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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MISAEL CASTELLANOS, Defendant and Appellant.	B159673 (Los Angeles County Super. Ct. No. KA055231)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark Grant Nelson, Judge. Affirmed as modified.

Mark Ankcorn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Alan D. Tate, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.A, the heading for part III.B, and part III.C.

I. INTRODUCTION

Defendant Misael Castellanos, appeals from his conviction for possession of a firearm by a felon (Pen. Code,[1] § 12021, subd. (a)(1)) and of a counterfeit seal. (§ 472.) Defendant argues the prosecutor improperly exercised peremptory challenges during jury selection and there was insufficient evidence to support a conviction for possession of a forged or counterfeit resident alien card. Defendant also argues he is entitled to four additional days of presentence conduct credit. In the published portion of this opinion, we discuss the sufficiency of the evidence that defendant violated section 472. We modify the judgment to award defendant additional presentence credits.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) In July 2001, defendant purchased a 1979 Datsun automobile from Jesus Gutierrez, who had just bought it a few weeks earlier at a police auction. Mr. Gutierrez had cleaned the car and never noticed a handgun inside the Datsun. On November 18, 2001, California Highway Patrol State Traffic Officer David Guler stopped defendant, who was driving the Datsun on a freeway for speeding. Defendant provided an automobile registration but no driver's license. Defendant gave his name, address, and birth date. The Datsun was not registered in defendant's name. However, defendant stated that he bought it "a while ago." Officer Guler subsequently determined that defendant was not licensed to drive a motor vehicle. Defendant was issued a citation. Defendant placed his thumbprint on the original citation. The Datsun was impounded for 30 days.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

The Datsun was towed to an impound yard by Barrington Branch, an employee of California Coach. Mr. Branch inventoried the personal property inside the Datsun. When Mr. Branch removed a yellow rag from between the driver's seat and center console, he found a loaded .38 caliber revolver. Mr. Branch also found a baggie containing 20 rounds of .38 caliber ammunition under the seatcover of the passenger seat. These items were turned over to Officer Guler.

On December 13, 2001, California Highway Patrol State Traffic Officer Brian Caporrimo went to defendant's residence with two other investigators. The officers saw defendant walking toward the residence. The officers stopped defendant and asked him about the citation he received in November. Defendant acknowledged that he had received a citation and his car had been impounded. Defendant also acknowledged that the property in the car belonged to him and that he was the sole driver of the car. Defendant was arrested. When defendant was searched incident to that arrest, California identification, social security, and immigration cards were removed from his wallet. During the booking process, defendant indicated he was born in Guatemala.

Immigration and Naturalization Service Special Agent Bonita Canterberry examined the legal permanent resident card found in defendant's possession at the time of his arrest. Agent Canterberry did not believe the card was legitimate because: the writing within the seal was illegible; the fingerprint was in the wrong place; the ink on the card was blue; an authentic card would not have an original signature or fingerprint; the card did not contain a point of entry on the front of the card; the card represented a combination of Immigration and Nationalization cards issued in 1977 and 1989; and the card did not have a legitimate number. When defendant's name, birthdate, parents' names were processed by computer, Ms. Canterberry discovered he entered the country as a visitor on April 3, 1983. Additional records revealed an application for petition for visa was made by defendant's wife, who is an American citizen, on August 17, 2001. The application includes the statement that the applicant cannot enter the United States without the permission of the Attorney General. If an applicant has been arrested and

served time in prison, the petition is automatically denied. Because defendant had been convicted of a felony in 1993, he would have been ineligible for a visa. Without a visa, the individual is not entitled to either a resident alien card or a social security card.

III. DISCUSSION

[Part III.A and the heading for part III.B is deleted from publication. See *post*, at page 10 where publication is to resume.]

A. *Wheeler* Motion

Defendant argues the trial court improperly denied his motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277. During the course of voir dire in this case, defense counsel made a *Wheeler* motion, arguing, "[T]here is a systematic and concerted effort to exclude jurors from Hispanic backgrounds without any other kind of basis." Defense counsel also indicated, "[I]t appears to me that, frankly, all of the Hispanic, Spanish surnamed jurors were eliminated, irrespective of gender, age, or any other factors." Thereafter, defense counsel listed juror Nos. 4312, 2099, 0381, and 7152 as the jurors in question. The trial court noted that although juror No. 7152 had a Hispanic surname, he appeared to be Caucasian. The trial court noted that at that time there were five Hispanics seated in the jury box. In addition, the trial court noted the prosecution had utilized peremptory challenges to excuse four individuals with Hispanic surnames and four Caucasians. Thereafter, the trial court noted: "Although a percentage of Hispanic potential jurors are on the matter, it does appear that four of the eight challenges exercised do involve Hispanic surnamed individuals. They are of a cognizable group, ethnic group, and, therefore, the court will find a reasonable inference as opposed to a strong likelihood persons are excluded because of group association, in other words, the Batson standard. [¶] [Prosecutor] you may give the court an explanation, at this point in time." The prosecutor objected to the trial court's finding that a prima facie case had

been made. Thereafter, the prosecutor gave reasons for the peremptory challenges as to each of the four jurors. On appeal, defendant challenges only the reasons given as to juror Nos. 0381 and 7152.

The California Supreme Court has held that the exercise of peremptory challenges to eliminate prospective jurors on the basis of race violates the state Constitution. (*People v. Williams* (1997) 16 Cal.4th 635, 662-663; *People v. Alvarez* (1996) 14 Cal.4th 155, 192-193; *People v. Turner* (1994) 8 Cal.4th 137, 164; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) A defendant who contends the prosecution has excused prospective jurors for impermissible reasons, has the burden of establishing "a prima facie case of purposeful discrimination." (*People v. Williams*, *supra*, 16 Cal.4th at p. 663; accord, *People v. Mayfield* (1997) 14 Cal.4th 668, 723; *People v. Arias* (1996) 13 Cal.4th 92, 134-135.) The California Supreme Court has held that there is a presumption that a prosecutor uses peremptory challenges in a constitutional manner. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 193; *People v. Turner*, *supra*, 8 Cal.4th at p. 164; *People v. Clair* (1992) 2 Cal.4th 629, 652.) However, once a prima facie case is found, the burden shifts to the prosecution to show the absence of purposeful discrimination. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 197; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) The California Supreme Court has held: "[A]dequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as a 'mask for race prejudice' [citation]." (*People v. Williams*, *supra*, 16 Cal.4th at p. 664; *People v. Turner*, *supra*, 8 Cal.4th at p. 165.)

Preliminarily, the trial court's finding that a prima facie showing had been made was not supported by substantial evidence and was erroneous. Findings in the *Wheeler* context of a prima facie determination are reviewed for substantial evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 993-994; *People v. Alvarez, supra,* 14 Cal.4th at p. 196.) A party claiming a prima facie showing of racial discrimination must demonstrate a

strong likelihood that the prospective jurors were excused because of their race. (*People v. Welch* (1999) 20 Cal.4th 701, 745; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) In the present case, the prosecutor had excused four "Hispanic, Spanish surnamed" jurors and four Caucasian jurors. Simply stating that all prospective members of a cognizable class have been excused is not a legally sufficient showing to establish a prima facie case. (*People v. Box* (2000) 23 Cal.4th 1153, 1188-1189; *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536; see *People v. Davenport* (1995) 11 Cal.4th 1171, 1201; *People v. Turner, supra,* 8 Cal.4th at pp. 167-168.) Yet, the ground relied upon by the trial court in making its prima facie finding was exactly that—the four excused jurors were of Hispanic surnamed individuals—a legally insufficient justification for such a finding. Under *Wheeler* and its progeny, the exercise of only four peremptory challenges in this case of a cognizable group did not constitute a prima facie showing. (*People v. Box*, *supra*, 23 Cal.4th at pp. 1185-1186 [2 Black jurors]; *People v. Mayfield* (1997) 14 Cal.4th 668, 721-727 [3 of 5 jurors excused by the prosecutor were Black]; *People v. Davenport*, *supra*, 11 Cal.4th at pp. 1200-1201 [3 of 6 jurors excused by the prosecutor were Hispanic]; *People v. Crittenden* (1994) 9 Cal.4th 83, 119-120, & fn. 3 [challenge of only Black juror in venire]; *People v. Turner*, *supra*, 8 Cal.4th at pp. 167-168 [defendant was Black, victims White; 4 of 6 jurors excused by the prosecutor were Black]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667 [2 minority jurors]; *People v. Allen* (1989) 212 Cal.App.3d 306, 311-318 [6 of 14 jurors excused by the prosecutor were Black]; *People v. Rousseau*, *supra*, 129 Cal.App.3d at p. 536 [no prima facie showing made when only 2 Black jurors excused by the prosecution]; see *People v. Christopher* (1991) 1 Cal.App.4th 666, 671-672, citing *People v. Harvey* (1984) 163 Cal.App.3d 90, 110-111 [excusing 1 or 2 prospective jurors rarely suggests a pattern of impermissible exclusion].) It bears emphasis the trial in this case occurred in the eastern portion of Los Angeles County—an area where large numbers of Hispanic jurors reside. No substantial evidence exists of a strong likelihood that the peremptory challenges were exercised for improper reasons; on that ground alone the judgment may not be reversed on *Wheeler* grounds.

Second, even if a prima facie showing was made, the trial court's express acceptance of the prosecutor's non-discriminatory basis for excusing the four jurors must be upheld on appeal. The trial court made a "'"'"'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered . . ."'"'" by the prosecutor. (See *People v. Ervin* (2000) 22 Cal.4th 48, 75, quoting *People v. Arias, supra,* 13 Cal.4th at p. 136.) The trial court's conclusions are therefore entitled to deference. (*People v. Ervin, supra,* 22 Cal.4th at p. 75; *People v. Williams* (1997) 16 Cal.4th 153, 189-190.) The California Supreme Court has held, "The determination whether substantial evidence exists to support the prosecutor's assertion of a nondiscriminatory purpose is a 'purely factual question.'" (*People v. Ervin, supra,* 22 Cal.4th at p. 75; *People v. Alvarez, supra,* 14 Cal.4th at p. 197.) The trial judge's personal observations are critical to distinguishing bona fide reasons for the peremptory challenges from "sham excuses." (*People v. Jones* (1998) 17 Cal.4th 279, 294; *People v. Turner, supra,* 8 Cal.4th at p. 165.) The California Supreme Court has held: "Even seemingly '"highly speculative"' or "'trivial'" grounds may support the exercise of a peremptory challenge. [Citations.]" (*People v. Ervin*, *supra*, 22 Cal.4th at p. 77; *People v. Williams, supra,* 16 Cal.4th at p. 191; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067 [circumstances prompting the exercise of a peremptory challenge may often be subtle, visual, incapable of being transcribed, subjective, and even trivial].) Moreover, the California Supreme Court has held, "[P]rospective '[j]urors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.'" (*People v. Box, supra,* 23 Cal.4th at p. 1186, fn. 6, quoting *People v. Turner, supra,* 8 Cal.4th at p. 165.) A prosecutor's reliance on a prospective juror's body language indicating a lack of attentiveness is on appeal a proper ground for affirming a judgment in the face of a *Wheeler* challenge. (*People v. Jones* (1997) 15 Cal.4th 119, 162, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Turner*, *supra*, 8 Cal.4th at p. 171; *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Johnson* (1989) 47 Cal.3d 1194, 1219.) The Supreme Court has held:

"Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm. [Citation.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1155 citing *People v. Sanders* (1990) 51 Cal.3d 471, 501; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092.)

In this case, the prosecutor gave race-neutral explanations for excusing the four jurors in question. The prosecutor noted that juror No. 0381 had been talking to another person during voir dire; viz. not paying attention to the proceedings. The prosecutor noted and the trial court acknowledged that the juror's talking was distracting. The prosecutor noted more specifically that juror No. 0381 appeared "very disconnected from the proceedings." Because juror No. 0381 had been talking, she did not provide all of the information requested of each juror. The prosecutor concluded: "[T]he primary thing, the primary factor that I was considering in excusing her was the fact that she did seem disconnected. She seemed like she did not want to be here. She was talking during the proceedings, which was distracting to me. In addition to that, she made the comment about being blind and was less than forthcoming in providing information." While the record does not reflect the juror's comment about being blind, there were other sufficient race-neutral explanations for her challenge.

The prosecutor also excused juror No. 7152. The prosecutor indicated that she was single, young, and inexperienced. More specifically, the prosecutor noted, "I do tend to try to exclude people who have a lot to do with schools, particularly teachers, especially if they do not appear to be teachers of high school age or of some level where the kids at some point are becoming defiant. [¶] In [juror No. 7152's] case, being a campus supervisor, it appeared to me that she had significant contact with young individuals and that she was not much older than, perhaps, high school age herself."

The prosecutor indicated juror No. 2099 was single, unemployed, and obese. She was described as follows: "[H]er manner of speaking was that of a little girl. It was a

very child-like manner of speaking. It appeared to me that she did not have significant life experience." The prosecutor also stated that juror No. 2099 raised a question concerning residency status. Juror No. 2099 was concerned whether any residency issues related to herself or family would affect whether she would sit on the jury. The prosecutor interpreted that to mean juror No. 2099 had particular sympathy for recent immigrants. Finally, juror No. 4312 was described by the prosecutor as young, with little life experience. The prosecutor stated: "He looked much younger to me than 18 years of age. He seemed to have the acne face of a teenage boy."

The trial court accepted what were on their face non-racial grounds for excusing the two jurors. Once it was satisfied with the reasons given, the trial court was not obligated to conduct further inquiry into the prosecutor's race-neutral explanations regarding prospective juror Nos. 0381 and 7152. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198; *People v. Johnson* (1989) 47 Cal.3d 1194, 1218.) Given the acceptance of the prosecutor's racially neutral explanations for the exercise of the two peremptory challenges, which occurred in the context of a sincere effort by the trial court to apply *Wheeler*, no error occurred.

The parties have averted to United States Supreme Court decisions discussing impermissible jury selection practices. (See *Purkett v. Elem* (1995) 514 U.S. 765, 773; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89.) However, defense counsel has never raised any federal constitutional issues. Hence, they are waived and we need not address the federal constitutional issues mentioned in passing by the parties. (*People v. Garceau* (1993) 6 Cal.4th 140, 173; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174.)

B. Sufficiency of the Evidence

[The balance of part III.B is to be published.]

Defendant argues there was insufficient evidence to support his conviction for possession of a forged or counterfeit resident alien card in violation of section 472. In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576; see also *People v. Gurule* (2002) 28 Cal.4th 557, 630.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

There was substantial evidence to support defendant's conviction for possession of a counterfeit government seal. Section 472 provides in relevant part: "Every person who, with intent to defraud another, forges, or counterfeits the seal of this State, the seal of any public officer authorized by law . . . or any other public seal authorized or

recognized by the laws of this State . . . Government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery." Section 8 provides: "Whenever, by any of the provisions of this Code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever." In this case the jury was instructed with CALJIC No. 15.00 which provides in pertinent part: "In order to prove this crime, each of the following elements must be proved: [¶] 1. A person had in his possession a counterfeited impression of a public seal; [¶] 2. That person knew the impression to be counterfeit and willfully concealed that fact; and [¶] 3. That person acted with the specific intent to defraud another person."

Defendant further argues that because he neither presented nor furnished the resident alien card to obtain money or property of value there is no substantial evidence he had no intent to defraud. Defendant is mistaken. In *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741, the court held: "Forgery has three elements: a writing or other subject of forgery, the false making of the writing, and intent to defraud. (2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Crimes Against Property, § 697, p. 792.) The subject of forgery is ordinarily an instrument or other writing which, if genuine, would create some legal right or obligation. [Citation.]" In *People v. Wilkins* (1972) 27 Cal.App.3d 763, 773, the court held: "Specific intent as an element of a crime may be proved by circumstantial evidence." (see also *People v. Rodriguez* (1969) 272 Cal.App.2d 80, 86; *People v. Williams* (1967) 252 Cal.App.2d 147, 154-155.) The *Wilkins* court held that the defendant's possession of blank sheets of selective service cards and instructions on making California driver's licenses could lead a reasonable trier of fact to infer that he possessed the requisite intent to defraud. (*People v. Wilkins, supra,* 27 Cal.App.3d at p. 773.) In *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 388, the court looked to common law to define forgery: "Making virtually any kind of

false document affords an inference that the maker intends to deceive someone. However, only a document with apparent legal efficacy is naturally suited to perpetrate the kind of deception that is strictly speaking a defrauding. Fabricating such a document by that very act affords an inference of an intention to 'defraud,' namely by such deceit to detrimentally accomplish something akin to a theft by false pretenses."

In this instance, the forged or counterfeit resident alien card in defendant's possession did not contain a point of entry on the front of the card. The card represented a combination of Immigration and Nationalization cards issued in 1977 and 1989, had original ink and fingerprint. The forged or counterfeit card did not have a legitimate number. The forged or counterfeit resident alien card bearing defendant's photograph would create a legal right or obligation to someone such as a prospective employer. The employer might reasonably conclude defendant would be lawfully authorized to work in the United States. Likewise, it could be, and apparently was, used to secure a Social Security card in defendant's name. Substantial evidence supports the intent to defraud element.

[The balance of part III is deleted from publication. See *post* at page 13 where publication is to resume.]

C. Presentence Credits

Following our request for further briefing, the Attorney General argues and defendant concedes he is entitled to only 212 presentence credits. The failure to award an accurate amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Defendant received an incorrect award of presentence credits. (§§ 2900.5, 4019.) He should have received 70 days of conduct credit as well as 142 days actual credit for a total of 212 days.

[The balance of the opinion is to be published.]

IV. DISPOSITION

The superior court clerk is directed to correct the abstract of judgment to reflect defendant's presentence credits of 212 days, including 142 actual days and 70 days of conduct credit. The superior court clerk shall forward a corrected copy of the abstract of judgment to the Department of Corrections. The judgment is affirmed in all other respects.

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TURNER, P.J.

We concur:

GRIGNON, J.

MOSK, J.