THIRD STEP IN BATSON-WHEELER ANALYSIS

The third step in a *Batson* analysis "involves evaluating 'the persuasiveness of the justification proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.' [Citation omitted.]" (*Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 974, 163 L.Ed.2d 824].)

Reasons for exercising a peremptory challenge should be viewed in combination, as a party may decide to exercise a peremptory challenge for a variety of reasons, with no single characteristic being dispositive. (*People v. Ledesma* (2006) 39 Cal.4th 641, 678.)

Inquiry regarding prosecutor's reasons for excusing prospective juror is not whether reviewing court finds 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. If the stated reason does not hold up, its pretextual significance does not fade because an appellate court can imagine a reason that might not have been shown as false. (*People v. Huggins* (2006) 38 Cal.4th 175, 233.)

HOW TO JUDGE CREDIBILITY

The credibility of the prosecutor's justifications for exercising a peremptory challenge "'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.'" (*People v. Schmeck* (2005) 37 Cal.4th 240, 271, quoting *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 2342, 162 L.Ed.2d 196].)

HOW TO JUDGE CREDIBILITY, CONT.

In determining whether the prosecutor's race-neutral reasons are credible, credibility can be measured by the prosecutor's demeanor, how probable or improbable the explanations are, and whether the proffered rationale has some basis in accepted trial strategy. The trial court may draw upon it observations of voir dire, experiences as a lawyer and as a judge in the community, as well as the common practices of the particular prosecutor or the office that employs the prosecutor. (*People v. Jones* (2011) 51 Cal.4th 346, 360; *People v. Lenix* (2008) 44 Cal.4th 602.)

The fact that a prosecutor asked few questions before excusing a juror is of "limited significance" in a case in which the prosecutor reviewed the jurors' questionnaires and was able to observe their responses and demeanor during extensive individual questioning by the court and later during group voir dire. (*People v. Clark* (2011) 52 Cal.4th 856, 906-907; *People v. Taylor* (2010) 48 Cal.4th 574, 615-616.)

PROSECUTOR MISTAKES

In determining whether the prosecutor's race-neutral reasons are credible, credibility can be measured by the prosecutor's demeanor, how probable or improbable the explanations are, and whether the proffered rationale has some basis in accepted trial strategy. The trial court may draw upon it observations of voir dire, experiences as a lawyer and as a judge in the community, as well as the common practices of the particular prosecutor or the office that employs the prosecutor. (*People v. Jones* (2011) 51 Cal.4th 346, 360; *People v. Lenix* (2008) 44 Cal.4th 602.)

An honest mistake of fact is "quite plausible" where prosecutor keeping track of dozens of prospective jurors, thousands of pages of jury questionnaires, and days of voir dire, had to make challenges without the luxury of checking facts as appellate attorneys and reviewing courts are able to do. An isolated mistake or misstatement does not, standing alone, compel the conclusion the prosecutor's reason was insincere. (*People v. Jones* (2011) 51 Cal.4th 346, 366.)

The prosecutor's professed "mistake" in excusing prospective juror can be a genuine race-neutral reason. (*People v. Williams* (1997) 16 Cal.4th 153, 188-189.)

PRIOR CASES and PROSECUTOR'S REPUTATION AND PRIOR CONDUCT

A defendant's showing that the prosecutor had exercised a peremptory challenge against an African-American in an unrelated case involving an African-American defendant is relevant to a *prima facie* showing, but is not very probative in light of the isolated nature of the prior conduct. (*People v. Crittenden* (1994) 9 Cal.4th 83, 119.)

KEEPING OTHER BLACK JURORS OR PASSING ON BLACK JURORS INITIALLY

The presence of minority jurors on the panel is an indication of a prosecutor's good faith in exercising his or her peremptories. (*People v. Lewis* (2008) 43 Cal.4th 415, 480.)

Although the prosecutor ultimately excused four of five African-American jurors called to the jury box, there was no discernable pattern from which to infer discrimination. The prosecutor passed African-American prospective jurors during several rounds of peremptory challenges before finally excusing them. The prosecutor also repeatedly passed a prospective female African-American juror who ultimately served as a juror in the guilt phase. (*People v. Clark* (2011) 52 Cal.4th 856, 906.)

KEEPING OTHER BLACK JURORS OR PASSING ON BLACK JURORS INITIALLY

"The prosecutor's acceptance of a panel including these African-American prospective jurors, while not conclusive, was 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection ….'" (*People v. Hartsch* (2010) 49 Cal.4th 472, 487, quoting *People v. Snow* (1987) 44 Cal.3d 216, 225.)

ONE OR TWO ISN'T A PATTERN

"'As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion.'" (*People v. Bell* (2007) 40 Cal.4th 582, 598, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111.)

HUNCHES, GESTURES, FACIAL EXPRESSIONS ARE ENOUGH

The prosecutor's reasons need not be sufficient to justify a challenge for cause, and even a trivial, arbitrary, or idiosyncratic reason, if it is genuine and neutral, is sufficient justification for exercising a peremptory challenge. Peremptory challenges may be based on hunches, gestures, or facial expressions. (*People v. Jones* (2011) 51 Cal.4th 346, 360; *People v. Lenix* (2008) 44 Cal.4th 602, 613; see also *Purkett v. Elem* (1995) 514 U.S. 765 [115 S.Ct. 1769, 131 L.Ed.2d 834, 839-840].)

"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." The circumstance where a juror hesitates over whether he would favor one side over another provides a valid reason for use of a peremptory challenge. (*People v. Jones* (2011) 51 Cal.4th 346, 367.)

JUST BECAUSE JUDGE DIDN'T SEE DEMEANOR ISN'T IMPORTANT

Where an explanation for a peremptory challenge is based on the demeanor of a prospective juror, a judge should take into account, among other things, any observations the judge was able to make during voir dire. However, nothing in *Batson* or *Synder* requires that a demeanor based explanation must be rejected if the judge either did not observe, or does not recall, the prospective juror's demeanor. (*Thaler v. Haynes* (2010) 559 U.S. ___ [130 S.Ct. 1171, 1175, 175 L.Ed.2d 1003] (per curiam).)

OCCUPATION/EDUCATION

A prospective juror's background as a psychology major supported race neutral reason for peremptory challenge by prosecutor because "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. Blacksher* (2011) 52 Cal.4th 769, 802.)

The prosecutor reasonably could believe that given the prospective juror's profession (administrative law judge), 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. Clark* (2011) 52 Cal.4th 856, 907.)

A prospective juror's educational backround (psychology courses) or experience in counseling or social services (master's degree in theology and helping homeless obtain social service benefits) are race-neutral reasons for prosecutor challenging prospective jurors. (*People v. Clark* (2011) 52 Cal.4th 856, 907.)

DEATH PENALTY VIEWS/QUALITIES

“[E]ven when jurors have expressed neutrality on the death penalty, neither the prosecutor nor the trial court is required to take the jurors’ answers at face value. [Citation.] If other statements or attitudes of the juror suggests 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. Lomax* (2010) 49 Cal.4th 530, 572, internal quotation marks omitted.)

A juror’s equivocal response about an ability to impose the death penalty is relevant to a challenge for cause, but does not undercut the race-neutral basis for a prosecutor’s decision to excuse the prospective juror peremptorily. (*People v. Hoyos* (2007) 41 Cal.4th 872, 902; *People v. Catlin* (2001) 26 Cal.4th 81, 118.)

In reviewing the record it is “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.” (*People v. Huggins* (2006) 38 Cal.4th 175, 236.)

A prospective juror’s statement in questionnaire that was “only moderately” in favor of death penalty and believes a life sentence to be a more severe penalty supports race neutral reason for exercising a peremptory challenge. Another prospective juror’s “ambivalent feelings” toward the death penalty and discomfort in role of deciding whether to impose a death sentence support race-neutral grounds for peremptory challenge of that prospective juror. (*People v. Blacksher* (2011) 52 Cal.4th 769, 802.)