

2001

# Utah v. Jefferey Ray Chatwin : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JEFFERY RAY CHATWIN,	:	Case No. 20010060-CA
Defendant/Appellant.	:	Priority No. 2

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**REPLY BRIEF OF APPELLANT**

Appeal from a judgment of conviction for Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1999), in the Third Judicial District Court, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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**SUMMARY OF THE ARGUMENTS**

Contrary to the State's contention, Appellant Jeffery Ray Chatwin's conviction cannot be affirmed because the prosecutor admitted that he used a peremptory strike to remove Venireman Amador Romero on the basis of his sex. R. 101 [27]. Fruitlessly, the State attempts to minimize the prosecutor's admission with two arguments: 1) the admission is inconsequential because Mr. Chatwin failed to make a prima facie showing of discrimination beforehand; and 2) the prosecutor dismissed Mr. Romero in an attempt to impanel a gender-balanced jury, not to discredit men as a class. Appellee's Br. 4-5. Neither argument works.

The State's first argument requires this Court to focus on prima facie considerations and overlook the prosecutor's bald statements that he removed Mr. Romero from the jury "because he was a man" and the game plan was to remove men. R. 101 [27]. This is nonsensical. With blatant discrimination on record, prima facie considerations are insignificant and cannot justify an affirmance.

At any rate, the prima facie showing was sufficient. A review of the record shows that Mr. Romero's dismissal was suspicious. To begin with, he was the only member of a racial minority group on the venire, R. 101 [26], and he spoke with an accent. Id. at 28. Further, there was no apparent reason for his dismissal. He was neither incompetent nor undesirable from the standpoint of the prosecutor. R. 101 [7, 25-28]; Aplt. Br. 15-17. Finally, the prosecutor used one hundred percent of his strikes to remove men from the jury, R. 49, and he effectively impaneled a predominantly female jury. Id. In these circumstances, suspicion of either racial or sexual discrimination was justified. And so, the State's prima facie argument fails.

The State's second argument is that the prosecutor's act of discrimination was pardonable because he was merely trying to impanel a gender-balanced jury. But the record does not bear this out. The record shows he blatantly discriminated against men, R. 101 [27], and it even shows that he was more comfortable with women on the jury than men. Id. The prosecutor was not merely trying to impanel a gender-balanced jury, he was illegally discriminating against men and the trial court should have belayed the strike.

Most importantly, the State's argument reflects a fundamental misunderstanding of the United States Supreme Court case of J.E.B. v. Alabama. J.E.B. prohibits sexual discrimination during jury selection, and there are no exceptions. J.E.B. v. Alabama, 511 U.S. 127, 129 (1994). There is certainly no exception for prosecutors who attempt to impanel gender-balanced juries. This is because doing so requires the prosecutor to focus



exclusively on gender and then remove venire persons on that basis. This is precisely what is prohibited. Id. What is more, the prosecutor cannot justify his actions by arguing that impaneling a gender-balanced jury is a finer goal than that of complying with J.E.B. Like anyone else, the prosecutor is subject to the law and cannot violate it for his own purposes, whatever they may be.

In sum, Mr. Chatwin's conviction cannot be affirmed. The prosecutor admitted sexual discrimination, and commented that he was more comfortable with women on the jury than with Mr. Romero on the jury. R. 101 [27]. This shows that the jury selection proceeding was irreparably tainted by at least one Equal Protection violation, and this case must be remanded for a fresh trial.

### **ARGUMENT**

#### **THE STATE'S ARGUMENTS DO NOT ALLAY THE EFFECTS OF THE PROSECUTOR'S BLATANT SEXUAL DISCRIMINATION**

Mr. Chatwin's conviction should be reversed and this case remanded for a new trial because the jury selection proceeding was tainted with illegal sexual discrimination. During the proceeding, the prosecutor used a preemptive strike to remove Mr. Romero from the venire "because he was a man" and the prosecutor's game plan was to remove men. R. 101 [27]. Under Batson v. Kentucky this discrimination violates the Equal Protection provision of the federal constitution and compels retrial. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986).

Nothing the State argues justifies an affirmance in these circumstances. Without exception, blatant sexual discrimination is unjustifiable and the taint of sexual discrimination cannot be removed once it is permitted to infiltrate the jury selection proceeding.<sup>1</sup> Nonetheless, the State makes two basic arguments: 1) Mr. Chatwin failed to make a prima facie showing of illegal discrimination, and 2) the prosecutor's goal of impaneling a gender-balanced jury was in harmony with J.E.B. Appellee's Br. 4-5. The first argument is unsupportable, and the second misunderstands J.E.B. and its jurisprudence. These arguments are examined in order below.

**A. Prima Facie Considerations Cannot Remove the Taint of Illegal Sexual Discrimination**

The State's prima facie argument focuses on procedural protocol. Appellee's Br. 11. According to protocol, the defense counsel must make a prima facie showing of illegal discrimination before the prosecutor must explain the peremptory strike at issue.<sup>2</sup> The State asserts that the prima facie showing in this case was insufficient and justifies an affirmance. Appellee's Br. 13.

This argument is unsupportable. Semantical interests aside, the prosecutor's admission of sexual discrimination compels reversal and retrial regardless of prima facie

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<sup>1</sup>Batson, 476 U.S. at 97-98; J.E.B. v. Alabama, 511 U.S. 127, 130-31 (1994); State v. Litherland, 2000 UT 76, ¶23 n.9, 12 P.3d 92; State v. Colwell, 2000 UT 8, ¶14, 994 P.2d 177; State v. Shepherd, 1999 UT App 305, ¶28, 989 P.2d 503.

<sup>2</sup> J.E.B., 511 U.S. at 144; Colwell, 2000 UT 8, ¶17; State v. Cantu, 778 P.2d 517, 518 (Utah 1989).

considerations. In fact, a majority of federal and state courts hold that the prima facie issue is moot once the prosecutor gives an explanation for the peremptory challenge at issue, the arguments are made, and the court decides the issue.<sup>3</sup> At this point, the principal question is not whether the prima facie showing was sufficient, but whether the defense met its ultimate burden of proving that the prosecutor illegally discriminated against a venire person.<sup>4</sup> This is because the ultimate burden transcends the preliminary burden of a prima facie showing, and makes it inconsequential on appeal.<sup>5</sup>

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<sup>3</sup> Hernandez v. New York, 500 U.S. 352, 359 (1991); United States v. Sneed, 34 F.3d 1570, 1579 (10<sup>th</sup> Cir. 1994); United States v. Johnson, 941 F.2d 1102, 1108 (10<sup>th</sup> Cir. 1991); Rankins v. Carey, 141 F. Supp.2d 1231, 1236 (D.C. Cal. 2001); People v. Rivera, 719 N.E.2d 154, 162 (Ill. App. Ct. 1999); State v. Edwards, 955 P.2d 1276, 1288 (Kan. 1998); Collins v. State, 691 So.2d 918, 925 (Miss. 1997); Fritz v. State, 946 S.W.2d 844, 850 n.2 (Tex. Crim. App. 1997); Colwell, 2000 UT 8, ¶18; State v. Higginbotham, 917 P.2d 545, 547 (Utah 1996); State v. King, 572 N.W.2d 530, 533 (Wis. Ct. App. 1997).

<sup>4</sup> See State v. Cannon, 2002 UT App 18, ¶5, 41 P.3d 1153 (A trial court's determination that the opponent of a peremptory challenge has failed to prove purposeful racial discrimination will not be reversed unless it is clearly erroneous); Higginbotham, 917 P.2d 545, 548 (Utah 1996) (The trial court's decision of "whether the opponent of the peremptory challenge has proved purposeful racial discrimination . . . will not be set aside unless it is clearly erroneous.") (citations omitted).

<sup>5</sup> An examination of the respective burdens of the parties is helpful in understanding this. These burdens are set out in the three-part Batson test. Initially, the defense counsel has the burden of making a prima facie showing of illegal discrimination. This is a threshold showing, and can be met by proffering a variety of evidence and argument relating to the voir dire and jury selection. J.E.B., 511 U.S. at 144-45; Shepherd, 1999 UT App 305, ¶29. Then the burden shifts to the prosecutor to proffer a race-neutral explanation for the peremptory challenge at issue. Cantu, 778 P.2d at 518. Finally, if the explanation is race or gender-neutral, the trial court must decide whether the defense counsel has proved purposeful discrimination. State v. Pharris, 846 P.2d 454, 464 (Utah Ct. App. 1993).

As is apparent from this review, the ultimate burden of persuasion rests with the defense counsel and never relents. See State v. Bowman, 945 P.2d 153, 155 (Utah Ct. App. 1997). ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.") (citations omitted). Although the burden of persuasion

This case helps illustrate the nonsensical results that would result if prima facie considerations are allowed to supercede the overall results of a Batson inquiry. Here, the prosecutor admitted that his game plan was to remove men from the jury. R. 101 [27]. He also explained that he removed Mr. Romero because he was a man. Id. If these admissions are ignored and the focus turns instead to preliminary matters, minor points such as the racial demographics of the venire or the presence of a linguistic accent will overshadow the blatant illegal discrimination on record. This cannot be allowed. While a prima facie showing is procedurally important at trial, it is insignificant in this case because a Batson inquiry was completed and blatant illegal discrimination is apparent.

What is more, reversal and retrial is necessary in this case even if the defense counsel's prima facie showing of illegal discrimination is thoroughly examined and critiqued. The trial court declared it sufficient, R. 101 [27], and that court is in the best position to make the necessary observations, ask the necessary questions, and assess the sufficiency of a showing.<sup>6</sup> In this case, the trial court observed voir dire, observed the attorneys during voir dire, observed Mr. Romero, and witnessed the pattern of

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temporarily shifts to the prosecutor to give a race or gender-neutral explanation for a peremptory challenge, the defense counsel is never relieved of the ultimate burden of persuasion. Thus, the ultimate burden transcends the prima facie case, and it becomes inconsequential once a Batson inquiry is completed.

<sup>6</sup> See State v. Bourgeois, 786 So.2d 771, 776 (La. Ct. App. 2001) (“The trial judge observes first-hand the demeanor of the attorneys and venire persons, the nuances of questions asked, the . . . composition of the venire, and the general atmosphere of the voir dire that simply cannot be replicated from a cold record. Thus, when a Batson challenge is made, it is incumbent upon the trial judge to address the challenge, either by ruling on whether a prima facie case of discriminatory intent has been made or by requiring race neutral reasons for the strikes.”)

preliminary strikes made by each attorney. R. 101 [24-28]. On these bases, the trial court properly found a prima facie case of illegal discrimination. R. 101 [27].

Nevertheless, the State argues that the defense counsel did not make a sufficient showing of illegal discrimination. Specifically, the State argues that: 1) the record does not show that the Mr. Romero is a member of a racial minority group; 2) Mr. Romero's minority status does not, by itself, establish a prima facie case; 3) the defense counsel did not establish a pattern of strikes against minority jurors; and 4) the defense counsel himself applied a racial stereotype. Appellee's Br. 11-13. All of these lack merit.

First, the record fully supports that Mr. Romero is a member of a racial minority group. During voir dire the trial court had ample opportunity to observe Mr. Romero and listen to him speak. R. 101 [7]. The court did not question his racial minority status; in fact, the trial court found that he is a member of a racial minority group and noted that he has a Hispanic surname. R. 101 [27]. Further, the defense counsel observed on the record that Mr. Romero has "a little bit of an accent," and this was not disputed by either the prosecutor or the court. R. 101 [28]. Even the prosecutor observed that the trial court "could find that" Mr. Romero was a member of a racial minority group. R. 101 [26]. There is no basis for the State's argument that Mr. Romero is not a member of a racial minority group.

Second, the State correctly points out that a venire person's minority status, by itself, does not establish a prima facie case.<sup>7</sup> However, the prima facie case is well-

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<sup>7</sup> Cannon, 2002 UT App 18, ¶8.

supported by a variety of points. Significantly, Mr. Romero was the only racial minority member on the venire and his dismissal appears unwarranted. R. 49-50, 101 [26]. Mr. Romero spoke only once during voir dire, and merely stated that he works for Associated Food Stores and his wife works for Sky West. R. 101 [7]. He did not indicate employment in the legal field, involvement with the criminal justice system, or anything else that would make him undesirable to the prosecutor. Also, as fully set out in the opening brief, there was nothing to indicate that he was in any way incompetent. Aplt. Br. 15-17. In these circumstances, the trial court was well-justified in finding a prima facie case of illegal discrimination.

Third, the State's complaint that the defense counsel failed to show that the prosecutor systematically excluded racial minorities from the jury is meritless. As a practical matter, making this showing is impossible when there is only one minority venire person, as there was here. R. 49-50, 101 [26]. Also, showing a pattern of strikes against minorities is only one way to support a prima facie case. There are many other ways and the absence of a pattern is not fatal.<sup>8</sup> At any rate, the prosecutor's pattern of strikes supports the defense counsel's prima facie case. The prosecutor dismissed the sole minority venire person, and used one hundred percent of his strikes to dismiss men. R.

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<sup>8</sup> Batson, 476 U.S. at 97. Notably, if a pattern of strikes was required, racial discrimination would be implicitly condoned any time only one member of a racial minority group appears in the venire. This result would directly conflict with both Batson and J.E.B., which recognized that "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." J.E.B., 511 U.S. at 142 n.13.

49. That is as significant, or more significant, in establishing a prima facie case than many other conceivable patterns of strikes. It supports the defense counsel's prima facie argument that the prosecutor illegally discriminated against Mr. Romero. R. 101 [25-26]. It even shows that all four strikes by the prosecutor were potentially gender-based.

Finally, contrary to the State's argument, the defense counsel did not demonstrate bigotry. He merely speculated that Mr. Romero may sympathize with Mr. Chatwin's poverty. This speculation could have been based upon the defense counsel's observations of Mr. Romero during voir dire, R. 101 [7], his explanation that he worked for a grocery store chain, Id., or some other factor not readily attainable from the record. The assumption that the defense counsel's speculation was based upon his race is unwarranted. Furthermore, whether any racism could be implied from the defense counsel's comments is irrelevant because he did not effectuate any illegal discrimination during the jury selection. That is an error which the prosecutor made and it should be corrected by a reversal and retrial.

The trial court's finding of a prima facie case of illegal discrimination is fully supported by the record, R. 101 [7, 26-29], and the State's arguments of insufficiency fail. Most importantly, prima facie considerations cannot obviate the taint of illegal sexual discrimination. The prosecutor admitted illegal discrimination against Mr. Romero, R. 101 [27], and this discrimination compels reversal and retrial regardless of any prima facie considerations. In short, both Batson and J.E.B. aimed to prohibit the type of superficial stereotyping that occurred here, and there is no justification for an

affirmance.

**B. The Prosecutor's Strike, Even if Used to Balance the Jury, was Sex-Based and Violated the Equal Protection Provision**

The State's second argument is that the prosecutor's strike was legal because he was not trying to remove men; he was trying to impanel a gender-balanced jury.

Appellee's Br. 16-18. However, the record belies that argument. The prosecutor used one hundred percent of his strikes to remove men, R. 49, and admitted that he "made efforts to take men off the Jury." R. 101 [27]. He even admitted that he was more comfortable with women on the jury than men: "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." Id. This evidence compels the conclusion that the prosecutor illegally discriminated against Mr. Romero on the basis of his sex.

The State's argument not only blindsides the record, it reflects a fundamental misunderstanding of J.E.B. J.E.B. prohibits the prosecutor from using preemptive strikes to impanel a gender-balanced jury because doing so requires the prosecutor to focus exclusively on a venire person's sex, and then strike the venire person on that basis. That is unconstitutional. J.E.B., 511 U.S. at 130-31. It is also unwarranted. The J.E.B. Court recognized that perfect sexual and racial inter-dynamics will not be achieved for every jury. Id. at 133-34. Neither is it required under the Equal Protection clause. Id. Equal Protection requires only that preemptive strikes not be race or gender-based. Id. at 143.



That is sufficient to protect the right of every person to participate in the justice process.

Id. Using preemptive strikes to achieve gender-balance is, therefore, both unnecessary and unconstitutional.<sup>9</sup>

The State is essentially asking this Court to make an inroad into J.E.B. on the basis that the prosecutor's purpose was higher than that of J.E.B. Appellee's Br. 17. But it is not the prosecutor's prerogative to violate the law for what he perceives as a higher purpose. Neither J.E.B. nor its jurisprudence contemplates exceptions based on higher purposes, or gives guidelines for evaluating such purposes. Opening the door for these exceptions violates J.E.B. and risks miring the simple holding of J.E.B. in a lot of cryptic nonsense that would soon nullify it. This is unacceptable. The J.E.B. Court declared that the highest purpose of the State in every case is to impanel a fair and impartial jury, and the prohibition against sex-based strikes inevitably furthers this purpose. J.E.B., 511 U.S. at 137 n.8. In simpler terms, striking venire persons on the basis of their sexes, for any

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<sup>9</sup> To further support its argument that the State struck men in order to achieve a gender-balanced jury, and not for reasons of sexual discrimination, the State provides an outline showing that the prosecutor did not strike the first four males on the Jury List. Appellee's Br. 20-21. Had the prosecutor wished to impanel a predominantly-female jury, the State argues, he would have dismissed the first four male jurors. Id.

However, as already argued above, striking jurors to impanel a gender-balanced jury is not a legitimate goal under J.E.B. And, even if it was, the State is mistaken. Striking the first four eligible males would not have created a predominantly-female jury; it would have created a balanced jury of four men and four women. R. 49 (striking jurors 1, 2, 5, and 6 would have left juror 3, a female, juror 4, a female, juror 7, a male, juror 9, a male, juror 10, a female, juror 11, a male, juror 12, a male, and juror 13, a female). This, of course, does not take into account any strikes that would have been made by the defense counsel in such circumstances. These strikes cannot be shown because they cannot be predicted. This, however, is immaterial because achieving a gender-balanced jury is not a legitimate goal to begin with.

reason, is unconstitutional and there are no exceptions.

The specific directive of J.E.B. is to find another basis, beyond sex or race, for exercising preemptive strikes. Id. at 143-45. Lawyers should give at least minimal thought to the characteristics that they desire or do not desire in jurors and exercise their strikes accordingly.<sup>10</sup> Strikes may be intelligently exercised, the J.E.B. Court pointed out, if voir dire is properly conducted:

If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.

J.E.B., 511 U.S. at 143-44. The directive is simple. It requires nothing more of advocates than to look beyond race and gender in exercising strikes. In this case, the prosecutor did not do that. He applied illegal sex-based assumptions and stereotypes in striking Mr. Romero, and this violated the constitutional principal of Equal Protection.

In conclusion, the trial court's failure to prohibit the strike against Mr. Romero is clearly erroneous and cannot be affirmed.<sup>11</sup> The prosecutor used one hundred percent of

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<sup>10</sup> See J.E.B., 511 U.S. at 143-44 (indicating that peremptory challenges may be exercised on the basis of anything other than race or gender); Cannon, 2002 UT App 18, ¶6 ("While a party is permitted to exercise their peremptory challenges for virtually any reason, or for no reason at all . . . our case law is clear: 'parties in a criminal action may not discriminate against potential jurors by exercising peremptory challenges solely on the basis of race.'") (citation omitted); State v. Merrill, 928 P.2d 401, 404 (Utah Ct. App. 1996) ("In Purkett, the [United States Supreme] Court stated merely that '[w]hat it means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection.'") (citation omitted).

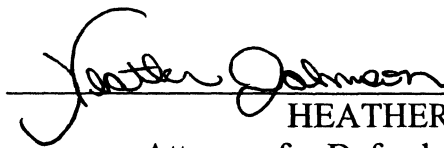
<sup>11</sup> J.E.B., 511 U.S. at 137-38 (responding to the State's argument that striking "virtually all the males from the jury" was reasonable because men would likely be more sympathetic to the arguments of a man in a paternity case, the United States Supreme Court held, "[w]e shall

his strikes against men, R. 49, and he admitted that he removed Mr. Romero solely because he is a man. R. 101 [27]. He even admitted his “game plan” was to remove men and he was more comfortable with women on the jury. Id. The record shows no other reason for Mr. Romero’s dismissal, and nothing indicates that he was an incompetent or otherwise undesirable. Id. at 7, 27. The trial court should have met the prosecutor’s strike with a flat refusal. Instead, it brushed aside the holding of J.E.B. and ruled that the strike was permissible because this is a “spousal-abuse type of case.” Id. at 28. This cannot be allowed to stand, and must be corrected by this Court.

### CONCLUSION

In light of the above, Mr. Chatwin’s conviction should be reversed, and this case should be remanded for a new trial before a jury which is not tainted by unconstitutional race or gender discrimination.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2002.

  
HEATHER JOHNSON  
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\_\_\_\_\_  
JOHN O’CONNELL, JR.  
Attorney for Defendant/Appellant

\_\_\_\_\_  
not accept as a defense to gender-based peremptory challenges ‘the very stereotype the law condemns.’”) (citation omitted).

**CERTIFICATE OF DELIVERY**

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 10<sup>th</sup> day of May, 2002.

  
\_\_\_\_\_  
HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_\_\_ day of May, 2002.

\_\_\_\_\_