

2001

# Utah v. Jefferey Ray Chatwin : Brief of Appellant

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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**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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**FILED**  
Utah Court of Appeals

JAN 10 2002

Paulette Stagg  
Clerk of the Court

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JEFFERY RAY CHATWIN, : Case No. 20010060-CA  
Defendant/Appellant. : Priority No. 2

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**NATURE OF THE PROCEEDINGS AND JURISDICTION**

This is 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, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.<sup>1</sup>

Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2001), which grants this Court jurisdiction over appeals from convictions for any crime other than a first degree or capital felony.

**STATEMENT OF THE ISSUE, STANDARD OF REVIEW, AND  
PRESERVATION OF THE ARGUMENT**

**Issue:** Did the trial court err by allowing the prosecutor to perempt Mr. Amador Romero [“Mr. Romero”], the only member of a racial minority on the venire, after the prosecutor

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<sup>1</sup> A copy of the Minutes of the “Sentence, Judgment, Commitment” is attached in Addendum A.



explained that the sole reason for Mr. Romero’s dismissal was his gender?

**Standard of Review:** “The trial court’s conclusion as to whether or not a prima facie case [of racial or sexual discrimination] was established is a legal determination which we review for correctness, according it no particular deference.”<sup>2</sup> Any “factual findings of the trial court relevant to allegedly discriminatory peremptory challenges merit deference on appeal and will be set aside only if they are clearly erroneous.” Pharris, 846 P.2d at 459. Ultimately, the trial court’s decision about whether purposeful discrimination was proved “turns on the credibility of the proponent of the strike and will not be set aside unless it is clearly erroneous.”<sup>3</sup>

**Preservation:** This issue was preserved at R. 101 [25-28].

### **RELEVANT CONSTITUTIONAL PROVISION**

The following provision from the United States Constitution is relevant on appeal.

The Fourteenth Amendment provides, in pertinent part:

. . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

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<sup>2</sup> State v. Pharris, 846 P.2d 454, 459 (Utah Ct. App. 1993). See also Batson v. Kentucky, 476 U.S. 79, 96 (1986) (describing the legal standards for assessing a prima facie case); State v. Span, 819 P.2d 329, 340-42 (Utah 1991) (analyzing the legal cognizability of a minority group for purposes of assessing a prima facie case of racial discrimination).

<sup>3</sup> State v. Higginbotham, 917 P.2d 545, 548 (Utah 1996). See also State v. Bowman, 945 P.2d 153, 155 (Utah Ct. App. 1997) (The trial court’s determination about whether purposeful racial discrimination has been proved “is a question of fact, [and] we will not reverse the decision of the trial court unless it is clearly erroneous.”)

U.S. Const. amend. XIV.

### **STATEMENT OF THE CASE**

On 16 June 2000 Appellant Jeffery Ray Chatwin [“Mr. Chatwin”] was charged by information with one count of Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1999). Mr. Chatwin entered a plea of not guilty, R. 21, and a trial date was set. R. 33.

A venire was assembled on 21 November 2000.<sup>4</sup> Following voir dire, the prosecutor and defense counsel exercised their peremptory strikes. R. 49, 101 [23]. The prosecutor used one of his strikes to eliminate the only member of a minority group, Mr. Romero, from the venire. R. 49, 101 [25-27]. Also, all four of the prosecutor’s strikes were used to eliminate men. R. 49, 101 [27]. The defense counsel challenged the elimination of Mr. Romero, pointing out that he was the only member of a minority group on the venire. R. 101 [26]. The prosecutor replied that he was not required to proffer an explanation for the strike unless the court found a prima facie case of racial discrimination. Id.

The court found that the name “Romero” is a Hispanic surname, and that the defense counsel was entitled to an explanation for the strike. R. 101 [26-27]. The prosecutor stated the following:

I felt, Your Honor, that this Jury would be better able to deliberate the

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<sup>4</sup> R. 101 [4-5]. The Jury List, R. 49-50, is included in Addendum B.

evidence that I anticipate presenting to it if it were balanced between men and women. 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]. In response, the defense counsel pointed out that the United States Supreme Court's holding in Batson v. Kentucky, prohibiting the use of peremptory strikes to eliminate venirepersons on the basis of their race, is extended to prohibit gender discrimination. R. 101 [28]. The defense counsel argued that removing venirepersons on the basis of either race or gender is inappropriate. Id. The trial court responded as follows:

Well, I am not prepared to state that the [prosecutor's] challenge [of Mr. Romero] was inappropriate. It appears to me that there's been a justification for exercising the challenge against Mr. Romero. And moreover I'm not persuaded that in a case of this nature, specifically a spousal-abuse type of case, that selecting jurors, be they male or female which the Prosecutor or Defense for that matter decides might be more inclined to adhere to the Prosecution's theory of the case or the Defense's theory, for instance, that that was an inappropriate way or manner or justification for a challenge; therefore, your challenge is declined.<sup>5</sup>

Mr. Chatwin was convicted by the jury as charged. R. 41-42. He filed a timely Notice of Appeal. R. 85-86.

### **STATEMENT OF THE FACTS**

Based upon incidents of domestic violence, Judge Sheila McCleve issued a

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<sup>5</sup> Id. The transcript of the defense counsel's objection, the prosecutor's explanation, and the trial court's rulings, R. 101 [25-29], is included in Addendum C.

protective order against Ms. Brenda Lee [“Ms. Lee”], ordering her to attend counseling and anger management classes and to stay away from Mr. Chatwin. R. 101 [55-56]. In violation of that order, Ms. Lee was living with Mr. Chatwin, his mother, and his five daughters at 1325 Indiana Avenue. R. 101 [37].

On 13 June 2000 Ms. Lee was intoxicated. R. 101 [52]. She had been drinking and using methamphetamine. R. 101 [39-40, 52-53]. She drove from Mr. Chatwin’s house to her friend “Doug’s” house, using Mr. Chatwin’s vehicle. Id. She then returned to Mr. Chatwin’s house. R. 101 [40]. She and Mr. Chatwin, who had drunk some beers that day, began arguing because Ms. Lee had missed a Drug Court meeting which she had been ordered to attend. R. 101 [40-41, 54-55]. Ms. Lee decided to leave and go to her mother’s house. R. 101 [41]. She began walking west on Indiana Avenue. Id.

Ms. Lee testified that Mr. Chatwin was “hollering and screaming” at her as she walked. R. 101 [43]. However, a juvenile witness indicated that Mr. Chatwin “just stood there.” R. 101 [63]. Besides being intoxicated, Ms. Lee had not slept for at least a day due to her methamphetamine use. R. 101 [52-54].

About that time, Ms. Lee’s 14-year old daughter, Alicia Ann Lee [“Alicia”], telephoned Mr. Chatwin’s home because she hadn’t spoken to her mother in several days and wanted to see how her mother was doing.<sup>6</sup> Mr. Chatwin answered the telephone. R. 101 [104]. He told Alicia that her mother was outside, and that she was taking her things and wanted to leave. Id. Ms. Lee did not come to the telephone. R. 101 [101].

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<sup>6</sup> R. 30, 101 [99]. Alicia was not living with her mother at that time. R. 101 [100].

Ms. Lee continued walking west on Indiana Avenue. She crossed Concord Street and Navajo Street, and reached a 7-Eleven. R. 101 [42-43]. Mr. Chatwin got in his truck and drove west, intending to find Ms. Lee to tell her about Alicia's call. R. 101 [43, 87]. He turned into the 7-Eleven and stopped in front of Ms. Lee. R. 101 [44]. He asked her to get in the truck. R. 101 [44]. She refused. R. 101 [45]. She turned, walked behind the truck, and started walking across the street. Id. A juvenile witness testified that Mr. Chatwin put the truck in reverse and hit Ms. Lee, throwing her several feet. The witness testified that Mr. Chatwin said, "that's what she gets." R. 101 [69]. Mr. Chatwin left the scene. R. 101 [71].

After Mr. Chatwin returned home, he called the police and reported that a drunk woman had bumped into his car at the 7-Eleven. R. 101 [80]. Alicia called again and Mr. Chatwin answered. R. 101 [104]. He told Alicia that her mother had bumped into the back of his truck and was at the 7-Eleven acting "like he hit her with the truck." Id. He also told Alicia "that he didn't know what he supposed to do" and had simply returned to the house. R. 101 [104].

### **SUMMARY OF THE ARGUMENTS**

The prosecutor's blatant admission that he "made efforts to take men off of the Jury," R. 101 [27], and that he dismissed Mr. Romero from the jury because Mr. Romero was a man, Id., violates the Equal Protection principle. In J.E.B. v. Alabama, the United

States Supreme Court extended the holding of Batson v. Kentucky<sup>7</sup> to prohibit prosecutors from intentionally discriminating against potential jurors on the basis of their gender. J.E.B. v. Alabama, 511 U.S. 127, 130-31 (1994). As the Court explained in J.E.B., intentional discrimination on the basis of gender “serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.” Id. This is particularly true in cases which involve gender-related issues, such as rape, sexual harassment, or paternity. Id. at 140. Courts across the country have been particularly diligent in ridding domestic violence cases from the taint of gender discrimination during jury selection.<sup>8</sup>

This case involves an incident of domestic violence and the trial court should have been particularly diligent in ensuring that gender discrimination did not taint jury selection. Instead, the trial court allowed the prosecutor to dismiss Mr. Romero on the basis that the prosecutor’s “game plan” was to remove men from the jury and Mr. Romero was dismissed pursuant to this plan. R. 101 [27]. The trial court also ruled that racial discrimination had not occurred and that gender discrimination during a “spousal-abuse type case” was not inappropriate. R. 101 [28].

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<sup>7</sup> In Batson v. Kentucky the United States Supreme Court held that prosecutors may not intentionally discriminate against potential jurors on the basis of their race. Batson v. Kentucky, 476 U.S. 69, 89 (1986).

<sup>8</sup> Maddox v. State, 708 So.2d 220, 228 (Ala. Crim. App. 1997); State v. Bourgeois, 786 So.2d 771, 775 (La. Ct. App. 2001); Commonwealth v. Tourscher, 682 A.2d 1275, 1280 (Pa. 1996); State v. Turner, 879 S.W.2d 819, 822 (Tenn. 1994); State v. Donaghy, 769 A.2d 10, 14-15 (Vt. 2000); Payne v. Gundy, 468 S.E.2d 335, 340, 343 (W. Va. 1996).

This ruling defies the holding of the United States Supreme Court in J.E.B. v. Alabama, and ignores the recognition of the Utah Supreme Court and this Court that gender discrimination is unconstitutional. 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. It also sets a dangerous precedent that would allow prosecutors to unabashedly discriminate on the basis of gender simply by asserting that members of one gender are more likely to be sympathetic and receptive to prosecutorial arguments. This sort of stereotyping is at the root of the social injustice condemned by the United States Supreme Court in Batson v. Kentucky, 476 U.S. at 97-99 and J.E.B. v. Alabama, 511 U.S. at 131-34. As the Court said in J.E.B., “[s]triking individual jurors on the assumption that they hold particular views simply because of their gender is ‘practically a brand upon them, affixed by the law, an assertion of their inferiority.’” Id. at 142 (citations omitted). The trial court’s unconstitutional precedent should be condemned by this Court, and Mr. Chatwin should receive a new trial untainted by governmentally-approved racial or sexual discrimination.

### **ARGUMENT**

#### **THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO STRIKE THE ONLY MINORITY VENIREPERSON AFTER THE PROSECUTOR EXPLAINED THAT HE WAS DOING SO ON THE BASIS OF THE VENIREPERSON’S GENDER**

The principal of Equal Protection prohibits the prosecutor from using even one

peremptory challenge to discriminate against a venireperson on the basis of race or gender. Yet, in this case the prosecutor boldly declared, “Mr. Romero was a man, I took him [off] 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]. The trial court, seemingly reassured that no unconstitutional activity was taking place, permitted the strike, ruling that there was nothing inappropriate about gender discrimination in a “spousal-abuse type of case . . . .” R. 101 [28]. This blatantly ignores well-established jurisprudence flatly prohibiting race or gender-based discrimination in jury selection, and condones gender discrimination in precisely the circumstances where it may do the most harm.

Beginning with Batson v. Kentucky issued in 1986, the United States Supreme Court has worked to ensure that the jury selection process proceeds unhindered by the evils of social discrimination that undermined the fabric of our society in the past. In Batson the Court declared that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.” Batson v. Kentucky, 476 U.S. 79, 89 (1986). This protection was readily extended to members of all cognizable racial minority groups in Holland v. Illinois, 493 U.S. 474, 476-77 (1990).

In J.E.B. v. Alabama, the Court examined the issue of gender discrimination in the jury selection process. In J.E.B. the State of Alabama filed a paternity suit against a man



on behalf of a mother and her minor child. J.E.B. v. Alabama, 511 U.S. 127, 129 (1994). The venire consisted of thirty-six people, twelve men and twenty-four women. Id. The State used nine of its ten peremptory strikes to remove men and the defendant used all but one of his strikes to remove women. Id. The resulting jury consisted entirely of women. Id. The defendant was found to be the father of the child and was ordered to pay child support. Id. He appealed, claiming that the prosecutor unconstitutionally discriminated against men in exercising his peremptory challenges. Id. at 129-30.

The United States Supreme Court agreed. The Court declared:

[t]oday we reaffirm what, by now, should be axiomatic: Intentional 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. Attempting to justify the strikes, the State drew the Court's attention to the fact that the case involved a paternity action filed on behalf of a child born out of wedlock. Id. at 137-38. The State argued that it was reasonable to strike virtually all of the men from the jury because, historically, male jurors had been disposed to accept the arguments of a man while female jurors were disposed to accept the arguments of the mother. Id. The Court flatly rejected this argument, declaring, "[w]e shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'"

Id. at 138 (citation omitted). The Court emphasized:

When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked

injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.' . . . *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.<sup>9</sup>

Addressing concern that its holding would severely cripple the important role of peremptory challenges in impaneling fair, impartial juries, the Court added that its holding "does not imply the elimination of all peremptory challenges." Id. at 143. On the contrary, "[p]arties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias." Id. "Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext." Id. To avoid pretextual strikes, trial courts

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<sup>9</sup> Id. at 140 (emphasis added) (quoting Powers v. Ohio, 499 U.S. 400, 412-13 (1991)). Significantly, the Court also noted:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization. . . . The generalization advanced by Alabama in support of its asserted right to discriminate on the basis of gender is, at the least, overbroad, and serves only to perpetuate the same 'outmoded notions of the relative capabilities of men and women.' . . . The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.

Id. at 139 n.11 (citations deleted).

should conduct a thorough voir dire so that parties will have a firm basis upon which to exercise their peremptory strikes. Id. at 143-44. “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.” Id. at 143.

The Utah Supreme Court recently recognized that J.E.B. v. Alabama prohibits Utah prosecutors from purposefully discriminating against venirepersons on the basis of their gender. State v. Litherland, 2000 UT 76, ¶23 n.9, 12 P.3d 92; State v. Colwell, 2000 UT 8, ¶14, 994 P.2d 177. Likewise, this Court holds that striking potential jurors solely on the basis of their gender violates the principal of Equal Protection. State v. Shepherd, 1999 UT App 305, ¶28, 989 P.2d 503.

As a result of J.E.B., courts across the country are particularly diligent in scrutinizing jury selection proceedings when cases involve domestic violence, rape, sexual harassment, and other gender-sensitive issues.<sup>10</sup> Recently, appellate courts have reversed or remanded many cases involving domestic violence because prosecutors have blatantly discriminated against venirepersons on the basis of gender.<sup>11</sup> Even when gender

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<sup>10</sup> See J.E.B., 511 U.S. at 140 (“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.”)

<sup>11</sup> Maddox v. State, 708 So.2d 220, 228 (Ala.Ct. App. 1997); State v. Bourgeois, 786 S.2d 771, 775 (La. Ct. App. 2001); Commonwealth v. Tourscher, 682 A.2d 1275, 1280 (Pa. 1996); State v. Turner, 879 S.W.2d 819, 821 (Tenn. 1994).

discrimination is merely implied, courts have reversed or remanded for Batson hearings.<sup>12</sup>

In such cases, a showing of harmfulness is not required because gender or race-based discrimination is a structural error that affects the entire trial from beginning to end. State v. Russell, 917 P.2d 557, 560 (Utah Ct. App. 1996). This is consistent with Batson v. Kentucky, which indicated that a showing of purposeful racial discrimination, unrebutted by a race-neutral explanation, requires the reversal of the defendant's conviction.<sup>13</sup> In this case, the prosecutor removed Mr. Romero from the jury on the basis of his gender and race, and Mr. Chatwin's conviction should be reversed and this case remanded for a new trial.

**A. As the Trial Court Ruled, There is a Prima Facie Case of Racial Discrimination Because Mr. Romero was the Only Member of a Racial Minority Group on the Venire, He Spoke with an Accent, and There was no Indication that He was an Incompetent or Undesirable Juror**

The United States Supreme Court indicates that when a peremptory strike is challenged as a pretext for racial or sexual discrimination, a three-part test applies. J.E.B., 511 U.S. at 144-45; Batson, 476 U.S. at 96-99. First, a defendant who is alleging discrimination must proffer a prima facie showing of intentional discrimination. J.E.B.,

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<sup>12</sup> People v. Gandy, 878 P.2d 68, 70 (Colo. Ct. App. 1996); State v. Donaghy, 769 A.2d 10, 14-16 (Vt. 2000); Payne v. Gundy, 468 S.E.2d 335, 340, 343 (W. Va. 1996).

<sup>13</sup> Batson, 476 U.S. at 100. See also State v. Pharris, 846 P.2d 454, 459 (Utah Ct. App. 1993) (Parties stipulation that a showing of harm is not required where purposeful discrimination is shown is "consistent with the directive in Batson that if a court finds unrebutted, purposeful discrimination, 'precedents require that [a] petitioner's conviction be reversed.'")

511 U.S. at 144-45. “In Utah, the elements necessary to establish a prima facie case include: ‘(1) as complete a record as possible, (2) a showing that persons excluded belong to a cognizable group . . . and (3) a showing that there exists ‘a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.’”<sup>14</sup>

Once a prima facie showing has been proffered, “[t]he burden then shifts to the challenged party to show the existence of a [race or gender] neutral reason for the challenge.” State v. Cantu, 778 P.2d 517, 518 (Utah 1989). If the prosecutor’s explanation is race neutral and gender neutral, the trial court must proceed to determine whether purposeful racial or sexual discrimination has tainted the jury selection process. Pharris, 846 P.2d at 464. If the prosecutor’s explanation is discriminatory on its face, the challenged peremptory strike violates the Equal Protection principal and the trial court must disallow the strike as a matter of law.<sup>15</sup>

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<sup>14</sup> Shepherd, 1999 UT App 305, ¶29, 989 P.2d 503 (quoting State v. Alvarez, 872 P.2d 450, 456 (Utah 1994)).

<sup>15</sup> See Batson, 476 U.S. at 98 (“The prosecutor therefore *must* articulate a neutral explanation related to the particular case to be tried. The trial court *then* will have the duty to determine if the defendant has established purposeful discrimination.”) (emphasis added); State v. Bowman, 945 P.2d 153, 155-56 (Utah Ct. App. 1997) (Once a race neutral explanation is proffered, the trial court must determine whether the explanation is a pretext for racial discrimination. This determination rests on the credibility of the proponent of the strike, and this Court “will not reverse the decision of the trial court unless it is clearly erroneous.”); State v. Higginbotham, 917 P.2d 545, 548 (Utah 1996) (Because the final step requires the trial court to evaluate the credibility of the proponent of the strike, who has already proffered a race neutral explanation, the court’s determination “will not be set aside unless it is clearly erroneous.”); State v. Merrill, 928 P.2d 401, 403 (Utah Ct. App. 1996) (“‘[U]nless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.’ . . . [When the explanation is race neutral] the inquiry, as to whether Batson was violated, proceeds

In this case, the first part of the test is met. As the trial court ruled, there is a prima facie case of racial discrimination. R. 101 [27]. The prosecutor used his fourth peremptory challenge to dismiss Mr. Romero. R. 49. Mr. Romero spoke with an accent, R. 101 [28], and the trial court noted that Mr. Romero had a Hispanic surname. R. 101 [27]. Both the defense counsel and prosecutor acknowledged that Mr. Romero was a minority venireperson. R. 101 [26-27]. In fact, as the defense counsel pointed out, Mr. Romero was the only member of a racial minority group on the venire. R. 101 [26]. Further, there was no apparent reason for Mr. Romero's dismissal. During voir dire, he stated his name, indicated that he worked for Associated Food stores, and explained that his wife worked for Sky West. R. 101 [7]. He said nothing during the rest of voir dire, R. 101 [11-24], and there was nothing to indicate that he was an incompetent or undesirable juror from the prosecutor's point of view. In these circumstances, the trial court correctly found that there was a prima facie showing of racial discrimination. R. 101 [27].

The defense counsel did not have an opportunity to proffer a prima facie case of sexual discrimination because that issue did not arise until the prosecutor gave an explanation which was sexually discriminatory on its face. R. 101 [27]. The trial court then ruled on both issues of discrimination. R. 101 [28]. At this point, the issue of whether there was a prima facie case of sexual discrimination is moot. Once a prosecutor tenders his explanation and the trial court rules on the ultimate question of purposeful

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to step three.") (citations omitted).

discrimination, the preliminary issue of a prima facie showing is irrelevant.<sup>16</sup>

At any rate, there was a prima facie case of sexual discrimination here. The venire consisted of thirty people, nineteen men and eleven women. R. 49-50. The first seventeen names on the list included ten men and seven women.<sup>17</sup> The prosecutor used 100 percent of his strikes to eliminate men. Four men were struck by the prosecutor, three men and one woman were struck by the defense counsel, and one woman was excused by the

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<sup>16</sup> Hernandez v. New York, 500 U.S. 352, 359 (1991). See also Drane v. State, 523 S.E.2d 301, 303 n.3 (Ga. 1999) (“The trial court made no finding as to prima facie discrimination, but this preliminary finding is moot once the proponent gives reasons for its strikes and the trial court makes its findings.”); People v. Rivera, 719 N.E.2d 154, 162 (Ill. Ct. App. 1999) (“[T]he preliminary issue of whether the defendant has made a prima facie case becomes moot where the trial court fails to determine whether such a showing has been made, the State voluntarily offers reasons for its challenges, and the trial court rules on the ultimate question of purposeful racial discrimination.”); State v. Edwards, 955 P.2d 1276, 1288 (Kan. 1998) (“[O]nce 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 has made a prima facie showing becomes moot.”); Collins v. State, 691 So.2d 918, 926 n.3 (Miss. 1997) (“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.”); Fritz v. State, 946 S.W.2d 844, 850 n.2 (Tex. Crim. App. 1997) (“Once the responding party has offered a neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of purposeful discrimination, the preliminary issue of whether the objecting party had made a prima facie showing becomes moot.”); Colwell, 2000 UT 8, ¶18 (the requirement of a prima facie showing is waived when the prosecutor fails to contest the sufficiency of the showing and proffers an explanation); Bowman, 945 P.2d at 155 n.2 (“The prosecutor waived the issue of whether a prima facie case of discrimination was established by failing to raise it in the trial court and providing an explanation for his use of the challenged peremptory strikes.”); State v. King, 572 N.W.2d 530, 533 (Wis. Ct. App. 1997) (“When the prosecutor offers a race-neutral explanation for peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant made a prima facie showing becomes moot.”).

<sup>17</sup> R. 49. Only the first seventeen venirepersons were necessarily evaluated by counsel for each side because eight jurors were to be impaneled, eight would be dismissed through peremptory strikes, and one was excused by the court. R. 49.

court. R. 49-50. Ultimately, the jury consisted of five women and only three men. R. 49.

By using his strikes to systematically eliminate men, the prosecutor reduced the percentage of men from sixty-three percent on the venire to thirty-eight percent on the jury.<sup>18</sup> Further, the alleged victim in this case was a women and the defendant was a man. These facts alone provides a strong indication of gender discrimination.<sup>19</sup> Additionally, the fact that this was a domestic violence case should have triggered careful scrutinization of the jury selection process because this is precisely the type of case where “[t]he potential for cynicism is particularly acute.”<sup>20</sup> Thus, there was a prima facie case of

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<sup>18</sup> R. 49. The percentage of men making up the first seventeen names listed is fifty-nine percent.

<sup>19</sup> Batson, 476 U.S. at 96-97 (pattern of striking members of cognizable racial group may give rise to inference of discrimination); Maddox, 708 So.2d at 224 (prima facie case established where prosecutor used nine of his eleven peremptory challenges to strike men); Gandy, 878 P.2d at 69 (prima facie case established where venire consisted of eleven men and fourteen women, and prosecutor used all six of his peremptory challenges to strike men); Bourgeois, 786 So.2d at 776 (prima facie case established where prosecutor exhibited a pattern of striking men from the jury where “[n]o obvious reason for the strikes other than gender appear of record.”); State v. Call, 508 S.E.2d 496, 510 (N.C. 1998) (Factors to consider in evaluating whether a prima facie case has been established “include the gender of the defendant, the victim and any key witnesses; questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of gender discrimination; the frequent exercise of peremptory challenges to prospective jurors of one gender that tends to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members of one gender; whether the State exercised all of its peremptory challenges; and the ultimate gender makeup of the jury.”); Pharris, 846 P.2d at 458 (this Court found a prima facie case of racial discrimination where prosecutor used three of his four peremptory challenges to strike Native Americans); Donaghy, 769 A.2d at 12 (prima facie case established where venire consisted of ten women and eleven men, and prosecutor used six strikes to eliminate men and one strike to eliminate a woman); Payne, 468 S.E.2d at 340 (prima facie case established where venire consisted of nine men and three women, and prosecutor used two of his three peremptory strikes to eliminate women).

<sup>20</sup> J.E.B., 511 U.S. at 140. See also Donaghy, 769 A.2d at 14 (“Because this case involves the gender-related issue of domestic violence, we review it with a keen eye to preventing state-



sexual discrimination here.

**B. Because the Prosecutor's Explanation for the Dismissal was Discriminatory on Its Face, the Trial Court Should Have Prohibited the Strike at that Point Rather than Allowing the Strike on the Basis that Sexual Discrimination is Acceptable in a "Spousal-abuse type case"**

The second part of the three-part test requires the prosecutor to come forward with a race and gender-neutral explanation for the dismissal. J.E.B., 511 U.S. at 145. The explanation "need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender [or race], and the proffered explanation may not be pretextual." J.E.B., 511 U.S. at 145. Specifically, "a party may not rebut the prima facie case by either asserting that he or she believed that the challenged venireman would be partial to the defendant because of race [or gender] or by simply denying any lack of good faith in the challenged peremptory strikes."<sup>21</sup> The explanation must be legitimate in that it is race neutral and gender neutral, it must be related to the case being tried, and it must be clear and reasonably specific. Cantu, 778 P.2d at 518.

In this case, after being required to proffer an explanation for Mr. Romero's dismissal, the prosecutor responded:

I felt, Your Honor, that this Jury would be better able to deliberate the

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sanctioned discrimination); Payne, 468 S.E. 2d at 343 ("inasmuch as this action involves a case of alleged domestic assault and battery, it comports with the admonition of J.E.B., set forth above, that the potential for cynicism in the face of gender discrimination in the jury selection process 'is particularly acute in cases . . . involving rape, sexual harassment, or paternity.'")

<sup>21</sup> Pharris, 846 P.2d at 463 (citing Batson, 476 U.S. at 98).

evidence that I anticipate presenting to it if it were balanced between men and women. 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]. The court then asked the prosecutor whether the strike had anything to do with Mr. Romero's Hispanic surname, and the prosecutor responded that it did not. Id. The defense counsel again objected, explaining that the United States Supreme Court's holding in Batson had been extended to prohibit gender discrimination. Id. at 28. The trial court then ruled as follows:

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

Id. at 28-29.

The prosecutor's explanation was discriminatory on its face, and the trial court's ruling was legal error. The prosecutor blatantly admitted that his general game plan was to remove men from the jury and he "made efforts to take men off of the jury." R. 101 [27]. He also acknowledged that he removed Mr. Romero "because he was a man . . . ." Id. This is illegal. "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" J.E.B., 511 U.S. at 138 (citation

omitted). Thus, the trial court should have disallowed the peremptory challenge, and should not have proceeded to the third part of the three-part test.

Blatant discrimination against venirepersons on the basis of gender, particularly where the case involves domestic violence, has not been tolerated in light of *J.E.B.* In *Commonwealth v. Tourscher*, the Superior Court of Pennsylvania vacated a conviction for burglary, criminal trespass, recklessly endangering another person, simple assault, and terroristic threats because the prosecutor “blatantly stated that she struck six female venirepersons because ‘from prosecuting domestic cases [she has found] that women are a lot tougher on domestic cases . . . .’” *Tourscher*, 682 A.2d at 1277, 1280 (citation omitted). In a case of incest, the Louisiana Court of Appeals remanded for a *Batson* hearing because the prosecutor commented before the trial and during the impanelment that he was trying to keep men off the jury. *Bourgeois*, 786 So.2d at 775.

The Alabama Court of Criminal Appeals reversed a rape conviction because the prosecutor’s explanation for removing a black woman from the jury was that “[t]here are some authorities who believe that the fewer the women that you have on a rape case, the . . . as jurors, the better.” *Maddox*, 708 So.2d at 228. In that case the Court commented, “[t]his appears to be exactly the sort of gender-based reason for exercising peremptory challenges condemned by the United States Supreme Court in *J.E.B. v. Alabama* . . . .” *Id.* Finally, in a case involving two counts of incest, the Supreme Court of Tennessee affirmed the trial court’s ruling that the defense counsel could not use his peremptory strikes to eliminate women from the jury after he admitted that he was trying to empanel

an all-male jury. Turner, 879 S.W.2d at 821.

Mere implications of gender discrimination have compelled appellate courts to reverse or remand for Batson hearings. The Supreme Court of Vermont remanded a case for a Batson hearing because the prosecutor used 85 percent of his strikes against men. Donaghy, 769 A.2d at 14-15. That Court noted that “[w]hen men appear to be systematically removed from juries selected by a prosecutor [charged with prosecuting violent crimes against women], there is a strong inference of gender discrimination.” Id. at 15. The West Virginia Supreme Court reversed an assault and battery conviction because the prosecutor’s explanation for using two of his three peremptory strikes to eliminate women was cursory and ambiguous and appeared to be a pretext for gender discrimination. Payne, 468 S.E.2d at 340. The Colorado Court of Appeals remanded a case involving a conviction for burglary because the prosecutor dismissed six men from the jury. Gandy, 878 P.2d at 69. The prosecutor in Gandy explained that he had dismissed the men because his “profile for the ideal juror was, like the victim, an educated professional woman who resided in the same neighborhood and in a similar living situation.” Id. at 70. The Court was dissatisfied with this answer, and remanded for further findings and rulings on the issue of gender discrimination. Id.

Here, the prosecutor’s blatantly discriminatory explanation did not meet the second part of the three-part test. The prosecutor, apparently attempting to justify his reasoning, indicated that “this Jury would be better able to deliberate the evidence that I anticipate presenting to it if it were balanced between men and women.” R. 101 [27].

However, the record shows that the prosecutor was not attempting to achieve an equal balance of men and women on the jury. Although the first seventeen venirepersons included ten men and seven women, the impaneled jury consisted of five women and only three men. R. 49. The percentage of men was reduced from fifty-nine percent of the first seventeen venirepersons to thirty-seven percent on the jury because of the prosecutor's plan to deliberately remove as many men as possible from the jury. R. 49, 101 [27]. During the peremptory challenge exercise the defense counsel had also eliminated some men, and if the prosecutor had intended to achieve an equal balance of men and women he would have stopped eliminating men once the number of men and women were equal.<sup>22</sup> However, the prosecutor undauntedly continued eliminating only men.

Further, achieving an equal balance of men and women on the jury is not a legitimate goal. This goal is based upon the archaic and overbroad gender stereotypes condemned in J.E.B., and is inherently discriminatory in its nature. J.E.B., 511 U.S. at 130-31. Thus, the prosecutor's comment indicating that he was trying to achieve a balance of men and women on the jury is not borne out in the record and is, itself, an

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<sup>22</sup> The peremptory strikes were exercised as follows: (1) prosecutor eliminated Mr. Paul Nicolet, (2) defense counsel eliminated Mr. Kevin Leitch, (3) prosecutor eliminated Mr. Michael Zarnofsky, (4) defense counsel eliminated Mr. Robert Cluff, (5) prosecutor eliminated Mr. Mark Hanson, (6) defense counsel eliminated Ms. Rebel Wood (Ms. Wood is a woman, R. 101 [8]), (7) prosecutor eliminated Mr. Romero, and (8) defense counsel eliminated Mr. David Cornelius. R. 49.

illegitimate explanation for Mr. Romero's dismissal.<sup>23</sup>

**C. The Trial Court's Declaration that the Prosecutor's Blatant Sexual Discrimination in a Spouse Abuse Case is not Inappropriate Sets a Dangerous Precedent Which Wholly Defies the United States Supreme Court's Ruling in J.E.B., the Holding of this Court, and the Holding of the Utah Supreme Court**

Because the prosecutor's explanation was not racially and sexually neutral, the trial court should have disallowed the strike immediately instead of proceeding to part three of the three-part test.<sup>24</sup> Notwithstanding, purposeful racial discrimination was proven under the third part of the test. Part three requires the trial court to consider the prosecutor's explanation in light of the surrounding circumstances, and decide whether there was intentional discrimination. Colwell, 2000 UT 8, ¶20-24. In State v. Cantu, the Utah Supreme Court indicated that:

the presence of one or more of [the following] factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (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

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<sup>23</sup> See Colwell, 2000 UT 8, ¶22 ("We have previously held that a proponent's reason given to justify a peremptory challenge must be (1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate." (Internal quotations omitted)).

<sup>24</sup> See Bowman, 945 P.2d at 155 ("If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.") (quoting Higginbotham, 917 P.2d at 547).

equally applicable to juror[s] who were not challenged.<sup>25</sup>

Ultimately, the prosecutor's explanation must be "(1) [n]eutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate." Cantu, 778 P.2d at 518.

Application of these criteria demonstrate that the prosecutor discriminated against Mr. Romero on the basis of his race and gender. In explaining Mr. Romero's dismissal, the prosecutor blatantly stated that he dismissed Mr. Romero "because he was a man . . ." and implied that Mr. Romero had certain opinions and biases "because he was a man . . . ." R. 101 [27]. The prosecutor also indicated that he was trying to achieve a balance of sexes on the jury, Id., and this is inherently discriminatory because it assigns certain opinions, sympathies, and tendencies to people solely on the basis of their gender. Further, the prosecutor used 100 percent of his strikes to eliminate men, R. 49, and then explained to the court that his general game plan was to remove men from the jury. R. 101 [27].

There is no apparent reason to disbelieve the prosecutor's comments. Such comments were against his own interests and were supported by his use of strikes. R. 49. The prosecutor does not appear to have been kidding. R. 101 [27]. Further, the court did not appear to disbelieve the comments, and in fact, acknowledged them and indicated that it did not think that the prosecutor's game plan was inappropriate. R. 101 [28].

There is also a showing of racial discrimination which the court failed to examine

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<sup>25</sup> Cantu, 778 P.2d at 518-19. See also State v. Span, 819 P.2d 329, 342-43 (Utah 1991); Bowman, 945 P.2d at 155-56; Pharris, 846 P.2d at 463-64.

properly, and which was the original motivation for the challenge. As the United States Supreme Court explained in J.E.B.:

Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

J.E.B., 511 U.S. at 145. After the prosecutor tendered his sexually discriminatory explanation, the trial court should have inquired further to determine whether the prosecutor was using gender as a pretext for racial discrimination. However, the court did not do this. The court did not ask the prosecutor why Mr. Romero was dismissed instead of a different man.<sup>26</sup> The court did not conduct further voir dire with Mr. Romero. R. 101 [27-28]. The court did not even ask the prosecutor for further explanation.<sup>27</sup> The entire challenge, explanation, and ruling took only three pages, R. 101 [25-28], and resulted in scant enlightenment beyond the prosecutor's indication that he was systematically removing men from the venire. R. 101 [27]. In light of the fact that Mr. Romero was the

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<sup>26</sup> R. 101 [27-28]. Instead of dismissing Mr. Romero, the prosecutor could have dismissed Brian Smith, Matthew Gregory, Robert Bennett, or David Cornelius. R. 49.

<sup>27</sup> Id. The only question which the court asked was as follows:

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

MR. COPE: Yes.

THE COURT: Very well.

Id. at 27.



sole minority venireperson, the fact that nothing during voir dire indicated that Mr. Romero was an incompetent or undesirable venireperson, and the prosecutor's sexually discriminatory explanation, the trial court's ruling was clearly erroneous.<sup>28</sup>

Finally, the trial court's ruling that gender discrimination is not inappropriate in a "spousal-abuse type of case," R. 101 [28], directly defies the holding of J.E.B. and its jurisprudence. Under the trial court's precedent, prosecutors could unabashedly discriminate on the basis of gender in any case simply by expressing the belief that one gender as a group is more likely to be sympathetic to prosecutorial arguments. This raises the specter of social injustice condemned in J.E.B., which chronicled the exclusion of women from jury service, property ownership, voting, and serving as legal guardians of their own children from the time of English common law. J.E.B. 511 U.S. at 131-34. It also "ratif[ies] and reinforc[es] prejudicial views of the relative abilities of men and women," Id. at 140, which are often "'archaic and overbroad . . .'" Id. at 135 (citation omitted). There is "virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes," Id. at 139, and "[s]triking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'" Id. at 142 (citation omitted). The unconstitutional precedent set by the trial court should be unhesitatingly

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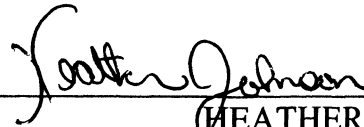
<sup>28</sup> There is no evidence to marshal in support of the trial court's determination of no racial or gender-based discrimination. See Colwell, 2000 UT 8, ¶20 ("To show clear error, the appellant must marshal all of the evidence in support of the trial court's finding and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.") (quoting Higginbotham, 917 P.2d at 548).

quashed by this Court and replaced by a condemnation of gender discrimination during jury selection.

**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 court and counsel chose without resorting to unconstitutional race or gender discrimination.

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



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HEATHER JOHNSON  
Attorney for Defendant/Appellant

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LISA J. REMAL  
Attorney for Defendant/Appellant

**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 January, 2002.

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

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

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## ADDENDUM A

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THIRD DISTRICT COURT-SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
: :  
vs. : Case No: 001910582 FS  
: :  
JEFFERY RAY CHATWIN, : Judge: J. DENNIS FREDERICK  
Defendant. : Date: January 5, 2001  
Custody: Salt Lake County Jail

S.O. # 171814

~~ENTERED IN REGISTRY~~  
~~OF JUDGMENTS~~  
DATE 01/11/01

PRESENT  
Clerk: cindyb  
Prosecutor: BERNARDS-GOODMAN, KATHERINE  
Defendant  
Defendant's Attorney(s): OCONNELL, JOHN D JR

DEFENDANT INFORMATION

Date of birth: August 4, 1964  
Video  
Tape Number: 1 Tape Count: 10:27-10:36

CHARGES

1. AGGRAVATED ASSAULT - 3rd Degree Felony  
Plea: Guilty - Disposition: 11/21/2000 {Guilty Plea}

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.  
The prison term is suspended.

Criminal Sentence @J



Case No: 001910582  
Date: Jan 05, 2001

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#### SENTENCE TRUST

The defendant is to pay the following:  
Attorney Fees: Amount: \$250.00 Plus Interest  
Pay in behalf of: LDA

Restitution:

#### SENTENCE TRUST NOTE

Pay restitution of all medical expenses of victim.

#### ORDER OF PROBATION

The defendant is placed on probation for 1 year(s).  
Probation is to be supervised by Adult Probation & Parole.  
Defendant is to pay a fine of 0

#### PROBATION CONDITIONS

Submit to searches of person and property upon the request of any Law Enforcement Officer.  
Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.  
Submit to tests of breath and urine upon the request of any Law Enforcement Officer.  
Enter, participate in, and complete any program, counseling, or treatment as directed by the Department of Adult Probation and Parole.  
Submit to drug testing.  
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.  
Refrain from the use of alcoholic beverages.  
Not to obtain any prescriptions without prior knowledge of probation officer.  
\*Serve 60 days in the Salt Lake County Jail (ADC) in addition to the time already served.  
Upon release from jail, enter into and successfully complete counseling program through F.A.C.T. or the Center for Family Development as recommended by Adult Probation and Parole.  
No contact with victim Brenda Lee.

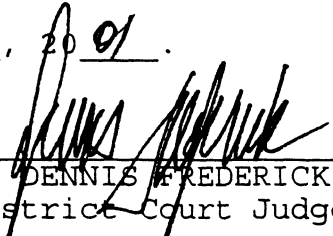
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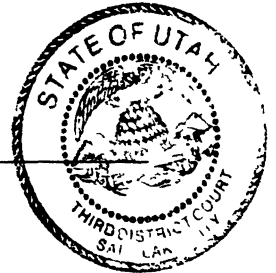
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Obtain and maintain full-time verifiable employment.  
Pay recoupment fee and restitution as ordered within the probation term.

\*THE COURT ORDERS DEFENDANT BE COMMITTED FORTHWITH TO THE SALT LAKE COUNTY JAIL (ADC) FOR 60 DAYS IN ADDITION TO THE TIME ALREADY SERVED, AS A CONDITION OF PROBATION.\*

Dated this 5<sup>th</sup> day of Jan, 2001.

  
J. DENNIS FREDERICK  
District Court Judge



## 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

By [Signature]  
SALT LAKE COUNTY  
Deputy Clerk

Brian Smith

~~Karin Leitch~~

Δ; #1 OK.

Pamela Wasson

Elizabeth Hansen

~~Paul Nicolet~~

Π #1 9Mope

Matthew Gregory

~~Robert Cliff~~

Δ; #2 OK

~~Carisa Hansen~~

Excused by stip #1 AT

Robert Bennett

Susan Flitton

~~Amador Romero~~

Π #4 9Mope

~~Michael Zarnofsky~~

Π #2 9Mope

~~Rebel Wood~~

Δ; #3 OK.

~~Mark Hansen~~

Π #3 9Mope

Virginia Rayburn

Dana Tapp

~~David Cornelius~~

Δ; #4 OK.

Stephen Ward

Kimberly St. Martin

Robert Kuhel

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

1 Jon Bonnesen

2 Kathryn Collins

3 Mark Augustyn

4 William Develyn

5 Hal Eatchel

6 Marco Herrera

7 Maria Leyba-Fitzen

8 Christopher Rodriguez

9 Kelli Runyan

0 Gary Kehr

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## ADDENDUM C

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.

1           Let's bring the Jury in.

2           (Jury Present.).

3           THE COURT: Jury is present, Counsel and the  
4 Defendant are present.

5           You may present your opening statement, Mr. Cope.

6           MR. COPE: Thank you.

7           Mr. Chatwin, Mr. O'Connell, Your Honor, Ladies and  
8 Gentlemen, this is a very simple case. It has a simple  
9 chronology. It has a simple cast of witnesses. There won't  
10 be a great deal of doubt about what happened by the time the  
11 evidence is finished.

12           The significance of what happened is what you are to  
13 determine. The Defendant sits there today protected by the  
14 shroud or mantel of innocence that we all have as citizens,  
15 especially when the sovereign state says: "You did something  
16 that's against the criminal law and we intend to try you for  
17 it."

18           This all begins on the 13th of June; late in the  
19 evening; certainly after 10:00 o'clock but before 11:00  
20 o'clock.

21           The Defendant, Mr. Chatwin, and his girlfriend -- I  
22 think that's an appropriate term for her -- had not been  
23 getting along. She decided that she wanted to leave the  
24 residence that they were sharing. That place is at 1225 West  
25 Indiana Avenue. Anybody who knows Salt Lake City knows that