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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MELROLANDO WARREN,

Defendant and Appellant.

A103913

(Alameda County
Super. Ct. No. H31401)

A jury found Melrolando Warren guilty of forcible rape (Pen. Code, § 261, subd. (a)(2)) and six counts of sexual penetration with a foreign object (*id.*, § 289, subd. (a)(1)), finding true special allegations of kidnapping and gun use (*id.*, §§ 667.61, subd. (d)(2), 12022.3, subd. (a)) and a prior strike conviction for forcible rape (*id.*, §§ 1170.12, subd. (c)(1), 667, subd. (e)(1)). Sentenced to a prison term of 65 years to life, Warren appeals claiming error in denying defense motions under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and seeking a remand to decide possible entitlement to presentence custody credits. We reject the claim of *Batson/Wheeler* error but remand regarding the credits.

BACKGROUND

The trial evidence is immaterial except to note that Warren is Black, as were four venire women against whose peremptory challenges he raised *Batson/Wheeler* objections.

Pertinent to the *Batson/Wheeler* claim, however, is a factual recitation given to the court by prosecutor Roy Scheingart before voir dire. The victim, Scheingart said, was waiting for a bus to go to work early one September 1986 morning in San Leandro when

Warren approached her and, after some small talk, put a gun to her chest and forced her to walk with him a few blocks to a small alleyway beside a store. There he forced her to disrobe and, over several minutes, committed the charged penetrations and rape. The victim at one point grabbed the gun from the ground and tried to shoot Warren, but it did not fire. They wrestled over the gun, and he got it back after slapping her and biting her in the back of the head. He penetrated her once more, then threatened to kill her if she told anyone and ordered her to count to 50 as he left. She called her boyfriend, and went to the sheriff's department and had a sexual assault exam. Over the next few weeks, she was shown three photo lineups assembled from her descriptions. But none contained Warren's picture, and she said each time that her assailant was not in them. Warren went unapprehended for these crimes for years but gave DNA samples while in prison for a rape conviction in 1991 and sexual battery in 1997. Forensic testing in 1997 of semen from the 1986 victim's underwear yielded a DNA profile, and Warren was matched as her assailant in mid-2001 through a "cold hit" in the DNA database. A blood sample obtained from him then produced a "positive match in the nature of one in 13 billion," and the victim immediately identified him from a new photo lineup.

Voir Dire

Defense counsel Richard Hove objected to Scheingart's second, fourth, sixth and eleventh peremptory challenges because they were used against Black women "under the age of 50."¹ We refer to the women as U.S., R.J., M.B. and R.W.H. The court reserved ruling until the end of voir dire and, in argument, had its attention called to answers that the four women, and some jurors who did serve, had given in written questionnaires.

U.S. Each questionnaire asked, "In general, what are your views concerning the effectiveness of the criminal justice system[?]" and U.S. wrote in hers, " 'What is Fair.' " Asked whether she agreed with the principle of law that the testimony of one witness, if

¹ Warren concedes on appeal that the women's *ages* were not legally relevant (citing *People v. McCoy* (1995) 40 Cal.App.4th 778, 783-786 [age-based groups do not constitute cognizable classes for fair cross-section requirement]) and so bases his claims simply on them being Black women.

believed, is sufficient to prove a fact, she wrote, “No, how would be sure [*sic*] if not an assumption.” The questionnaire explained the presumption of innocence and that failure by the People to meet the reasonable-doubt burden entitled the defendant to a verdict of not guilty; asked if she agreed, and to “please explain” if not, she wrote, “Not Guilty.” Asked if she agreed with the principle that the prosecution has the burden to prove guilt beyond a reasonable doubt and that a defendant is not obligated to present any evidence, she wrote, “No, their [*sic*] two sides to every story.” Asked if friends or family members had been arrested, charged or convicted criminally and whether the experience would impair her ability to be fair and impartial, she wrote, “Yes, son—traffic accident, stop randomly & secure—‘unfair.’ ” Asked for any experience with police that would impair her ability should a police witness testify, she wrote: “Yes, being question[ed] on issue that had no bearing on issue at that time.” Asked for anything about “the nature of the charges alone” here that would impair her ability to be fair and impartial, she wrote, “Yes, mainly I feel rape is such a violent crime.”

In initial questioning by the court about her “two sides to every story” answer and the court’s explanation why “there would not be two sides necessarily” in the courtroom, U.S. said she understood and agreed with the explanation. She said she was comfortable following the law about the testimony of one witness being enough, said she did not think her strong feelings about the crimes would affect her ability to be fair, said, “Yes, I think so,” when asked if she could put aside those feelings and be fair, adding that she was “willing to do it.”

Asked later by Scheingart what she meant by her “ ‘What is Fair’ ” answer, U.S. offered: “Talking personally, to me I’m just saying fair in what way? Meaning — how should I put this — not looking at one issue or the other, just saying that I’m not sure if I have evidence of something, I can live with that, and if I don’t, it’s kind of like weighing whether or not I feel it’s fair or not fair. I don’t know how to explain it. It’s not like I’m saying something isn’t or is. It’s just that I’m saying that off the top of my head I would say some things seem fair. Some things don’t.” Asked what she meant by some things seeming fair and some not, she cited “an example stopping individuals. Sometimes it

seems like a more particular individual gets stopped more than others. I just draw that concept of what is fair in there.” She added: “A certain race or against another race. Whereas people do the same thing in all races, but it seems like more would get stopped more than the other.” Asked if she was suggesting “prejudice inherent in the criminal justice system against members of a certain race,” she said “No” and added: “I’m just saying that I see or I hear or I see the media. I’m not saying I’m particularly saying that it’s one race or the other. I’m just saying that you see it mostly sometimes on one and not — it’s kind of confusing. I’m trying to say that — it’s not that I’m saying that — I see it may be one race more than the other and maybe it’s not. I just say, ‘What is fair?’ ” On her questionnaire answer about the impact of police experience on her ability to be fair regarding a police witness, she explained: “I was being questioned about my son, and it went off into a different direction that had nothing to do with why they were asking me a particular question, yes.” The questionnaire asked about any attorneys she knew and her relationship with them, and U.S. named one for which she wrote, “Represent my son.” She elaborated: “He was arrested for driving under the influence [DUI], but it was proven that he wasn’t drunk and tested. He wasn’t stopped. There was an accident, and they say they found a bottle cap in his car.” “[T]hey tested him for alcohol.”

R.J. R.J. answered, in her questionnaire, that “a few friends & family members” had been victims of sexual offenses but that this would not impair her ability to be fair. Confusingly, as to whether she agreed with the law that the testimony of one witness, *if believed*, is sufficient to prove a fact, she wrote: “[N]o. That person could be lying.” On friends or family having been arrested or charged or convicted, she wrote: “Yes. Too many to list! No, this would not impair my ability.” She also felt no impairment from knowing attorneys from work (as a secretary for a utilities agency) and family law, or knowing people in law enforcement—a brother in the California Highway Patrol (CHP) and the police officer husband of a friend. On the general effectiveness of the criminal justice system, she wrote: “Sometimes there are too many technical issues. If the person committed a crime, that person should not be found innocent because of a technicality.”

In examination by the court on her “technicality” answer, the court explained to R.J. that the court would decide any questions about admitting evidence; jurors would not and would hear only things they were permitted to hear. R.J. said she was okay with that. She was also comfortable, having heard the court explain to another juror, with the idea of one witness being enough and would follow that law.

Prosecutor Scheingart probed R.J.’s too-many-to-list reply about arrested, charged or convicted friends and family. These were for grand theft and drugs, as recent as a year or two past, she said, were brought against “[c]ousins, stepbrother, friends,” and involved jail. None were still ongoing as far as she knew. Asked how she felt about a case being thrown out on a technicality, she said: “It depends on what it is. It just depends on what it is and what it involves and who it involves.” Asked if it would make a difference “if it was a theft versus a violent crime,” she replied: “It depends on the circumstances, what was involved, the crime.” On knowing people in law enforcement, R.J. said that her brother had been with the CHP for two years or less, in Northern California, but that she did not talk to him much about his work and was not close to him.

M.B. To the questionnaire item on arrests, charges or convictions, M.B. wrote: “Yes I have a cousin serving time for assault. This I don’t feel would impair my ability to be a fair juror.” On knowing victims of sexual offenses, she wrote: “[M]y daughter was a victim although no charges were filed due to lack of evidence in 1986[.]” In-chambers questioning of M.B. (Juror No. 48 in the transcript) revealed that this was in Oakland. The child, at age three, had revealed oral copulation by an uncle, the husband of M.B.’s sister, and child protective services told M.B. that lack of physical trauma to the child meant that charges could not be brought. Around the same time, the sister moved with the uncle to Los Angeles, disappeared and was never heard from again. M.B. felt the uncle was involved and should be held responsible but did not go to the police, fearing further trauma to her child and that the child might disappear, too. M.B. thought that she could set this aside.

Scheingart asked if the cousin’s matter was handled in that county (Alameda). M.B. said it was in San Leandro in 1997 and confirmed that someone in Scheingart’s

office had prosecuted him. The case went to trial and resulted in conviction. Asked if she was “close with” the cousin, M.B. said, “No, not really.”

R.W.H. To the written query about views concerning the effectiveness of the criminal justice system, R.W.H. wrote: “I never dealt with it, so I really would not have anything to say about it.” On agreement with the law presuming innocence, she wrote: “Once again, I have never been put in that position before so I really don’t know how to answer that.” On whether she agreed with the principle that penalty or punishment was not a proper consideration for the jury in determining whether a case had been proved, she answered, “I really don’t know how to answer that.” On whether she agreed with the idea of the prosecution having the burden of proving guilt beyond a reasonable doubt and the defendant having no obligation to present any evidence, she wrote: “No[,] I do not agree. I believe both sides should be heard in order to get a full understanding of what I have to make a decision on.” On whether she agreed with the principle of one witness’s testimony being sufficient if believed, she wrote, “It depends on how close the person is to the testimony.” On the principle that a defendant had a right to remain silent, even at trial, and that jurors could not consider this in any way in determining guilt, she wrote: “No, a person should tell their side[.]” On whether she had been the victim of a crime, she wrote, “Not anything that has to do with the court system.” On the arrests of friends or family for crime, she wrote: “Yes—my nephew was in jail for 2 years. I never been to any of his trail [*sic*] so I can not answer that!”

Asked by the court about the nephew’s case, R.W.H. said it was a California prosecution for “murder as far as I know,” but that she had not been involved in the trial and did not think it would affect her service here. On a defendant’s right not to testify, she was now “[c]rystal clear,” having heard explanations during the preceding voir dire, could follow the law in this case, and was willing to serve.

When later questioned by Scheingart about her need to hear both sides to make a decision, she said this was “something that I try to teach my children, that there’s two sides to every story” She had heard the court’s explanations, however, and said if she had to listen to only one side “and that’s the law, I’ll do my best with that,” adding:

“I think just to be fair, you should hear the other person if they want to be heard. If they chose not to be heard, then you have to make the best decision with the information that you have.” Questioned further about the nephew’s case, she said it was a jury trial in Alameda County, that the nephew had been “just released this year” and not convicted. She had been very close with the nephew “[w]hen he was growing up” but did not know whether he was treated fairly in the case. All of her information about it had been “third- and fourth-hand,” she said: “I didn’t go to the trial or have anything [*sic*]. I distanced myself from it because I couldn’t deal with it.”

Argument and ruling. The court, after hearing defense counsel Hove argue that there were insufficient reasons for challenging the four Black women, ruled that a prima facie case had been made out and asked Scheingart for responses.

For U.S., Scheingart cited U.S.’s written qualms about the one-witness rule, her “unusual” what-is-fair response to the effectiveness question, and her oral replies on the same subject, which Scheingart felt “made no sense,” were “rambling,” were “not even close to being articulated with any sort of logic,” and struck him as being “very confusing and [showing] potential bias.” He also cited her reasonable-doubt need to hear both sides of every story, her feeling that the son’s stop was random and “unfair.” While she said the stop was for a traffic accident, it was evidently serious since she hired an attorney for him. “So,” Scheingart said, “I don’t think that she was being as forthright as she should have been in filling out her questionnaire. And particularly with regard to the events involving her son, I think that she had a very strong bias that was being concealed that I, in questioning, believed to exist, and that was the basis of my excusing [her].” Hove offered no rebuttal specific to U.S.

For R.J., Scheingart cited her too-many-to-list answer yet claim that this would not impair her ability, saying he found the statements to be “oxymorons in nature.” Also, the casual, too-many-to-list answer, given “family members in this county being involved with the law,” seemed “quite unusual” and a sign that she would not be fair. Scheingart was also put off at start of voir dire after Hove introduced himself and his client. Warren

said hi and then, “ ‘What? No hi’s back?’ ”² R.J. then raised her right hand and looked right at Warren, which Scheingart “perceived to be a ‘hello’ or a gesture back” to him. Scheingart thought this “extraordinary” since no one else responded at all. Hove countered, evidently referring in error to M.B.: “As to . . . the other jurors, especially Ms. B[.], I didn’t notice Ms. B[.] make any movement whatsoever. Had she made some indication, the prosecutor would have brought that up at the recess, just as he did when he said he heard Mr. Warren make a statement [see fn. 2, *ante*]. I think he would have indicated that Ms. B[.] made a movement with her arm in direction of, I guess, some sort of affiliation or affection with the defendant. I didn’t see that occurring whatsoever.”

Regarding M.B., Scheingart cited her cousin serving prison time for an assault, apparently in Alameda County. While M.B. said she did not think this would impair her ability to be fair, Scheingart reasoned: “She knows her cousin. She’s somewhat close to her cousin. Besides that, I don’t think that she could be fair because of that relationship”

Finally, Scheingart explained that he had misplaced his questionnaire for R.W.H. (apparently notated), but worked from the court’s copy to jog his memory. He cited her never-been-put-in-that-position answer to the presumption of innocence query, seeing it as unusual for “such a significant issue of law.” Regarding her answer that both sides must be heard, the response struck him as indicating that she would have a problem understanding some legal concepts. As to her both-sides answer, Scheingart acknowledged that she had later changed her answer, but he feared that if one side did not testify, “that renders her in a situation of confusion and inability to make a decision.” He also cited her written reply that persons should have to tell their side of the story. He felt

² Scheingart had stated back then, out of the panel’s presence: “When we were introduced, Mr. Hove introduced his client. The defendant looked at the jury and said, ‘No hi’s back.’ I heard it. I wrote it down. I asked the court reporter if she recorded it. [She] indicated that she couldn’t hear because of someone else talking, and I would ask that that be placed on the record. And I would ask Mr. Hove [to] respond whether he heard that as well.” Hove said only, “He said something.” The court indicated that it knew Warren had said something but had not heard what.

that her nephew having been “in jail as a result of an action in this county,” apparently for homicide, “would have a significant impact.” Finally, he had noticed: “[W]hen I tried to make eye contact with her when I was questioning her, she would look away from me. I took that posture, those mannerisms, to be evasive. . . . I look at everyone to see if they make eye contact with me when I talk with them. I look at their body language to see what I may interpret to be the type of person that is amenable or keeps an open mind to evidence, to questioning, and I did not get that same sense from her as I did from other jurors.”

Most of Hove’s comments centered on R.W.H. Hove said he had paid particular attention to her, believing Scheingart would “bounce her” immediately, and felt that she “comported herself properly” and had “looked him directly in the eye.” The nephew’s trial, Hove noted, had not been attended by R.W.H., who got secondhand information from the family and said it would not affect her. Hove urged that the both-sides answer meant that if Warren did not testify, R.W.H. would not show “confusion” but, rather, be inclined to find guilt, making Scheingart’s reliance on that factor “totally disingenuous.”

Hove then invited comparisons with questionnaire answers from some retained jurors. On agreement with the one-witness rule, Juror No. 8 wrote, “It depends,” and Juror No. 1 wrote, “No, the testimony of all witnesses should be used to determine if the testimony is credible.” On friends or family having been charged or convicted, Juror No. 4 listed a brother and two friends, and Juror No. 2 wrote that a friend spent time in jail for multiple DUI’s and subsequent failures to appear.

The court ruled: “As to . . . eye contact, I must admit I was not paying attention to that. I have no idea if there was or was not eye contact. And as for the alleged gesture that was made, I did not see that. I was looking down writing copious notes and trying to get through jury selection and pay attention to the ethnicity and gender of each juror so I could take note of it in case there was a *Wheeler* motion. So I have no idea if that was done. [¶] However, it’s clear that contact with the criminal justice system is enough to defeat *Wheeler*. The crimes that the four excluded jurors had familiarity with in terms of their family members were crimes of violence, as [with] this crime, versus nonviolent

crimes with some of the other jurors who were left on the jury.” The court cited cases on family exposure to the system (e.g., *People v. Douglas* (1995) 36 Cal.App.4th 1681) and reiterated: “[C]ontact with the criminal justice [system] is enough to defeat *Wheeler*. In this case I believe it does. And the *Wheeler-Batson* motion is denied.”

Scheingart then stated for the record, “in an abundance of caution,” that there were three Black jurors left on the jury. The court, however, said: “It doesn’t matter what’s left under *Wheeler*”; “Irrelevant.” Hove urged that the remaining jurors were “irrelevant” because the court “kept deferring the hearing on this motion,” and the court said, “Which is why I said we didn’t have to discuss this.”

DISCUSSION

I. *Batson/Wheeler*

Race-based use of a peremptory challenge violates the federal constitutional guaranty of equal protection of the law, as held in *Batson*, and the state constitutional right to a jury drawn from a representative cross-section of the community, as held in *Wheeler* (*People v. Cornwell* (2005) 37 Cal.4th 50, 66); “Blacks . . . are a cognizable group for purposes of both *Wheeler* [citation] and *Batson* [citation],” and “Black women are a cognizable subgroup for *Wheeler*. [Citations.]” (*People v. Clair* (1992) 2 Cal.4th 629, 652.) “. . . *Batson* states the procedure and standard to be employed by trial courts when [a challenge is] made. ‘First, the defendant must make out a prima facie case by “showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” [Citations.] Second, once the defendant has made out a prima facie case, the “burden shifts to the State to explain adequately the racial exclusion” by offering permissible race-neutral justifications for the strikes. [Citations.] Third, “if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.” [Citation.]’ [Citation.]” (*People v. Cornwell, supra*, 37 Cal.4th at pp. 66-67, quoting *Johnson v. California* (2005) ___ U.S. ___, ___ [125 S.Ct. 2410, 2416], fn. omitted.)

Here, the court found a prima facie case (unchallenged on appeal), thus shifting the burden to the prosecutor, and the prosecutor gave facially neutral reasons for each

[citation].” (*People v. Williams* (1997) 16 Cal.4th 635, 664.) The trial court had to ask: “[W]as the reason given . . . a ‘legitimate reason,’ legitimate in the sense that it would not deny defendant[] equal protection of law [citation], or was it a disingenuous reason for a peremptory challenge that was in actuality exercised solely on grounds of group bias?” (*People v. Reynoso, supra*, 31 Cal.4th at p. 925.)

On appeal, we review that determination with great deference because it turns largely on evaluations of credibility. (*People v. Reynoso, supra*, 31 Cal.4th at p. 918, 924.) California appellate courts do not engage in comparative juror analysis for the first time on appeal but do use it where, as here, it was part of the circumstances offered at trial. (*People v. Cornwell, supra*, 37 Cal.4th at p. 71; *People v. Johnson, supra*, 30 Cal.4th at pp. 1306, 1324-1325; see fn. 3, *ante*.)

Warren does not claim lack of substantial evidence for most of the race-neutral factors cited by the prosecutor; nor does he dispute the court’s stated reliance on each of the challenged prospective jurors having had family members or friends prosecuted for crime. Rather, Warren parses out the court’s statement that family members’ crimes were “crimes of violence, as [with] this crime, versus nonviolent crimes with some of the other jurors who were left on the jury.” Pointing out that U.S. said her son was arrested in a DUI stop and that R.J. said her friends’ and family’s offenses involved grand theft and drugs, Warren contends that the record does not show that all four jurors revealed crimes that were *violent* and, thus, that the ruling cannot stand. The court, he proposes, “based its ruling entirely on the characteristic that they all had family members associated with crimes that were violent rather than nonviolent,” and this “necessarily means that the court found that none of the other reasons stated by the prosecutor justified the challenges”

We disagree, first, with the notion that the court relied solely on family’s or friends’ law enforcement experiences, to the exclusion of all else in the record. We are cited no authority that the court had to state every factor influencing its finding of no purposeful discrimination. Case law is to the contrary. A court must make a sincere and reasoned effort to evaluate prosecutors’ explanations in light of the circumstances then

known (*People v. Reynoso, supra*, 31 Cal.4th at p. 919), “[b]ut in fulfilling that obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor’s race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.” (*Ibid.*) Thus, unlike Warren, we cannot deem the court’s articulation of one factor an implied rejection of every other. “When the prosecutor’s stated reasons are both inherently plausible and supported by the record, the trial court need not . . . make detailed findings” (*People v. Silva, supra*, 25 Cal.4th at p. 386), and that describes our case. This is not a case where more specificity was needed because “the prosecutor’s stated reasons are either unsupported by the record, inherently implausible, or both” (*Ibid.*)

Looking to the court’s words, we also see no *statement* that the court rejected all other reasons. It said it had not seen R.J. gesture to Warren, but this does not necessarily imply that it *disbelieved* the prosecutor’s account. The court only said, in effect, that it had not been paying attention and therefore could not independently resolve the factual conflict arising between the prosecutor and defense counsel, who said he had not noticed anything. The court went on to state: “So I have no idea if that was done. [¶] However, it’s clear that contact with the criminal justice system is enough to defeat *Wheeler*.” As part of our great deference to a *Batson/Wheeler* ruling we draw appropriate inferences to support a ruling. (E.g., *People v. Reynoso, supra*, 31 Cal.4th at p. 918, fn. 4.) Warren’s view that the court relied on only one factor, to the exclusion of all others, contravenes that principle by asking us to draw an inference *against* the ruling.⁴ So does his view that, because the court did not itself see R.J. gesture toward Warren, the court “rejected

⁴ Deferential review of a *Batson/Wheeler* ruling entails a test for substantial evidence (*People v. Williams, supra*, 16 Cal.4th 635, 666; cf. *People v. Boyette* (2002) 29 Cal.4th 381, 423 [no prima facie case]), and substantial evidence review entails deference to credibility matters, viewing the record most favorably to the ruling, and presuming in its support all supported implied findings (*In re Manuel G.* (1997) 16 Cal.4th 805, 822; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11). We cannot ignore supported favorable inferences and rely, instead, on contrary inferences we might find supported. (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11; *In re Manuel G., supra*, 16 Cal.4th at p. 823.)

the prosecutor's reason" for that challenge. Rather, and more appropriately, we infer *in support* of the ruling that the court was otherwise satisfied with the prosecutor's good faith and, having no personal basis for resolving the attorneys' conflicting impressions, accepted the prosecutor's account as made in good faith.

We reject also the inflated worth Warren attaches to the court's reliance on the term "crimes of violence." The court initially said only that "contact with the criminal justice system is enough to defeat *Wheeler*," and closed by saying: "[C]ontact with the criminal justice [system] is enough to defeat *Wheeler*. In this case I believe it does." Precedent solidly holds that family's or friends' negative contact with the criminal justice system is a reason which, if not sham or pretextual, justifies a peremptory challenge in the face of a *Batson/Wheeler* claim (*People v. Garceau* (1993) 6 Cal.4th 140, 172 [family members had "run afoul of the law" and been incarcerated]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [brother convicted of a crime possibly prosecuted by another deputy in the same office]; *People v. Walker* (1988) 47 Cal.3d 605, 626 [juror believed police had followed her husband home and harassed him by stopping him without cause]; *People v. Douglas, supra*, 36 Cal.App.4th 1681, 1690 [son convicted for grand theft auto]), and no case of which we are aware requires that such negative contact must be for crimes of violence. Indeed, a case cited by the trial court involved grand theft auto that apparently entailed no violence. (*Ibid.*)

Warren stresses, however, this single sentence between the court's opening and closing lines: "The crimes that the four excluded jurors had familiarity with in terms of their family members were crimes of violence, as [with] this crime, versus nonviolent crimes with some of the other jurors who were left on the jury." Warren would have us infer, *against* the ruling, that "crimes of violence" were crucial to the court finding good faith by the prosecutor. A supported inference *in favor of* the ruling, however, is that the court was satisfied, for all four of the challenged women, that family members' negative crime contacts were genuine and enough under the law it cited, and went on to mention crimes of violence only to address defense counsel's invitation to do a comparative juror analysis, counsel having argued that other jurors with similar negative contacts were not

challenged. Viewing the record in that favorable light, error in characterizing two of the challenged jurors' family experiences as "crimes of violence" has little apparent impact on the ruling as a whole. First, as the trial court was presumably aware, case law deems comparative juror analysis to be, while "not *irrelevant*," " 'largely beside the point' because of the legitimate subjective concerns that go into selecting a jury. [Citation.]" (*People v. Johnson, supra*, 30 Cal.4th at p. 1323.) Moreover, as Warren concedes, two of the women did have family members who were tried for crimes of violence. M.B.'s cousin had been convicted of "assault," which was M.B.'s term and, since she declared "no" legal training, most likely not used in any legal sense of mere attempted battery or a " 'least touching' " (*People v. Colantuono* (1994) 7 Cal.4th 206, 214). The case was prosecuted by someone in this same Alameda County prosecutor's office, and the cousin was still serving time (reinforcing the inference that violence was involved). R.W.H.'s nephew had been tried for murder, also in Alameda County, and while he had been released just that year without being convicted, had spent two years in jail. R.W.H. said she had been close to this nephew as he was "growing up" and said she had "distanced" herself from the trial, "because I couldn't deal with it." Neither the prosecutor nor the trial court was bound to accept at face value a prospective juror's answer (*People v. Boyette, supra*, 29 Cal.4th at p. 422), and the record here raises legitimate doubt about either of these women's claimed ability to serve impartially and without bias despite the relatives' negative experiences.

Any error, then, was the court perceiving crimes of "violence" for the other two women. U.S. wrote of her son being stopped "randomly & secure" (apparently meaning arrested), called it " 'unfair,' " and said police had questioned her "on [an] issue that had no bearing on issue at that time." From her oral answers, we learn that the incidents were related, for she was questioned about the son. She explained that the son was "arrested" for DUI after "an accident"; yet inconsistently, "He wasn't stopped"; and "it was proven that he wasn't drunk and was tested" (sic). We do accept that DUI is not what lawyers think of as intrinsically a "crime of violence," but the court may well have linked the DUI to the "traffic accident" that precipitated the arrest, in which case there clearly was some

unspecified physical impact. Obviously, this arrest of a son, which U.S. deemed unfair and resulted in her being questioned by police in a way that she found offensive, legitimately supports the court's conclusion that her challenge was not purposeful racial discrimination. Bearing in mind that any error in characterizing the DUI as a "crime of violence" related specifically to a comparative juror analysis, we see no conceivable prejudice. True, as Warren points out, Alternate Juror No. 1 wrote of his brother having been involved in a DUI as well, but nothing from that juror fueled the strong implication of lingering bias that M.B.'s answers did. The juror said that a friend of his wife's who had quit the San Francisco Police Department left him with some qualms about certain long-term officers, but that his brother's case had nothing to do with this and that he felt fine about it. With or without characterizing the crime of U.S.'s son as violent, the record still amply supports race-neutral reasons for challenging U.S. but not the alternate.

R.J. wrote, "Too many to list," to the query about friends or relatives who had been arrested, charged or prosecuted. She revealed little detail in follow up except to say they were cousins, friends and a stepbrother, and, when asked the crimes' *type* or *range*, said: "Grand theft, drugs. That's about it." Warren is correct to say that the record does not show, with certainty, that any of these offenses was a crime of violence, but again we see no conceivable prejudice in that distinction. The point, for R.J., was not so much the seriousness of the offenses, but that there were so many she could not list them and, yet, asserted that this would not "impair" her ability to serve fairly. The prosecutor felt that the two statements were "oxymorons in nature," and that the too-many-to-list reply was unusual and casual, given so many "family members in this county being involved with the law." It was taken as a sign that she would not be fair. None of this was significantly altered by any mistaken notion by the court that one or more of the family or friends had committed a "crime of violence." The prosecutor, whose good faith and reasons were the paramount concerns, articulated no such distinction or misapprehension.

Also on the subject of violent crimes, Warren correctly observes that Juror No. 3 had a nephew who was convicted of armed robbery, a violent crime, but he mistakenly concludes from this that the court erroneously thought that "none of the selected jurors

had family members who were involved in violent crimes.” The court did not, in fact, find that “none” had that involvement; it spoke of “nonviolent crimes with *some* of the other jurors who were left on the jury” (italics added).

Warren invites comparison of the challenged women with passed jurors, pointing out the alternate’s brother’s DUI conviction (discussed above), that Juror No. 2 had a friend who spent time in jail for multiple DUI’s and related failures to appear, that Juror No. 1 had a friend with a DUI, and that Jurors No. 3, 4, 5 and 6 had largely unspecified friends or family members who had been arrested or convicted of unspecified crimes. However, none of those mostly vague responses compares with the sheer number of experiences for J.R., the stop and jailing of a son that U.S. deemed random and unfair, the once-close nephew’s conviction that R.W.H. had to distance herself from because she “couldn’t deal with it,” and the assault conviction of M.B.’s cousin, something for which the cousin was still serving time.

Also, the prosecutor articulated *multiple* race-neutral reasons for three of the women. Warren would have us isolate the arrest/conviction factor as the sole basis for ruling, but as already explained, we cannot do that and imply that the court rejected all others. For U.S., the record supports Scheingart’s additional concern that her oral replies were rambling and made little sense, suggesting confusion with legal concepts, a good reason for challenge (*People v. Turner* (1994) 8 Cal.4th at p. 169), and/or concealed bias. For R.J., there was Scheingart’s concern over a gesture made to Warren, which the court’s could not personally verify due to inattention and defense counsel said he had not noticed; but the court could have believed the account and found this to be an added good reason (*People v. Reynoso, supra*, 31 Cal.4th at p. 917 [smiling or glaring at defendant]). If the court entirely disregarded that observation, as Warren urges, the challenge was still solidly justified given the too-many-to-list arrests and convictions. For R.W.H., there was Scheingart’s concern that her never-been-in-that-situation answers regarding various legal concepts legitimately raised suspicion of her inability to understand them, and this remained so even if, for sake of argument, the court was troubled by defense counsel’s insistence that M.B. had not, as Scheingart claimed, also avoided eye contact. The court

presumably rejected defense counsel’s cynical argument—shamelessly urged again on appeal—that, if M.B. evinced any confusion about the single-witness rule, this would favor the prosecution and was therefore a “disingenuous” ground for challenge. A prosecutor is entitled to seek jurors capable of understanding the law, regardless of whom any confusion might benefit.

In short, this was not a close case, for any of the challenges, so that error in the comparative analysis on the issue of whether relatives or friends had experienced crimes of “violence” would have been prejudicial.

Finally, the court’s remarks discounting as “[i]rrelevant” the prosecutor having left three Black jurors on the jury are perplexing. “Although not a conclusive factor, ‘the passing of certain jurors may be an indication of the prosecutor’s good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection’ ” (*People v. Reynoso, supra*, 31 Cal.4th at p. 926; accord *People v. Turner, supra*, 8 Cal.4th 137, 168 [passed jurors considered]; *People v. Gray* (2001) 87 Cal.App.4th 781, 787 [passed group members a factor]). Warren defends the remarks by positing that the passing of jurors is relevant only in finding no prima facie case, but this is incorrect. Our Supreme Court has also declared it relevant in reviewing a finding of no purposeful discrimination. (*People v. Reynoso, supra*, 31 Cal.4th at p. 926.) The trial court’s further remarks deeming the factor inappropriate, because the court had reserved ruling on all objections until the end of jury selection, are also perplexing. The court never intimated that it deemed the prosecutor’s passing of Black jurors an effort to mask purposeful discrimination, and such a finding would be hard to reconcile with its overall finding of no purposeful discrimination. Still, Warren correctly observes that the record does not show the *gender* of the passed Black jurors, and that if they were not women, this arguably did diminish their relevance in assessing a claim of improper challenges against Black *women*. Whatever the court’s reasoning, it clearly did not rely on passed jurors, and its implied finding of no purposeful discrimination is supported without that additional factor.

Substantial evidence supports the ruling.

II. Presentence Credits

The probation officer's report states, without elaboration, "DAYS IN JAIL THIS CHARGE 568 days," but no credits were awarded, denied or mentioned at sentencing. Perhaps, due to the lengthy prison term of 65 years to life imposed on a defendant who was already 34 years old, the matter was simply overlooked. Warren asks that, since we cannot determine from the record an appropriate disposition on credits or how the 568 days indicated in the report were calculated, we remand for the court to do so.

The Attorney General agrees that the court had a duty to determine and award any credits that might be due (*People v. Goodloe* (1995) 37 Cal.App.4th 485, 492; Pen. Code, § 2900.5 subd. (d); see, e.g., *People v. Wiley* (1994) 25 Cal.App.4th 159, 165) and should act accordingly on a remand for that purpose. We agree.

DISPOSITION

The judgment is affirmed; the case is remanded for the trial court to consider and award any presentence credits to which Warren may be entitled.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.