

2001

Utah v. Jefferey Ray Chatwin : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

JEFFERY RAY CHATWIN,

Defendant/Appellant.

Case No. 20010060-CA

Priority No. 2

BRIEF OF APPELLEE

**AN APPEAL FROM A CONVICTION FOR AGGRAVATED ASSAULT, A
THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-
103 (1999), IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH,
SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK
PRESIDING**

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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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Case No. 20010060-CA

Priority No. 2

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from a judgment of conviction for aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1999). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES

The sole issue on appeal is whether the trial court correctly denied defendant's objection to the prosecutor's fourth and final peremptory strike as an unconstitutional strike based on gender.

Standard of Review. "The trial court's conclusion as to whether or not a prima facie case was established is a legal determination . . . review[ed] for correctness, according it no particular deference." *State v Pharris*, 846 P 2d 454, 459 (Utah App.), *cert. denied*, 857 P.2d 948 (Utah 1993). However, the trial court's determination as to whether the opponent

of the peremptory strike has proved purposeful discrimination “generally turns on the credibility of the proponent of the strike and will not be set aside unless clearly erroneous.” *State v. Higginbotham*, 917 P.2d 545, 548 (Utah 1996); accord *State v. Cannon*, 2002 UT App 18, ¶ 5, 440 Utah Adv. Rep 7.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Interpretation of the Fourteenth Amendment’s Equal Protection Clause is relevant to this case, but a determination of the issues does not turn on the amendment’s language

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant was charged with one count of aggravated assault and two counts of domestic violence in the presence of a child, all third degree felonies. R. 1-3. Following a preliminary hearing, defendant was bound over for trial on aggravated assault, but both counts of domestic violence in the presence of a child were dismissed. *See* R. 19-20.¹ A jury convicted defendant as charged. R. 41-42, 74. After receiving a presentence investigation report, the trial court sentenced defendant to an indeterminate prison term of zero-to-five years, but suspended imposition of the sentence and place defendant on supervised probation for one year. R. 82-84. Defendant timely appealed. R. 85. Since the filing of defendant’s

¹The results of the preliminary hearing are found only in the court docket fastened to the record at R. 16-20. No minutes of the preliminary hearing are found in the record

appeal, the trial court revoked defendant's probation and imposed the indeterminate prison term.²

SUMMARY OF FACTS³

On the evening of June 13, 2000, Brenda Lee was at the home of her boyfriend, defendant. R. 101: 38, 102. Lee was living with defendant at the time but was in the process of moving to her mother's house. R. 101: 55-56. Lee and defendant were both drinking heavily and using methamphetamine that night. R. 101: 40, 41, 54. Eventually, the two began to argue. *See* R. 101: 39, 41, 52, 54, 80, 100. Lee decided to leave and packed all of her belongings with the intention of walking to her mother's house. R. 101: 41, 42, 80. Defendant followed Lee into the front yard and the two of them continued to fight. R. 101: 49, 63, 75. After arguing with defendant for several hours, Lee began walking down the street toward her mother's house. R. 101: 49, 63. Defendant followed her for a time on foot, "[h]ollering and screaming" at her, but then returned to the house. R. 101: 43.

After returning to his house, defendant got into his truck and resumed his pursuit of Lee. R. 101: 43. As Brenda stood on the sidewalk in front of a 7-Eleven, defendant pulled his truck into the driveway four feet from Brenda, blocking her path. R. 101: 44, 67, 80. Through his open window, defendant told Brenda to get into the truck. R. 101: 44, 66.

²The signed minute entry revoking defendant's probation and imposing the prison term is found on the first two pages of the court record. However, the trial court clerk did not index those pages and the several others that follow.

³Except as otherwise noted, this brief recites the facts in the light most favorable to the jury's verdict. *See State v. Litherland*, 2000 UT 76, ¶ 2, 12 P.3d 92.

Brenda refused but instead attempted to cross behind him R 101 45, 58, 80 As Brenda stepped off the curb, however, defendant put his truck in reverse and accelerated into her knocking her back six to nine feet into the middle of the street R 101 66 As several bystanders rushed over to help her, defendant drove off. R 101 66 As he did so, he yelled out of the car window, “[T]hat’s what she gets ” R 101 66.

SUMMARY OF ARGUMENT

Defendant contends that the trial court erred in denying his objection to the prosecutor’s peremptory strike of Juror 11, Amador Romero The trial court’s decision should be affirmed for several reasons. First, defendant failed to make a prima facie showing of discrimination. In finding that Juror 11 was a minority, it relied solely on the fact that he had an Hispanic name. That is not enough. Nor is it enough to show that the prospective juror was a minority as the trial court assumed. This Court should therefore affirm on the alternative ground that because defendant failed to establish a prima facie case of discrimination, he should not have been required to proffer an explanation.

Second, the prosecutor did not exercise his peremptory strike in a discriminatory manner on the basis of gender. The prosecutor did not base his peremptory challenges on any stereotype or assumption that women would be more likely to convict defendant or that men were less qualified to consider a matter of domestic violence against women Rather, he simply attempted to achieve a gender-balanced jury Had no peremptory challenges been exercised, the jury would have consisted of 6 men and 2 women The prosecutor simply used his strikes in a manner that would achieve a more balanced jury Accordingly, the

prosecutor's strikes did not violate the principles of equal protection, but in fact furthered them. A review of the record supports the prosecutor's explanation.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S OBJECTION TO THE PROSECUTOR'S PEREMPTORY STRIKE OF JUROR 11

Defendant asserts that the trial court erred in denying his objection to the prosecutor's peremptory strike of prospective juror number eleven, Amador Romero ("Juror 11"). For the reasons explained below, defendant's claim fails.

A. Equal Protection Limits on the Use of Peremptory Challenges.

"Ordinarily, prosecutors have the freedom to base peremptory challenges on any reasons related to their views of the outcome of the case to be tried." *State v. Pharris*, 846 P.2d 454, 462 (Utah App.), *cert. denied*, 857 P.2d 948 (Utah 1993). However, that privilege "is subject to the commands of the Equal Protection Clause." *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719 (1986). Thus, "parties in a criminal action are prohibited from engaging in purposeful racial discrimination in exercising peremptory challenges of potential jurors." *State v. Higginbotham*, 917 P.2d 545, 547 (Utah 1996) (citing *Batson*, 476 U.S. at 90, 106 S.Ct. at 1719)); *accord State v. Colwell*, 2000 UT 8, ¶ 14, 994 P.2d 177. Likewise, "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man." *JEB v.*

Alabama, 511 U.S. 127, 146, 114 S.Ct. 1419, 1430 (1994); accord *State v. Shepherd*, 1999 UT App 305, ¶ 28, 989 P.2d 503.

“Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.” *J.E.B.*, 511 U.S. at 140, 114 S.Ct. at 1427. As a result, “if purposeful discrimination is ultimately found, reversal of the defendant’s conviction is mandated, without regard to the harmlessness of the constitutional error.” *State v. Macial*, 854 P.2d 543, 545 (Utah App.) (citing *Batson*, 476 U.S. at 100, 106 S.Ct. at 1721), *cert. denied*, 862 P.2d 1356 (Utah 1993).

B. Equal Protection Analysis for Peremptory Strikes.

Under *Batson* and its progeny, trial courts engage in a three-step analysis for determining whether a party challenging a peremptory strike has demonstrated an equal protection violation:

[O]nce the opponent of a peremptory strike has made out a prima facie case of [] discrimination, (step one), the burden of production shifts to the proponent of the strike to come forward with a [neutral] explanation (step two). If a [neutral] explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful [] discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 1770-71 (1995) (*per curiam*) (applying the analysis to race-based claims); accord, *J.E.B.*, 511 U.S. at 144-45, 114 S.Ct. at 1429-30; *Cooperwood v. Cambra*, 245 F.3d 1042, 1045-46 (9th Cir.), *cert. denied*, — U.S. —, 122 S.Ct. 228 (2001); *Higginbotham*, 917 P.2d at 547.

1. Establishing a Prima Facie Case of Purposeful Discrimination.

Under the first step of the analysis, the party opposing the strike “must make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” *Batson*, 476 U.S. at 93-94, 106 S.Ct. at 1721; accord *J.E.B.*, 511 U.S. at 144-45, 114 S.Ct. at 1429-30; *Colwell*, 2000 UT 8, at ¶ 18. The purpose behind this first step is “to ‘separate meritless claims of discrimination from those that have merit.’” *State v. Alvarez*, 872 P.2d 450, 455 (Utah 1994) (quoting *United States v. Malindez*, 962 F.2d 332, 334 (4th Cir.), cert. denied, 506 U.S. 875, 113 S.Ct. 215 (1992)). This step “requires more than simply showing that one or more minority jurors were peremptorily stricken.” *State v. Harrison*, 805 P.2d 769, 777 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991); accord *Colwell*, 2000 UT 8, at ¶ 18. “[A]s a general rule, a ‘defendant who requests a prima facie finding of purposeful discrimination is obligated to develop [some] record beyond numbers, in support of the asserted violation.’” *Alvarez*, 872 P.2d at 457 (quoting *United States v. Brown*, 941 P.2d 656, 659 (8th Cir. 1991)); *Colwell*, 2000 UT 8, at ¶ 18. And “[w]hile numerical evidence alone may be sufficient to establish a pattern of peremptory strikes against minority jurors, numerical evidence alone does not necessarily establish a prima facie case.” *Shepherd*, 1999 UT App 305, at ¶ 30.

In addition to demonstrating that the excluded panel members “belong to a cognizable group,” the opponent of the strike must show “that there exists ‘a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.’” *Alvarez*, 872 P.2d at 456 (quoting *State v. Cantu*, 778 P.2d 517, 518 (Utah

1988)); accord *Shepherd*, 1999 UT App 305, at ¶ 29. “To satisfy this burden, the opponent of the strike must create a record establishing sufficient evidence to support the allegation of purposeful [] discrimination.” *State v. Cannon*, 2002 UT App 18, ¶ 8, 440 Utah Adv. Rep 7. In making this determination, the trial court “must undertake a ‘factual inquiry’ that ‘takes into account all possible explanatory factors’ in the particular case.” *Batson*, 476 U.S. at 995, 106 S.Ct. at 1722. For example, “a ‘pattern’ of strikes against [minority] jurors might give rise to an inference of discrimination. Similarly, the prosecutor’s questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose.” *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; accord *Alvarez*, 872 P.2d at 455.

2. Offering a Neutral Explanation for the Peremptory Strike.

Once the opponent of the strike makes a *prima facie* showing, the proponent “must articulate a neutral explanation related to the particular case to be tried.” *Batson*, 476 U.S. at 97-88, 106 S.Ct. at 1723-24; accord *J.E.B.*, 511 U.S. at 144-45, 114 S.Ct. at 1429-30. The proponent of a strike cannot satisfy step two “by merely denying that he had a discriminatory motive or by merely affirming his good faith.” *J.E.B.*, 511 U.S. at 769, 115 S.Ct. at 1771. On the other hand, this second step “does not demand an explanation that is persuasive, or even plausible.” *Purkett*, 514 U.S. at 768, 115 S.Ct. at 1771; see also *Batson*, 476 U.S. at 97, 106 S.Ct. at 172 (explaining that the explanation “need not rise to the level justifying exercise of a challenge for cause”). All that is required is an explanation that “does not deny equal protection.” *Purkett*, 514 U.S. at 769, 115 S.Ct. at 1771. “Unless a discriminatory intent is

inherent in the prosecutor's explanation, the reason offered will be deemed [] neutral." *Id.* This is so because "the ultimate burden of persuasion regarding [] motivation rests with, and never shifts from, the opponent of the strike." *Id.*⁴

3. Proving Purposeful Discrimination.

The final step requires the trial court to decide whether the opponent of the peremptory challenge has proved purposeful [] discrimination." *Higginbotham*, 917 P.2d at 548; *accord Batson*, 476 U.S. at 98, 106 S.Ct. at 1724. In other words, the trial court must determine whether the proponent's "explanation for a peremptory challenge should be believed." *State v. Bowman*, 945 P.2d 153, 156 (Utah App. 1997) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 111 S.Ct. 1859, 1869 (1991)). "[T]he question is not whether the prosecutor's explanation for the strike was factually correct, but whether it was a pretext to disguise a [discriminatory] motive." *Id.* at 156; *accord Higginbotham*, 917 P.2d at 549 n.3 (holding that "a peremptory challenge can be made even for a mistaken reason so long as it is not racially motivated").

⁴In *Batson*, the Supreme Court explained that the proponent of the strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98 n.20, 106 S.Ct. at 1724 n.20. Based on this language, Utah courts have concluded that the explanation by the proponent of the strike "must be '(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate.'" *Higginbotham*, 917 P.2d at 548 (quoting *Cantu II*, 778 P.2d at 518). These latter two requirements, however, do not suggest that the explanation be plausible. As later explained by the Supreme Court in *Purkett*, were simply "meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." *Purkett*, 514 U.S. at 769, 115 S.Ct. at 1771. In other words, "[w]hat is meant by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*

In this final step, “the persuasiveness of the [proponent’s] justification becomes relevant.” *Purkett*, 514 U.S. at 768, 115 S.Ct. at 1771. As observed by the United States Supreme Court, “[a]t this stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.” *Id.* ““There will seldom be much evidence bearing on th[is] issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.”” *Id.* (quoting *Hernandez*, 500 U.S. at 365, 111 S.Ct. at 1869). Accordingly, “[i]n determining whether the peremptory challenge involved purposeful [] discrimination, the trial court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Cannon*, 2002 UT App 18, at ¶ 13 (internal quotes and citations omitted). Factors that may bear on the credibility of the explanation offered include “(1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor’s reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.” *Bowman*, 945 P.2d at 155-56 (quoting *Cantu II*, 778 P.2d at 518-19).

C. The Peremptory Strike of Juror 11 Was Not Discriminatory.

Applying the three-step analysis to the facts here reveals that the trial court correctly denied defendant’s objection to the prosecutor’s peremptory strike of Juror 11.

1. Defendant Did Not Establish a Prima Facie Case of Purposeful Discrimination.

After each party exercised its four peremptory challenges and the jury was sworn, defendant's counsel raised a *Batson* objection to the prosecutor's fourth peremptory challenge against Juror 11, Amador Romero. R. 101: 25-26.⁵ Counsel pointed out that Juror 11 was the only minority of the sixteen prospective jurors from which the jury would be selected. R. 101: 26. He further argued that because Juror 11 was a minority, he would have "more sympathy" for his client who came "from a lower socioeconomic environment." R. 101: 26. The prosecutor argued that he was not required to provide an explanation for the strike, contending that defendant had failed to make a prima facie showing of discrimination. R. 101: 26-27. Relying solely on the fact that "Romero" is a Hispanic surname, the trial court found that Juror 11 was a minority. R. 101: 27. The court ruled that "given that fact alone, Counsel's probably entitled to some explanation as to [the prosecutor's] reasons so [the court] may then determine whether or not . . . it was neutral and not racially charged" R. 101: 27. The trial court's conclusion was error.

In the first instance, the evidence was insufficient to support the trial court's finding that Juror 11 was in fact a minority. As observed by this Court in *Bowman*, "Utah courts have never found a Spanish surname alone sufficient to show minority status unless that minority status was corroborated by the trial court or the jurors themselves, or was undisputed." 945 P.2d at 156. The record does not support a finding that Juror 11 was a

⁵The portion of the transcript containing defendant's *Batson* objection and the trial court's ruling thereon is reproduced in Addendum A.

minority. During the voir dire examination, Juror 11 responded to two questions, giving his name and general background and indicating that he had once served on a jury. *See* R. 101: 7, 17. Nothing in his responses indicated that he was Hispanic other than his name. Although defense counsel asserted that Juror 11 “also had a little bit of an accent,” the trial court did not address that claim and the record cannot support it. *See* R. 101: 27-28. Moreover, the prosecutor did not concede that Juror 11 was Hispanic, but expressed some doubt as to that fact. Although the prosecutor recognized that the court could rule otherwise, he did not concede the point. *See* R. 101: 26-27 (stating that “[i]f the Court finds that Mr. Romero is a minority”). On these facts, the trial court erred in finding that defendant was a minority based on his surname alone. *See Bowman*, 945 P.2d at 156.

Even if the trial court correctly concluded that Juror 11 was a minority, it incorrectly concluded that Juror 11's minority status alone was sufficient to require an explanation from the prosecutor. Both this Court and the Utah Supreme Court have made it clear that “[t]he mere fact that the subject of the peremptory strike is a minority member does not establish a prima facie case.” *Colwell*, 2000 UT 8, at ¶ 18; *accord Cannon*, 2002 UT App 18, at ¶ 8. Moreover, defendant did not identify anything else in the record that would support a finding that the strike was discriminatory. He did not establish a pattern of strikes against minority jurors. *See Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. As noted by the prosecutor, Juror 11 was in fact the fourth and last prospective juror stricken by him. *See* R. 49; R. 101: 27.^b Nor did defendant point to anything in the “prosecutor’s questions and statements during *voir dire*

^bThe jury list is reproduced in Addendum B.

examination [or] in exercising his challenges” that would support “an inference of discriminatory purpose.” *See Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. Indeed, there was none. *See* R. 101: 5-25.

Defendant did make a claim that the peremptory strike of Juror 11 was improper because as a minority, he would be more sympathetic to his client who came from a “lower socioeconomic environment.” R. 101: 26. This argument in itself reinforces the very kind of stereotypes that *Batson* seeks to prevent. As counsel acknowledged, nothing suggested that Juror 11 came from a lower socioeconomic environment. *See* R. 101: 26. And that fact should not be inferred by virtue of a juror’s minority status. Moreover, *Batson* made clear that “a defendant has no right to a ‘petit jury composed in whole or in part of persons of his own race.’” *Batson*, 476 U.S. at 85, 106 S.Ct. at 1717 (quoting *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 305 (1880)). Defendant likewise has no right to a jury composed in whole or in part of persons of his own socioeconomic background.

In sum, because the trial court incorrectly concluded that defendant had made a prima facie showing of discrimination, this Court should affirm the conviction below on that ground. *See State v. Finlayson*, 2000 UT 10, ¶ 31, 994 P.2d 1243 (holding that the appellate court “may affirm a judgment of a lower court if it is sustainable on any legal ground or theory apparent on the record”).⁷

⁷ Although the prosecutor ultimately explained the reasons for his strike, he did so only after the court so required. Thus, the State did not waive review of the trial court’s finding on the sufficiency of defendant’s prima facie showing. *See Higginbotham*, 917 P.2d at 547 (holding that “[w]here the proponent of the peremptory challenge fails to contest the sufficiency of the prima facie case at trial and merely provides a rebuttal

2. The Prosecutor Offered a Neutral Explanation for Striking Juror 11.

Assuming, *arguendo*, the trial court correctly concluded that defendant had made a *prima facie* showing of discrimination, the prosecutor's explanation was neutral.

In response to the *Batson* challenge, the prosecutor explained:

I felt, your Honor, that this Jury would be better able to deliberate the evidence that I anticipate presenting to it if it were balanced between men and woman [sic]. I therefore made efforts to take men off of the Jury. That may not make a great deal of sense, but that was the game plan. Mr. Romero was a man. I took him because he was a man and I thought I would be more comfortable with Ms. Rayburn or Ms. Tapp on the Jury than Mr. Romero on the Jury.

R. 101: 27. Defendant thereafter objected to the strike on the ground that removing a juror solely on the basis of gender is also impermissible under *Batson* and its progeny. R. 101: 28. The trial court rejected defendant's argument, concluding that in a "spousal-abuse type of case," the parties are entitled to strike either gender, depending on which may be more inclined to adhere to their theory of the case. R. 101: 28. Although the trial court incorrectly concluded that strikes based solely on gender are permissible, the prosecutor's peremptory strikes were not gender-based.

J.E.B. v. Alabama involved a paternity and child support action brought by the State on behalf of the mother of a minor child. *J.E.B.*, 511 U.S. at 129, 114 S.Ct. at 1421-22. The putative father challenged the State's use of peremptory strikes to remove prospective male jurors. *Id.* The State "maintain[ed] that its decision to strike virtually all the males from the jury in this case 'may reasonably have been based upon the perception, supported by history,

explanation for the challenge, the issue of whether a *prima facie* case was established is waived"); *see also State v. Merrill*, 928 P.2d 401, 403 (Utah App. 1996).

that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.” *J E B*, 511 U S at 137-38, 114 S Ct at 1426 (citations to record omitted) The issue before the United States Supreme Court was “whether peremptory challenges *based on gender stereotypes* provide substantial aid to a litigant’s effort to secure a fair and impartial jury.” *Id* at 137, 114 S Ct at 1426 (emphasis added) The high court concluded that they do not

The Supreme Court held that “[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.” *Id* at 130-31, 114 S Ct at 1422 In extending *Batson* to gender-based strikes, the high court observed that “[a]ll persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of *discriminatory and stereotypical presumptions* that reflect and reinforce patterns of historical discrimination.” *Id* at 141-42, 114 S Ct at 1428 (emphasis added) The court further explained

The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full

participation by one gender or that the deck has been stacked' in favor of one side

Id. at 140, 114 S Ct at 1427. Accordingly, contrary to the trial court's conclusion below, the parties were not at liberty to strike prospective jurors on the basis of their gender under the assumption that one gender or another would be sympathetic to their position in a spouse abuse case. However, the prosecutor did not proffer that as a reason for the strikes of the men on the jury. He asserted instead a desire to achieve a gender-balanced jury.

Less than a handful of jurisdictions have touched on the propriety of exercising peremptory strikes to achieve a gender-balanced jury. *See, e.g., United States v Tokars*, 95 F 3d 1520 (11th Cir. 1996), *cert denied*, 520 U S 1132, 117 S Ct 1282 (1997), *People v Hudson*, 745 N E 2d 1246 (Ill.), *cert denied*, — U S —, 122 S Ct. 134 (2001), *Gattis v Delaware*, 697 A.2d 1174 (Del. 1997), *cert denied*, 522 U S 1124, 118 S Ct 1070 (1998). None, however, have squarely addressed the issue, relying instead on "dual motivation" analysis. For example, in *Tokars*, federal prosecutors argued that they struck men from the jury to ensure that every sex was represented in the jury. *Tokars*, 95 F 3d at 1532. The Eleventh Circuit assumed that the government's preferred reason was discriminatory, but nevertheless upheld the strikes because the government offered other gender-neutral reasons for the strikes. *Id.* at 1533. Likewise, the Illinois Supreme Court in *Hudson* assumes that exercising peremptory challenges to achieve a gender-balanced jury is improper. However, the court nevertheless recognized that such an explanation is not what concerned the Supreme Court in *J E B*. After explaining *J E B*'s refusal to countenance the assumption

that “men might be more sympathetic to the putative father in a paternity suit and women might be more sympathetic to the mother.” the Illinois court observed:

It is important to recognize that no such invidious stereotype has been advanced or suggested in the case at bar. Rather, we are faced with a statement that, on its face, indicates that the prosecutor was, among other things, attempting to seat a jury with a diverse character.

Id. at 1254. Indeed, a review of the holding in *J.E.B.* confirms that a pattern of strikes to achieve a gender-balanced jury is not the evil which *J.E.B.* seeks to prevent.

As noted, the prosecutor here sought a balanced jury of men and women, explaining that a balanced jury “would be better able to deliberate the evidence.” R. 101: 27. In seeking that balance, he did not “ratify and reinforce prejudicial views of men and women” which *J.E.B.* sought to prevent. *J.E.B.*, 511 U.S. at 140, 114 S.Ct. at 1427. Instead, the prosecutor sought to ensure the very thing that *J.E.B.* could not—a jury composed of a fair cross-section of the community. In this regard, the court in *J.E.B.* observed:

“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. . . .”

Id. at 146 n.19, 114 S.Ct. at 1430 n.19 (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 986 (1946)). Rather than excluding any particular gender, the prosecutor was simply attempting to include both genders in a balanced way.

In striking jurors to achieve a balanced jury, the prosecutor did not pursue a course of action “reflective of ‘archaic and overbroad’ generalizations about gender, or based on ‘outdated misconceptions concerning the role of females’” *Id.* at 135, 114 S.Ct. at 1424-25 (citations omitted). In short, he did not assume, as the trial court incorrectly did, that individual jurors would “hold particular views simply because of their gender.” *Id.* at 141-42, 114 S.Ct. at 1428 (quoting *Strauder*, 100 S.Ct. at 308). Rather than sending a message “to all those in the courtroom . . . that certain individuals, for no reason other than gender, are presumed unqualified,” the prosecutor sent a message that both genders should participate. *See id.* at 142, 114 S.Ct. at 1428. As the supreme court in *J.E.B.* observed:

“It is said . . . that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act like a class The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.”

Id. at 133-34, 114 S.Ct. at 1424 (quoting *Ballard v. United States*, 329 U.S. 187, 193-94, 67 S.Ct. 261, 264 (1946)).

Because the prosecutor did not exercise his peremptory challenges in a discriminatory manner, but rather to achieve the interests espoused in *J.E.B.*, the trial court correctly concluded that his explanation was gender-neutral.

3. The Trial Court Properly Found that the Prosecutor's Reason for Striking Juror 11 Was Not Purposefully Discriminatory.

The final inquiry in the equal protection analysis is whether defendant met his burden in establishing that the prosecutor's strike was purposefully discriminatory. *See Higginbotham*, 917 P.2d at 548. A review of the record reveals that he did not.

The prosecutor did not single out any of the male jurors for "special questioning designed to evoke a certain response." *See Bowman*, 945 P.2d at 155-56; R. 101: 5-25. He expressly sought a balanced jury to decide a highly charged confrontation between a man and woman. *See id.* (holding that a reason unrelated to the case shows discriminatory intent). Moreover, the pattern of strikes confirms an intent to achieve a gender-balanced jury rather than an intent to exclude all men.

The jury in this case was selected from an initial pool of thirty prospective jurors. *See* R. 49-50. That pool was reduced to twenty-nine after the voir dire examination when Juror 8 was excused by stipulation of the parties. *See* R. 49. Because defendant was being tried for a third degree felony offense, he was entitled to a jury of eight and the parties were entitled to four peremptory challenges each. *See*; Utah Code Ann. § 78-46-5(2) (1996);⁸ Utah R. Crim. P. 17(e); Utah R. Crim. P. 18(d). The parties were therefore left with jurors 1 through 7 and 9 through 17 from which to exercise their peremptory challenges—ten men

⁸Section 78-46-5 has since been amended, but the amendment did not alter the number of jurors defendant would have been entitled to. *See* Utah Code Ann. § 78-46-5(1)(b) (Supp. 2002).

and six women. *See* R. 49. By virtue of their order in the jury pool, jurors 18 through 30 were necessarily eliminated from jury selection. *See* R. 49-50.

Before any peremptory challenges, the first eight jurors—and thus the potential jury—consisted of 6 men and 2 women. *See* R. 101: 49. The prosecutor exercised his first peremptory challenge against Juror 5, a male, leaving a potential jury of 5 men and 3 women. After defendant struck juror 2, a male, the potential jury still consisted of 5 men and 3 women. The prosecutor exercised his second peremptory challenge against Juror 12, a male. However, that strike did not affect the composition of the potential jury, which still consisted of 5 men and 3 women. Had he wished to further alter the balance, the prosecutor would have exercised his strike against jurors 1, 6, 7, 9, or 11—thus achieving a 4-4 split. Defendant's second peremptory strike against Juror 7, a male, did in fact create a potential jury evenly split between men and women, 4-4. The prosecutor exercised his third peremptory strike against juror #14, a male, which again left unaffected the composition of the potential jury. *See* R. 101: 49. Defendant's third challenge striking Juror 13, a female, also left unchanged the jury composition of 4 men and 4 women.

The prosecutor exercised his final peremptory strike against Juror 11, a male, tilting for the first time the composition of the potential jury in favor of women, 3-5. At that point, however, the prosecutor was faced with limited possibilities for achieving the 4-4 balance, all dependent on how defendant would exercise his last peremptory challenge. The final composition of the jury could have ranged from 5 men and 3 women, 5 women and 3 men, or 4 men and 4 women. Accordingly, the prosecutor was left to speculate as to which

prospective juror would be stricken by defendant. The defendant exercised his final peremptory challenge against Juror 17, a male, leaving a final jury composition of 3 men and 5 women.

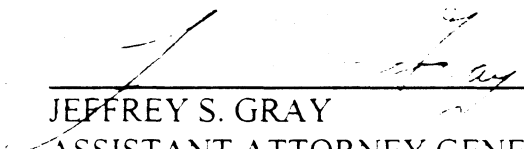
As the foregoing review of the strikes reveals, the prosecutor did not attempt to weight the jury with female jurors, but simply attempted to balance the jury. Had he had a discriminatory intent, he would have stricken the first four eligible male jurors. That course of action would have created the greatest likelihood of having a predominately female jury. He did not pursue that course of action. Accordingly, the trial court did not clearly err in concluding that the prosecutor's strikes were purposefully discriminatory.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's conviction.

Respectfully submitted this 13th day of March, 2002.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

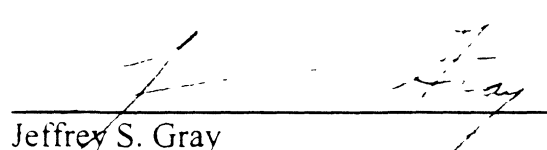


JEFFREY S. GRAY
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2002, I served two copies of the attached Brief of Appellee upon the defendant/appellant, Jeffery Ray Chatwin, by causing them to be delivered via first class mail, postage prepaid, to his counsel of record, as follows:

Heather Johnson
Salt Lake Legal Defender Ass'n
424 East 500 South, Ste. 300
Salt Lake City, UT 84111



Jeffrey S. Gray
Assistant Attorney General

ADDENDA

Addendum A

1 (Jury sworn.)

2 THE COURT: You may be seated for a moment, folks.

3 Will you please read the Information?

4 (Clerk reads Information.)

5 THE COURT: Members of the Jury, I will remind you of
6 an admonition each time we reconvene or recess. The
7 admonition is: Do not discuss this case with anyone. Do not
8 allow anyone to discuss it with you or in your presence. If
9 anyone attempts to do so, I want you to report it to myself or
10 the bailiff immediately.

11 You must not view, listen to, read or otherwise be
12 exposed to any media report about this trial. I don't
13 anticipate there will be any, but you must be cautious about
14 that. You must keep an open mind until you have heard all of
15 the evidence and not be distracted by any outside influences.

16 I will remind you of that admonition at each recess.

17 Now, we are going to take a recess, folks, of
18 approximately 15 minutes. And we will reconvene when the
19 Bailiff tells us it's time. Thank you, folks.

20 (Recess.)

21 THE COURT: We are convened in the instant matter
22 outside of the presence of the Jury.

23 Mr. Cope, Mr. O'Connell, you wanted to say something
24 on the record?

25 MR. O'CONNELL: Your Honor, I had been concerned

1 about one of the State's challenges, and I wanted to put that
2 on the record. It was, I think, Number 11, Amador Romero.
3 Mr. Romero was the only minority on the Jury, and I understand
4 my client is not a minority, but I still think that he's
5 entitled to the benefit -- my client comes from a lower
6 socioeconomic environment, that Mr. Romero does not
7 necessarily come from that, but as a minority I think he has
8 more sympathy to that type of thing. And so I think he's
9 still entitled to have him on this jury. And I think under
10 U.S. v. Battson (phonetic) -- I forget the -- under the
11 Supreme Court challenge, I am raising an objection to him
12 taking out the only minority at least in the first 17 we were
13 picking from. He was the only minority and was taken off by
14 the State.

15 THE COURT: Mr. Cope, do you wish to state for the
16 record your rationale for exercising that peremptory that's
17 being referred to?

18 MR. COPE: Your Honor, under Battson (phonetic), my
19 understanding is that unless the Court finds that there was
20 some improper motivation or prima facia case was establish by
21 the Defense for that, that I will not have to state a reason
22 for striking Mr. Romero. If the Court finds that Mr. Romero
23 was a minority, I believe -- I guess the Court could find
24 that.

25 But I note that Mr. Romero was the fourth person

1 taken by the prosecution, and that -- well, if the Court wants
2 me to state my reason for taking him rather than --

3 THE COURT: Let me say it this way: Of the initial
4 17 names from which the Jury was selected, at least as our
5 procedure goes, it appears to me that the name "Romero" is,
6 indeed, a Hispanic surname, and I think that given that fact,
7 alone, Counsel's probably entitled to some explanation as to
8 your reasons so I may then determine whether or not, in my
9 estimation, it was neutral and not racially charged so to
10 speak.

11 MR. COPE: I felt, Your Honor, that this Jury would
12 be better able to deliberate the evidence that I anticipate
13 presenting to it if it were balanced between men and woman. I
14 therefore made efforts to take men off of the Jury. That may
15 not make a great deal of sense, but that was the game plan.
16 Mr. Romero was a man, I took him because he was a man and I
17 thought I would be more comfortable with Ms. Rayburn or
18 Ms. Tapp on the Jury than Mr. Romero on the Jury.

19 THE COURT: So, the striking -- your peremptory
20 challenge to Mr. Romero had nothing -- according to your
21 statement here, had nothing at all to do to the fact that he
22 has an Hispanic surname?

23 MR. COPE: Yes.

24 THE COURT: Very well.

25 MR. O'CONNELL: Your Honor, in response to that:

1 Briefly, I think Mr. Romero also had a little bit of an accent
2 as I recall --

3 THE COURT: Excuse me?

4 MR. O'CONNELL: Had a little bit of an accent, which
5 probably won't show up in the record since this is
6 transcribed.

7 My concern, of course, is -- I can't remember the
8 name of the case. There was a later Supreme Court case that
9 extended Battson to gender as well, and it is also
10 inappropriate for the State to remove somebody solely based
11 upon their gender. And taking people off because they are
12 male or female I think is also inappropriate and in the same
13 situation as taking off a minority. So I think either way
14 that it is an inappropriate choice.

15 THE COURT: Well, I am not prepared to state that the
16 challenge was inappropriate. It appears to me that there's
17 been a justification for exercising the challenge against
18 Mr. Romero. And moreover I'm not persuaded that in a case of
19 this nature, specifically a spousal-abuse type of case, that
20 selecting jurors, be they male or female which the Prosecutor
21 or Defense for that matter decides might be more inclined to
22 adhere to the Prosecution's theory of the case or the
23 Defense's theory, for instance, that that was an inappropriate
24 way or manner or justification for a challenge; therefore,
25 your challenge is declined.

Addendum B

Date Nov. 21, 2000

State of Utah

vs

Jeffery Ray Chatwin

No 001910582 FS

James Cope

Attorneys for Plaintiff

John D. O'Connell, Jr.

Attorneys for Defendant

JURY LIST

FILED DISTRICT COURT
Third Judicial District

NOV 21 2000

SALT LAKE COUNTY

Deputy Clerk

Brian Smith

~~Karin Hatch~~

Δ; #1 JLC.

Pamela Wasson

Elizabeth Hansen

~~Paul Nicolet~~

Π #1 Mope

Matthew Gregory

~~Robert Cliff~~

Δ; #2 JLC

~~Carisa Hansen~~

Excluded by stip #1 AT

Robert Bennett

Susan Flitton

~~Amador Romero~~

Π #4 Mope

~~Michael Zarnofsky~~

Π #2 Mope

~~Rebel Wood~~

Δ; #3 JLC.

~~Mark Hanson~~

Π #3 Mope

Virginia Rayburn

Dana Tapp

~~David Cornelius~~

Δ; #4 JLC.

Stephen Ward

Kimberly St. Martin

Robert Kuhel

Date Nov 21, 200

State of Utah

vs

Jeffery Ray Chatain

No 001910582 FS

James Cope

Attorneys for Plaintiff

John D. O'Connell, Jr.

Attorneys for Defendant

JURY LIST

21 Jon Bonnesen

22 Kathryn Collins

23 Mark Augustyn

24 William Develyn

25 Hal Eatchel

26 Marco Herrera

27 Maria Leyba-Fitzen

28 Christopher Rodriguez

29 Kelli Runyan

30 Gary Kehr

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