***HUGGINS* (2006) 38 Cal.4th 175**

II. *Batson–Wheeler* Claim

68 As we have observed, a different jury from the one that tried the guilt phase heard the second penalty phase trial. Defendant claims that the prosecution, in participating in the selection of the second penalty phase jury, exercised peremptory challenges against African–American prospective jurors in violation of *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, and ***637 *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748.

Federal law following *Batson* holds that exercising peremptory challenges solely on the basis of race offends the Fourteenth Amendment's guaranty of the equal protection of the laws (*Miller–El v. Dretke* (2005) 545 U.S. 231, 238, 125 S.Ct. 2317, 2324, 162 L.Ed.2d 196; *U.S. v. Martinez–Salazar* (2000) 528 U.S. 304, 315, 120 S.Ct. 774, 145 L.Ed.2d 792), and *Wheeler* holds that such conduct violates defendants' right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution (*People v. Wheeler, supra,* 22 Cal.3d 258, 276–277, 148 Cal.Rptr. 890, 583 P.2d 748).

697071 Procedurally, the "three *Batson* steps should by now be familiar. 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 *227 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.' " (*Johnson v. California* (2005) 545 U.S. 162, 167, 125 S.Ct. 2410, 2416, 162 L.Ed.2d 129.) Excluding even a single prospective juror for reasons impermissible under *Batson* and *Wheeler* requires reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386, 106 Cal.Rptr.2d 93, 21 P.3d 769.) And although a party may exercise a peremptory challenge for any permissible reason or no reason at all (*Purkett v. Elem* (1995) 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834; *People v. Jones* (1998) 17 Cal.4th 279, 294, 70 Cal.Rptr.2d 793, 949 P.2d 890), "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination" (*Purkett, supra,* at p. 768, 115 S.Ct. 1769).

72 In evaluating a trial court's *Batson–Wheeler* ruling that a party has offered a race-neutral basis for subjecting particular prospective jurors to peremptory challenge, we are mindful that " '[i]f the trial court makes a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' " (*People v. Johnson* (2003) 30 Cal.4th 1302, 1319–1320, 1 Cal.Rptr.3d 1, 71 P.3d 270, overruled on another point as explained *post,* 41 Cal.Rptr.3d at p. 638, 131 P.3d at p. 1033, fn. 13; accord, *People v. Silva, supra,* 25 Cal.4th 345, 385–386, 106 Cal.Rptr.2d 93, 21 P.3d 769.) In a case in which deference is due, "[t]he trial court's ruling on this issue is reviewed for substantial evidence." (*People v. McDermott* (2002) 28 Cal.4th 946, 971, 123 Cal.Rptr.2d 654, 51 P.3d 874.) The trial court here made a sincere and reasoned effort to evaluate the prosecution's explanations for its excusal of the prospective jurors and, as we now explain, its ruling that the explanations were satisfactory is supported by substantial evidence. We find no basis for reversal.

The parties and the trial court conferred in chambers to discuss defense and prosecution *Batson–Wheeler* motions. Of course, only defendant's motion is at issue here.

Defendant objected that the prosecution had excluded eight African–American prospective jurors in the course of exercising 15 peremptory challenges. After struggling, along with the parties, over the question whether one of the seated jurors, a Puerto Rican woman, was more properly categorized as Hispanic or African–American, ***638 the trial **1033 court returned to defendant's motion. Before the court ruled on whether defendant had made out a prima facie case of impermissible discrimination, the prosecutor said, "none of my reasons for excusing any of the [prospective] jurors related to race. [They] [r]elated to what I perceived their attitudes are and their ability to be able to impose the death penalty."

*228 The trial court found a prima facie case of impermissible discrimination, and asked the prosecutor to explain the peremptory challenges.[13]

With regard to the first prospective juror, Mark T., the prosecutor observed that (1) he equivocated about his ability to impose the death penalty; (2) he had witnessed the effects of drug abuse and might be a "wild card on that issue," if the defense presented any drug-related mitigating evidence, as the prosecutor believed it did in the first penalty trial; (3) his mother was a psychiatric social worker and his sister a psychologist; (4) he went to several colleges but graduated from none of them, which "[j]ust kind of gives me the impression that he doesn't follow through with things"; (5) "he also had law-related classes with the law school format. I don't want [him] playing lawyer on the jury"; (6) he expressed surprise that the electorate voted not to retain former Chief Justice Rose Bird on this court in 1986, and "I don't want anybody [with that view of the 1986 election] on my jury in a death penalty case"; (7) another employee in the Alameda County District Attorney's Office knew Mark T. and told the prosecutor he did not think he would be able to vote for death; and (8) the defense asked no questions of him, and "I have a real problem with that, because it's obvious to me that they like him."

With regard to the second prospective juror, Gloria W., the prosecutor observed that (1) she was late to court one day; (2) she had a son the same age as defendant at the time of the crimes; (3) she did not "mix with the other [prospective] jurors" and came across as unfriendly both to them and to him; (4) she equivocated in numerous respects about the death penalty and, ultimately, the prosecutor doubted she could impose it; (5) her youngest brother had died of a drug overdose and the prosecutor was unsure how she might react to any mitigating evidence of drug usage by defendant; (6) she might have religious scruples regarding capital punishment; (7) "[s]he's training for foster care to take care of 12–year–old boys. And I know in the *229 last [penalty] trial the defense relied heavily on the defendant's problems back in Mississippi ... [in] foster ***639 situations"; and (8) the defense asked no questions of her.

With regard to the third prospective juror, Ray F., the prosecutor observed that (1) he was born in Berkeley and might share anti-death-penalty views the prosecutor believed to be prevalent there; (2) court security reported that Ray F. had jousted verbally with them; (3) "he was totally against the death penalty as a student"; (4) he might have excessive religious scruples regarding capital punishment; (5) he opposed the electorate's decision not to retain former Chief Justice Rose Bird on this court in 1986; (6) he would find psychological or psychiatric testimony helpful, and "I would prefer people that don't

particularly like it if I could find them”; and (7) he had equivocated over the years about **1034 the death penalty and, ultimately, the prosecutor doubted he could impose it.

With regard to the fourth prospective juror, Charles S., the prosecutor observed that (1) potential affinities existed between him and defendant because the prospective juror's father was a minister in Mississippi, as the prosecutor believed a grandfather of defendant to be; (2) his children had drug-abuse problems; (3) he was not friendly to the prosecutor and the prosecutor did not believe he would get along with other jurors; (4) his son was a career criminal; (5) he had minimized the extent of his own criminal activity, describing an arrest for disturbing the peace when instead he was arrested on a felony charge of trying to draw a firearm on an Oakland police officer (the prosecutor regretted not knowing that information earlier or he would have challenged Charles S. for cause); (6) he equivocated in numerous respects about the death penalty and, ultimately, the prosecutor believed he would never impose it; and (7) the defense asked no questions of him.

With regard to the fifth prospective juror, M.S., the prosecutor observed that (1) he dressed “pretty grubbily” in court and thereby showed “no respect for the entire process”; (2) potential affinities existed between him and defendant because they were both from Mississippi and the prospective juror's father was a farmer in that state, as the prosecutor believed a grandfather of defendant to be; (3) he equivocated in numerous respects about the death penalty and, ultimately, the prosecutor believed he would never impose it; (4) he was not friendly to the prosecutor and the prosecutor did not believe he would get along with other jurors; (5) he inaccurately answered a question concerning whether one of his two sons had been a crime victim; (6) a sister's boyfriend had been charged with murder in Arkansas; (7) he might think that mental illness could warrant a sentence less than death; (8) he believed death penalty appeals take too long; (9) he might have religious scruples regarding capital punishment; and (10) the prosecutor had *230 driven by his house and saw a wrecked automobile in the driveway, which suggested a certain disorderliness in the prospective juror's life. Moreover, the prosecutor believed that the known attitudes of the remaining prospective jurors made the excusal of M.S. advantageous.

With regard to the sixth prospective juror, George M., the prosecutor observed that (1) he continually wore sunglasses in court and thereby showed “no respect to the system”; (2) he flirted with female prospective jurors and “I don't want ... a Don Juan on the jury”; (3) he equivocated in numerous respects about the death penalty and, ultimately, the prosecutor believed he would never impose it; (4) he was not friendly to the prosecutor and the prosecutor did not believe he would get along with other male jurors; (5) he did not graduate from high school; and (6) his ***640 back problems made him unable to sit or stand for extended periods. Moreover, the prosecutor believed that the known attitudes of the remaining prospective jurors made the excusal of George M. advantageous.

With regard to the seventh prospective juror, V.R., the prosecutor observed that (1) potential affinities existed between her and defendant because they both had children born out of wedlock; (2) she equivocated in numerous respects about the death penalty and, ultimately, the prosecutor believed she would never impose it; (3) she was aloof to other prospective jurors; (4) she inaccurately answered a question concerning whether she had been a crime victim; (5) she might have religious scruples regarding capital punishment; (6) the prosecutor had noticed that her automobile was in a sufficiently

dilapidated condition to suggest a certain disorderliness in her life; (7) the prosecutor had watched the prospective juror interact with coworkers at Home Depot and observed that she did not appear to get along with them; and (8) the defense seemed too comfortable with her. “I don't think I could take a chance on her.” Moreover, “the one that replaced her[,] who was next on the list when I excused her[,] was another black female ... who I thought was a much stronger juror and much better for the prosecution. And she is, in fact, on the jury and she's a black woman also.”

**1035 With regard to the eighth prospective juror, Ethel F., the prosecutor observed that (1) she was elderly and might regard life as too precious; (2) she was not friendly toward him and appeared to be aloof toward the other prospective jurors, but kept smiling at defendant; (3) her career in nursing might make her too compassionate; (4) she might have religious scruples against imposing the death penalty; (5) she might have to leave the jury in midtrial to help an ailing son; (6) she equivocated about the death penalty and, ultimately, the prosecutor believed she would never impose it; and (7) the defense seemed too comfortable with her. Moreover, the prosecutor believed that the known attitudes of the remaining prospective jurors made the excusal of Ethel F. advantageous.

*231 The trial court denied defendant's *Batson–Wheeler* motion. It found the prosecutor's reasons to be genuine and candid and not pretextual, and recited in detail its reasons for so finding. It explained at length that many of the prosecutor's observations of the prospective jurors' demeanors and attitudes matched its own. And it commented that “I do not find that [the prosecutor's] voir dire of the Black [prospective] jurors as opposed to other [prospective] jurors was perfunctory, unsavory, shallow or desultory. [¶] I find it was thorough and lengthy. And his voir dire of Black [prospective] jurors was virtually the same as was his voir dire of other [prospective] jurors.”

Given the trial court's well-reasoned and sincere effort to evaluate the nondiscriminatory justifications the prosecutor offered, its conclusions are entitled to deference on appeal. (*People v. Johnson, supra,* 30 Cal.4th 1302, 1319–1320, 1 Cal.Rptr.3d 1, 71 P.3d 270, overruled on another point as discussed *ante,* 41 Cal.Rptr.3d at p. 638, 131 P.3d at p. 1033, fn. 13.) Substantial evidence, set forth in detail below in our discussion of defendant's *Miller–El* claim (*Miller–El v. Dretke, supra,* 545 U.S. 231, 125 S.Ct. 2317), supports the trial court's ruling with regard to each prospective juror. Apart from an inconsequential misstatement of the content of Mark T.'s juror questionnaire, which we ascribe to an innocent misrecollection, we have found nothing in the record contradicting the prosecutor's explanations ***641 for his peremptory challenges.[14] To the extent that the record touches on the genuineness of the prosecutor's stated race-neutral reasons for challenging the prospective jurors, it confirms them.[15]

Our discussion requires a further inquiry, but undertaking it does not alter our conclusion. In *Miller–El v. Dretke, supra,* 545 U.S. 231, 125 S.Ct. 2317, the United States Supreme Court held that the defendant had established purposeful discrimination under *Batson.* (*Id.* at p. 234, 125 S.Ct. at pp. 2322, 2341.)

*232 Prefatorily, we note that *Miller–El v. Dretke, supra,* 545 U.S. 231, 125 S.Ct. 2317 (*Miller–El*), is an extreme case, in which the evidence of the Dallas County, Texas, District Attorney's Office's practice of improperly challenging African–American prospective jurors on the basis simply of race was overwhelming. The Supreme Court referred to the state's “incredible explanations” (*id.* at p. 263, 125

S.Ct. at p. 2339), “trickery” (*id.* at p. 261, 125 S.Ct. at p. 2337), and “ruse[s]” (*id.* at p. 261, 125 S.Ct. at p. 2336, fn. 24, **1036 at p. 259, 125 S.Ct. at p. 2338, fns. 25, 26). In sum, “the state court's [contrary] conclusion was unreasonable as well as erroneous” (*id.* at pp. 266, 267, 125 S.Ct. at p. 2340) under the very high standard imposed on federal courts reviewing state court death judgments.[16]

In *Miller–El* the Court performed a comparative prospective juror analysis, apparently for the first time on appeal. (*Miller–El, supra,* 545 U.S. 231, 239–253, 125 S.Ct. 2317, 2325–2332; see also *id.* at pp. 277, 286, 125 S.Ct. at pp. 2347, 2351 (dis. opn. of Thomas, J.).) On the basis in part of “the transcript of *voir dire* ” (*id.* at p. 240, 125 S.Ct. at p. 2326, fn. 1; accord, *id.* at pp. 253, 254, 125 S.Ct. at pp. 2332, 2333), the court in *Miller–El* engaged in “side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve” (*id.* at p. 239, 125 S.Ct. at p. 2325) and examined the prosecution's treatment of challenged and accepted prospective jurors who were “similarly situated” (*id.* at p. 247, 125 S.Ct. at p. 2329). The court explained that prospective ***642 jurors may be similarly situated without an exact match between or among them with respect to the reasons that a party gave for challenging them. “None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.” (*Id.* at p. 247, 125 S.Ct. at p. 2329, fn. 6.) But the court did not articulate a minimum standard of similarity at which point the comparisons will begin to be probative.

Assuming without deciding that comparative prospective juror analysis for the first time on appeal is constitutionally required in these circumstances, in which the trial court found a prima facie case of discrimination (see *People v. Cornwell* (2005) 37 Cal.4th 50, 71, 33 Cal.Rptr.3d 1, 117 P.3d 622; cf. *id.* at pp. 69, 71, 33 Cal.Rptr.3d 1, 117 P.3d 622 [undertaking that analysis even though no prima facie case established, when prosecutor permitted to comment despite the lack of such a case]), we undertake that analysis. Doing so, we find nothing in the record that entitles defendant to relief.

*233 In *Miller–El, supra,* 545 U.S. 231, 125 S.Ct. 2317, the Supreme Court said of peremptory challenges in state courts that “choices [to exercise them are] subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected.” (*Id.* at p. 238, 125 S.Ct. at p. 2324.) These influences include matters that “are often the subjects of instinct.” (*Id.* at p. 253, 125 S.Ct. at p. 2332.) The court cautioned, however, that “[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.” (*Id.* at p. 239, 125 S.Ct. at p. 2325; accord, *id.* at p. 248, 125 S.Ct. at p. 2330.) It further stated that failure to engage in any meaningful voir dire examination on a subject a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual. (*Id.* at p. 246, 125 S.Ct. at p. 2328; accord, *id.* at p. 250, 125 S.Ct. at p. 2330, fn. 8.) In a similar vein, the court stated that “the credibility of reasons given can be measured by ‘how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.’ ” (*Id.* at p. 247, 125 S.Ct. at p. 2329.) In another component of its discussion, *Miller–El* instructs that if a “stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.” (*Id.* at p. 253, 125 S.Ct. at p. 2332.) Finally, the *Miller–El* court thought it fitting to consider, albeit as a less significant factor than the side-by-side comparisons it undertook,

the statistic that "the State had peremptorily challenged 12% of qualified nonblack panel **1037 members, but eliminated 91% of the black ones." (*Id.* at p. 266, 125 S.Ct. at p. 2340.)

73 The fundamental inquiry remains the same after *Miller–El* as before: is there substantial evidence to support the trial court's ruling that the prosecutor's reasons for excusing prospective jurors were based on proper grounds, and not because of the prospective jurors' membership in a protected group? If so, then defendant is not entitled to relief. In undertaking this inquiry, we note that the question is not whether we as a reviewing court find the challenged prospective jurors similarly situated, or not, to those who were accepted, but whether the record shows that the party making the peremptory challenges honestly believed them not to be similarly situated in legitimate respects. As we have observed, *Miller–El* ***643 teaches that if a "stated reason does not hold up, its pretextual significance does not fade because ... an appeals court, can imagine a reason that might not have been shown up as false." (*Miller–El, supra,* 545 U.S. 231, 252, 125 S.Ct. 2317, 2332.) Accordingly, we confine our inquiry to whether the prosecutor here honestly found pertinent and legitimate dissimilarities between members of the group he challenged and the group he accepted.

*234 Defendant compares 17 prospective jurors (including three African–Americans and two Latinos) whom the prosecution accepted at various stages against eight African–Americans whom it peremptorily challenged, and argues that the accepted prospective jurors shared characteristics with the excluded African–Americans.

It is true that a number of the accepted jurors had isolated and discrete similarities with the rejected African–American prospective jurors. There are, in fact, dozens of such commonalities. For example, the prosecutor stated that because Mark T., a challenged prospective juror, had witnessed the effects of drug abuse, and the brother of another challenged prospective juror, Gloria W., had died of a drug overdose, they might be unduly swayed by defense evidence involving defendant's use of drugs. Several of the accepted jurors, however, including Lloyd B., Charleen H., Mary S., Holly A., and Richard R., had also witnessed the effects of drug abuse on family members, and one accepted juror, Beverly R., stated that drug usage might be mitigating. The prosecutor also stated that Mark T.'s mother was a psychiatric social worker and his sister a psychologist, and that he and another prospective juror he peremptorily challenged, Ray F., would find psychological or psychiatric testimony unduly helpful. In general, then, the prosecutor implied that people exposed to psychology or psychiatry might give too much deference to testimony regarding mental health issues. Several of the accepted jurors, however, including Beverly R., Willie G., Danielle M., Marion R., Sheila B., Charleen H., Brian H., and Mary S., had had similar exposure, or otherwise indicated they might be receptive to mitigating testimony on mental health issues. The prosecutor stated that Ray F.'s Berkeley background might make him too liberal, but an accepted juror, Dorothy B., apparently once lived in Berkeley. The prosecutor asked her no questions on the subject. As noted, *Miller–El* states that failure to engage in any meaningful voir dire examination on a subject a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual. (545 U.S. 231, 245, 125 S.Ct. 2317, 2328; accord, *id.* at p. 250, 125 S.Ct. at p. 2330, fn. 8.)[17] The prosecutor stated that he peremptorily challenged George M. in part because he did not graduate from high school. But that was also true of R.G., whom he accepted even though she had only a ninth-

grade education. These are but a few examples of similarities found in prospective jurors the prosecutor accepted and African–Americans he challenged.

*235 **1038 Defendant, relying on *Miller–El's* teaching that failure to engage in any meaningful voir dire examination on a subject ***644 a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual (*Miller–El, supra,* 545 U.S. 231, 245, 125 S.Ct. 2317, 2328; accord, *id.* at p. 250, 125 S.Ct. at p. 2330, fn. 8), notes that the prosecutor cited the damaged condition of the automobiles associated with M.S. and V.R., "without asking them a single question about the circumstances of the accidents causing the damage or whether the cars even belonged to them." He is correct that the prosecutor did not question either prospective juror about the automobiles.

Nevertheless, the trial court's ruling that the prosecutor's conduct was within constitutional bounds is supported by substantial evidence. In each case, the prosecutor justified the excusals by stating, either explicitly by giving the ultimate conclusion or implicitly by giving examples, that he believed the prospective jurors he challenged were dissimilar to those he accepted because members of the former group were at least unlikely—and in some cases would be unwilling—to impose the death penalty. The record supports the prosecutor's justifications and provides substantial evidence in support of the court's ruling. To provide a few examples, Mark T. testified, "my feelings are mixed about [capital punishment], yes." He worried about "[t]he idea of disproportionate penalties, inequities, ... distribution of the penalty...." Gloria W. had written on her jury questionnaire that the death penalty is justified if the crime has been established "without any doubts," a higher standard than the beyond a reasonable doubt standard the guilt phase jury applied. Asked whether it was right for the state to kill, she initially testified, "I don't know whether anyone should take anyone's life, except if it's a matter of self-defense, to defend yourself." She did later state that "I think the state has a right to do that." Still, even on the written record before us, she seemed reluctant to impose the death penalty. Ray F. testified, "I was a student in the 70's, and I think I was probably totally against the death penalty then. And now I'm an older person, and I'm not certain I'm actually for the death penalty or against it." He characterized his prior position as "extreme." Charles S. equivocated about the death penalty, and testified in a manner from which the prosecutor could infer that he was lukewarm about it. It was undisputed that M.S. disported himself arrogantly (wearing a cap and sunglasses in court) and arrived late one day, and thus nothing contradicts the prosecutor's assertion that M.S. appeared to him not to respect the judicial process. Moreover, the prosecutor correctly noted that M.S. mentioned mental illness as a possible reason not to impose a death sentence. George M. testified, "I don't want to be on no jury that's going to kill somebody or convict them for life, anyway." The record of V.R.'s testimony does not contradict any of the prosecutor's observations about her. The prosecutor stated that Ethel F. was not friendly toward him and appeared to be aloof *236 toward the other prospective jurors, but kept smiling at defendant, and nothing in the record before us contradicts that concern.

We also note that the prosecutor accepted three African–American jurors, which we find here to be "an indication of the prosecution's good faith in exercising his peremptories." (*People v. Snow* (1987) 44 Cal.3d 216, 225, 242 Cal.Rptr. 477, 746 P.2d 452.) If the prosecutor were filtering prospective jurors by race, presumably he would have challenged Charleen H., an African–American woman of Puerto Rican descent. Charleen H. stated that the justice system is biased against the poor; she opined that "it

depends how much money ***645 you have, I think, where you go to prison and how you're treated." But Charleen H. also stated that she strongly favored the death penalty. Sheila B., an African–American whom the prosecutor did not challenge peremptorily or for cause, opined that the criminal justice system is "less than just," and amplified on this sentiment by explaining that "our society's inherently racist, it's inherently prejudiced, it's inherently classist. So if you're from a certain class, race, whatever group, you may be unjustly either found guilty, not guilty[,] or things happen to you." But Sheila B. also had a law enforcement background, moderately favored the death penalty in principle, and, stating "I believe it has a place in the **1039 judicial process," declared that she would vote for it if it appeared on the ballot. Overall her questionnaire showed her to be thoughtful, sober-minded, and analytical. Plainly the prosecutor was looking for prospective jurors bearing a favorable attitude toward his cause, not race or ethnicity, in assessing them.

In sum, the prosecutor gave reasons showing that he honestly viewed the prospective jurors he challenged as not similarly situated, in legitimate respects, to those he accepted. The trial court accepted those reasons, and substantial evidence in the record supports the its ruling. On our own review of the record, we think it clear that the prosecutor was looking, without regard to race, for sober-minded jurors who led orderly lives and could impose the death penalty if the evidence warranted it. The prospective jurors, including Latinos and African–Americans, whom he accepted were of that type, and those he rejected were lacking in the essentially pro-death-penalty qualities he was seeking. Accordingly, we conclude that defendant's *Batson–Wheeler* claim is without merit.

People v. Huggins, 38 Cal. 4th 175, 226-36 (2006), *as modified (May 24, 2006)*

***LEWIS* (2006) 39 Cal.4th 970**

B. *Batson–Wheeler* Claims (Lewis, Oliver)

Defendants contend that by failing to grant their motions challenging the prosecution's excusal of seven Black male prospective jurors, made over defense objection, the trial court violated the federal constitutional guaranty of equal protection of the laws (*Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (*Batson*)), and the state constitutional right to a jury drawn from a representative cross-section of the community. (*People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (*Wheeler*).)[9]

39 A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. **808 (*Wheeler, supra,* 22 Cal.3d 258, 276–277, 148 Cal.Rptr. 890, 583 P.2d 748; *People v. Griffin* (2004) 33 Cal.4th 536, 553, 15 Cal.Rptr.3d 743, 93 P.3d 344.) Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment. (*Batson, supra,* 476 U.S. 79, 88, 106 S.Ct. 1712, 90 L.Ed.2d 69; see *People v. Cornwell* (2005) 37 Cal.4th 50, 66, 33 Cal.Rptr.3d 1, 117 P.3d 622; *People v. Cleveland* (2004) 32 Cal.4th 704, 732, 11 Cal.Rptr.3d 236, 86 P.3d 302.)

40 The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard trial courts should use when handling motions challenging peremptory strikes. "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, '[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the *1009 strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, 125 S.Ct. 2410, 2416, 162 L.Ed.2d 129, fn. omitted.)

414243 We review the trial court's ruling on purposeful racial discrimination for substantial evidence. (*People v. McDermott ***506* (2002) 28 Cal.4th 946, 971, 123 Cal.Rptr.2d 654, 51 P.3d 874.) It is presumed that the prosecutor uses peremptory challenges in a constitutional manner. We defer to the court's ability to distinguish "bona fide reasons from sham excuses." (*People v. Burgener* (2003) 29 Cal.4th 833, 864, 129 Cal.Rptr.2d 747, 62 P.3d 1.) As long as the court makes "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*Ibid.*)

We now turn to defendants' contentions regarding the seven prospective jurors. Defendants assert the prospective jurors were subjected to peremptory challenge in violation of *Batson* and *Wheeler.* The trial court disagreed. We will sustain its rulings.

1. Defense Motions

There were four *Batson–Wheeler* motions. The first expressly covered three Black males against whom the prosecutor had exercised peremptory challenges: L.W., L.T., and C.W. (See *People v. Avila* (2006) 38 Cal.4th 491, 549, 552, 43 Cal.Rptr.3d 1, 133 P.3d 1076 [scope of motion affects scope of inquiry into reasons for excusal].) The trial court stated that it saw nothing amounting to a prima facie case of improper group bias, but directed the prosecutor to explain her reasons for the challenges. After hearing these explanations, the court denied the motion without elaboration.

In their second *Batson–Wheeler* motion, defendants expressly challenged the excusals of L.B. and K.B. The trial court found a prima facie case of improper group bias, but denied relief after hearing the prosecutor's reasons. It accepted without elaboration the prosecutor's reasons regarding L.B. With regard to K.B., the court commented that he showed an anti-capital punishment bias throughout the process.

In their third *Batson–Wheeler* motion, defendants expressly challenged the excusal of V.H. The trial court first granted the motion, but changed its mind and denied it the next day. The court did so following an extensive hearing in which the prosecutor insisted that she had no reason or desire to discriminate, and argued that "[no] prosecutor would allow a man like [V.H.] to sit on this jury." The court observed that "all 6 of the People's peremptories have been of male Blacks." The court nonetheless concluded, "I don't see anything that *1010 appears to be inherently racial" in the prosecutor's reasons for excusing prospective jurors, and that the prosecutor had excused V.H. for a "race neutral" reason.

In their fourth *Batson–Wheeler* motion, defendants expressly challenged the excusal of N.S. The trial court denied this motion too, with little discussion, stating, "I accept the prosecution's explanation and reason as valid."

**809 The parties agreed that several Blacks served on the jury. The prosecutor also asserted, in response to the *Batson–Wheeler* motion concerning V.H., that the defense had peremptorily challenged three Black prospective jurors and sought stipulations to the excusal of another three. The foreperson of the jury at the guilt phase was a Black man, and the foreperson of the jury at the penalty phase was a Black woman.

2. Prosecutor's Reasons

We assume solely for purposes of argument that, for each prospective juror, we must proceed to the third step of the *Batson–Wheeler* inquiry, i.e., whether substantial evidence supported the trial court's finding that the prosecution had articulated a permissible, race-neutral reason ***507 for the excusal. (See *People v. Ward* (2005) 36 Cal.4th 186, 200–201, 30 Cal.Rptr.3d 464, 114 P.3d 717.) In each case, it is plain that there was.

44 As noted, the first *Batson–Wheeler* motion expressly challenged the excusals of L.W., C.W., and L.T. Prospective Juror L.W. testified that a half brother had been in and out of jail in Oklahoma since age 15

and was currently in state prison there. L.W. asserted he was once stopped by police on false pretenses. The police cited him for running a red light but he denied having done so. In his view, the police stopped him to see if he might have been driving a stolen car, and the citation was pretextual. He denied that this experience would cause him to tend to disbelieve police testimony.

The prosecutor stated that the juror questionnaire and voir dire of L.W. warranted a peremptory challenge. For example, he "had the brother in the Oklahoma prison. He indicated that his brother was in and out of jail...." Also, L.W. had "a difficult time with the questionnaire" in terms of understanding some of the legal concepts. And he "gave me a bad feeling ... right from the start, especially when he indicated he was ... stopped for running a red light, [and] felt that the police simply used an excuse to stop him because they actually thought he was driving a hot car. And it was definitely my feeling that he thought he was being discriminated against because he was Black. [¶] I did not believe him when he said that he would not hold that against us. Everything about his demeanor ... was very negative. I didn't feel like there was any hope the People had of getting a fair trial" from him.

*1011 On this record, it is apparent that the prosecutor had reason for her expressed skepticism that L.W. would be fair to the People. On this basis, she was entitled to excuse him.

45 C.W. seemed to have trouble hearing two of the trial court's initial questions. Also, voir dire began with C.W.'s admission that he would rather not have been called to the stand. He later explained that he might have to help his disabled daughter-in-law, and that the possibility of having to do so might distract him during trial. In a conflicting response, however, he insisted he could give full attention to the case if on the jury.

C.W. and members of his family had been crime victims, and he felt that the police response to crime reports in general is slow when the victims are poorer. Many years before, he had spent a couple of hours in jail after being arrested for drinking in a night spot after legal hours. The charges were dismissed. One son was once charged with burglary but not convicted (C.W. believed his son was innocent), another son had died of a drug overdose, and his daughter was charged with shoplifting and was convicted. The police had beaten one of his sons in a county facility. None of these incidents, he testified, would affect his ability to be fair in a trial of defendants, including his ability to impose the death penalty if warranted. Finally, C.W. was familiar with the Mount Olive Church or at least the surrounding area, though he was not aware of the murders that had occurred there.

The prosecutor explained that given C.W.'s testimony, he would be unduly reluctant to convict the defendants. "[H]e indicated that he feels the police serve the rich ... better than the poor.... He himself, his son and his daughter have all been busted.... He himself, his son was beaten in custody by police officers. [¶] He is familiar with the area of the Mount Olive Church. He has a **810 concern about having to ***508 go and take care of his son's wife, who is apparently paralyzed. He also indicated that he visited his son in L.A. County Jail, his son's case was thrown out. He felt that his son was innocent. [¶] This would definitely give somebody a feeling that somebody who is in court might well be innocent as well as in occasions where defendants are poor, it would definitely bias them in their favor given his feeling about law enforcement[,] given the fact he and his son were beaten by the police."[10]

Despite C.W.'s contrary assurances, the prosecutor had reason for her expressed skepticism that he would be fair to the People. On this basis, she was entitled to excuse him.

46 L.T. circled an answer on his juror questionnaire that justice was not served in the Rodney King beating case in which police officers were acquitted and *1012 declined to explain why. On voir dire, L.T. stated that he felt that police officers could be both good and bad. A friend of his was once wrongfully accused of starting a fire that was large enough to be seen from a freeway. L.T. commented on then recent events involving Rodney King and Reginald Denny, who was beaten by one or more rioters following the police beating of King. He stated that justice had not been served because the King incident had been treated differently from the Denny incident. He felt that the respective incidents showed that the law applied differently to Blacks than to Whites, now and then.

The prosecutor explained that she challenged L.T. because “he has a very large chip on his shoulder as was evidenced by the fact he felt the King verdict was unjust.... [¶] He feels that the death penalty is imposed more often on Blacks than on Whites. He feels that he got bad treatment from the police. And he was probably the most strident [prospective] juror we heard from yet with respect to the King case and the racial issues involved.” Here again, the prosecutor had reason for her expressed skepticism that a prospective juror would be fair to the People. On this basis, she was entitled to excuse him.[11]

As noted, defendants' second *Batson–Wheeler* motion expressly challenged the excusals of L.B. and K.B.

47 L.B. began voir dire by explaining that his brother was in confinement for a pending robbery charge, even though the prosecution did not have enough evidence to convict him. He testified that the police told their mother that his brother should turn himself in or they would shoot him. His own experiences with police officers had been mixed: “you have some good ones, you [have] some bad ones.” In general, he expressed a willingness to be fair in the case against defendants.

***509 The prosecutor said that L.B.'s answers about his brother and the police showed a hostility to the state that warranted a peremptory challenge. “I could not imagine him possibly being fair in any way in which a defendant who was Black was being tried for a crime.” She also said, “It's obvious that *1013 he feels unhappy about the situation his brother finds himself in.” Despite L.B.'s assurances, the prosecutor had reason for her expressed skepticism that the prospective juror could be fair to the People. She was entitled to excuse him.

48 In his questionnaire, K.B. said that he would find it difficult to serve on a jury in a capital case and could not be objective. Elsewhere on his questionnaire, he suggested **811 that he would always reject the death penalty and vote for life imprisonment without possibility of parole. He “ agree[d] somewhat” that anyone who intentionally kills another should never get the death penalty. He would prefer not to serve on the jury out of “sympathy.”

On voir dire, K.B. testified that although he had expressed reservations about the death penalty on his questionnaire, he was more comfortable with it now, evidently from having observed the voir dire proceedings. He, too, expressed a willingness to be fair in the case against defendants. But the record reflects a rote quality to his answers about his open-mindedness, and the prosecutor began her

questioning of him by commenting that “I feel like sometimes we get to the point where we start programming your responses and people start to try to conform to what everybody else says....” She then asked him if he was disavowing a prior statement that his religious scruples would make it difficult to sit in judgment of another in a capital case. K.B. replied that he did not realize then that the trial court would tell the jury what to do regarding the penalty phase, and the prosecutor explained that his first instinct was correct: the court would not tell the jury what sentence to impose. K.B. gave a vague response, and the prosecutor pressed, “how does that make it easier?” K.B. replied: “I'm just more at ease after listening to everything and after she [the court] said everything, explained everything to us and just listening to her.”

The prosecutor then asked K.B. about two other questionnaire responses: his feelings about the death penalty would interfere with his objectivity at the guilt phase, and he could never see himself voting for death. K.B. essentially disavowed those responses.

The prosecutor stated with regard to K.B., “I just don't believe a word this man said. His questionnaire is so completely down the line anti-death penalty and every single answer is consistent, anti-death, anti-death, ‘I can't be fair,’ anti-death. Then he when questioned says no, everything is fine, everything has changed.”

On this record, it is apparent that the prosecutor had reason for her expressed skepticism that K.B. would be fair to the People. His juror questionnaire showed considerable antipathy toward the death penalty and *1014 suggested that he would automatically vote for life imprisonment without possibility of parole. His answers on voir dire did not persuasively convey a different impression. On this basis, the prosecutor was entitled to excuse him.

As noted, defendants' third *Batson–Wheeler* motion expressly challenged the excusal of V.H.

49 V.H. had recently served on a jury that acquitted someone else of rape. The jury did not believe the victim. V.H.'s son had had trouble with the law at least since age 15 and was currently incarcerated. Despite this, neither was bitter toward the state, and V.H. had encouraged his son to do his time without complaining. He generally ***510 professed an ability to be fair in the case against defendants.

The prosecution explained that she found V.H. “very acceptable” until she learned he had voted to acquit someone on a rape charge. “Unfortunately, it is my feeling that once a juror has had the experience of acquitting a defendant, it does create a certain mind set and the readiness to acquit. It certainly shows that he was able to reject the prosecutor's argument, reject the People's proof and reject the word of a woman. [¶] In this trial, we will have women testifying to the history of abuse by one of the defendants. Their believability and credibility will become crucial with this case.” The prosecutor noted that the defense had properly exercised a peremptory challenge against a prospective juror for having rendered a verdict of death in another case, and “[t]hat's what a peremptory challenge is all about.”

In light of V.H.'s vote to acquit another criminal defendant of rape, rejecting the testimony of a female victim of violence, the prosecutor had reason to be skeptical about V.H.'s willingness to be fair in this

case, in which the testimony of female victims of violence would be crucial. On this basis, she was entitled to excuse him.

**812 50 As noted, defendants' fourth *Batson–Wheeler* motion challenged the excusal of N.S. This individual had a brother in the custody of what is now called the California Department of Corrections and Rehabilitation. His brother would not reveal the nature of the offense, and N.S. did not know what it was. He believed his brother was fairly incarcerated, and that circumstance would not affect N.S.'s ability to be fair in the case against defendants.

N.S. testified that because a prisoner dies in prison whether sentenced to death or to life imprisonment without possibility of parole, he viewed the two penalties as equal. He added that for a Black person a life sentence to prison would be "like death," according to what his brother had told him. He *1015 thought that because Robert Alton Harris (see *People v. Harris* (1981) 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240) was White, his case had gotten better treatment from the courts than a condemned Black man who had been executed "for killing a San Francisco cop. I don't feel he was guilty. They had to drag him away screaming. No one looked into his case after he was convicted. If they did, they probably would have found him innocent." N.S. assured the trial court that despite these views he could be fair to both sides in the trial against defendants.

The prosecutor explained that she believed N.S. "felt the death penalty and life without would be torture.... This is a juror whose beliefs concerning the death penalty are at the very least bizarre, but most likely not fair, I believe, to the People." She also explained that his comments contrasting Robert Alton Harris and the Black condemned prisoner reflected that he "did not feel that Blacks receive justice in the justice system. He does have an agenda. He does not like the death penalty, that reason alone." Earlier, in presenting a challenge for cause against N.S., the prosecutor said, "the truth of the matter is he could not be fair based on his feelings, his racial bias in terms of what he thinks a Black man goes through in prison, and what he thinks might happen if [giving] the death sentence in terms of the possibility of finding later on he was innocent." "[H]e has a clear racial bias in favor of any Black defendant that would prevent him from fairly convicting or sentencing someone to death."

The prosecutor had reason to be skeptical about the willingness of N.S. to convict ***511 defendants and vote for a verdict of death in this case. On this basis, she was entitled to excuse the prospective juror.

Defendants further contend that the prosecution's reasons could hardly be race neutral insofar as the prosecutor commented on the racial attitudes of three prospective jurors: L.W., L.B., and N.S. In particular, defendants insist that it is unconstitutional to exercise peremptory challenges against prospective jurors because they harbor views gleaned from their individual experiences as Black persons or carry attitudes representing viewpoints that predominate or are held more widely in their community than in society at large. Lewis admits that "[t]he prosecutor without a doubt identified factors relating to each of the excluded [prospective] jurors that made them less desirable from her perspective," and that her conduct "does not appear to be a vendetta against black skin per se." But he argues that when "a prosecutor strikes a minority [prospective] juror because [he or she] has in fact had an experience or

expresses an opinion reflective of the minority perspective, the prosecutor cannot constitutionally seize upon that experience or opinion as an 'individualized' reason for striking [him or her] .... even if [his or her] attitude or experience might be ... suggestive of a less conviction-prone attitude than [that of] other jurors from different backgrounds."

5152 *1016 Under *Batson, supra,* 476 U.S. 79, 106 S.Ct. 1712, and *Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, a party cannot *assume* in exercising its peremptories that because a prospective juror belongs to a cognizable minority group, that person holds biased views common to that group, and therefore is undesirable as a juror. (*Batson, supra,* at pp. 86, 91, 96, 97, 99, 106 S.Ct. 1712.) But the prosecutor may excuse prospective jurors, including members of cognizable groups, based on personal, individual biases those individuals *actually **813 express. (Wheeler, supra,* at p. 277 & fn. 18, 148 Cal.Rptr. 890, 583 P.2d 748.) That is so even if the biased view or attitude may be more widely held inside the cognizable group than outside of it.

Batson and *Wheeler* are intended to limit reliance on stereotypes about certain groups in exercising peremptory challenges. Defendants invoke *Batson* and *Wheeler* to preclude the excusal of a member of a cognizable group who expresses personal biases—and thus to foreclose individualized treatment of that prospective juror—if the biases expressed are presumably common to that group. Such an approach stands the law on its head, and promotes the very group stereotyping that *Batson* and *Wheeler* forbid. A party does not offend *Batson* or *Wheeler* when it excuses prospective jurors who have shown orally or in writing, or through their conduct in court, that they personally harbor biased views.

3. Comparative Analysis

53 Defendants further seek to show the pretextual nature of the prosecutor's excusals of the Black prospective jurors by comparing their questionnaires and voir dire responses with those of prospective jurors, both Black and non-Black, whom the prosecutor did not challenge.[12] Defendants ***512 present an array of comparisons among the two groups in an effort to show that they were similarly situated. Oliver emphasizes, though not to the exclusion of other factors, prospective jurors' attitudes toward then recent events involving the Rodney King beating case.

The King beating case lies in the background of the proceedings. On May 4, 1992, the trial court granted Oliver's mistrial motion following the verdicts of acquittal of police officers in that case, which involved the beating of Rodney King, a Black man, and the subsequent "civil unrest in Los Angeles since April 29, 1992," which included a well-publicized assault on Reginald *1017 Denny, a White man, by rioters. On May 7, the court granted Lewis's mistrial motion on the same grounds, and dismissed the original jury venire as to both defendants. Because the King beating case had so recently ended when the new venire was summoned, some prospective jurors mentioned the case in answer to the questions, "What serious criminal case have you followed in the media within the last five years?" and "Do you feel justice was served[?]"

Defendants did not engage in a comparative prospective juror analysis in the trial court. In earlier cases, we have declined to engage in comparative juror analysis for the first time on appeal, stating that such an analysis was unreliable in evaluating the prosecutor's justifications for excusing minority prospective

jurors. (*People v. Box, supra,* 23 Cal.4th 1153, 1190, 99 Cal.Rptr.2d 69, 5 P.3d 130; *People v. Ervin* (2000) 22 Cal.4th 48, 76, 91 Cal.Rptr.2d 623, 990 P.2d 506; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220–1221, 255 Cal.Rptr. 569, 767 P.2d 1047.) Since then, of course, the United States Supreme Court has issued its decision in *Miller–El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (*Miller–El*), which conducts a comparative juror analysis, albeit not on direct appeal.

In *Miller–El,* the United States Supreme Court held that, in the context of a challenge of a Black prospective juror, the defendant had established purposeful discrimination under *Batson, supra,* 476 U.S. 79, 106 S.Ct. 1712, and was entitled to relief on that ground in federal habeas corpus proceedings (28 U.S.C. § 2254). (*Miller–El, supra,* 545 U.S. 231, 235, 125 S.Ct. 2317, 2322.) In so holding, the high court observed: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* **814 third step." (*Id.* at p. 241, 125 S.Ct. at p. 2325.)

Assuming, without deciding, that comparative juror analysis must be undertaken for the first time on appeal in the present case, we conclude that defendants' proffered analysis fails to demonstrate purposeful discrimination.

Defendants urge, in essence, that one of the prosecutor's stated reasons for excusing L.T., who said justice had not been served because the Rodney King incident had been treated differently from the Reginald Denny incident, showed evidence of pretext because the reason applied equally to prospective jurors M.C. (a White man), A.R. (a White woman), M.R. (a Hispanic man), and M.J. (a Black woman), whom the prosecutor did not challenge. They also assert that the prosecutor asked no questions of M.C., A.R., or M.R. about the King beating case. (See *Miller–El, supra,* 545 U.S. 231, 245, 125 S.Ct. 2317, 2328; *id.* at p. 250, fn. 8, 125 S.Ct. at p. 2330, fn. 8 ***513 [failure to engage in meaningful voir dire on a subject a party claims is important suggests the stated concern is pretextual].)

*1018 As will appear, however, none of the foregoing prospective jurors was similarly situated to L.T.[13]

M.C., A.R., M.R., and M.J. mentioned the Rodney King beating trial verdicts on their questionnaires. Unlike L.T., who condemned the trial outcome as the unjust product of a race-based double standard, who circled "no" on the question asking whether justice was served and declined to explain why, and whom the prosecutor accordingly evaluated as "strident ... with respect to the King case," M.C. and A.R. believed that the trial's outcome was a fair result and gave written answers that obviated the need for followup questions on oral voir dire. (See *People v. Huggins* (2006) 38 Cal.4th 175, 235, 41 Cal.Rptr.3d 593, 131 P.3d 995 [failure to ask questions of prospective jurors did not show any impropriety].)[14]

Specifically, M.C. wrote that although he was surprised at the verdict, the jury in the Rodney King case "did its job" in acquitting the accused police officers. He circled "yes" in answer to a question whether justice had been served. A.R. criticized media sources that, in her view, manipulated her emotions in an effort to make the verdict in the King case look "not just." By inference, she felt that it was just. Also, A.R. stated on her questionnaire that her opinions were provisional, i.e., based on incomplete information and *1019 subject to change. A.R. declined to circle **815 either answer to the was-justice-served question and explained, "I really cannot make a judgment [;] I was not in the court listening to

the evidence, even though the media exposed some facts." Their answers were markedly unlike those of L.T.

***514 Also, the questionnaires and voir dire of M.C. and A.R. showed pro-prosecution views that L.T. did not share or shared only in certain respects. In general, during his brief voir dire as an alternate prospective juror, M.C. showed willingness to support the prosecution's position if the evidence warranted it, to be open-minded and fair, and to follow the law. He understood and accepted the concept of accomplice liability, and agreed that a nonshooter could receive the death penalty.[15] A.R. showed a willingness to follow the law and be open-minded and fair to both parties, including the People. She said, for example, "I feel very comfortable with weighing the mitigating and aggravating circumstances involved in the penalty phase." She had no problem with accomplice liability, even if it led to imposing the death penalty on a nonshooter. She had a friend in a district attorney's office.

M.R. circled an answer that justice was not served in the King beating case, but, like A.R., made clear that this was a tentative conclusion based on imperfect information. He wrote that his view of the outcome was based on media accounts and that "[p]erhaps if I knew all the facts or most of the fact [s] I could give a more intelligent answer." M.R. also indicated familiarity with the Reginald Denny beating case but did not opine that justice was not served in that case. M.R.'s responses were thus unlike those of L.T. in significant respects.

Also, the questionnaire and voir dire of M.R. showed pro-prosecution views that L.T. did not share or shared only in certain respects. M.R. showed a willingness to support the prosecution's position if the evidence warranted it, and generally to be fair, open-minded, and follow the law. He understood and accepted the concept of accomplice liability, and agreed a nonshooter could receive the death penalty. Expressing views that strongly contrasted with those of L.T., M.R. wrote on his juror questionnaire, "I feel very confident & comfortable with our Law Enforcement," and opined, "I feel *1020 very strongly about our judicial system. Without it we would be [in a] mess." With regard to the death penalty, he wrote that "the punishment should fit the crime."

As for M.J., because she was Black, even if one of the prosecutor's stated justifications for striking L.T. applied to her, that is not evidence tending to prove purposeful discrimination. (See *Miller–El, supra,* 545 U.S. at p. 241, 125 S.Ct. at p. 2325.) Moreover, although M.J. opined that the police officers in the Rodney King beating case were guilty and that justice was not served, she generally held pro-prosecution, pro-death penalty attitudes. She wrote on her questionnaire, "I believe in the death penalty because I feel if you take a life that your life should be taken also." She added in response to another question on the death penalty, "I just believe that a person will reap what they sow." She would want anyone who murdered one of her family members to receive the death penalty. She appeared to be open-minded, fair, and willing to follow ***515 the law. Viewed as a whole, her attitudes were markedly different from those of L.T., who believed that the justice system was unjust.

In sum, a side-by-side comparison of the prospective jurors in question reveals that they were not "similarly situated." (*Miller–El, supra,* 545 U.S. 231, 248, 125 S.Ct. 2317, 2329.)

54 Defendants further urge in essence that one of the prosecutor's proffered reasons for striking L.W., C.W., L.B., V.H., and N.S., i.e., that they had family members or **816 loved ones with criminal histories, applied equally to Prospective Jurors A.C. (who was Black, and also Hispanic), M.C., V.R. (who was Hispanic), T.F. (who was White), and M.J. But, as will appear, the prospective jurors were not similarly situated.

As stated, A.C. and M.J. were Black, so defendants' attempted comparison is inapposite from the beginning. Even if one of the prosecutor's stated justifications for striking L.W., C.W., L.B., V.H., and N.S. applied to A.C. or M.J., that is not evidence tending to prove purposeful discrimination. (See *Miller–El, supra,* 545 U.S. at p. 241, 125 S.Ct. at p. 2325.)

In any event, a side-by-side comparison of the prospective jurors in question reveals that they were not "similarly situated" (*Miller–El, supra,* 545 U.S. 231, 248, 125 S.Ct. 2317, 2329). A.C. was different in notable respects from the aforementioned prospective jurors whom the prosecutor peremptorily challenged. To be sure, A.C. stated that her brother had a criminal and gang-involvement history, had been in prison for manslaughter, and later was killed in a drive-by shooting, and yet the prosecutor did not peremptorily challenge her.

A.C. stated, however, that her brother had been treated fairly by the law and that she had "no complaint," which would give the prosecutor less reason *1021 to be concerned about a relative's criminal history, and although V.H. and N.S. voiced similar sentiments, L.W., C.W. and L.B. did not. Also, A.C.'s brother had committed the crime 25 to 35 years before she filled out the questionnaire, had been released from prison decades ago, and had died in the drive-by shooting 25 to 30 years before she filled out the questionnaire. Thus, unlike the family members of L.W., L.B., V.H., N.S., and possibly C.W., the criminal history of A.C.'s brother was remote in time. A.C. distanced herself from her brother. She was not close to him, and events involving him were "over with" and "done."

More generally, and of paramount importance from the prosecutor's point of view, A.C. consistently appeared willing to impose the death penalty in a proper case, unlike L.W., C.W., L.B., V.H., and N.S. (hereafter L.W. et al.), and yet to be fair and follow the law. She wrote, "If the person is guilty they should [accept] the punishment the law gives." Her uncle was a sheriff in Louisiana. She had never had any unpleasant experiences with law enforcement officers. She said she would be able to impose the death penalty on a nonshooter in a capital crime under a theory of accomplice liability.

As noted, M.C. was a prospective alternate juror. His brother was serving a 10–year sentence in Michigan for selling cocaine. M.C. offered only mild criticism of his brother's sentence, stating that it "[s]eems ... long...." On voir dire, he said his brother, a habitual offender, was treated fairly. Despite the one superficial commonality in the situations of M.C. and those of L.W. et al., those prospective jurors were not similarly situated because, as stated above, M.C. showed pro-prosecution views that differed from those of the ***516 other prospective jurors in question, and he was an prospective alternate juror.

As for V.R.'s purported similar situation to L.W. et al., the record shows that she also was not similarly situated to those other prospective jurors. To begin with, she was a prospective alternate juror.

To be sure, two of V.R.'s six brothers had convictions for driving under the influence, a relatively minor offense. Nonetheless, V.R. had vigorous pro-prosecution views. She stated her brothers were treated fairly; in fact, she insisted that they were guilty even though she predicted they would deny it. She showed a willingness to follow the law and be open-minded and fair to both parties, including the People, writing on her questionnaire, “I don't believe in an eye for an eye but if evidence shows premeditated guilt I do believe in [the] death penalty.” “When a person plans another['s] death they should think what is going to happen to them.” “I think people should think twice before taking another['s] life. The higher power did not make them judge & jury.” She held these views even though her church opposed capital punishment—a view she flatly rejected. She accepted the concept of accomplice liability. In sum, V.R.'s pro-prosecution views set **817 her apart from L.W. *1022 et al. It is not surprising that the prosecutor did not challenge V.R. She was not similarly situated to the prospective jurors in question whom the prosecutor did challenge.

T.F. was another prospective alternate juror, which set her apart from L.W. et al. Defendants note that T.F.'s former boyfriend had been convicted of driving under the influence two years beforehand and that she had visited him in custody. Defendants complain that the prosecutor asked no questions of T.F. about the conviction.

However, T.F. showed a pro-prosecution attitude that obviated any need to do so. Both in her questionnaire and on voir dire, T.F. emphatically renounced her former boyfriend. She wrote, “I feel that he was a potential danger, not only to himself, but to the public while driving drunk and he deserved what he got.” She said the same on voir dire. On her questionnaire, she wrote, “when a crime has been committed that is so serious, such as taking someone else's life, a punishment must be reached that would stop that person from again committing that crime and also serve justice for the families and victims left behind.” With regard to the death penalty, she wrote, “I am a firm believer in what comes around must go around.” She expressed a general willingness to follow the law and to be fair and open-minded toward both parties, including the People. She believed in the concept of accomplice liability sufficiently to volunteer in writing, “If the person who aids knowingly is doing so and consents to helping—[he or she is] therefore causing a crime,” and she could impose the death penalty on a nonshooter who was an accomplice.

Again, it is not surprising that the prosecutor did not challenge T.F. She was not similarly situated to L.W. et al. The same may be said of M.J., who, as described, held pro-prosecution views, an attitude that set her apart in significant respects from L.W. et al.

Lewis urges that a prospective juror whom the prosecutor did not challenge, T.M., a Black woman, was similarly situated in numerous respects to K.B., whom she did. For example, both had friends in law enforcement, both knew people who had died by violence, and both were employed by well-established businesses. Moreover, T.M., like L.W. et al., had a relative with a criminal history.

***517 As is the case with M.J. and A.C., because T.M. was Black, even if one or more of the prosecutor's stated justifications for striking the other prospective jurors in question applied to her, that is not evidence tending to prove purposeful discrimination. (See *Miller–El, supra,* 545 U.S. at p. 241, 125

S.Ct. at p. 2325.) In any event, in important respects the other prospective jurors *1023 in question were not similarly situated to her. Although T.M.'s brother had been in custody for a drug offense, she did not think he had been treated unfairly, and unlike the other prospective jurors in question, she had pro-prosecution views. She wrote, “Depending upon the nature of the crime I would be inclined to support the death penalty.... I would support the death penalty for a mass murderer for sure.” She had a friend in the Los Angeles County District Attorney's Office. She understood and accepted the concept of accomplice liability. Her views caused the defense to peremptorily challenge her. Thus, the prosecutor could conclude that T.M. was acceptable and not feel the same way about the other prospective jurors.[16]

55 Defendants further urge that S.P. (who was perceived as possibly Hispanic), like V.H., had served on a jury that tried a criminal case, and yet the prosecutor did not peremptorily challenge her or attempt to learn whether her jury voted to acquit the defendant, which was a stated reason for peremptorily challenging V.H. But the two prospective jurors were not similarly situated. The charges in the case in which S.P. participated consisted of trespassing and assault. She expressed a willingness to be fair and open-minded toward both parties, including **818 the People, and was willing to follow the law, except that she would hold the prosecution to a higher standard of proof than beyond a reasonable doubt in a capital case.[17]

Although the prosecutor stated she found V.H. acceptable until she learned he voted to acquit another defendant of rape, and did not inquire about the verdict S.P.'s jury returned, nevertheless the two were not similarly situated. As the prosecutor emphasized, V.H.'s case involved rejecting the allegations of a woman who had been the subject of a violent and felonious assault against her, whereas the case S.P. heard does not appear on this record to have been similarly serious. As described, the prosecutor stated of V.H. that his vote to acquit someone charged with rape “shows that he was able to reject the prosecutor's argument, reject the People's proof and reject the word of a woman. [¶] In this trial, we will have women testifying to the history of abuse by one of the defendants. Their believability and credibility will become crucial with this case.” The prosecutor's concern with prospective jurors who had served on rape trials extended to others. On learning that M.J. had served on a jury trying a rape case, that the jurors disagreed on the verdict, and that the disagreement centered on the alleged victim's credibility as a witness, the prosecutor wanted to know which way M.J. had voted. *1024 Defense counsel objected and the trial court sustained the objection. Nevertheless, the prosecutor asked numerous questions of M.J. concerning the rape case jury on which she had ***518 previously served. On this record, S.P. does not appear similarly situated to V.H.

We emphasize that, unlike the Black prospective jurors whom the prosecutor peremptorily challenged, the unchallenged prospective jurors showed by their questionnaires and voir dire answers that they were comfortable serving on the jury, were open-minded and dedicated to following the law, including possibly imposing the death penalty if the evidence warranted it, gave written answers consistent with their oral voir dire, and did not appear to have difficulty understanding questions. In conclusion, a side-by-side comparison of the Black prospective jurors in question whom the prosecutor peremptorily challenged and those, Black and non-Black, whom she did not reveals that they were not “similarly situated.” (*Miller–El, supra,* 545 U.S. 231, 248, 125 S.Ct. 2317, 2329.) Defendants are not entitled to

relief on the basis of a comparative prospective juror analysis for the first time on appeal, assuming for purposes of discussion that such an analysis is required.[18]

People v. Lewis, 39 Cal. 4th 970, 1008-24 (2006), *as modified (Nov. 1, 2006)*

***JONES* (2011) 51 Cal. 4th 346, 362-69 (2011)**

II. Discussion

A. Prosecutor's Use of Peremptory Challenges

Defendant contends the prosecutor improperly challenged three African–American prospective jurors for racial reasons—two during selection of the *357 seated jurors and one during selection of alternate jurors. We disagree. Although the trial court found that defendant had stated a prima facie case of improper use of peremptory challenges, the record supports its ultimate conclusion that the prosecutor excused the jurors for race-neutral reasons.

1. Factual Background

The record indicates that defendant is African–American; the victims were White. During jury selection, two African–American prospective jurors were excused for hardship on stipulation of both parties. Another African–American prospective juror, M.S., was excused for cause because of her views favoring the death penalty. During voir dire questioning by defense counsel, M.S. stated she could not return a verdict of life if defendant were found guilty of the charged crimes. Under questioning from the prosecutor, she said that, although she favored the death penalty, she could consider a life without parole verdict in an appropriate case. However, on further questioning from the court, she ***14 reiterated that she could not consider a **93 life sentence. Accordingly, defendant challenged her for cause, the prosecutor submitted the matter without argument, and the court granted defendant's challenge.

In selecting the main jury, the prosecutor exercised 16 peremptory challenges. His ninth and 12th challenges were to African–American Prospective Jurors G.G. and N.C. The jury that was ultimately selected, before the selection of alternates, included one African–American. At this point, defendant objected to the peremptory challenges. The prosecutor said he did not have his jury notes with him and was not prepared to state his reasons for his challenges at that time. The court decided to rule on the question after the alternate jurors had been selected. While selecting six alternate jurors, the prosecutor exercised six peremptory challenges, one to an African–American prospective juror, D.L. The last five of these challenges, including D.L.'s, came after defendant had exhausted his peremptory challenges. The six alternates actually selected included one African–American.

Thereafter, out of the presence of the jury, defendant objected to the prosecutor's excusal of the three African–American prospective jurors "under the *Batson* line of cases and the *Wheeler* line of cases." (*Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (*Wheeler*).) When asked to respond, the prosecutor first noted that one African–American juror whom he had rated highly as a possible juror had been excused for cause, and that two other African–American jurors he had also rated highly remained on the jury, one as an alternate. He also stated that he had been reluctant to stipulate to the hardship excusals of

two other *358 African–American prospective jurors because he would have liked to see them on the jury. He then explained his reasons for the peremptory challenges at issue.

Regarding N.C., the prosecutor primarily was concerned with the prospective juror's answer on the juror questionnaire to the question whether he or a close friend or family member had been accused of a crime. N.C. wrote that his son had been so accused. The prosecutor stated, “I think it was attempt murder or murder.” (In fact, N.C. had stated on the questionnaire only that his son had been accused of a crime and that it went to trial. He left blank questions regarding what the crime was and what happened.) The prosecutor explained why this was a concern to him: “When defense counsel kept talking about being falsely accused, I watched him, and his responses troubled me on that. Just watching his body language and his response to that. And I took that in conjunction to [the person N.C. had said had been accused of a crime], which I believed to be his son. [¶] Finally, when the defense attorney asked him ... if he would help [defendant], I saw a pause—a gigantic pause. I could have counted to 25, I think, before he answered that question. And when he finally answered it, I didn't remember what the answer was, but at that point I was sure that it was something he mulled over. And he mulled over it so seriously that he could not be a juror in this case.” The court asked the prosecutor, “So your primary concern there is because a family member had been charged with a serious offense?” The prosecutor responded that the “conjunction” of these factors “pushed [N.C.] over on the scale.”

Regarding G.G., the prosecutor said that one factor was that his adult children were unemployed. That was a concern, but that factor alone “wouldn't have been a final ***15 concern, because he had some other good things going for him. [¶] There was another concern I had with him, and that was that he is in charge of buses that bus in that very area where this crime occurred. And what concerned me about that was, there may be some dispute on timing. [¶] The defense has provided me with a videotape of a route from, I think, the defendant's place to the victim's place, and I was real concerned about his opinions regarding those routes. [¶] Likewise, what may be an issue in the case is how sunlight is in the morning. And because my witness is going to say that this happened at that time of morning before the sun comes up. And I had concerns about this bus driver, as well as other bus drivers, in this particular business. [¶] Finally, when **94 defense counsel talked about scapegoats, and I asked [G.G.] about a scapegoat, at first it appeared to me his response was, ‘Yes, this case could be about a scapegoat,’ even though there had been no evidence at all. That led me to think this particular juror was buying into something that the defense was trying to get across with their voir dire questions. So at that point it was when I finally made up my mind that he wouldn't be an acceptable juror either. [¶] Before that time, I would *359 say he was, in my opinion—despite some strong things, he did have some very strong, sound things that I did like. But that scapegoat area troubled me a lot. I had the belief that he was buying into some sort of defense theory, without hearing any evidence, just based upon the voir dire questioning.”

Regarding D.L., the prosecutor explained that he regarded her “as a close one. And ... the People kicked a lot of jurors that ... I believe were close. [¶] As I saw it, I had good, strong jurors further down the line, and I had to weigh them in my mind against jurors down the line. [¶] [D.L.] had some very, very positive aspects. There were a couple of things that alerted me right away. She left question No. 20 blank. Again, that is the question about ‘Do you know or have anybody in your family that's been accused?’ ... I was

real concerned about her leaving that particular question blank. [¶] She answered another question that concerned me. And again, it wasn't a final thing. It was an additional thing. She mentioned her church was A.M.E. [stated as “African Methodist Episcopal” on the questionnaire], and I assume that it's the A.M.E. church up in LA. I constantly see A.M.E. on television. They are constantly controversial, and I don't particularly want anybody that's controversial on my jury panel. [¶] Another thing that I responded to was, when she was asked about being falsely accused, she almost had a defensive, combined with an overbearing manner. And two things occurred to me: One, she was buying into some of this ‘falsely accused’ business.... But also, at the same time, I have many witnesses. The witnesses are black kids, and they are just kind of rough. And I had the feeling that she would look down upon those kids, and I can't have a juror that does that. [¶] ... And also, at the time that [D.L.] came up—I think that was in the final six-pack, I'll call it—and I had three of my best jurors that I liked best in that same six-pack. And when I saw the defense used up all of theirs, I figured I could gain my best jurors by kicking some of these other jurors who ... I thought were pretty good jurors. Because I was down I think, six to one, which gave me a chance to pick up some very strong jurors, in my mind, such as [two who were actually selected as alternates].”

The prosecutor summarized his thinking: “So that was the thought process with those three particular jurors. I would tell the Court that I had some sort of system. ***16 I rated the ... the two black jurors on the panel as my highest ranking and had no intentions of ever kicking those two jurors.”

When the prosecutor finished explaining his peremptory challenges, the court invited defense counsel to respond. He declined to do so. The court then clarified that it had found that defendant had stated a prima facie case of improper use of peremptory challenges. However, it found, “now having heard from the prosecution, it appears that the reasons that these persons were excluded from the jury was for nonracial purposes and racially neutral purposes.” Accordingly, the court denied defendant's motion.

*360 *2. Analysis*

123 “Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to excuse prospective jurors based on race.... [¶] The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” (*People v. Lenix* **95* (2008) 44 Cal.4th 602, 612–613, 80 Cal.Rptr.3d 98, 187 P.3d 946, fn. omitted (*Lenix*).)

4567 Here, the trial court found that defendant had made a prima facie showing, so the burden shifted to the prosecutor to explain his conduct. “A prosecutor asked to explain his conduct must provide a ‘ “clear and reasonably specific” explanation of his “legitimate reasons” for exercising the challenges.’ [Citation.] ‘The justification need not support a challenge for *cause,* and even a “trivial” reason, if genuine and neutral, will suffice.’ [Citation.] A prospective juror may be excused based upon facial

expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. [Citation.] Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (*Lenix, supra,* 44 Cal.4th at p. 613, 80 Cal.Rptr.3d 98, 187 P.3d 946.)

89 The prosecutor gave a detailed, specific, race-neutral explanation of each of the challenges in question. "At the third stage of the *Wheeler*/ *Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*Lenix, supra,* 44 Cal.4th at p. 613, 80 Cal.Rptr.3d 98, 187 P.3d 946, fn. omitted.)

10111213 The trial court denied defendant's motion, implicitly finding the prosecutor's explanation credible and expressly finding his reasons to be race neutral. "Review of a trial court's denial of a *Wheeler*/*Batson* motion is deferential, examining ***17 only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a *361 prosecutor's justifications for exercising peremptory challenges " 'with great restraint.' " [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and 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 nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' " (*Lenix, supra,* 44 Cal.4th at pp. 613–614, 80 Cal.Rptr.3d 98, 187 P.3d 946.)

As we recognized in *Lenix,* the United States Supreme Court has also emphasized the deference a reviewing court must give to the trial court's determination. " '[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.,* nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie ' "peculiarly within a trial judge's province,' '' [citations], and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]." [Citation.]' " (*Lenix, supra,* 44 Cal.4th at p. 614, 80 Cal.Rptr.3d 98, 187 P.3d 946, quoting *Snyder v. Louisiana* (2008) 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175.) The high court has also "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Snyder v. Louisiana, supra,* at p. 478, 128 S.Ct. 1203.)

14 Relying largely on *People v. Silva* (2001) 25 Cal.4th 345, 385–386, 106 Cal.Rptr.2d 93, 21 P.3d 769, defendant argues that we should not defer to the trial court's **96 ruling because, after hearing from the prosecutor, it simply denied the motion without further discussion, which, defendant contends,

shows that it did not make a sincere and reasoned attempt to evaluate the prosecutor's credibility. We disagree. As we explained in response to a similar argument in *People v. Lewis* (2008) 43 Cal.4th 415, 471, 75 Cal.Rptr.3d 588, 181 P.3d 947, the "court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty." Here, the court asked the prosecutor one question during his explanation. Additionally, it invited defense counsel to comment on the prosecutor's explanation. Defense counsel declined to comment, thus suggesting he found the prosecutor credible. Under the circumstances, the court was not required to do more than what it did.

Additionally, and contrary to defendant's argument, the statistics are not particularly troubling. The prosecutor did peremptorily challenge 60 percent of the African–American prospective jurors who were called into the box—three out of five—and a little less than a third of the non-African-American prospective jurors called into the box—19 out of 62. On the other hand, the prosecutor used three of 22 peremptory challenges against African– ***18 Americans before accepting a jury, including alternates, that contained two African–Americans out of 18. Thus, he challenged African–Americans at a rate only slightly higher than their percentage on the jury. If he had exercised one fewer challenge against African–Americans, he would have challenged them at a rate lower than their percentage on the jury.

151617 These numbers are not nearly as troubling as those in *Snyder v. Louisiana, supra,* 552 U.S. at page 476, 128 S.Ct. 1203, where the prosecutor challenged all five prospective African–American jurors, resulting in none on the actual jury, or in *Miller–El v. Dretke* (2005) 545 U.S. 231, 240–241, 125 S.Ct. 2317, 162 L.Ed.2d 196, where the prosecutor challenged nine of 10 prospective African–American jurors, resulting in only one on the actual jury. Moreover, the prosecutor told the court that he would have liked to have had on the jury the two African–American jurors who were excused for hardship, as well as M.S., who was excused for cause due to her views on the death penalty. We cannot evaluate the credibility of the prosecutor's statement regarding the jurors excused for hardship, although the trial court could do so. Even on a cold record, however, we can evaluate the credibility of the prosecutor's statement regarding M.S. Under questioning from defense counsel, M.S. stated she could not return a verdict of life if defendant were found guilty. The prosecutor then engaged in questioning obviously designed to do what is called "rehabilitate" the juror—that is, to elicit answers that would make her not subject to a challenge for cause. He elicited the response that she *could* consider a verdict of life in an appropriate case. The prosecutor's effort to rehabilitate M.S. ultimately failed, and the court excused her for cause at defendant's request, but the record shows that the prosecutor wanted to keep her on the jury. Thus, the prosecutor clearly wanted on the jury three of the six African–American jurors who were excused for cause or were called into the box—50 percent—and said he wanted on the jury five of the eight who were excused for hardship or cause or were called into the box—62.5 percent.

18 All of these are probative circumstances, although they are not dispositive, especially considering the small numbers involved. (*People v. Cleveland* (2004) 32 Cal.4th 704, 734, 11 Cal.Rptr.3d 236, 86 P.3d 302.) In *Cleveland,* the question was whether a prima facie case existed, but these circumstances are also relevant to the third stage of the *Wheeler*/*Batson* inquiry. "While the fact that the jury included

members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in *363 exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection." (*People v. Turner* (1994) 8 Cal.4th 137, 168, 32 Cal.Rptr.2d 762, 878 P.2d 521, quoted in *People v. Stanley*(2006) 39 Cal.4th 913, 938, fn. 7, 47 Cal.Rptr.3d 420, 140 P.3d 736.) **97 The prosecutor's acceptance of the jury containing an African–American and of the alternates containing another one, as well as his desire to have had as jurors the three who were excused for hardship or cause, together with the fact that he challenged only three African–Americans out of 22 total peremptory challenges, "strongly suggests that race was not a motive in his challenge [s]." (*Lenix, supra,* 44 Cal.4th at p. 629, 80 Cal.Rptr.3d 98, 187 P.3d 946.)

19 But "a single race-based challenge is improper." (*People v. Cleveland, supra,* 32 Cal.4th at p. 734, 11 Cal.Rptr.3d 236, 86 P.3d 302.) Accordingly, we examine defendant's specific factual arguments, while keeping in mind the overall picture before ***19 us. He challenges the prosecutor's explanation as to each of the three prospective jurors in question.

20 Regarding G.G., defendant claims the prosecutor's concern that G.G.'s children were unemployed was not sincere or legitimate because he did not question him about this concern. Here, there were lengthy juror questionnaires supplemented by substantial voir dire questioning of the prospective jurors by the court and the parties. Thus, this is hardly a case of perfunctory examination of prospective jurors. (*People v. Bell* (2007) 40 Cal.4th 582, 598–599, fn. 5, 54 Cal.Rptr.3d 453, 151 P.3d 292.) The prosecutor questioned G.G. extensively about defense counsel's "scapegoat" theory. It is not suspicious that the prosecutor did not further question him about all other concerns. A party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge. Concern over unemployed children is race neutral, and the record gives no reason to believe this explanation was not sincere.

Defendant also challenges the prosecutor's explanation that he was concerned that G.G. was "buying into" the defense's scapegoat theory. He notes that G.G. *said* all the right things in this regard. But the record shows that, while questioning the jury panel generally about the scapegoat theory, the prosecutor noticed some reaction from G.G. that concerned him and caused him to question him further. Thus, it appears the prosecutor's concern was based on G.G.'s body language. "Experienced trial lawyers recognize what has been borne out by common experience over the centuries. There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." (*Lenix, supra,* 44 Cal.4th at p. 622, 80 Cal.Rptr.3d 98, 187 P.3d 946.)

*364 Relying on *Snyder v. Louisiana, supra,* 552 U.S. 472, 128 S.Ct. 1203, defendant argues that a reviewing court may not rely on body language to uphold a challenge. In *Snyder,* the prosecutor gave one nondemeanor reason for challenging a particular prospective juror (Brooks) and also said the juror appeared nervous. The high court concluded for many reasons that the nondemeanor reason was pretextual. The court then held that when the only nondemeanor reason given (i.e., the only reason a reviewing court can evaluate) is shown to be pretextual, a reviewing court should not uphold the

challenge solely because the prosecutor also gave a demeanor reason, at least not when the trial court does not specifically cite that demeanor in its ruling. (*Id.* at pp. 479, 485, 128 S.Ct. 1203.) The court explained that under the circumstances of that case, including the "absence of anything in the record showing that the trial judge credited the claim that Mr. Brooks was nervous," and the pretextual nature of the other reason the prosecutor cited, "the record does not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone." (*Id.* at p. 485, 128 S.Ct. 1203.) But the high court never suggested that demeanor is not a valid basis for a peremptory challenge. Here, the record does not show that the nondemeanor reasons the prosecutor gave were pretextual.

Defendant asks us to engage in comparative juror analysis regarding the prosecutor's concern that G.G. was a bus driver in the **98 area. The prosecutor said he "had concerns about this bus driver [i.e., G.G.], ***20 as well as other bus drivers." Defendant claims this concern was insincere because the prosecutor did not similarly challenge two White jurors who were also bus drivers in the area. Defendant did not raise this issue at trial, but he does so for the first time on appeal. Despite problems inherent in conducting comparative juror analysis for the first time on appeal—including the difficulties of comparing what might be superficial similarities among prospective jurors and trying to determine why the prosecutor challenged one prospective juror and not another when no explanation was asked for or provided at trial—both the high court and this court have done so on request. (See *Snyder v. Louisiana, supra,* 552 U.S. 472, 128 S.Ct. 1203; *Miller–El v. Dretke, supra,* 545 U.S. 231, 125 S.Ct. 2317; *Lenix, supra,* 44 Cal.4th at p. 622, 80 Cal.Rptr.3d 98, 187 P.3d 946.)[2]

21 *365 Defendant's proffered comparative juror analysis is not very probative in this case. The prosecutor candidly stated he was concerned about all of the bus drivers, but he was not asked why he did not peremptorily challenge the others. The record strongly suggests race-neutral reasons why he chose to accept the others despite his concern that they were bus drivers. For example, the two bus drivers the prosecutor did not challenge said they were "strongly in favor" of the death penalty. G.G. rated himself as only "moderately in favor" of the death penalty. An attorney must consider many factors in deciding how to use the limited number of peremptory challenges available and often must accept jurors despite some concerns about them. A party concerned about one factor need not challenge every prospective juror to whom that concern applies in order to legitimately challenge any of them. "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Lenix, supra,* 44 Cal.4th at p. 624, 80 Cal.Rptr.3d 98, 187 P.3d 946.) The comparison here provides no basis to overturn the trial court's ruling.

2223 Defendant argues that the prosecutor did not cite G.G.'s views on the death penalty as a reason for challenging him, and that we are limited to considering the reasons the prosecutor gave. We agree with defendant that in judging why a prosecutor exercised a particular challenge, ***21 the trial court and reviewing court must examine only the reasons actually given. "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (*Miller–El v. Dretke, supra,* 545 U.S. at p. 252, 125 S.Ct.

2317.) But we disagree with defendant's further argument that we may not consider reasons not stated on the record for accepting *other* jurors. The prosecutor was not asked why he did not challenge the other bus drivers. When the trial court finds a prima facie case of improper use of peremptory challenges, the prosecutor must state the reasons for those challenges "and **99 stand or fall on the plausibility of the reasons he gives." (*Ibid.*) But no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why *other* jurors were *not* challenged. One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges. When asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must *366 not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors.

24 Regarding N.C., defendant argues that the prosecutor misstated N.C.'s answer to the question about his son having been accused of a crime. We agree that the record does not support the prosecutor's statement: "I think it was attempt murder or murder." The prospective juror did not specify on the questionnaire what the crime was. Although relevant, this circumstance is not dispositive. No reason appears to assume the prosecutor intentionally misstated the matter. He might have based what he thought on information he obtained outside the record. Or he may simply have misremembered the record. The prosecutor had to keep track of dozens of prospective jurors, thousands of pages of jury questionnaires, and several days of jury voir dire, and then he had to make his challenges in the heat of trial. He did not have the luxury of being able to double-check all the facts that appellate attorneys and reviewing courts have. Under the circumstances, it is quite plausible that he simply made an honest mistake of fact. Such a mistake would not show racial bias, especially given that an accurate statement (that N.C. wrote that his son had been accused of, and tried for, a crime but left the rest of the answer blank) would also have provided a race-neutral reason for the challenge.

The purpose of a hearing on a *Wheeler*/*Batson* motion is not to test the prosecutor's memory but to determine whether the reasons given are genuine and race neutral. "Faulty memory, clerical errors, and similar conditions that might engender a 'mistake' of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associated with impermissible reliance on presumed group bias." (*People v. Williams* (1997) 16 Cal.4th 153, 189, 66 Cal.Rptr.2d 123, 940 P.2d 710.) This "isolated mistake or misstatement" (*People v. Silva, supra,* 25 Cal.4th at p. 385, 106 Cal.Rptr.2d 93, 21 P.3d 769) does not alone compel the conclusion that this reason was not sincere.

Defendant also asks us to compare the prosecutor's challenge to N.C. with his failure to challenge another juror who stated on the questionnaire that her brother had been tried in Okinawa in 1978 for assault and battery. But being accused of a crime in Japan is different from being accused in this country. The other juror's questionnaire ***22 suggested she favored the death penalty more strongly than did N.C. Moreover, the other juror apparently did not present the other concerns the prosecutor expressed about N.C. Just as with G.G., this comparative juror analysis for the first time on appeal has little probative value.

25 Defendant also argues the prosecutor misstated the circumstances surrounding N.C.'s pause before he answered defense counsel's question *367 whether he would favor defendant. We disagree. Defense counsel asked N.C. whether he "would have a tendency of trying to protect [defendant] on a case like this because you're black." N.C. answered, "Yeah. In a way." On further questioning, N.C. said this answer related to earlier questioning regarding defendant's hairstyle, and he later stated he would not protect defendant just because he was African–American. The prosecutor asked N.C. why he had hesitated so long before answering whether he would protect defendant. N.C. did not deny he hesitated, but responded, "I was just trying to get it right," and reiterated that he could be fair to the prosecution. This further questioning dispelled any reason to excuse the juror for *cause,* but it did not automatically dispel any legitimate concern the prosecutor might have had. N.C.'s original statement that he might try to protect defendant may, as defendant now **100 argues, have been based on a misunderstanding. But the circumstance that a prospective juror hesitates over whether he would favor (or try to protect) one side provides a valid reason for the opposing side to use a peremptory challenge out of caution. A peremptory challenge is not a challenge for cause but may be exercised whenever a legitimate reason appears for a party to worry whether that juror will be impartial.

Defendant also claims the prosecutor's concern about N.C.'s "body language" in response to defense counsel's talk about someone being falsely accused was not credible. He notes that no one directly asked N.C. about this point. But this is exactly the sort of reliance on body language that the trial court, but not a reviewing court, may and must evaluate. Defendant also claims the reliance on body language was insufficient because the prosecutor did not go on to describe exactly what the body language was. But an explanation need not be that specific. The prosecutor's overall explanation regarding N.C. was clear and reasonably specific. We see no reason to overturn the trial court's finding that the stated reasons for this challenge were sincere and race neutral.

26 Regarding D.L., defendant challenges the prosecutor's reasons on several grounds, none convincing. The prosecutor candidly stated that he found her a "close" call because she had some good qualities. But he excused her (and several others) because he believed he had even better potential jurors who had not yet been called, and defendant had already exhausted his peremptory challenges. This explanation is plausible and race neutral.

2728 Defendant claims the prosecutor's concern that she was a member of the African Methodist Episcopal Church—which he assumed was the one in Los Angeles (D.L.'s questionnaire indicated she had lived in Los Angeles, was currently working in Los Angeles, and had been working there for seven years)—was itself discriminatory. But the prosecutor did not excuse her, as defendant claims, just because she belonged to a largely African–American *368 church but because this particular church was, in his view, "constantly controversial," and he did not "particularly want anybody that's controversial on my jury panel." Defendant also contends this explanation constituted impermissible discrimination ***23 based on religious affiliation. He did not object on that basis at trial and may not do so for the first time on appeal. (*People v. Cleveland, supra,* 32 Cal.4th at p. 734, 11 Cal.Rptr.3d 236, 86 P.3d 302.) Moreover, the prosecutor did not excuse her because of her religious views but because he believed she belonged to a controversial organization.

Defendant also claims that the prosecutor's "feeling that she would look down upon those kids," whom he described as "kind of rough" "black kids," was itself impermissible racial stereotyping. But the record shows that the prosecutor was concerned that *this particular prospective juror* might look down on his witnesses—due possibly to her "overbearing manner"—not that *all* African–Americans would look down on rough, youthful African–American witnesses. Defendant also argues that the prosecutor's concern about D.L.'s failure to answer question No. 20 was insincere because he asked her no questions about it. Again, a party need not inquire into every possible concern that party may have regarding a prospective juror.

Defendant also challenges the validity of the prosecutor's concern that D.L. might be "buying into some of this 'falsely accused' business." But the concern was based on her "defensive" and "overbearing manner." Again, the trial court must, but a reviewing court cannot, evaluate this explanation, and we must defer to the trial court's determination. Defendant also asks us to compare the prosecutor's challenge to D.L. with his failure to challenge two White jurors about whom, he claims, the prosecutor should have had similar concerns. Any such comparison proves nothing for several reasons. First, defendant asks us to make a false comparison. The other two jurors were part of the originally chosen jury. D.L. was being considered as an alternate. When the prosecutor had to decide whether to challenge D.L., it was too late to challenge either of the other two jurors. In deciding about D.L. (and others among the alternates), the prosecutor felt he had the luxury of challenging good **101 jurors in the hope of obtaining even better ones. Thus, even if we (or the prosecutor at trial) were to view D.L. as more favorable to the prosecution than either of the other two, the prosecutor never had a choice between D.L. and them. Moreover, the record gives no indication the other two had body language comparable to what concerned the prosecutor about D.L. Finally, the other two's answers on other points, for example, their stronger views in favor of the death penalty, suggested reasons to keep them, but not D.L., on the jury even if the prosecutor was concerned about them in this one respect.

Finally, defendant disagrees with the Attorney General's argument that the prosecutor legitimately relied on the circumstance that challenging D.L. gave *369 him the "chance to pick up some very strong jurors," such as two who later became alternate jurors. Defendant asks us to compare D.L. with the two alternate jurors the prosecutor specifically mentioned, who identified themselves as "White" and "Caucasian (Portuguese)," respectively. He argues that D.L. was a stronger prosecution juror than those two. But the record suggests reasons the prosecutor could sincerely have believed the two would be stronger prosecution jurors than D.L. For example, one of the alternate jurors stated on the juror questionnaire that he was "moderately in favor" of the death penalty. Additionally, he stated that if "the defendant is found guilty of taking a life then his life should end," and expressed strong agreement with the statement that "[a]nyone who kills another person should always get the death penalty," explaining that "the person has taken a ***24 life." The second alternate juror stated that he was strongly in favor of the death penalty. D.L. said she was moderately in favor of the death penalty and disagreed somewhat with the statement that "[a]nyone who kills another person should always get the death penalty." Defendant cites other statements of these jurors and makes various arguments to support his view that the prosecutor should have considered D.L. to be a stronger prosecution juror than the other

two, but he provides no reason for this court to conclude that the trial court was compelled to find insincere this portion of the prosecutor's explanation for challenging D.L.

29 In sum, “a prosecutor, like any party, may exercise a peremptory challenge against anyone, including members of cognizable groups. All that is prohibited is challenging a person *because* the person is a member of that group.” (*People v. Cleveland, supra,* 32 Cal.4th at p. 733, 11 Cal.Rptr.3d 236, 86 P.3d 302.) The record here shows that the prosecutor exercised his peremptory challenges to obtain a jury as favorable to his side as possible (just as defendant presumably exercised *his* peremptory challenges to obtain a jury as favorable to *his* side as possible), and not to eliminate African–Americans for racial reasons. This case presents no exceptional circumstances requiring us to overturn the trial court's ruling. (See *Snyder v. Louisiana, supra,* 552 U.S. at p. 477, 128 S.Ct. 1203.)

People v. Jones, 51 Cal. 4th 346, 362-69 (2011)

***LEWIS* (2008) 43 Cal. 4th 415, 468-82**

D. Jury Selection Issues

1. Prosecution's peremptory challenges

During jury selection, defendant's counsel made four separate motions for a mistrial based on *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, challenging the prosecutor's use of peremptory challenges to remove five Black prospective jurors and prospective ***634 alternate jurors from the panel. The trial court denied each motion after listening to the prosecutor's reasons for the strikes. The trial court also rejected defendant's *Wheeler* motion challenging the prosecutor's use of peremptory challenges to remove young people from the jury. The jury that tried defendant included two Black jurors, one of whom served as the foreman at the guilt phase. The jury also included one Hispanic juror, who served as the foreman at the penalty phase.

*469 Defendant now contends that the prosecutor's use of peremptory challenges to remove Black, Hispanic, and young persons from the jury violated his rights under the Fourteenth Amendment to the United States Constitution and article I, section 16 of the California Constitution. (See *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *People v. Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748.)

30 It is well settled that "[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds'—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution." (*People v. **987 Avila, supra,* 38 Cal.4th at p. 541, 43 Cal.Rptr.3d 1, 133 P.3d 1076, quoting *People v. Wheeler, supra,* 22 Cal.3d at pp. 276–277, 148 Cal.Rptr. 890, 583 P.2d 748.) "Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (*People v. Avila, supra,* 38 Cal.4th at p. 541, 43 Cal.Rptr.3d 1, 133 P.3d 1076, citing *Batson v. Kentucky, supra,* 476 U.S. at p. 88, 106 S.Ct. 1712.)

31 When a defendant moves at trial to challenge the prosecution's use of peremptory strikes, 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.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129, fn. omitted; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 475–477, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175; *Miller–El v. Dretke* (2005) 545 U.S. 231, 239, 125 S.Ct. 2317, 162 L.Ed.2d 196.)

3233 "[T]he critical question in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller–El v.*

Cockrell (2003) 537 U.S. 322, 338–339, 123 S.Ct. 1029, 154 L.Ed.2d 931.) The credibility of a prosecutor's stated reasons for exercising a peremptory challenge "can be measured by, among other factors ... how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Id.* at p. 339, 123 S.Ct. 1029.)

3435 The existence or nonexistence of purposeful racial discrimination is a question of fact. (See *Miller–El v. Cockrell, supra,* 537 U.S. at pp. 339–340, 123 S.Ct. 1029.) *470 When the trial court has made a " 'sincere and reasoned attempt' " to evaluate the prosecutor's race neutral explanations for his exercise of peremptory strikes, we review the trial court's ruling ***635 on the question of purposeful discrimination under the deferential substantial evidence standard. (*People v. McDermott* (2002) 28 Cal.4th 946, 971, 123 Cal.Rptr.2d 654, 51 P.3d 874, quoting *People v. Silva* (2001) 25 Cal.4th 345, 385–386, 106 Cal.Rptr.2d 93, 21 P.3d 769; see also *People v. Huggins* (2006) 38 Cal.4th 175, 227, 41 Cal.Rptr.3d 593, 131 P.3d 995.)

Because different considerations apply to each group that defendant contends was improperly excluded, we examine each group separately below.

a. Black prospective jurors

i. Prospective Jurors C.S. and P.B.

36 Defendant made his first *Wheeler* motion[11] after the prosecutor peremptorily challenged Prospective Jurors C.S., a Black man, and P.B., a Black woman. Without stating whether it had found a prima facie case, the trial court asked "Mr. Urgo [prosecutor]?" The prosecutor explained that his reasons for dismissing C.S. and P.B. were "based entirely on their views on the death penalty." After hearing argument from defense counsel, the trial court denied the motion.

37 Before addressing whether substantial evidence supports the trial court's ruling, we address a preliminary matter. After defendant made his *Wheeler* motions as to Prospective Jurors C.S. and P.B. (as well as S.F. and G.W., discussed below) and explained the basis for each motion, the trial court solicited an explanation of reasons from the prosecutor without stating whether or not it had found a prima facie case. As to Prospective Juror R.W., the prosecutor volunteered his **988 reasons without waiting for the trial court to ask. Here, "[b]y requesting the prosecutor to explain his reasons for these challenges, the trial court impliedly found that defendant had established a prima facie case." (*People v. Hayes* (1990) 52 Cal.3d 577, 605, 276 Cal.Rptr. 874, 802 P.2d 376; see also *People v. Arias* (1996) 13 Cal.4th 92, 135, 51 Cal.Rptr.2d 770, 913 P.2d 980; *People v. Fuentes* (1991) 54 Cal.3d 707, 716–717, 286 Cal.Rptr. 792, 818 P.2d 75.) Contrary to the Attorney General's contention, this is not a case like *People v. Bittaker* (1989) 48 Cal.3d 1046, 259 Cal.Rptr. 630, 774 P.2d 659, where we concluded that the trial court had not impliedly found a prima facie case. In *Bittaker,* after soliciting the prosecutor's response, the trial court expressly found that a prima facie *471 case had not been established. (*Id.* at pp. 1091–1092, 259 Cal.Rptr. 630, 774 P.2d 659.) Here, by contrast, "nothing in the record suggests" that the trial court had not found a prima facie case. (*People v. Hayes, supra,* at p. 605, fn. 2, 276 Cal.Rptr. 874, 802 P.2d 376.)

38 Moreover, by proffering his reasons for excusing R.W., the prosecutor rendered moot the question whether a prima facie case existed. (See *Hernandez v. New York* (1991) 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 [“Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot”].) We proceed to the second and third steps of the *Batson/Wheeler* inquiry.

Defendant does not dispute that the prosecutor met his burden at the second step of articulating a race-neutral explanation for each of the peremptory strikes defendant challenged. (See ***636 *Johnson v. California, supra,* 545 U.S. at p. 168, 125 S.Ct. 2410; *Purkett v. Elem* (1995) 514 U.S. 765, 767–768, 115 S.Ct. 1769, 131 L.Ed.2d 834.) Defendant argues, however, that the trial court erred at the third step by finding that the prosecutor's reasons for excusing these prospective jurors were genuine and not pretextual. In this regard, defendant asserts that we should not defer to the trial court's findings because that court did not make a “sincere and reasoned attempt” to evaluate the credibility of the prosecutor's proffered reasons, but rather denied each motion without any comment or discussion. (See *People v. Silva, supra,* 25 Cal.4th at pp. 385–386, 106 Cal.Rptr.2d 93, 21 P.3d 769; *People v. Hall* (1983) 35 Cal.3d 161, 167–168, 197 Cal.Rptr. 71, 672 P.2d 854.)

We disagree. The trial court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty. (*People v. McDermott, supra,* 28 Cal.4th at p. 980, 123 Cal.Rptr.2d 654, 51 P.3d 874; *People v. Williams* (1997) 16 Cal.4th 153, 189–190, 66 Cal.Rptr.2d 123, 940 P.2d 710.) Moreover, the trial court was not required to question the prosecutor or explain its findings on the record because, as we will explain, the prosecutor's reasons were neither inherently implausible nor unsupported by the record. (*People v. Silva, supra,* 25 Cal.4th at p. 386, 106 Cal.Rptr.2d 93, 21 P.3d 769.) Under these circumstances, we apply the usual substantial evidence standard. (*People v. McDermott, supra,* at p. 980, 123 Cal.Rptr.2d 654, 51 P.3d 874; *People v. Williams, supra,* at pp. 189–190, 66 Cal.Rptr.2d 123, 940 P.2d 710.)

39 The prosecutor explained that he struck Prospective Juror C.S. because C.S. “preferred the reform approach rather than vote for death.” Substantial evidence supports the conclusion that this reason was credible. On *472 his questionnaire, C.S. wrote that he was not a strong supporter of the death penalty. In response to a question about how he felt about the death penalty, C.S. wrote: “I don't agree or disagree with the death penalty[.] [T]ry to reform that person reather [*sic*] than the death penalty.” His answers to several other questions emphasized the possibility of reform. When the prosecutor asked about those responses during voir dire, C.S. stated: “I think that you could be reformed, yes.” Although C.S. also stated that he felt he could make the decision **989 between life imprisonment without parole and the death penalty if asked to do so, on balance the record provides substantial support for the trial court's finding that the prosecutor reasonably was concerned that C.S. might be reluctant to impose the death penalty. A prospective juror's feelings about the death penalty are reasonably related to trial strategy (see *Miller–El v. Cockrell, supra,* 537 U.S. at p. 339, 123 S.Ct. 1029) and are a legitimate race-neutral reason for exercising a peremptory challenge (see *People v. Ledesma* (2006) 39 Cal.4th 641, 678,

47 Cal.Rptr.3d 326, 140 P.3d 657; *People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9, 21 Cal.Rptr.2d 705, 855 P.2d 1277).

Defendant asserts that a comparison of C.S.'s responses with the responses of non-Black jurors whom the prosecutor did not excuse demonstrates that the prosecutor's reasons were pretextual. The United States Supreme Court has instructed that such a comparative analysis may be a useful tool in proving purposeful discrimination: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination ***637 to be considered at *Batson's* third step." (*Miller–El v. Dretke, supra,* 545 U.S. at p. 241, 125 S.Ct. 2317; see also *Snyder v. Louisiana, supra,* 552 U.S. at pp. 482–486, 128 S.Ct. at pp. 1211–1212.)

In recent cases, we have assumed without deciding that comparative juror analysis is appropriate for the first time on appeal at the third step of the *Batson/Wheeler* analysis. (*People v. Stevens* (2007) 41 Cal.4th 182, 196, 59 Cal.Rptr.3d 196, 158 P.3d 763; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1017–1024, 47 Cal.Rptr.3d 467, 140 P.3d 775; *People v. Ledesma, supra,* 39 Cal.4th at pp. 679–680, 47 Cal.Rptr.3d 326, 140 P.3d 657; *People v. Avila, supra,* 38 Cal.4th at p. 546, 43 Cal.Rptr.3d 1, 133 P.3d 1076; *People v. Huggins, supra,* 38 Cal.4th at pp. 232–235, 41 Cal.Rptr.3d 593, 131 P.3d 995; *People v. Guerra* (2006) 37 Cal.4th 1067, 1106, 40 Cal.Rptr.3d 118, 129 P.3d 321.) We do the same here. In doing so, we bear in mind that "the question is not whether we as a reviewing court find the challenged prospective jurors similarly situated, or not, to those who were accepted, but whether the record shows that the party making the peremptory challenges honestly believed them not to be similarly situated in legitimate respects." (*People v. Huggins, supra,* at p. 233, 41 Cal.Rptr.3d 593, 131 P.3d 995.)

Defendant points to two non-Black jurors whom the prosecutor did not challenge who, like C.S., wrote on their questionnaires that they were not *473 strong supporters of the death penalty and who mentioned the role of rehabilitation. Unlike C.S., however, neither of those jurors stressed the importance of rehabilitation. J.A. stated in response to a question about the costs of imprisonment that "[t]here may be a possibility of rehabilitation to help others in prison." And in response to a question about what government can do to solve the crime problem, M.K. suggested "programs to rehabilitate."[12] In contrast, in response to questions about whether the death penalty would be warranted in particular situations, C.S. repeatedly stated that he "strongly disagreed" with the statement because of the possibility of reform. In light of these responses, the prosecutor reasonably could have believed that J.A.'s and M.K.'s views on rehabilitation and reform were not similar to C.S.'s. Thus, the prosecutor's failure to challenge them does not undermine the credibility of his stated reason for exercising a peremptory challenge against C.S.

The prosecutor struck Prospective Juror P.B. because she initially indicated she felt unable to sit on a death penalty case and because in her questionnaire she wrote she was unsure how she felt about the death penalty. The record supports the trial court's implied finding that these reasons were credible. On her questionnaire, P.B. wrote she was not a strong supporter of the death penalty and answered "not sure" in response to questions regarding whether the death penalty would always be warranted in certain circumstances and to the question, **990 "Tell us how you feel about the death penalty." On

voir dire, when the prosecutor asked the panel, “Is there anyone here now who feels that they just could not sit on a death penalty case, they do not want to make that decision,” P.B. volunteered, “I have to admit I'm not sure?” When questioned a few minutes later, she said: “I could probably do it, but you know, it is just—right now I wouldn't be sure, but if I had to, I would.” These facts support the trial court's assessment that the prosecutor's stated race-neutralreasons ***638 for peremptorily challenging P.B. were genuine.

A comparative analysis again does not aid defendant. Defendant does not claim that any of the non-Black sitting jurors, alternates or prospective jurors whom the prosecutor did not strike volunteered, in response to a question to the panel, that they felt they might not be able to sit on a death penalty jury. Accordingly, the prosecutor reasonably could have believed that his proffered reason for striking P.B. did not apply just as well to any other juror.

ii. Prospective Juror R.W.

40 Defendant made another *Wheeler* motion after the prosecutor used a peremptory challenge to strike Prospective Juror R.W., a Black woman. *474 Without prompting by the trial court, the prosecutor volunteered his reasons for excusing R.W.: “She seemed to have been educated, as most of the jurors, as to the exact answers that will keep her on the jury, and I think the best as to what she said originally, she said that she is not a strong supporter of death on [questionnaire question No. 3]. She said that everyone is entitled to live, the death question [No. 6], and death [question No. 11], she indicates that it is not always the answer. [¶] I think when the time comes to it, she could not impose the death penalty, regardless as to what she said in open court and that is why I kicked her.” The trial court denied defendant's *Wheeler* motion.

R.W.'s questionnaire responses support the prosecutor's assessment that she had scruples about the death penalty. R.W. wrote she was not a strong supporter of the death penalty. Asked to explain her feelings on the death penalty, she wrote: “It depends on the circumstances. I would have to know the crimes involved.” In answer to a question about whether the death penalty helps society, she wrote: “In a way yes and no. Yes because others may see what can happen to them if they commit such a crime. And no because everyone is entitled to life.” R.W. “agreed somewhat” that the death penalty should always be imposed for intentional murder and when the defendant intentionally killed more than one person in separate incidents, but in the former situation she “would need to know the circumstances involved.” Asked whether the death penalty was always warranted in the case of a murder during the course of a burglary and sexual attack, she wrote she “agreed somewhat” because the “death penalty is not always the answer.” She strongly disagreed that “convicted murderers should be swiftly executed.” On balance, these answers reflect some hesitation about the death penalty, and the prosecutor reasonably could have believed they reflected R.W.'s true feelings and undermined her assurance on voir dire that she would not automatically vote for life imprisonment without possibility of parole.

Nothing in the record causes us to doubt the sincerity of the prosecutor's assessment. Defendant points to R.W.'s questionnaire responses that he asserts reflect a stance favorable to the prosecution. For example, R.W. believed that criminal sentences should be harsher. Both her fiancé and her uncle were in

law enforcement, and she had been a victim of crime and was fearful of being victimized again. She described crimes that "deserve" the death penalty as intentional murder, killing children, and "killing someone to where they are unrecognizable." None of these expressed feelings was inherently in conflict with the prosecutor's assessment that R.W. might be hesitant to impose the death penalty in this case, which did not involve child victims or mutilation. R.W. also wrote in her questionnaire that she would expect the defendant to testify. Her written explanation, however, reflected a defense orientation; she stated, ***639 "I feel they should be able to tell their own side." And on voir dire, she assured defense counsel that she **991 would not hold it against a defendant if he or she did not testify. In sum, R.W. did not express *475 leanings so favorable to the prosecution that the prosecutor could not honestly believe that she was hesitant about the death penalty.

Defendant further argues that a comparative analysis shows that the prosecutor's reasons for striking Prospective Juror R.W. were pretextual. He points to 14 non-Black jurors and prospective jurors whom the prosecutor did not strike who, like R.W., wrote on their questionnaires they were not strong supporters of the death penalty. But the prosecutor reasonably could have felt that eight of these 14 panelists would be more willing than R.W. to impose the death penalty, given their views about its social value. Thus, unlike R.W. (who, in response to the question about whether the death penalty helps society, answered "yes and no" because "everyone is entitled to life"), seven of these panelists (K.F., C.H., D.S., M.H., R.S., M.S., and H.D.) stated unequivocally in their questionnaires that they believed the death penalty helps society in one or more ways, such as by deterring crime, incapacitating the offender, saving the taxpayers money, or maintaining social order. The other panelist (G.P.) did not believe the death penalty helped society, but only because it was not used frequently enough to have any deterrent value. The prosecutor's failure to excuse these eight panelists thus provides no evidence that his peremptory challenge against R.W. was based on her race.

Regarding the other six non-Black jurors and prospective jurors defendant identifies whom the prosecutor did not strike and who were not strong death penalty supporters, their overall responses reflected more pro-death-penalty views than R.W.'s. D.N. wrote that "there is a place for the death penalty"; that there was "no other option" but the death penalty for some "horrendous" crimes; that someone who kills more than one person in separate incidents should get the death penalty because that person "has no respect for human life"; and that convicted murderers should be swiftly executed. R.P. previously had served as a juror on a death penalty case in which a verdict was reached, and stated on voir dire that he had no problem with how the judicial system worked in that case. P.M. wrote on her questionnaire that her support of the death penalty was 7 on a scale of 1 to 10, in part because "I see no need for us to pay to house someone in prison for life"; she believed that convicted murderers should be swiftly executed; and she strongly agreed that a person who kills more than one person on separate occasions should always receive the death penalty (although she retreated somewhat from that view on voir dire). J.A. stated on her questionnaire that she strongly agreed that a person who kills more than one person in separate incidents should always get the death penalty and that convicted murderers should be swiftly executed because "if a person has been given the death penalty I see no reason to wait." M.K. stated that she would lean in favor of the death penalty for a person who kills more than one person on separate occasions. J.G. stated on her questionnaire that she was in favor of the death

penalty but would have to “be sure the circumstances of the crime warranted it,” and that she believed *476 serial killers should get the death penalty. On the whole, the prosecutor reasonably could have believed that these six prospective and selected jurors would be more favorably disposed toward the death penalty than R.W., so his failure to excuse them ***640 does not support an inference that his excusal of R.W. was based on her race.[13]

41 Finally, defendant contends that the prosecutor's failure to ask R.W. any questions on voir dire and his exercise of a peremptory challenge against her immediately after passing her for cause reflect a “predetermined intention to challenge her based on her race.” The United States Supreme Court has noted that a party's failure to **992 engage in meaningful voir dire on a topic the party says is important can suggest the stated reason is pretextual. (*Miller–El v. Dretke, supra,* 545 U.S. at pp. 246, 250, fn. 8, 125 S.Ct. 2317.) Here, the prosecutor's failure to explore R.W.'s views on voir dire is somewhat troubling. The prosecutor, however, had the opportunity to observe R.W.'s demeanor during questioning by the trial court and defense counsel, and, as explained above, no other of the 14 identified non-Black, nonstricken jurors or prospective jurors expressed quite the level of hesitation about the death penalty on his or her questionnaire that R.W. did. Therefore, the prosecutor's failure to question her on voir dire does not undermine the trial court's conclusion that the prosecutor's stated reasons for striking her were not pretextual.

iii. Prospective Juror S.F.

42 Defendant made another *Wheeler* motion after the prosecutor used a peremptory challenge to strike Prospective Juror S.F., a Black woman. Counsel for codefendant Machuca joined and noted that the prosecutor several times had accepted a jury that included S.F. Turning to the prosecutor, the trial court asked: “All right. Any comment?” The prosecutor explained that although he had been willing to accept a jury that he was “not totally pleased with” on a number of occasions, since he now had many more peremptory challenges available than the defense did he had decided to use those challenges to dismiss jurors that he was “not totally comfortable with.” He explained that he struck S.F. because she had a degree in psychology, had taken many classes in psychology and sociology, and had been a correctional counselor who evaluated committed felons. The prosecutor expressed concern that S.F. would rely on her educational and occupational background when *477 evaluating anticipated psychiatric testimony at the penalty phase and would not be inclined to vote for the death penalty. The trial court denied defendant's *Wheeler* motion.

The record supports the trial court's conclusion that the prosecutor's stated reasons were credible. S.F. was a Parole Agent III for the State of California who in her questionnaire described her previous occupation as “Correctional counselor—Diagnostic evaluations from a sociological standpoint on committed felons” in a men's prison. In response to a question about whether she had taken courses in the behavioral sciences, she wrote: “Many, many, many, B.S. Psychology, minor Sociology. You name it, I probably took it to get the degree.” In light of this educational and occupational background, the prosecutor reasonably could have been concerned that S.F. would rely on her background and would be disinclined to vote for the death penalty.

Defendant contends that the prosecutor's failure to peremptorily challenge several ***641 White jurors and prospective jurors with backgrounds similar to S.F.'s undermines the credibility of the prosecutor's stated reason for peremptorily challenging S.F. But none of the jurors or prospective jurors whom the prosecutor did not challenge had the extensive educational background in psychology and sociology, nor the occupational background evaluating prisoners, that S.F. had.[14] Accordingly, the prosecutor's failure to peremptorily challenge these panelists does not support an inference that the prosecutor's challenge to S.F. was pretextual.

Defendant points out that the prosecutor asked no questions of S.F. on voir dire before peremptorily challenging her. But the prosecutor **993 reasonably could have believed that voir dire would do nothing to clarify S.F.'s questionnaire responses, which were unambiguous and themselves sufficient to support the exercise of a peremptory challenge. (See *People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1018, fn. 14, 47 Cal.Rptr.3d 467, 140 P.3d 775.) Moreover, the prosecutor exercised a peremptory challenge against C.G., a White prospective juror with an occupational background similar to S.F.'s. C.G. was an intake *478 counselor at the California Institute for Men, responsible for preparing social evaluations of incoming prisoners. Assuming comparative analysis is appropriate for the first time on appeal, the prosecutor's peremptory challenge of C.G. supports an inference that his challenge to S.F. was not pretextual. (See *People v. Wheeler, supra,* 22 Cal.3d at p. 282, 148 Cal.Rptr. 890, 583 P.2d 748 [prosecutor may sustain burden of justification by, among other things, demonstrating "that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds"].) The totality of the circumstances thus supports the trial court's conclusion that the prosecutor's stated reasons for striking S.F. were not pretextual.[15]

***642 *479 *iv. Prospective Alternate Juror G.W.*

43 Defendant made a final *Wheeler* motion after the prosecutor used a peremptory challenge to strike Prospective Alternate Juror G.W., a Black woman. Again without stating whether it had found a prima facie case, the trial court stated: "All right. Mr. Urgo [prosecutor]?" The prosecutor responded: "She was dismissed for her views on the death penalty, your Honor. She stated **994 so clearly in the questionnaire that she could never vote for the death penalty, yet she stated here that just because she heard the charges read that she could do it and she also indicated she could give up her religious beliefs to do it. [¶] I frankly don't believe that someone who is as adamant as she was in saying that she could never vote for the death penalty can change like that." The trial court denied defendant's *Wheeler* motion.

The record supports the credibility of the prosecutor's assertions. Although G.W. did not state in her questionnaire that she could never vote for the death penalty,[16] her answers to several questions revealed strong religious and other scruples about the death penalty. She wrote she was not a strong supporter of the death penalty. In response to the question "tell us how you feel about the death penalty," she wrote: "I feel that you are just as bad as the person that did the crime. This person may repent if he get life in prison. David in the Bible did. He killed someone." She answered "no" to a question about whether the death penalty helps society. In response to a question about whether there are any murders that do not deserve the death penalty, G.W. wrote: "I do not think anyone deserve the

death penalty. Person may repent if he ***643 get life in prison." When asked whether certain crimes always warrant the death penalty, she answered "Person will be punish more if he stay in prison for life," and "[t]his person may have a chance to repent while he is in prison." And she stated that life imprisonment without the possibility of parole was a more severe punishment than the death penalty.

During voir dire questioning by the trial court, Prospective Juror G.W. asserted that she could be fair and impartial and could consider both sentencing alternatives, death or life imprisonment without the possibility of parole, if the case reached the penalty phase. When defendant's counsel asked G.W. about her questionnaire answers, G.W. explained: "Well, at the time I was answering those questions I didn't have my glasses and I did the best I could. If I had taken it—been able to take it home, it would have been *480 different." She then assured counsel that she could impose the death penalty if she felt it was appropriate after hearing the evidence. During questioning by the prosecutor, G.W. said that she recalled her questionnaire responses, but that being in court and listening to the judge read the charges had caused her to change her mind about whether she could impose the death penalty. She said she did not think she would "hold by those same [religious] beliefs" that caused her to write the answers she did in the questionnaire. In light of G.W.'s strongly expressed opposition to the death penalty in her questionnaire and her dubious explanation on voir dire of her purported change of mind, the record supports the trial court's conclusion that the prosecutor's skepticism about G.W.'s ability to impose the death penalty was genuine.

A comparative analysis again does not aid defendant. He points to no sitting or prospective juror whom the prosecutor did not challenge who expressed religious scruples against the death penalty as strong as those G.W. expressed. Accordingly, the prosecutor honestly could have believed that no panelist was similar to G.W.

44 Finally, we note that at the end of selection of the jurors, and before selection of the alternate jurors, three Black jurors—R.D., A.R., and J.Y.—were seated in the jury box.[17] The presence of these jurors on the panel is " 'an indication of the prosecutor's good faith in exercising his peremptories.' " (*People v. Huggins, supra,* 38 Cal.4th at p. 236, 41 Cal.Rptr.3d 593, 131 P.3d 995, quoting *People v. Snow* (1987) 44 Cal.3d 216, 225, 242 Cal.Rptr. 477, 746 P.2d 452.) For all of these reasons, the trial court did not err in finding that defendant did not establish purposeful discrimination in the prosecutor's exercise of peremptory challenges.

**995 *b. Hispanic prospective jurors*

After defendant's counsel made his *Wheeler* motion with respect to Prospective Juror R.W., but before the trial court had ruled, the following exchange took place:

"Mr. Tyre [Machuca's counsel]: Your Honor, I would join in that. The other reason also is I think his other peremptories, besides the Blacks, I believe that there is [*sic*] three to four Hispanics that he has also kicked off, so it appears to be a systematic excusal of minorities.

"Mr. Coleman [defendant's counsel]: [J.L.] was one, the last Spanish that he kicked out.

*481 “Mr. Gornik [Hubbard's counsel]: I join in the motion and if it hasn't been explicitly stated, [R.W.], who was just released, ***644 is Black and three of the four defendants are Black.”

The prosecutor responded by making a *Wheeler* motion of his own contesting defense counsel's use of peremptory challenges against Hispanics. He then explained his reasons for challenging R.W. The trial court intervened, saying, “Well, let's handle one thing at a time.” After ascertaining that there would be no further argument regarding R.W., the trial court denied that motion. Defendant's counsel then joined the prosecutor's *Wheeler* motion regarding Hispanics. When codefendant Machuca's counsel stated, “We have no reasons, your Honor,” the prosecutor withdrew his *Wheeler* motion. The court then took a recess. After the recess, voir dire continued without further discussion of the *Wheeler* motions.

45 Defendant now contends that the trial court erred in denying his *Wheeler* motion as to Hispanic Prospective Jurors C.P. and J.L. We disagree. The failure to articulate clearly a *Wheeler/Batson* objection forfeits the issue for appeal. (*People v. Gallego* (1990) 52 Cal.3d 115, 166, 276 Cal.Rptr. 679, 802 P.2d 169.) Here, it is not clear that defendant made a *Wheeler* motion regarding the prosecutor's excusal of Hispanics. Machuca's counsel's comment that the prosecutor had “kicked” Hispanics appears to have been intended to bolster the argument that the prosecutor's excusal of R.W. violated *Wheeler* because there was “systematic excusal of minorities.” Defendant's counsel's comment—“[J.L.] was one, the last Spanish that he kicked out”—hardly clarified the matter, and it was followed immediately by Hubbard's counsel's comment that three of the four defendants were Black. In context, these comments seem intended to support the defense motion regarding Blacks, not as a separate motion regarding Hispanics.

4647 Even assuming defendant properly made a *Wheeler/Batson* motion regarding the prosecutor's excusal of Hispanics, we conclude the issue is not preserved for appeal. Failure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171, 64 Cal.Rptr.2d 892, 938 P.2d 950.) The situation here is analogous. When defense counsel mentioned the prosecutor's excusal of Hispanic prospective jurors, the trial court was confronted with simultaneous argument on two other *Wheeler* motions: the defense motion regarding R.W., and the prosecutor's motion regarding defense excusals of Hispanics. Under the circumstances, defense counsel at least had an obligation to remind the court that it had not yet addressed the prosecutor's excusal of Hispanics, so that the court would have the opportunity to correct the alleged error. Here, the record does not reflect whether the *482 trial court ignored counsel's comments about Hispanics, or simply forgot about them. Either way, it was incumbent on counsel, if they wished to pursue the matter, to secure a ruling from the trial court. The failure to do so forfeits the claim.

c. Young prospective jurors

48 Defendant argues that the trial court erroneously denied his motion challenging the prosecutor's use of peremptory challenges to exclude young persons from the jury. As defendant acknowledges, neither this court nor the United States Supreme Court has ever held that young persons are a cognizable group under *Batson* or *Wheeler.* Indeed, existing authority holds, to the contrary, that young persons are not a cognizable group. (E.g., **996 ***645 *People v. McGhee* (1987) 193 Cal.App.3d 1333, 1351–1352, 239

Cal.Rptr. 28 [young persons not a cognizable class under *Wheeler*]; *United States v. Pichay* (9th Cir.1993) 986 F.2d 1259, 1260 [young persons not a cognizable group for purposes of equal protection challenge to petit jury under *Batson*]; see also *People v. Ayala* (2000) 23 Cal.4th 225, 257, 96 Cal.Rptr.2d 682, 1 P.3d 3 [" 'California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group within the meaning of [the representative cross-section] rule' "].) We decline to extend *Batson* and *Wheeler* beyond their current parameters.

People v. Lewis, 43 Cal. 4th 415, 468-82 (2008)

CLARK (2011) 52 Cal. 4th 856, 903-08

2. Prosecutor's exercise of peremptory challenges

Defendant contends the trial court erred in denying two defense motions under *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, which asserted that the prosecutor impermissibly used peremptory challenges to remove four African–American prospective jurors based on their race. We find no error.

27 " 'Under *Wheeler, supra,* 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748], "[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group *904 bias—that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds'—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.]" [Citation.] "Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment. [Citations.]" ' " **289 (*People v. Taylor* (2010) 48 Cal.4th 574, 611, 108 Cal.Rptr.3d 87, 229 P.3d 12.)

28 In ruling on a motion challenging the exercise of peremptory strikes, the trial court follows a three-step procedure. "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, '[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.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129, fn. omitted (*Johnson*).)

29 Under *Johnson,* a defendant establishes a prima facie case "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson, supra,* 545 U.S. at p. 170, 125 S.Ct. 2410; see also *People v. Taylor, supra,* 48 Cal.4th at p. 614, 108 Cal.Rptr.3d 87, 229 P.3d 12.) In *Johnson,* the United States Supreme Court concluded that California courts had been applying too rigorous a standard in deciding whether defendants made out a prima facie case of discrimination. (*Johnson, supra,* at pp. 166–168, 125 S.Ct. 2410.) When, as here, it is unclear from the record whether the trial court employed this disapproved-of standard, " 'we review the record independently to "apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis.' [Citations.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 342, 60 Cal.Rptr.3d 209, 160 P.3d 84, italics omitted.)

The prosecutor exercised his fifth and sixth peremptory challenges against two African–American women, J.J. and S.B. When the prosecutor used his 15th challenge to excuse an African–American man, A.M., defense counsel moved for mistrial under *Wheeler*/*Batson*. Counsel complained that the prosecutor had excused three of the four African–American prospective ***280 jurors seated in the jury box, and argued that the only reason they were dismissed was because they, like defendant, were African–American. The court denied the motion on the ground the defense failed to state a prima facie

case. It found “no particular racial bias” in the prosecutor's exercise of the three peremptory challenges in question, and noted the prosecutor had used a total *905 of 15 challenges so far. It also observed the prosecutor had not challenged an African–American woman who was then in the jury box. Although the court made clear it found no prima facie case, it asked the prosecutor to make a record of the reasons for his excusals, in the event a “higher authority” disagreed with its conclusion. After the prosecutor's explanations, the court repeated its ruling denying the *Wheeler*/*Batson* motion.

The following day, after the prosecutor challenged another African–American prospective juror, T.C., the defense again moved for mistrial under *Wheeler*/*Batson*. Counsel noted T.C. was the only African–American to come into the jury box since the first motion. The court again found no prima facie case, but again invited the prosecutor to explain the basis of his challenge. After the prosecutor's explanation, the court repeated its ruling denying the motion. One African–American woman, J.C., remained on the panel. She ultimately served on the guilt phase jury but was excused for hardship during the sanity phase.

30 Defendant rests his claim of error on the statistical frequency with which the prosecutor excused African–Americans from the jury pool. He points out that at the time the court heard the second *Wheeler*/*Batson* motion, the prosecutor had used 20 percent of his total peremptory challenges (four of 20) to excuse 80 percent of the eligible African–Americans (four of five), even though African–Americans comprised only 5 percent of the jury panelists not excused for cause.[11]

**290 Standing alone, defendant's statistics do not raise an inference of discrimination. Notably, African–Americans comprised 5 percent of the jury pool but represented nearly 10 percent of the selected jury. (See *People v. Hartsch* (2010) 49 Cal.4th 472, 487–488, 110 Cal.Rptr.3d 673, 232 P.3d 663 [the defendant's statistics showed Whites were actually underrepresented on the panel as compared with African–Americans].)

31323334 Nor does the totality of the relevant facts provide a basis for inferring that the prosecutor challenged the four prospective jurors in question because of their race. *Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, describes the type of evidence that may be useful in determining whether a defendant has carried his or her burden of showing an inference of discriminatory excusal. Such an inference may arise, for example, when the record shows the prosecutor “struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group.” (*Id.* at p. 280, 148 Cal.Rptr. 890, 583 P.2d 748.) Also relevant is whether the excused jurors have little in *906 common other than their membership in the group, and whether the prosecutor engaged in “desultory voir dire” or no questioning at all. (*Id.* at p. 281, 148 Cal.Rptr. 890, 583 P.2d 748.) Although a “defendant need not be a member of the excluded group,” it is significant ***281 if he is and if, in addition, his victims are members of the group to which the majority of the remaining jurors belong. (*Ibid.;* see also *People v. Kelly* (2007) 42 Cal.4th 763, 779–780, 68 Cal.Rptr.3d 531, 171 P.3d 548.) “[T]he burden rests on the defendant to ‘ “show[ ] that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” ’ [Citations.]” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1292, 82 Cal.Rptr.3d 265, 190 P.3d 616.)

35 In the present case, the fact that defendant and the prospective jurors in question are African–American supports an inference of discrimination. (*Wheeler, supra,* 22 Cal.3d at p. 281, 148 Cal.Rptr. 890, 583 P.2d 748.) In addition, although defendant points to no definitive evidence regarding the race or ethnicity of the seated jurors, we shall assume for argument that most of them were White, like the victims. (*People v. Taylor, supra,* 48 Cal.4th at p. 615, 108 Cal.Rptr.3d 87, 229 P.3d 12.) However, other circumstances appearing in the record dispel any inference of discriminatory motive. Although the prosecutor ultimately excused four of the five African–Americans called to the jury box, there was no discernable pattern from which to infer discrimination. (*People v. Bonilla, supra,* 41 Cal.4th at p. 343, fn. 12, 60 Cal.Rptr.3d 209, 160 P.3d 84.) Notably, the prosecutor passed J.J. and S.B. during several rounds of peremptory challenges before finally excusing them. Moreover, the prosecutor repeatedly passed J.C., an African–American woman who ultimately served as a juror in the guilt phase.[12] (See *People v. Cornwell* (2005) 37 Cal.4th 50, 69–70, 33 Cal.Rptr.3d 1, 117 P.3d 622 [no inference of bias in excusing one of two African–American prospective jurors, given that the other African–American prospective juror was passed repeatedly by the prosecutor and sat on the jury].) Although the circumstance that the jury included a member of the identified group is not dispositive (*People v. Snow* (1987) 44 Cal.3d 216, 225–226, 242 Cal.Rptr. 477, 746 P.2d 452), "it is an indication of good faith in exercising peremptories" and an appropriate factor to consider in assessing a *Wheeler*/*Batson* motion. (*People v. Turner* (1994) 8 Cal.4th 137, 168, 32 Cal.Rptr.2d 762, 878 P.2d 521; *People v. Howard* (1992) 1 Cal.4th 1132, 1156, 5 Cal.Rptr.2d 268, 824 P.2d 1315.) Further, defendant points to nothing in the record suggesting that the four challenged jurors shared no characteristics other than their race. And although he asserts the prosecutor asked few questions of J.J. before excusing her, that factor is of limited significance in a case such as this one, in which the prosecutor reviewed the jurors' **291 questionnaire answers and was able to observe their *907 responses and demeanor, first, during extensive individual questioning by the court and later, during group voir dire. (*People v. Taylor, supra,* 48 Cal.4th at pp. 615–616, 108 Cal.Rptr.3d 87, 229 P.3d 12.)

36 In addition, the record of voir dire suggests race-neutral reasons for excusing each of the four jurors in question. J.J. indicated in her questionnaire and during questioning that she was an administrative law judge. The prosecutor reasonably could believe that, given J.J.'s profession, she might consciously or unconsciously exert undue influence during the deliberative process, or that fellow jurors would ascribe to her a special legal expertise. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924–925, fn. 6, 3 Cal.Rptr.3d 769, 74 P.3d 852 [noting ***282 that a prosecutor properly may excuse a prospective juror in the belief that his or her occupation renders him or her ill-suited to serve as a juror on the case]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667–668, 61 Cal.Rptr.2d 860 [prosecutor stated race-neutral grounds for excusing a prospective juror who had a history of working in various legal departments].)

37 Similarly, the record shows race-neutral reasons for excusing S.B., who reported on her questionnaire that she had taken college courses in psychology, and expressed the view during voir dire questioning that someone who commits murder must have "something wrong with them in their mind." (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124–1125, 124 Cal.Rptr.2d 373, 52 P.3d 572 [prosecutor's belief that the prospective juror would place too much weight on the opinion testimony of mental health experts justified the peremptory challenge]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790–791, 56

Cal.Rptr.2d 824 [that a prospective juror's educational background and experience in psychiatry or psychology might cause him to favor the defense constituted a valid explanation for his excusal].)

3839 A.M. explained during voir dire that he had no problem with the death penalty but believed that facts could be manipulated and anyone could be "hoodwinked" by corrupt attorneys. A prospective juror's distrust of the criminal justice system is a race-neutral basis for his excusal. (*People v. Turner, supra,* 8 Cal.4th at pp. 170–171, 32 Cal.Rptr.2d 762, 878 P.2d 521.)

4041 Finally, the record discloses ample race-neutral reasons for excusing T.C. He wrote on his questionnaire that he was a licensed pastoral counselor. During voir dire questioning, he indicated he had a master's degree in theological studies and was working toward a Ph.D. Two Sundays a month he and his wife led religious services for the homeless and also helped them obtain social service benefits. Peremptory challenges based on a juror's experience in counseling or social services is a proper race-neutral reason for excusal. *908 (*People v. Trevino* (1997) 55 Cal.App.4th 396, 411–412, 64 Cal.Rptr.2d 61.) Further, T.C. indicated that serving on the jury might be problematic because he recently had been promoted to a management position in the company where he worked as a truck driver, and he was scheduled in the following month to begin 15 weeks of training. The court asked T.C. whether the impending promotion would cause him to be distracted if he were selected as a juror. T.C. replied that he felt he "could be conscious of what's happening around here," but emphasized how much the promotion meant to him and that it was "a great step" for him in his career. Although the court found T.C.'s promotion obligations an insufficient ground on which to excuse him for hardship, the prosecutor reasonably could have believed T.C.'s divided loyalties to jury service and career would impair his ability to give the former his full attention. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 994, 95 Cal.Rptr.2d 377, 997 P.2d 1044 [the risk of detriment to the prospective juror's employment if he was required to serve on a lengthy trial was a proper race-neutral ground for his excusal].)

In sum, based on our independent review of the entire record of voir dire, we conclude the record fails to support an inference that the prosecutor excused the four jurors in question because of their race. Rather, the record reflects race-neutral grounds for the peremptory challenges at issue. The trial **292 court did not err ***283 in denying defendant's *Wheeler*/ *batson* motions.[13]

People v. Clark, 52 Cal. 4th 856, 903-08 (2011)

***LOMAX* (2010) 49 Cal. 4th 530, 569-78**

2. *Peremptory Challenges*

Defendant, who is African–American, urges he was deprived of his constitutional rights to equal protection and a representative jury because the prosecutor exercised peremptory challenges to exclude African–Americans from the jury. (*People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (*Batson*).)

4243 The three-step inquiry governing *Wheeler/Batson* claims is well established. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 612–613, 80 Cal.Rptr.3d 98, 187 P.3d 946; see also *Johnson v. California* (2005) 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129.)

44 *570 Three African–American prospective jurors were among the original twelve. The prosecutor used his first peremptory ***135 challenge to strike one of these, Prospective Juror Gloria Y. He then struck three jurors who were not African–American and accepted the panel five times before excusing another African–American from the original group, Prospective Juror Robbie W. Later, the prosecutor used his 10th peremptory challenge to excuse the remaining African–American from the original panel, Prospective Juror Darnell F. As the parties exercised their challenges, six additional African–Americans were seated in the jury box. Of these six, the prosecutor struck three: Prospective Jurors Ricky W., Jonathan S., and, **410 after the court denied defendant's *Wheeler* motion, Stephanie M.–H.[13]

Defense counsel moved to quash the venire after the prosecutor used his 14th peremptory challenge to excuse a fifth African–American panelist. The court found that defendant had made a prima facie showing of discrimination "based on the numbers" and asked for the prosecutor's response. After the prosecutor gave his reasons for excusing each prospective juror, the court stated that it had evaluated these reasons and consulted its own notes on the excused panelists. The court remarked, "In each case I have myself seen reasons why there might be an excusal or a challenge...." The court ruled that there had been "no systematic exclusion of jurors based on race" and denied the motion.

The People do not dispute that a prima facie showing was made. Accordingly, we focus on the third *Wheeler/Batson* prong and examine whether the African–American panelists were excused due to intentional discrimination. (See *People v. Mills* (2010) 48 Cal.4th 158, 174, 106 Cal.Rptr.3d 153, 226 P.3d 276; *People v. Lenix, supra,* 44 Cal.4th at p. 613, fn. 8, 80 Cal.Rptr.3d 98, 187 P.3d 946.)

4546 "At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted *571 trial strategy.'

(*Miller–El* [*v. Cockrell* (2003)] 537 U.S. [322,] 339 [123 S.Ct. 1029, 154 L.Ed.2d 931].) In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. (See *Wheeler, supra,* 22 Cal.3d at p. 281 [148 Cal.Rptr. 890, 583 P.2d 748].)" (*People v. Lenix, supra,* 44 Cal.4th at p. 613, 80 Cal.Rptr.3d 98, 187 P.3d 946, fn. omitted.)

474849 "We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges ' "with great restraint." ***136 ' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and 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 nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 864, 129 Cal.Rptr.2d 747, 62 P.3d 1.) The trial court here made such a "sincere and reasoned" evaluation when it considered the prosecutor's response and reviewed its own notes about the excused panelists. Accordingly, its decision must be upheld on appeal if it is supported by substantial evidence. (*People v. Lenix, supra,* 44 Cal.4th at p. 613, 80 Cal.Rptr.3d 98, 187 P.3d 946.)

505152 We have reviewed the record surrounding each of the challenges. In his opening brief, defendant urges us to conduct a comparative juror analysis. He argues a comparison of African–American panelists who were challenged with panelists of other races who were allowed to serve on the jury would reveal that the prosecutor's reasons for striking the African–Americans were pretextual. **411 [14] "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to *572 serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller–El v. Dretke, supra,* 545 U.S. at p. 241, 125 S.Ct. 2317.) We have recently explained that "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*People v. Lenix, supra,* 44 Cal.4th at p. 622, 80 Cal.Rptr.3d 98, 187 P.3d 946.) Although we must consider comparative juror analysis evidence raised for the first time on appeal (see *ibid.*), our focus is limited to the responses of stricken panelists and seated jurors that have been identified by defendant in his claim of disparate treatment. (*Id.* at p. 624, 80 Cal.Rptr.3d 98, 187 P.3d 946.) Having reviewed the record and conducted a comparative analysis where required, we conclude substantial evidence supports the trial court's ruling.

53545556 In responding to the *Wheeler*/*Batson* motion, the prosecutor explained that, in general, he was seeking the ***137 strongest possible jurors for the penalty phase. Accordingly, he was wary of keeping prospective jurors who expressed a neutral philosophical position toward the death penalty. He stated, "I want people who are going to be able to work together and people who are going to take a strong enough position with regard to the death penalty. If it's something that they either don't believe in or [are] very weak in their feelings, I think we are going to have a real difficult time when it comes to penalty phase." Defendant protests that rejecting a juror based on the juror's expressed "neutrality is tantamount to finding a juror unacceptable because he or she is unbiased." This is a flawed comparison. As we have observed in the past, a juror's decision whether to impose the death penalty has moral and

normative underpinnings. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643, 276 Cal.Rptr. 874, 802 P.2d 376.) A juror's philosophical position on capital punishment is directly relevant and may factor into penalty phase decisionmaking, but the same cannot be said of bias. A juror is, of course, obligated to set aside all biases and view the evidence impartially. Moreover, even when jurors have expressed neutrality on the death penalty, "neither the prosecutor nor the trial court [i]s required to take the jurors' answers at face value." (*People v. Boyette* (2002) 29 Cal.4th 381, 422, 127 Cal.Rptr.2d 544, 58 P.3d 391.) If other statements or attitudes of the juror suggest that the juror has "reservations or scruples" about imposing the death penalty, this demonstrated reluctance is a race-neutral reason that can justify a peremptory challenge, even if it would not be sufficient to support a challenge for cause. (*People v. Panah* (2005) 35 Cal.4th 395, 441, 25 Cal.Rptr.3d 672, 107 P.3d 790; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 678, 47 Cal.Rptr.3d 326, 140 P.3d 657; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202–1203, 47 Cal.Rptr.2d 800, 906 P.2d 1068.)

Defendant next claims a comparative juror analysis reveals the prosecutor's "neutrality" **412 rationale was a pretextual basis for excluding African–American panelists. He notes that Juror No. 9, who was Mexican–American, and Juror No. 11, who was Caucasian, also checked the questionnaire response stating *573 that they were philosophically neutral on the death penalty. However, when asked to describe their opinion, both of these jurors expressed more favorable views toward capital punishment. Juror No. 9 said she felt the death penalty "is needed to fit certain crimes." Juror No. 11 said he had not given the death penalty much thought, "except the laws [seem] to favor the person before he/she is put to death." These jurors could also be considered prosecution oriented for other reasons. Juror No. 9 worked as a fingerprint analyst for the sheriff's department and was married to a police officer. Juror No. 11 was 41 years old and had been married for 22 years. Before moving to Los Angeles, he was very active in community organizations in his Iowa hometown. He fit the profile of the mature, stable juror the prosecutor said he was seeking.

57 Defendant also questions the validity of the neutrality rationale because, during voir dire, the prosecutor asked only one of the excused panelists (Jonathan S.) about his views on the death penalty. A failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual. (See *Miller–El v. Dretke, supra,* 545 U.S. at pp. 244–245, 125 S.Ct. 2317; *People v. Lewis* (2008) 43 Cal.4th 415, 476, 75 Cal.Rptr.3d 588, 181 P.3d 947; *People v. Huggins* (2006) 38 Cal.4th 175, 234–235, 41 Cal.Rptr.3d 593, 131 P.3d 995.) ***138 Defendant's assertion here, however, is misleading. The attorneys were not permitted to question prospective jurors directly, but instead had to ask the trial court to inquire into areas of special concern. With the exception of Prospective Juror Jonathan S., the prosecutor expressed multiple concerns about the panelists he excused, and substantial evidence in the record supports the trial court's conclusion that these race-neutral justifications were genuine. (See *People v. Lewis,* at pp. 476–478.)

Prospective Juror Gloria Y.

5859 Prospective Juror Gloria Y. said she was "neither for nor against the death penalty." The prosecutor was skeptical of this professed neutrality and explained he was trying to exclude as many panelists as

possible who expressed that position. In addition, Gloria Y. disclosed that two years ago her nephew was convicted of murder in Chicago, Illinois, and he was still in prison for the offense. She did not know if her nephew had been treated fairly by the police and the court system. The arrest of a juror or a close relative is an accepted race-neutral reason for exclusion. (*Wheeler, supra,* 22 Cal.3d at p. 277, fn. 18, 148 Cal.Rptr. 890, 583 P.2d 748; see *People v. Panah, supra,* 35 Cal.4th at p. 442, 25 Cal.Rptr.3d 672, 107 P.3d 790.)

Defendant offers a comparative juror analysis in an effort to show that this asserted reason was pretextual. He notes that Juror No. 8's son was a gang member who had been convicted of burglary, and Juror No. 12's cousin had *574 been convicted of aggravated assault. We are not persuaded. Neither of these crimes is as serious as murder, the offense committed by Gloria Y.'s nephew and charged against defendant. More importantly, despite the criminal convictions of their relatives, these seated jurors expressed strongly prosecution-oriented views. Juror No. 8, who was of Puerto Rican descent, expressed contempt for violence and gangs and described negative encounters with gang members. Unlike Gloria Y., he strongly favored the death penalty. Juror No. 12, who was Hispanic, also expressed strong support for the death penalty. She had taken courses at the police reserve academy, had applied to work with various law enforcement agencies, and planned to pursue a bachelor's degree in criminal justice. Juror No. 12 also had several friends and relatives who worked in law enforcement, including an uncle who worked as a detective in Long Beach. She wanted to become a police officer herself. Indeed, defendant unsuccessfully challenged this juror for cause based on her law enforcement connections and aspirations. Thus, although they each had a family member who was convicted of a crime, Juror Nos. 8 and **413 12 a nd Prospective Juror Gloria Y. were not similarly situated.

The prosecutor had another legitimate reason for excusing Prospective Juror Gloria Y. Ms. Y. said she was dissatisfied with the outcome of two criminal cases in which her family members were victims. Her father was murdered in a 1976 armed robbery, and one of her nephews was murdered just a month earlier, in Long Beach, California. No one had been charged in either case. Although she disavowed the response in oral questioning, Gloria Y. said in her questionnaire that, given her feelings about these crimes, she was unsure whether she could be an impartial juror in a case involving violence. This record amply supports the panelist's exclusion. A juror's negative experience with the criminal justice system has long been considered a valid basis for exercising a peremptory challenge. (*People v. Turner* (1994) 8 Cal.4th 137, 171, 32 Cal.Rptr.2d 762, 878 P.2d 521.)

***139 *Prospective Juror Robbie W.*

6061 Robbie W., a 24–year–old clerk with the Department of Social Services, had some paralegal training. She gave several curious questionnaire responses that revealed possible misunderstandings of the law. For example, when asked whether she could base a verdict solely on the evidence and instructions presented at trial, Robbie W. stated: “The preponderance of evidence during the phases of discovery etc. will either clear him to be guilty or innocent.” She said she was neutral on the death penalty and explained her philosophy as follows: “The death penalty should be imposed if the pre[s]iding judge/jury finds him/her guilty without a reasonable doubt. I am pro-choice in this aspect.” Prospective Juror Robbie W.'s father had recently been convicted of driving under the influence of

alcohol and had past encounters *575 with the police stemming from domestic violence against Robbie W.'s mother. The prosecutor said he excused Robbie W. because, in addition to her professed neutrality on the death penalty, she was very young and “came into court wearing a T-shirt and somewhat sloppily attired.” Nothing in the record contradicts this description. The prosecutor explained that he generally preferred to have “older, more conservative people” on the jury. A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge. (*People v. Sims* (1993) 5 Cal.4th 405, 430, 20 Cal.Rptr.2d 537, 853 P.2d 992.) As the Supreme Court observed in *Rice v. Collins* (2006) 546 U.S. 333, 341, 126 S.Ct. 969, 163 L.Ed.2d 824, it is not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older, more permanent resident to impose a substantial penalty. Likewise, a slovenly appearance can reveal characteristics that are legitimately undesirable to the prosecution. (*People v. Hamilton* (2009) 45 Cal.4th 863, 904–905, 89 Cal.Rptr.3d 286, 200 P.3d 898.)

Defendant challenges the credibility of these reasons because the prosecutor did not excuse 28–year–old Juror No. 12. However, as we explained in regard to Prospective Juror Gloria Y., Juror No. 12 was a strongly prosecution-oriented juror. (See *ante,* 112 Cal.Rptr.3d at p. 138, 234 P.3d at pp. 412–413.) She came from a family of law enforcement officers, aspired to become a police officer herself, and strongly favored the death penalty. Other than their relative youth, Juror No. 12 and Prospective Juror Robbie W. shared little in common. Defendant's comparison does not undermine the trial court's finding that Robbie W. was dismissed for reasons unrelated to her race. That finding is supported by substantial evidence.

Prospective Juror Ricky W.

6263 Ricky W. was not a member of the original panel, and the prosecutor challenged him almost as soon as he was called forward. Mr. W. was another prospective juror who expressed neutrality on the death penalty, stating only that he might be in favor of it depending on the case. The prosecutor had several additional reasons for excusing this panelist, however. Foremost among these was Ricky W.'s conviction for receiving stolen property. Although he remained eligible to serve because the crime was a misdemeanor, the criminal conviction was a valid, race-neutral reason for the prosecutor **414 to dismiss him from the jury. (*People v. Sanders* (1990) 51 Cal.3d 471, 500–501, 273 Cal.Rptr. 537, 797 P.2d 561.) Ricky W. described several other encounters with crime and law enforcement that made him an undesirable juror from the prosecution's perspective. He had “a lot of friends” who had been arrested and convicted of crimes, and he had witnessed ***140 many crimes, including robberies, drug offenses, thefts and assaults. Ricky W. was robbed *576 but did not report the crime. The record amply supports the trial court's finding that this panelist was dismissed for legitimate reasons.

Prospective Juror Darnell F.

6465 The prosecutor said he had “mixed feelings” about Prospective Juror Darnell F., and this ambivalence is reflected in the fact that the prosecutor accepted the jury panel five times while it included Mr. F. Acceptance of a panel containing African–American prospective jurors “strongly suggests that race was not a motive” in the challenge of an African–American panelist. (*People v. Lenix, supra,* 44

Cal.4th at p. 629, 80 Cal.Rptr.3d 98, 187 P.3d 946; see also *People v. Snow* (1987) 44 Cal.3d 216, 225, 242 Cal.Rptr. 477, 746 P.2d 452.) Ultimately, the prosecutor decided to excuse Darnell F. because he had testified as an alibi witness for his brother in a criminal trial for assault. At the prosecutor's urging, the court questioned the panelist about this experience and the nature of his testimony. He initially said he did not know the result of the trial, even though he and his brother were "very close," but he later disclosed that his brother had been convicted and jailed for the offense. Mr. F. had testified that his brother was not at the scene of the crime when it was committed. Because the case resulted in a conviction, the jury apparently rejected Mr. F.'s alibi testimony, and the prosecutor explained that he feared Prospective Juror Darnell F. may have perjured himself on behalf of his brother. Defendant protests that this rationale "smacked of racism" but fails to explain why. We do not agree that this legitimate concern can be blithely dismissed by labeling it "racist." Either the entire jury was wrong when it disbelieved Mr. F.'s alibi testimony and found the brother guilty, or Mr. F. perjured himself when he gave the testimony. This prospective juror's veracity is also called into question by the disclosure that he had been court-martialed and discharged from the Navy for falsifying a reading on his watch station. Mr. F. was also less than candid when he initially told the court that he did not know the outcome of his brother's trial but later admitted to the contrary. Substantial evidence supports the conclusion that the challenge to Darnell F. was not race motivated.

Prospective Juror Jonathan S.

66 The prosecutor accepted the jury once after Jonathan S. joined the panel but later used his 14th peremptory challenge to excuse him. In his questionnaire, Jonathan S. had expressed complete neutrality on the death penalty. He described his opinion as "sometimes 'yes' and sometimes 'no.' It depends on the nature of the crime." During voir dire, the prosecutor asked the court to inquire further on this topic. Asked if he had his own criteria about the type of crime warranting the death penalty, Prospective Juror Jonathan S. explained he was trying to say that he was neutral, with no opinion one way or *577 the other: "It depends on the circumstances how I would go." In responding to defendant's *Wheeler* motion, made immediately after the challenge to Mr. S., the prosecutor explained that his greatest concern was finding jurors who strongly favored the death penalty. He noted, "even if you get people who express philosophical positions supporting the death penalty ... once put in that position of actually making that decision it's something that's very difficult to do." The prosecutor thought Mr. S. "may or may not be okay," but he was not an ideal prosecution juror because of his neutral opinion of the death penalty. The prosecutor explained, "It's simply a ***141 matter of looking down the road with the number of peremptory challenges that I have and some of the people that I know are coming up now [and] deciding that I can do better than that." Considering that the prosecutor specifically questioned Prospective Juror Jonathan S. on his death penalty views and also accepted the jury panel once when it included Mr. S., **415 substantial evidence demonstrates that this challenge was not impermissibly race motivated. As we noted in *People v. Lenix, supra,* 44 Cal.4th at page 623, 80 Cal.Rptr.3d 98, 187 P.3d 946, "the selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled." Although the prosecutor might have initially been willing to accept some panelists with neutral opinions on capital punishment, the changing mix of prospective jurors could legitimately motivate him to strike

these neutral panelists in hopes of obtaining upcoming jurors with more favorable death penalty views. The prosecutor's explanation that his jury choices were partially influenced by “looking down the road” is also supported by his responses to panelists later called.

Prospective Juror Stephanie M.-H.

67 In responding to defendant's *Wheeler* motion, the prosecutor disclosed that he planned to challenge another African–American prospective juror who was set to be called into the jury box soon. Like Robbie W., Stephanie M.–H. was young. She expressed neutrality on the death penalty in her questionnaire but, when asked to describe her opinion, stated, “Why some are put to death and some aren't for somewhat sim[i]lar crimes.” At the prosecutor's request, the court asked her to explain this response, but Prospective Juror Stephanie M.–H. essentially repeated that she did not understand why people could receive different sentences for the same crime. This comment suggested to the prosecutor that Ms. M.–H. might have “some deeper philosophical reservations about the death penalty” than she had revealed in court. The prosecutor had also asked the court to inquire further into other questionnaire responses, and he remained troubled by the prospective juror's responses. Her ex-boyfriend had been prosecuted for purse snatching. She and others in her home owned guns “for protection,” and she had fired a gun or been present when guns were *578 fired as part of a “New Year's tradition.” Defendant has not shown that the reasons for excusing Prospective Juror Stephanie M.–H. were pretexts for racial discrimination.

People v. Lomax, 49 Cal. 4th 530, 569-78 (2010)

***BLACKSHER* (2011) 52 Cal. 4th 769, 800-03**

C. *Batson/Wheeler* Claims

Upon defendant's objection, the court found no prima facie showing that the prosecutor exercised two peremptory challenges on racial grounds. Defendant challenges the ruling. There was no evidence of racial bias and no error.

2021 *801 The prosecution's use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity, violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and his right to equal protection under the Fourteenth Amendment to the United States Constitution. (*Batson, supra,* 476 U.S. at p. 97, 106 S.Ct. 1712; *Wheeler, supra,* 22 Cal.3d at pp. 276–277, 148 Cal.Rptr. 890, 583 P.2d 748.) These procedures apply when a defendant makes such an objection: "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 **400 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.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129, fn. omitted; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 74, 58 Cal.Rptr.3d 608, 158 P.3d 157.)

2223 At issue here is whether defendant made a prima facie showing of group bias. To do so, the defendant must demonstrate " ' "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.]' " (*People v. Howard* (2008) 42 Cal.4th 1000, 1016, 71 Cal.Rptr.3d 264, 175 P.3d 13, quoting *Johnson v. California, supra,* 545 U.S. 162, 168, 125 S.Ct. 2410.) Where, as here, it is unclear whether the court relied on the recently disapproved "strong likelihood" standard, rather than the correct "reasonable inference" standard, "we review the record independently" to determine whether defendant's showing met the "reasonable inference" standard. (*Howard,* at p. 1017, 71 Cal.Rptr.3d 264, 175 P.3d 13.)

Defendant is African–American. During jury selection, the prosecutor used his fourth and eighth peremptory challenges to excuse Prospective Jurors M.P. and L.W., African–American women. Defense counsel lodged an objection in chambers, arguing there was "a strong likelihood that both of those jurors were excluded on the basis of their race." The court found no prima facie showing, noting there were still two African–American jurors on the panel and that the defense had exercised one of its own challenges against an African–American juror. Jury selection resumed. ***227 The final jury included six African–American jurors.

24 Based on our independent review, we agree with the court that defendant did not make a prima facie showing of group bias. Defendant offered no circumstances relevant to his claim of discriminatory

intent. Defense counsel made no attempt to argue that the excused jurors were not, apart from their *802 race, as “heterogeneous as the community as a whole” or that the prosecution engaged them in desultory voir dire. (*People v. Bell* (2007) 40 Cal.4th 582, 597, 54 Cal.Rptr.3d 453, 151 P.3d 292.) Defense counsel failed to show that the prosecution had struck most or all members of the identified group or had used a disproportionate number of challenges against the group. (*Ibid.*)

In fact, other circumstances demonstrate a lack of discriminatory purpose. The prosecutor did not challenge several other African–American jurors, and, as noted, six ultimately served on the jury. (*People v. Cornwell* (2005) 37 Cal.4th 50, 70, 33 Cal.Rptr.3d 1, 117 P.3d 622 [concluding a challenge raised no inference of bias, “particularly in view of the circumstance that the other African–American juror had been passed repeatedly by the prosecutor from the beginning of voir dire and ultimately served on the jury”]; *People v. Turner* (1994) 8 Cal.4th 137, 168, 32 Cal.Rptr.2d 762, 878 P.2d 521 [“While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection”].)

2526 Moreover, race-neutral grounds supported the prosecutor's challenges. Prospective Juror M.P. wrote that she had “ambivalent feelings” toward the death penalty. She expressed discomfort in playing any role in deciding to impose a death sentence. She believed no one has the right to take a life and such a decision might be akin to “playing ‘God.’ ” Prospective Juror L.W. stated in her questionnaire that she was only “moderately” in favor of the death penalty and believed a life sentence was a more severe penalty. (See *People v. Bolin* (1998) 18 Cal.4th 297, 317, 75 Cal.Rptr.2d 412, 956 P.2d 374 [the use of “peremptory challenges to excuse prospective jurors who expressed scruples about imposing the death penalty” is proper].)

Furthermore, M.P. wrote that, based upon a racial-profiling incident involving her brother and the police, she might treat police testimony with skepticism. **401 (*People v. Farnam* (2002) 28 Cal.4th 107, 138, 121 Cal.Rptr.2d 106, 47 P.3d 988 [“a close relative's adversary contact with the criminal justice system might make a prospective juror unsympathetic to the prosecution”].) Finally, L.W. was a psychology major and characterized that discipline as a “science.” Her background thus posed the danger of having her own specialized knowledge influence her decisionmaking regarding the significance of the claims of defendant's mental illness. (*People v. Howard* (1992) 1 Cal.4th 1132, 1156, 5 Cal.Rptr.2d 268, 824 P.2d 1315 [prospective juror's professional training as a nurse suggested a possible ground for the prosecutor's challenge].)

*803 The court properly found no prima facie case of discrimination and did not err in denying defendant's *Batson*/*Wheeler* motion.

People v. Blacksher, 52 Cal. 4th 769, 800-03 (2011)