1992

The State of Utah v. Jason Ewell : Reply Brief

Utah Court of Appeals

DOCKET NO. 920379 IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JASON EWELL,	:	Case No. 920379-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from judgments and convictions for two counts of aggravated robbery, first degree felonies, in violation of Utah Code Ann. section 76-6-302 (1990 Repl. Vol.), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix 1 to this brief contains the full text of the following controlling constitutional and statutory provisions:

Constitution of Utah, Article I section 7
Constitution of Utah, Article I section 10
Constitution of Utah, Article I section 12
Constitution of Utah, Article V section 1
United States Constitution, Amendment V
United States Constitution, Amendment VI
Utah Code Ann. section 76-3-203
Utah Code Ann. section 76-6-302
Utah Code Ann. section 76-8-1001
Utah Code Ann. section 77-1-6
Utah Rule of Civil Procedure 46
Utah Rule of Civil Procedure 47
Utah Rule of Criminal Procedure 18
Utah Rule of Criminal Procedure 20.

SUMMARY OF ARGUMENT

Mr. Ewell's jury conviction should be reversed because the trial court conducted an inadequate voir dire and erred in denying the motion for a mistrial made by counsel for Mr. Ewell upon counsel's discovery that one of the jurors on Mr. Ewell's jury had failed to disclose during Mr. Ewell's voir dire a bias against non-testifying defendants which he had disclosed in a voir dire in Judge Rokich's court two days prior to the voir dire in Mr. Ewell's

case. The State's arguments to the contrary are based on important misperceptions of fact and law, which are explained in detail in this brief.

The trial court violated the plain language of the firearm enhancement statute.

ARGUMENT

I.
THE TRIAL COURT SHOULD HAVE CONDUCTED AN ADEQUATE VOIR DIRE AND GRANTED THE MISTRIAL MOTION STEMMING FROM A JUROR'S PROVISION OF MATERIAL MISINFORMATION DURING VOIR DIRE.

A. Mr. Ewell's Claim of the Overall Inadequacy of the Voir Dire Remains Unrebutted.

The State fails to respond to Mr. Ewell's contention that the overall voir dire in this case was inadequate.[1] A brief summary

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1. The State argues,

> There is no dispute that a trial court must, either by its own examination or by permitting counsel to examine the prospective jurors, conduct voir dire in such a way that "counsel was afforded an adequate opportunity to gain the information necessary to evaluate jurors." State v. Bishop, 753 P.2d 439, 448 (Utah 1988); Utah R. Crim P. 18(b). A court must also excuse for cause any person who, upon examination, demonstrates the disqualifications stated in rule 18(e), Utah Rules of Criminal Procedure. State v. Gardner, 789 P.2d 273, 280 (Utah 1989). Defendant has not presented any specific ways in which the trial court neglected these obligations. Defendant's complaint is that, when he discovered that Bogaard had answered a voir dire question differently in this case than he had in a previous case, the court refused to declare a mistrial.

Brief of appellee at 7.

of the contention unrebutted by the State follows. Juror Bogaard, the foreman of Mr. Ewell's jury, participated in a voir dire in Judge Rokich's court two days before the voir dire in Mr. Ewell's case, wherein he expressed a bias against the defendant's right not to testify, and wherein he learned that expressing this bias disqualifies panelists from serving on juries and may anger trial judges.[2] Judge Sawaya had apparently learned of the events in the Rokich voir dire prior to the voir dire of the panelists in Mr. Ewell's case.[3] Judge Sawaya conducted the voir dire in a petulant (T. 7, 30) and pedantic (T. 11-12, 32) manner which defeated Mr. Ewell's constitutional, statutory and common law rights to have a

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2. The State does not object to this Court's taking judicial notice of the voir dire conducted in Judge Rokich's court. Brief of appellee at 13. A copy of the Rokich voir dire is in Addendum A of appellee's brief.

3. The State contests Mr. Ewell's assertion that "Judge Sawaya 'was apparently aware of the unusual events in the [Judge] Rokich voir dire.'" Brief of appellee at 14 n.5. While it is true that Judge Sawaya indicated in first denying the motion for a mistrial, "I don't know what happened in Judge Rokich's court or what attitude Mr. Bogaard may have had at that time," the record indicates that the Judge Sawaya was apparently informed prior to conducting the voir dire in Mr. Ewell's case concerning the events in the Rokich voir dire. When trial counsel indicated his mistake in having assumed that none of the Rokich panelists who had expressed a bias against the right against self-incrimination would be recycled in Mr. Ewell's case, the prosecutor stated, "We discussed that very issue in your chambers before we came out and we discussed the fact that as part of our jury panel, there were some jurors that had been excused by Judge Rokich. We discussed why he excused them. In fact, there was some conversation about the veracity of that decision so I distinctly remember us all being present and having the conversation." (T. 217-218). The trial court did not contest the prosecutor's version of events, but ruled erroneously that the voir dire he conducted mooted any concerns stemming from the Rokich voir dire (T. 218).

voir dire adequate to reveal panelists' biases supporting for-cause and peremptory challenges. Not one of the panelists in this case ever admitted to one bias during the course of the entire voir dire, and the foreman of Mr. Ewell's jury remained silent about his concern about a defendant's right not to testify, a bias that he had revealed during the Rokich voir dire. Mr. Ewell did not testify. Brief of Appellant at 1, 9, 11, 19-21.

B. Trial Counsel did not Waive the Issue Concerning Juror Bogaard.

In responding to Mr. Ewell's contention that the trial court should have granted his motion for a mistrial when it came to light that one of the jurors in Mr. Ewell's case had failed to express the bias revealed during the Rokich voir dire, the State first argues waiver. In a nutshell, the State's argument is that this Court should not address the merits of this issue because counsel for Mr. Ewell did not request a remedy less drastic than a mistrial. E.g. brief of appellee at 11-12 ("[A] party has an obligation to seek to mitigate problems cause by unforeseen circumstances by the least onerous method possible. In the present case, the least burdensome method would have been to ask the court to question Bogaard about the allegedly different answers on different days to the same voir dire question.").

The State's argument overlooks the phalanx of law putting the burden on the trial courts to insure the right to a fair and impartial jury trial. See e.g. brief of appellant at 9-11.

The cases the State cites in support of its novel

proposition that a defendant must select and request the least instrusive remedy in order to preserve an error are not supportive and/or inapposite. The first authority the State cites is McDonough Power v. United States, 464 U.S. 548, 550 n.2 (1984)("It is not clear from the opinion of the Court of Appeals whether the information stated in Greenwood's affidavit was known to respondents or their counsel at the time of the voir dire examination. If it were, of course, respondents would be barred from later challenging the composition of the jury when they had chosen not to interrogate juror Payton further upon receiving an answer which they thought to be factually incorrect."). Brief of appellee at 8. By its own terms, the Court's statement is dicta which would not be binding on any court. More importantly, the dicta is not persuasive authority for the State's proposition. In McDonough, the attorney for the complaining party conducted the voir dire. Id. at 449. Requiring the attorney to pursue during voir dire those juror responses that the attorney knew at that time to be inaccurate would be natural in that context. However, the context and dicta of McDonough do nothing to support the State's proposition that an attorney who learns in the middle of a trial of juror dishonesty during the voir dire must move for the re-opening of the voir dire, rather than for a mistrial.

The State's second authority, State v. Suarez, 793 P.2d 934 (Utah App. 1990), like McDonough, is inapposite because it involved a discrepancy concerning juror bias that came to the parties' attention during the voir dire. Suarez does nothing to bolster the

State's suggestion that a discrepancy concerning juror bias discovered in the middle of a trial is waived if a defense attorney moves for a mistrial rather than moving the court to re-open voir dire.

State v. DeMille, 756 P.2d 81 (Utah 1988), the State's third authority, stands for the proposition that defendants may not submit juror affidavits to impeach a verdict after trial with evidence of juror biases, when the potential for those biases was clearly foreseeable and the defense attorneys had the opportunity to voir dire the jury but did not inquire into the potential biases or ask the trial court to do so. DeMille at 83; brief of appellee at 9-10. According to the record made by trial counsel for Mr. Ewell, he mistakenly believed that the panelists who had been dismissed from the Rokich voir dire because they had expressed a bias against the defendant's right not to testify were not recycled in Mr. Ewell's voir dire (T. 217-218). His assumption was reasonable; it is difficult to imagine that anyone would attempt to seat a panelist in a criminal case when that panelist had expressed a bias against the defendant's right not to testify two days before and had witnessed the unusual proceedings in Judge Rokich's court. The voir dire in Mr. Ewell's case undoubtedly reinforced trial counsel's mistaken assumption because when Judge Sawaya asked the panelists if any of them had "served as a juror in the trial of a criminal case," only one juror responded, indicating that he had served in a case twelve years before (T. 16). While the prosecutor disputed trial counsel's mistake (T. 218), when the motion for a mistrial was first

raised in the middle of trial, the prosecutor indicated that he himself did not know which jurors had been on Judge Rokich's panel (T. 175-176). Judge Sawaya did not make any finding that trial counsel's mistake was disingenuous. In short, DeMille is inapposite to this case because DeMille involved an attorney who failed during voir dire and waited until after receiving a guilty verdict to inquire into a particular bias that would portend to be present in all panelists for the case at issue; whereas in this case, trial counsel reasonably but mistakenly believed that there was no concern about recycled biased jurors from Judge Rokich's court, and raised the issue immediately with the trial court before a verdict when the issue came to trial counsel's attention.

The State's reliance on caselaw governing the criminal discovery process, appellee's brief at 10-11, is misplaced. The discovery cases cited by the State are both based on Utah Rule of Criminal Procedure 16, which sets forth specific remedies for discovery violations. E.g. State v. Christofferson, 793 P.2d 944, 948 (Utah 1990)("The remedy for violation of this rule is set forth in Utah Code Ann. § 77-35-16(a)(1982): 'If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances."); State v. Griffiths, 752 P.2d 879, 883 (Utah 1988)("Thus, under the facts of this case, we conclude that

defendant waived relief under rule 16(g) as implemented in Knight by not making timely efforts to mitigate or eliminate the prejudice caused by the prosecutor's conduct."). Discovery violations impact on the evidence available for trial. When the evidence available changes, there are many remedies available, which are geared toward the dynamic nature of the presentation of evidence in a trial, such as objecting to the admission of the evidence, moving to strike the evidence, requesting curative jury instructions, seeking a continuance to facilitate rebuttal of the evidence, moving for a mistrial, and seeking dismissal. E.g. State v. Griffiths, 752 P.2d 879, 883 (Utah 1988). Hence, in cases involving criminal discovery violations, it is incumbent for a defendant to demonstrate evidentiary prejudice that was not cultivated by the defense attorney's failure to mitigate the prejudice. Id. at 882-883. It is important to note that neither Griffiths nor Christofferson holds as the State wishes, that defense attorneys must identify and request the least onerous remedy. Rather, the cases require reasonable and timely efforts to mitigate or eliminate the prejudice. See Griffiths, 752 P.2d at 882-883; Christofferson, 793 P.2d at 948.

In contrast to the context of discovery violations, when it comes to light that there has been a fundamental error in the seating of the jury, Utah Rule of Criminal Procedure 16 does not apply. Once a jury has been selected and a trial has begun, there are very few, if any, ways to "mitigate" the damage done by improper jury selection. See State v. Worthen, 765 P.2d 839 (Utah 1988)(voir

dire is designed to be a subtle process, whereby Utah trial courts cull from jurors those subconscious biases which might impact on their performance). See also State v. Pharris, 204 Utah Adv. Rep. 39, 41 (Utah App. 1993)(fundamental structural errors impacting on the right to a fair and impartial jury are traditionally reversed without a showing of evidentiary prejudice); Constitution of Utah, Article I sections 10 and 12 (guaranteeing right to unanimous verdict of eight impartial jurors).

The State's proposed standard that a defense attorney must identify and request the "least onerous method" to remedy an error in order to preserve the issue for appeal disregards the fact that appellate courts are not to function as "'citadels of technicality.'" McDonough Power Equipment v. Greenwood, 464 U.S. at 553 (citations omitted). Notably, the State itself, even given time to write an appellate brief, does not commit to one proper remedy on appeal, but argues three remedies (waiver, affirmance on the merits, remand) in the alternative. Brief of appellee at 7-16.

The State's argument that evidence of Mr. Ewell's guilt allows the application of its "least onerous remedy" standard, appellee's brief at 12 n.4, overlooks the fundamental procedural nature of the error in the instant case. As the Court explained in Turner v. Louisiana, 379 U.S. 466 (1965)

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. 'A fair trial in a fair tribunal is a basic requirement of due process.' In the

> ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be 'indifferent as he stands unsworne.' His verdict must be based upon the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station of life which he occupies. ...

Id. at 471-472 (citations omitted).

Assuming arguendo that the State's "least onerous remedy" standard applies, trial counsel did not waive the issue concerning juror Bogaard. The State argues that the least onerous remedy would have been to ask the court to re-open the voir dire to determine whether Juror Bogaard had been dishonest or had been "rehabilitated" by his voir dire experiences under Judges Rokich and Sawaya. Brief of appellee at 11-12. Such a request would have been futile. The trial court had the opportunity to re-open the voir dire if he had seen fit to do so, and was implicitly suggested to do so by the prosecutor's argument that the trial court was not in a position to make a ruling on the motion for a mistrial on the basis of hearsay from trial counsel (T. 175-176). Rather than seeking any verification of trial counsel's allegations, the trial court twice maintained that his own voir dire successfully mooted any concerns about the events in Judge Rokich's voir dire (T. 177; 218). Particularly given Juror Bogaard's unique experience in Judge Rokich's court (wherein he undoubtedly learned the volatile risks of revealing a bias against non-testifying defendants), followed by the heavy-handed voir dire in Judge Sawaya's court (wherein Juror Bogaard saw Judge Sawaya unexplainably lash out at a different prospective juror, and was instructed about the law governing,

rather than probed concerning, biases about non-testifying defendants), trial counsel selected and requested the appropriate remedy in moving for a mistrial.

As the State admits, brief of appellee at 15 n.7, in State v. Suarez, 793 P.2d at 934 (Utah App. 1990), this Court noted that when an inference of bias attaches to a potential juror, the burden is on the trial court to investigate the bias until it is rebutted. Brief of Appellee at 15 n.11. See also brief of appellant at 18 n. 2 (citing additional Utah cases to this effect); Frazier v. United States, 335 U.S. 497, 513 (1948)(there may be cases wherein jurors are so obviously and prejudicially unqualified to serve that trial courts have a duty to remove the panelists sua sponte). In the instant case, Judge Sawaya should not have recycled the jurors who were dismissed for expressing a bias against non-testifying defendants in Judge Rokich's voir dire, or should have been very thorough in investigating the bias attaching to those jurors. Id. Particularly when trial counsel brought the trial court's error to his attention, the trial court should have granted the mistrial. Contrary to the State's argument, trial counsel for Mr. Ewell never asked "the court to limit its consideration to the propriety of granting a mistrial." Brief of appellee at 15 n.7. In moving for a mistrial, trial counsel brought the error involved in Juror Bogaard's service to the attention of the trial court, who then neglected his legal duty to cure the error.

C. Mr. Ewell is Entitled to a New Trial under Suarez.

In addressing the merits of the Suarez issue, the State argues that Mr. Ewell has not demonstrated that Juror Bogaard answered a material voir dire question falsely. The State's analysis is tied lock-step to the two-pronged test of McDonough: "To obtain a new trial, a defendant 'must first answer honestly a material question of voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.'" Appellee's brief at 12-15, quoting Suarez, 793 P.2d at 938, quoting McDonough, 464 U.S. at 556. The State's strict approach is unworkable and unwarranted in light of the McDonough decision and subsequent caselaw.

The McDonough test is a procedural test based on the federal procedural rules and the facts of the McDonough case, wherein the Supreme Court reversed a circuit court of appeals' reversal of a verdict following a three week civil jury trial on the basis of vague and disputed allegations concerning a juror's failure to disclose a case-related bias, which allegations were not raised directly in a motion for a new trial in the district court. McDonough, 464 U.S. at 551-553 and n.3.

The McDonough test did not command a majority of the Court. In concurrence, Justice Blackmun, joined by Justices Stevens and O'Connor, indicated his belief that a juror's honesty during voir dire is "in most cases" the best "initial indicator" of whether a juror was biased, and added that the McDonough decision did not foreclose the traditional remedy for showing a violation of the right to an impartial jury -- a hearing before the trial court

wherein the movant is allowed to prove "actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred." 464 U.S. 556-557. In a separate concurring opinion, Justice Brennan, joined by Justice Marshall, also stated a broad view of assessing claims of juror impartiality,

> [F]or a court to determine properly whether bias exists, it must consider at least two questions: are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant. Whether the juror answered a particular question on voir dire honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in this latter determination of actual bias.

464 U.S. 558.

Following the McDonough decision, Utah courts have cited the minority's two-pronged test as a helpful guide, but have applied the test in a practical manner, tailored the appropriate procedural course of Utah cases. In State v. Thomas, 777 P.2d 445 (Utah 1989), the "[d]efendant [who was charged with rape] sought to introduce post-trial evidence that two jurors had failed to disclose during voir dire that either they or a close relative had been victims of sex-related crimes. He alleged that the other jurors had used this nondisclosure as leverage to change the two jurors' votes from acquittal to conviction." Id. at 447. The trial court denied an evidentiary hearing, finding that the juror affidavits were barred by Utah Rule of Evidence 606(b). Id. On appeal, the Utah Supreme Court found that the trial court should have admitted the affidavits in an evidentiary hearing, and remanded the case for consideration

under the McDonough test. Id. at 451. On remand, the trial court found that the two jurors in issue did not answer falsely a material question of voir dire. State v. Thomas, 830 P.2d 243, 245 (Utah 1992).

On appeal after remand, the justices of the Utah Supreme Court issued four opinions concerning how the McDonough test should apply to the facts of Thomas. Justice Durham's opinion found that the trial court was clearly erroneous in finding that the two jurors did not falsely answer a material voir dire question, elaborating on the first prong of the McDonough test as follows:

> Some courts have interpreted McDonough to require a finding of juror misconduct only if a prospective juror is aware that her answers are false. We think the better-reasoned approach mandates that a juror's "honesty" or "dishonesty" be determined by an objective perspective. See McDonough, 464 U.S. at 558, (Brennan, J., concurring)("One easily can imagine cases in which a prospective juror provides what he subjectively believes to be an honest answer, yet that same answer is objectively incorrect and therefore suggests that the individual would be a biased juror in the particular case."). The emphasis should be on the juror's lack of partiality rather than on her intent.

Thomas, 830 P.2d at 246 (citations omitted). This discussion of the first prong of McDonough commanded a majority of the Utah Supreme Court. See opinions of Stewart, J., and Zimmerman, J., 830 P.2d at 249-250. Justice Durham opined that because the jurors' true answers would not have supported a challenge for cause, the facts of Thomas did not fit neatly within the McDonough framework. She opined that the McDonough framework should be modified to allow a showing that a correct answer would have supported a challenge for

cause, or that a false answer impaired the juror's impartiality. Id. at 248. In a concurring opinion, Justice Stewart agreed with Justice Durham's analysis, except for her extension of the second prong of the McDonough test, and opined that the two jurors had incorrectly answered material voir dire questions, which were critical to the effective exercise of peremptory challenges. He effectively argued that the second prong of McDonough should be extended to encompass cases wherein correct answers would have been critical to the exercise of peremptory challenges. Id. at 250. Justice Zimmerman wrote a separate opinion, disagreeing with Justice Durham's and Justice Stewart's extensions of the second prong of McDonough, and opining that both prongs of the original test were met in Thomas. Id. at 250. Justice Howe, joined by Chief Justice Hall, wrote a dissenting opinion, criticizing Justice Durham's extension of McDonough, and arguing that the first prong of the McDonough test was met for only one of the jurors, and that the second prong was not met for either juror. Id. at 251. Justice Zimmerman's concurring opinion criticized the dissent of Justices Howe and Hall for analyzing the second prong of McDonough with hindsight. Id. at 250.

While the State quotes Suarez in its brief, the State overlooks the fact that Suarez provides yet another example of the fact that the application of the minority McDonough rule must be tailored to the procedural facts of the case. In State v. Suarez, 793 P.2d 934 (Utah App. 1990), this Court quoted the traditional minority McDonough rule, 793 P.2d at 938, but tailored the

application of the rule to fit the facts of the case. This Court found that the second prong of the test was readily met because if the recycled juror in that case had revealed the pro-police bias that he had revealed in a preceding voir dire in a different case, that bias would have justified a for-cause challenge. Suarez at 938. In addressing the first prong of McDonough, this Court stated,

> The first prong of the McDonough test requires closer study. Defendant asserts that juror Wolford failed in the instant case to honestly answer the question concerning his partiality to police officer testimony. His argument is based upon juror Wolford's conflicting voir dire responses in the instant case and in Judge Russon's court.
>
> Although the court might have questioned juror Wolford about his conflicting response or conferred with Judge Russon, it instead passed juror Wolford for cause and required defense counsel to use a peremptory challenge to have him dismissed. On the record before us, however, we must conclude that juror Wolford should have been excused for cause.

793 P.2d at 938-939.

The State's argument intimates that Juror Bogaard did not reveal his concern about non-testifying defendants during Judge Sawaya's voir dire because his initial statement in Judge Rokich's court did not reflect an inability to follow the law, and/or because Judge Rokich's voir dire and Judge Sawaya's voir dire taught Juror Bogaard that it was the defendants' right not to testify. Brief of appellee at 15. Bogaard's statement in Judge Rokich's voir dire certainly did reflect an inability to follow the law -- it reflected that his willingness to afford a defendant the right not to testify was contingent on the facts of the case. He stated, "I'm not sure if it would sway my opinion one way or another. I would want --

depends on the course of the trial, it might sway me. I have no opinion one way or another. Depending on what comes out, it might have an effect." Brief of Appellee at 13. The overall voir dire in the Rokich court and the overall voir dire in the Sawaya court do not by speculation erase the bias that he expressed. Given the strange manner in which both trial courts conducted voir dire, rather than somehow purging Mr. Bogaard of his bias against non-testifying criminal defendants, it is likely that the trial courts taught Mr. Bogaard that revealing a bias would demonstrate his unwillingness to follow the law, and would anger the powerful trial judges.

The Suarez decision demonstrates that because the trial court failed to make a tangible record documenting Juror Bogaard's impartiality, any speculation as to the inconsistency in the juror's performance in the successive jury selections proceedings must be resolved in Mr. Ewell's favor. As the Suarez court explained in footnote 11,

> Other explanations may exist for the discrepancy in [the juror's] voir dire answers besides that he told the truth in [the first court] and lied to the court in this case. He may actually have fabricated in [the first court] to avoid jury service, and then, feeling remorseful about his dereliction in civic duty, answered truthfully in this case. He may have answered truthfully in [the first court] and then, having reflected on the absurdity of that position, undergone an honest change of viewpoint. The [argument] submitted by defense counsel may not have set forth with precision the colloquy in [the first court.] However, these possibilities are only speculative since the trial court failed to "investigate further until the inference of bias was rebutted...." Bailey, 605 P.2d at 768.

D. Remand is Unnecessary.

The State argues that if this Court does not resolve this case on waiver grounds, this Court should remand this case to the trial court. The State notes that the Utah Supreme Court remanded the Thomas case, and indicates without any explanation, "Such a remand may be appropriate here." Brief of Appellee at 16.

A remand in the instant case would be an unnecessary waste of resources. The trial court already had the opportunity to assess Juror Bogaard's bias, and ruled that regardless of his performance during the Rokich voir dire, Juror Bogaard's performance during the Sawaya voir dire demonstrated no bias (T. 177, 218). Assuming that the rulings of the trial court are read as factual findings that Juror Bogaard was accurate in the Sawaya voir dire because Bogaard felt that his previously expressed bias would not effect him in Mr. Ewell's case, the findings would be clearly erroneous. Even if Juror Bogaard subjectively believed that his bias against non-testifying defendants had somehow been erased by the two voir dire proceedings, the overall objective facts of this case demonstrate a bias that would have supported a challenge for cause. See Thomas, 830 P.2d at 246 (requiring an objective approach); brief of appellant at 11-21 (detailing objective facts of this case). As the majority opinion in Thomas II demonstrates, the juror is not the person to evaluate whether a bias will disqualify him from serving impartially; it is the trial court's job to assess the impartiality of the jurors. See Thomas 830 P.2d at 246-247 (judge, and not juror must decide if bias will prevent impartial service). Here, Judge

Sawaya did nothing to investigate on the record which jurors had participated in the Rokich voir dire, let alone whether they had been dismissed for a bias against non-testifying defendants, or whether that previously expressed bias would prevent their impartial service in this case. Once it became clear that one of the Rokich panelists was serving on the jury and had expressed a bias against non-testifying defendants, Judge Sawaya did nothing to investigate how, if at all, the juror's bias was no longer a presumptive threat to an impartial jury in Mr. Ewell's case. In these circumstances, Judge Sawaya failed to sufficiently investigate the presumptive bias expressed by Juror Bogaard, and reversal is the appropriate remedy. Suarez.

Additionally, because the overall voir dire conducted by Judge Sawaya in this case was inadequate, reversal is the appropriate remedy. See point IA of this brief.

II.
THE TRIAL COURT MISINTERPRETED THE FIREARM STATUTE IN SENTENCING MR. EWELL.

The State apparently does not contest the "plain language" doctrine of statutory construction. See brief of appellee at 21-22 (relying on cases based on that doctrine). Unfortunately, the State has failed to realize what that doctrine means in this case. The essence of the State's argument is that when the Utah State Legislature used two separate phrases in the firearm enhancement statute, "has been sentenced" and "is convicted," the legislature was using two separate phrases to describe one concept -- the

sentence.[4] Brief of appellee at 17-20. In addition to overlooking the different grammatical tenses of the two phrases, the State's argument overlooks well-established law that when the legislature uses separate terms in one statute, the terms are considered to mean different things. E.g. Seeber v. Washington State Public Disclosure Commission, 634 P.2d 303 (Wash. 1981). See also Madsen v. Borthick, 769 P.2d 245, 252 n.11 (Utah 1988)(court has "fundamental duty to give effect, if possible, to every word of the statute.").

The State overreaches in arguing that Utah Rule of Criminal Procedure 22(c) defines the term "judgment of conviction" and that this definition should be used to blur the legislature's distinction between "is convicted" and "has been sentenced" in the firearm statute.[5] The rule of criminal procedure is not a statutory

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4. The disputed subsection of Utah Code Ann. section 76-3-203 states as follows:

> Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently.

(Emphasis added).

5. The State argues,

> This [the State's argument] is consistent with the term "judgment of conviction" as used in the Utah Rules of Criminal Procedure. Rule 22 states in part:
>
> (c) Upon a verdict or plea of guilty or plea of no contest, the court shall

(footnote continues)

definition that is a binding definition for the firearm enhancement statute or any other statute. It is a court rule that directs the trial courts concerning documentation necessary to the resolution of criminal cases.

While the State is correct in noting that the Tenth Circuit appears in the minority in its interpretation of the federal firearm statute, brief of appellee at 21-22, the plain language doctrine and rule of lenity explained in that case are relevant and fitting in this case. The language of the Utah statute is stronger than the

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(footnote 5 continued)

> impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of his right to appeal and the time within which any appeal shall be filed.

(emphasis added). Thus, the term "judgment of conviction" includes (1) the verdict or plea, and (2) the sentence. Additionally, the use of the technical meaning if the term is a mandated form of statutory construction in Utah Code Ann. § 68-3-11 (1986). That section states:

> Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

Since the term "judgment of conviction" is defined in the Utah Rules of Criminal Procedure, that definition should carry a presumption of being the appropriate meaning in the context of criminal procedure law.

Brief of appellee at 18-19.

language of the federal statute in its indication that the enhancement in subsection 4 applies only after a felony firearm conviction follows a felony firearm sentence.[6]

The State's argument that the trial court committed a harmless error in imposing the subsection (4) five to ten year enhancement on case number 1244, rather than on case number 1243, brief of appellee at 19-20, misses the whole point of the extreme penalty involved in subsection (4) of section 76-3-203. The legislature did not write the statute with the terms "is convicted" and "has been sentenced" because it matters upon which of two contemporaneous cases the enhancement falls. The legislature used the sequential language because it intended for the extreme

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6. Subsection (4) of Utah Code Ann. section 76-3-203 states as follows:

> Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently.

(Emphasis added). The federal statute, however, provides,

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . ., uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, ... In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years[.]

Brief of appellee at 21.

penalty involved in subsection (4) to apply only in those cases wherein a defendant has been sentenced in a firearm felony case and then is convicted of another firearm felony. See Utah Code Ann. section 76-1-104 ("The provisions of this code shall be construed in accordance with these general purposes. ... (3) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition o[f] differences in rehabilitation possibilities among individual offenders.").

In sentencing Mr. Ewell to an additional firearm enhancement under subsection (4) of Utah Code Ann. section 76-3-203, the trial court violated the rules of statutory construction, which are essential to the proper balance of power between the legislative and judicial branches of government in this state. See brief of appellee at 25.

CONCLUSION

This Court should reverse Mr. Ewell's conviction in case no. 911901244, and reverse the five year firearm enhancement under Utah Code Ann. section 76-3-203(4).

RESPECTFULLY SUBMITTED this 7th day of July, 1993.

ELIZABETH HOLBROOK
Attorney for Mr. Ewell

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that I have caused to be served eight copies of the foregoing to the Utah Court of Appeals and two copies of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 26 day of Feb., 1993.

ELIZABETH HOLBROOK

DELIVERED this _____ day of Feb., 1993.

APPENDIX 1

Statutes and Constitutional Provisions

ARTICLE I

DECLARATION OF RIGHTS

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

ARTICLE V

DISTRIBUTION OF POWERS

Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

76-3-203. Felony conviction — Indeterminate term of imprisonment — Increase of sentence if firearm used.

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(3) In the case of a felony of the third degree, for a term not to exceed five years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(4) Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently.

76-6-302. Aggravated robbery.

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) causes serious bodily injury upon another.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

76-8-1001. Habitual criminal — Determination.

Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state would have been a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least a felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life.

77-1-6. Rights of defendant.

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Rule 46. Exceptions unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 47. Jurors.

(a) **Examination of jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper.

(b) **Alternate jurors.** The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

(c) **Challenge defined; by whom made.** A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

(d) **Challenge to panel; time and manner of taking; proceedings.** A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be noted by the reporter, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(e) **Challenges to individual jurors; number of peremptory challenges.** The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule.

(f) **Challenges for cause; how tried.** Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water power, light or other services rendered to such resident.

(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

(6) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Any challenge for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of such challenge.

(g) **Selection of jury.** The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, in the order called, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(h) **Oath of jury.** As soon as the jury is completed an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and a true verdict rendered according to the evidence and the instructions of the court.

(i) **Proceedings when juror discharged.** If, after the impanelling of the jury and before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) **View by jury.** When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(k) **Separation of jury.** If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished

by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) **Deliberation of jury.** When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he must not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) **Papers taken by jury.** Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits and all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

(n) **Additional instructions of jury.** After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or taken down by the reporter.

(o) **New trial when no verdict given.** If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) **Court deemed in session pending verdict; verdict may be sealed.** While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(q) **Declaration of verdict.** When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is his verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(r) **Correction of verdict.** If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Rule 18. Selection of jury.

(a) The clerk shall draw by lot and call the number of the jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant.

(c) A challenge may be made to the panel or to an individual juror.

(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or recorded by the reporter. It shall specifically set forth the facts constituting the grounds of the challenge.

(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) The challenge for cause is an objection to a particular juror and may be taken on one or more of the following grounds:

(1) want of any of the qualifications prescribed by law;

(2) any mental or physical infirmity which renders one incapable of performing the duties of a juror;

(3) consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;

(4) the existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted to or employed by the state or a political subdivision thereof;

(5) having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by him in a criminal prosecution;

(6) having served on the grand jury which found the indictment;

(7) having served on a trial jury which has tried another person for the particular offense charged;

(8) having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;

(9) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(10) if the offense charged is punishable with death, the entertaining of such conscientious opinions about the death penalty as would preclude the juror from voting to impose the death penalty following conviction regardless of the facts;

(11) because he is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense;

(12) because he has been a witness, either for or against the defendant on the preliminary examination or before the grand jury;

(13) having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged; or

(14) that a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) The court may direct that alternate jurors be impanelled. Alternate jurors, in the order in which they are called, shall replace jurors who are, or become, unable or disqualified to perform their duties. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen.

Alternate jurors shall have the same qualifications, take the same oath and enjoy the same privileges as regular jurors.

(h) A statutory exemption from service as a juror is a privilege of the person exempted and is not a ground for challenge for cause.

(i) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Rule 20. Exceptions unnecessary.

Exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party state his objections to the actions of the court and the reasons therefor. If a party has no opportunity to object to a ruling or order, the absence of an objection shall not thereafter prejudice him.