notwithstanding the prosecutor's acceptance of three or four African-American jurors, a

constitutional violation occurs if even one juror is removed because of race regardless of how many other jurors of the same race remain on the jury. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) Because we find the prosecutor failed to offer plausible race-neutral reasons that either withstood comparative analysis against non-African-American jurors whom the prosecutor accepted (bright clothing and nursing profession) or support in the record (poor memory), the trial court erred in denying appellant's *Wheeler* motion. An erroneous denial of a *Wheeler* motion constitutes structural error not subject to harmless error analysis. (*People v. Turner* (1986) 42 Cal.3d 711, 728; *People v. Allen* (2004) 115 Cal.App.4th 542, 553.) Automatic reversal is required. (*Ibid.*)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.