Filed 4/4/12

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>BRIAN WRIGHT,<br><br>Defendant and Appellant. | B228640<br><br>(Los Angeles County<br>Super. Ct. No. BA358919) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed.

Frank Duncan, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Brian Wright appeals from the judgment entered following his conviction by jury of second degree murder (Pen. Code, § 187) with personal use of a deadly and dangerous weapon (Pen. Code, § 12022, subd. (b)(1)) and an admission he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)). The court sentenced appellant to prison for 31 years to life. We find the court had no sua sponte duty to instruct the jury on voluntary or involuntary intoxication causing unconsciousness and there was no *Wheeler*[1] error. We affirm the judgment.

## *FACTUAL SUMMARY*

1. *People's Evidence*.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that in July 2009, the decedent Lindval Baptist (Lindval), his cousin Earl Baptist (Earl), and appellant lived in a Los Angeles apartment. Earl rented the apartment from appellant, and Earl and Lindval sold drugs from it. Appellant was a drug user and Earl gave appellant drugs as payment for rent. Lindval also gave drugs to appellant. About 1:00 a.m. on July 11, 2009, Earl left the apartment.

During an early morning in July 2009, Dorothy Martin went to the above apartment and bought drugs from Lindval. Martin went with appellant to his bedroom and smoked the drugs. Someone knocked on the front door to the apartment and appellant answered the door. Two persons were at the door, and they later left. Appellant returned to the bedroom, spoke with Martin, and appeared to be angry. Martin testified appellant indicated "[Lindval] . . . was fooling around with [appellant's] girlfriend, [or] disrespected him or something." Appellant left the bedroom, closed its door, and said he would lock it.

Later, Martin heard persons conversing. At some point, she heard someone beating on something, i.e., she heard about 10 pounding noises. Appellant reentered the bedroom and said they had to leave. He was nervous and had a hammer in his hands. The hammer had blood on it. Appellant gave the hammer to Martin and the two left the apartment.

---

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

About 6:00 a.m. on July 11, 2009, appellant went to the apartment of Cynthia Fentroy, his fiancée. Appellant had a hammer wrapped in black plastic. Fentroy asked him why the hammer had blood on it, and appellant replied, " 'I killed him. I told you I was going to do it. I killed him' " Appellant also said, " 'You know who I'm talking about.' " Appellant said that he stood over the victim with a hammer in his hand, told the victim to tell the truth and confess his sins, and hit the victim in the forehead. Appellant said that he kept hitting the victim. Fentroy told police that appellant was bragging somewhat about it. Appellant told Fentroy that appellant murdered the victim. Appellant said he did all this for Fentroy.

Fentroy saw blood on appellant's clothing and shoes. Appellant emptied a sock containing money and perhaps 30 crack cocaine rocks. More money was stashed in an alley on Montclair, and he wanted Fentroy to retrieve it.

Earl returned to the apartment about 9:00 a.m. on July 11, 2009, and found Lindval lying on the floor inside the apartment. Lindval was wearing only boxers, and there was blood all over a wall. Lindval died as a result of 21 blunt force injuries to his head.

2. *Defense Evidence*.

In defense, appellant testified he was a crack cocaine addict and, during the last few days prior to July 10, 2009, he felt he was being poisoned. Later during his testimony, he denied he had testified he had been poisoned, and claimed he had testified he had been drugged.

On July 10, 2009, appellant had been drinking all day. At some point on July 10, 2009, appellant saw blood on his face, he was getting "high," and he went berserk. Appellant found cigarette burns on his chest, red crosses drawn in blood on his forehead, and did not know what had happened. He testified he did not know "what was in the dope or what it was." During the late hours of the day, Fentroy came to the apartment, the two used crack cocaine, and the two slept. Fentroy later got up, left the room, and, still later, returned to bed. Appellant suspected that, during the interim, she had had sexual relations with Lindval. About 11:30 p.m., Fentroy left. Appellant's mother testified to the effect on July 10, 2009, appellant told her that when he awoke, he had "needle sticks in [his] arm."

Appellant testified that perhaps about 1:00 a.m. on July 11, 2009, Martin arrived. Appellant had not slept for four or five days and, during that time, he was using cocaine. After Martin arrived, the two smoked crack cocaine and drank in appellant's bedroom. Appellant told Martin that he loved Fentroy and was "feeling kind of down," and he told Martin what had happened. Appellant testified he thought "we were drugged."

Appellant left the bedroom, awakened Lindval, and asked Lindval if he had disrespected Fentroy. Lindval looked at appellant, laughed, then shoved him hard against a stereo. Appellant grabbed a hammer and from that point he "lost it," must have "snapped," and did not know what happened afterwards. Appellant knew he hurt Lindval but did not intend to hurt him. Appellant did not know he had hit Lindval 21 times with the hammer. The hammer was in appellant's bare hands at the time.

During cross-examination, appellant testified as follows. While Lindval was sleeping, appellant retrieved a hammer, began working around the apartment and installing padlocks, then put the hammer in the kitchen. Appellant later entered the bedroom where Martin was. Still later, appellant exited the bedroom, picked up the hammer, and resumed working around the house to repair locks. Appellant then went to the front, awakened Lindval, began talking with him, and asked if Lindval had disrespected Fentroy.

After Lindval shoved appellant, appellant fell back into a stereo. Appellant then stood and Lindval did not expect appellant to hit him. The first time appellant swung at Lindval, appellant raised his right hand, which was holding the hammer. Appellant did not see Lindval put his hands up. Appellant swung the hammer and hit Lindval in the head. Appellant knew he hit Lindval with the hammer. When appellant hit Lindval with the hammer, appellant was looking in Lindval's eyes. After appellant hit Lindval the first time, Lindval was standing and dizzy. Appellant swung and hit Lindval again in the head. Lindval was not looking in appellant's direction the second time appellant hit him. Appellant was full of drugs and alcohol. Lindval fell. Appellant did not remember what happened after he struck Lindval twice. Appellant later took money and 30 cocaine rocks from a sock belonging to Lindval. Appellant subsequently went to Fentroy's house.

## *ISSUES*

Appellant presents related claims: (1) the trial court erroneously failed to instruct sua sponte on voluntary intoxication causing unconsciousness, on involuntary intoxication causing unconsciousness, and on the definition of voluntary intoxication, and (2) he was denied effective assistance of counsel by his trial counsel's failure to request instructions on these issues. Appellant also claims the trial court erred by (1) granting a *Wheeler* motion based on appellant's group bias towards women and, (2) as a remedy, reseating an excused juror even though she knew appellant had challenged her.

## *DISCUSSION*

1. *The Trial Court Did Not Err by Failing to Instruct Sua Sponte on Intoxication and Unconsciousness.*

Appellant did not ask the trial court to give, and the trial court did not give sua sponte, (1) CALCRIM No. 626 on voluntary intoxication causing unconsciousness,[2] (2) CALCRIM No. 3425 on involuntary intoxication causing unconsciousness,[3] and (3) CALCRIM No. 3426, defining voluntary intoxication.[4] The court gave CALCRIM No. 625, defining voluntary intoxication.[5]

---

[2] CALCRIM No. 626, states, in relevant part, "Voluntary intoxication may cause a person to be unconscious of his or her actions. . . . [¶] . . . [¶] . . . . If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter."

[3] CALCRIM No. 3425, states, in relevant part, "The defendant is not guilty of any of the crimes if he acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. . . . The defendant's unconsciousness must have been caused by involuntary intoxication."

[4] CALCRIM No. 3426, states, in relevant part, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. . . . [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose."

[5] CALCRIM No. 625, states, in relevant part, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that

Appellant claims the trial court erred by failing to give sua sponte CALCRIM Nos. 626, 3425, and 3426. Appellant also claims his trial counsel (who is also appellant's appellate counsel in this appeal) provided ineffective assistance of counsel as trial counsel by failing to request those instructions. We reject the claims.

CALCRIM No. 626 relates voluntary intoxication to unconsciousness, and CALCRIM No. 3425 relates involuntary intoxication to unconsciousness. The standard of unconsciousness is the same in both contexts. "[U]nconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, at the time, conscious of acting.' " (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417 (*Halvorsen*).)

As for CALCRIM No. 626, a trial court has no duty to give sua sponte an instruction relating voluntary intoxication to unconsciousness. (Cf. *People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432.) Even if the court had such a duty, there was no need to give CALCRIM No. 626 because there was no substantial evidence appellant was voluntarily intoxicated to the point he was unconscious. (Cf. *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661-1662.)

As *Halvorsen* stated, "Defendant's own testimony makes clear that he did not lack awareness of his actions during the course of the offense[]. The complicated and purposive nature of his conduct . . . suggests the same. That he did not, by the time of trial, accurately recall certain details of the shootings does not support an inference he was unconscious when he committed them." (*Halvorsen, supra,* 42 Cal.4th at p. 418.) *Halvorsen* noted, "defendant in this case testified in sharp detail regarding the shootings." (*Ibid.*) Similarly, appellant's own testimony made clear that he was conscious of his actions when he killed Lindval.

---

evidence only in deciding whether the defendant acted with an intent to kill . . . . [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

As for CALCRIM No. 3425, appellant suggests he was intoxicated involuntarily because (1) he had been poisoned, and (2) a foreign substance had been introduced into the cocaine he had been smoking. However, there was no substantial evidence either event occurred. A trial court is under no duty to give an instruction unsupported by substantial evidence. (Cf. *People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

Involuntary intoxication is not established when a defendant voluntarily uses an unlawful drug not realizing it contains another illegal drug. Any such intoxication is voluntary. (*People v. Gallego* (1990) 52 Cal.3d 115, 183-184.) Further, as mentioned, there is no substantial evidence appellant was unconscious. As for CALCRIM No. 3426, the court gave CALCRIM No. 625, which adequately covered the issues discussed in CALCRIM No. 3426. The court did not err by failing to give sua sponte CALCRIM No. 626, 3425, or 3426.

Even if the trial court erred as alleged by appellant, there was ample evidence from the evidence presented by the parties that appellant was conscious when he killed Lindval. It is not reasonably probable appellant would not have been convicted of second degree murder absent the alleged instructional error. (Cf. *People v. Breverman* (1998) 19 Cal.4th 142, 178; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Finally, appellant has not demonstrated that trial counsel provided ineffective assistance of counsel. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)[6]

[6] As mentioned, appellant's appellate counsel represented appellant at the trial court level. One of the issues appellant raises is ineffective assistance of counsel. This may raise an issue of conflict of interest. However, we need not address this issue because we find as a matter of law that there was no error.

2. *The Trial Court Did Not Commit Wheeler/Batson Error*.

a. *Pertinent Facts.*

During jury selection, Juror No. 4748 was a prospective juror (hereafter, juror).[7] Appellant's counsel exercised 15 peremptory challenges, including his last, a challenge to Juror No. 4748, a woman. At the time, the jury consisted of 10 women and two men. The court ordered that Juror No. 4748 be excused. The prosecutor stated she was making a *Wheeler* motion. The court asked Juror No. 4748 to wait in the hallway. The above events occurred in open court.

Outside the presence of the jury, the prosecutor argued appellant's counsel was impermissibly challenging Caucasians and Asians. The court later denied the *Wheeler* motion to the extent it was based on counsel's challenges as to Asians.

The court later indicated as follows. Appellant's counsel had exercised 15 peremptories, and had used eight of the 15 to challenge Caucasians. As to at least two of those Caucasians, i.e., Juror No. 4748 and another juror, there was nothing unique about them and counsel had no apparent reason to challenge them. The court found a prima facie showing of group bias had been made, and asked appellant's counsel to explain his reasons for challenging each of the eight jurors.[8]

After the court found a prima facie showing had been made that counsel exercised challenges based on group bias towards Caucasians, and after the court asked counsel to explain his reasons, counsel replied, "Your Honor, first of all, we have an overwhelming number of women in this panel. I would like to get some men on this jury; and I'm just not getting it. . . . I think I have . . . four men on the jury, as I recall. [¶] I can't actually state at this time even as to . . . [Juror No. 4748], other than . . . I didn't get . . . any feeling

---

[7] The court, instructing the jurors (including Juror No. 4748) concerning peremptory challenges, explained counsel exercising such challenges could "excuse people without giving me a reason" and "If you get excused, don't get your feelings hurt."

[8] As mentioned, counsel used eight of his 15 challenges to challenge Caucasians (men and women). However, we note he also used eight of his 15 challenges to challenge women, including Juror No. 4748. The two groups of eight were not the same, i.e., only some jurors (such as Juror No. 4748) were members of both groups of eight.

for her. Just when she talked, I put a check on her which means get rid of her. I just didn't feel any rapport. She seemed to be, to me, rather cold. [¶] And, you know, we don't have really any choice here. We have Caucasian women, and we have Asian women. We have a few men. Unfortunately for us, two of them, apparently, have some language problems; but at least they're men. I wanted a more balanced jury in this case. [¶] In fact, this is a case I would like to have the majority of men, but that's impossible. But I'm surprised that the -- saying I'm biased against Caucasian women. We've got so many of them on the jury panel."

The court asked in pertinent part if the prosecutor was seeking the sanction of reseating Juror No. 4748, and the prosecutor replied yes. The prosecutor commented she agreed with counsel and that "there was [*sic*] lot of women on this jury." The court explained, "I don't disagree with [counsel's] idea that he'd like to have a more balanced jury; but the problem is, that you just can't do it by excusing people just 'cause they're women. It's unfortunate, but you just can't do it. [¶] And so I don't attach any judgment to it, but [counsel's] statement is tantamount to a statement that some women got excused because they're [women.] I don't blame him, but you just can't do it that way." The court ordered that Juror No. 4748 be reseated.

b. *Analysis.*

Appellant argues he did not violate *Wheeler*/*Batson* principles and the reseating of Juror No. 4748 was prejudicial. We disagree. In *Wheeler,* our Supreme Court stated, "[w]e conclude that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*) came to the same conclusion based on the federal equal protection clause. (*People v. Huggins* (2006) 38 Cal.4th 175, 226.)

"When a defendant asserts at trial that the prosecution's use of peremptory strikes violates the federal Constitution, the following procedures and standards apply. '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." [Citation.] 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, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' [Citations.] The identical three-step procedure applies when the challenge is brought under the California Constitution. [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 447.) The same principles apply to group bias based on gender. There is no dispute women are a cognizable group for purposes of *Wheeler*/*Batson* analysis. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341; *People v. Panah* (2005) 35 Cal.4th 395, 438.) Finally, *Wheeler*/*Batson* principles apply whether the prosecutor or defendant is the complaining party. (*People v. Willis* (2002) 27 Cal.4th 811, 813 (*Willis*).)

Fairly read, the record reflects the prosecutor sought to make a prima facie showing counsel had exercised challenges based on group bias towards Caucasians, the court found the prosecutor made that showing as to eight jurors, and, as a result, the court asked counsel to explain his challenges as to those eight.

Counsel's subsequent explanation revealed he essentially had two motivations. At the very outset, counsel stated, "Your Honor, first of all, we have an overwhelming number of women in this panel. I would like to get some men on this jury[.]" (Italics added.) Counsel made similar comments demonstrating he had challenged jurors based on group bias towards women. Second, counsel offered subjective explanations and/or explanations pertaining to Juror No. 4748's alleged demeanor, such as counsel's statement that Juror No. 4748 seemed to be rather cold.

In sum, the court found a prima facie showing had been made as to group bias towards *Caucasians* and asked counsel for race-neutral justifications as to that showing. However, counsel's response simultaneously (1) made a prima facie showing he had exercised challenges based on group bias towards *women*, and (2) demonstrated he lacked a gender-neutral justification for those challenges. Accordingly, the trial court impliedly granted a *Wheeler* motion predicated upon counsel's challenges based on group bias towards women, and the court, as a remedy, reseated Juror No. 4748 with the prosecutor's consent.

Appellant argues there was no prima facie showing counsel made challenges based on group bias towards women. However, as mentioned, the record demonstrates such a prima facie showing was in fact made. Appellant concedes counsel stated "he wanted to balance the jury from a gender perspective."

Appellant suggests he offered gender-neutral justifications for challenging Juror No. 4748. However, review of a trial court's denial of a *Wheeler/Batson* motion is deferential. We examine whether substantial evidence supports the trial court's conclusions. We review with great restraint a trial court's determination regarding the sufficiency of a party's proffered justifications, and we " 'give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the [alleged] nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' " (*People v. Lenix* (2008) 44 Cal.4th 602, 613-614.) In the present case, the record demonstrates the trial court made a sincere and reasoned effort to evaluate counsel's proffered justifications, and the trial court's conclusion that he made challenges based on group bias towards women was supported by substantial evidence.

Finally, appellant argues that the reseating of Juror No. 4748 was improper because, according to appellant, *Willis, supra,* 27 Cal.4th 811, requires that any peremptory challenge and *Wheeler* motion be made at sidebar. Appellant argues that because this procedure was not followed in the trial court in this case, he suffered prejudice because when Juror No. 4748 was reseated, she knew appellant had attempted to challenge her.

However, even assuming appellant did not waive this issue by failing to raise it below, *Willis* said trial courts "may" (*Willis*, *supra*, 27 Cal.4th at p. 821) employ the procedure suggested by appellant, but *Willis* did not hold trial courts must employ that procedure. *Willis* repeatedly indicated the matter was left to the discretion of the trial court. (*Id.* at p. 822.) Moreover, in the present case, the trial court instructed jurors, including Juror No. 4748, to the effect that counsel could exercise a challenge without a reason, and a juror was not to view a challenge as an insult (see fn. 7, *ante*). We presume the jury, including Juror No. 4748, followed the instruction. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The alleged procedural error was not prejudicial. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

## ***DISPOSITION***

The judgment is affirmed.

**CERTIFIED FOR PUBLICATION**

KITCHING, J.

I concur:

CROSKEY, J.

KLEIN, P. J., Concurring.

I concur in the majority decision. With respect, I write separately to expand on the majority's footnote 6 (at page 7, *ante*), which points out the possible conflict of interest issue arising from the fact appellant is being represented on appeal by the same attorney who represented him at trial.

"The right to counsel guaranteed by section 15 of article I of the California Constitution does contemplate effective counsel, and effectiveness means more than mere competence. Lawyering may be deficient when conflict of interest deprives the client of undivided loyalty and effort." (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)
" 'Conflicts of interest may arise in various factual settings. Broadly, they "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person *or by his own interests*." ' " (*People v. Hardy* (1992) 2 Cal.4th 86, 135.)

Our Supreme Court has noted "the inherent conflict that arises when the same attorney represents a defendant at trial and on direct appeal . . . ." (*People v. Young* (2005) 34 Cal.4th 1149, 1232, citing *People v. Bailey* (1992) 9 Cal.App.4th 1252, 1254-1255.) However, our Supreme Court has also said that while " 'it is difficult for counsel to argue his or her own incompetence' . . . [we have not] suggested it is impossible for counsel to do so . . . ." (*People v. Sanchez* (2011) 53 Cal.4th 80, 89.)

Hence, it is incumbent upon defense counsel in such situations to disclose this potential conflict of interest to the defendant and obtain a waiver of that conflict, particularly where ineffective assistance of counsel is one of the issues to be raised on appeal. Here, there is no indication in the record such a waiver was obtained from appellant. Nevertheless, I would affirm the judgment because I agree with the majority that, as a matter of law, there was no ineffective assistance of trial counsel in the failure to request instructions on intoxication and unconsciousness.

KLEIN, P. J.