1992

Utah v. Macial : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

DOCKET NO. 920316

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
LOUIS LEE MACIAL,	:	Case No. 920316-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for three counts of "Unlawful Distribution, Offering, Agreeing, Consenting, or Arranging to Distribute a Controlled" Substance, all second degree felonies, in violation of Utah Code Ann. sections 58-37-8(1)(a)(ii), -(8)(1)(b)(i) (1991), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. section 78-2a-3(2)(f) (1992), and Utah R. Crim. P. 26(2)(a), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and constitutional provisions are contained in the text of this brief or in the Addendum:

Utah Code Ann. § 58-37-8(1)(a)(ii)
Utah Code Ann. § 58-37-8(1)(b)(ii)
Utah Code Ann. § 76-3-201
Utah Code Ann. § 76-3-401
Utah Code Ann. § 77-17-10
Utah R. Evid. 609
U.S. Const. amend. XIV
Utah Const. art. I, § 10
Utah Const. art. I, § 12

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Whether the lone black female, a prospective juror who had been involved in a discrimination lawsuit, was improperly excluded by the prosecutor on the basis that she was "whiny."

> To the extent that a trial court's ruling on the proffered explanation of a prosecutor turns on the latter's credibility, we agree with the United States Supreme Court that "a reviewing court ordinarily should give those findings great deference." (Batson v. Kentucky, [476 U.S. 79, 98 n.21 (1986)]) Our decisions demonstrate, however, "ordinarily" does not mean "inevitably": in some cases the reviewing court may conclude that the explanation is inherently implausible in light of the whole record. And even when there is no doubt of the prosecutor's good faith, the issue whether a given explanation constitutes a constitutionally permissible--i.e. nondiscriminatory--justification for the particular peremptory challenge remains a question of law.

People v. Turner, 726 P.2d 102, 107 n.6 (Cal. 1986); Chew v. State, 562 A.2d 1270, 1276 (Md. App. 1989) ("an appellate court will give great deference to the first level findings of fact made by a trial judge, but having done so, will make an independent constitutional appraisal concerning the existence of neutral, non-racial reasons for the striking of a juror"); accord State v. Cantu, 778 P.2d 517 (Utah 1989); see also 778 P.2d at 519 (Hall, C.J., dissenting) (opinion disagreeing with the majority's unwillingness to defer to the trial court's findings and conclusion of law); cf. State v. Butler, 731 S.W.2d 265, 268 (Mo. App. 1987) ("'Rubber stamp' approval of all nonracial explanations, no matter how whimsical or fanciful, would cripple Batson's commitment to 'ensure that no

citizen is disqualified from jury service because of his race'"); Gamble v. State, 357 S.E.2d 792, 794 (Ga. 1987).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for three counts of "Unlawful Distribution, Offering, Agreeing, Consenting, or Arranging to Distribute a Controlled" Substance, all second degree felonies, in violation of Utah Code Ann. sections 58-37-8(1)(a)(ii), -(8)(1)(b)(i) (1991), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, presiding. (R 107-09). On February 26, 1992, a jury found Defendant/Appellant Louis Lee Macial guilty of the above entitled offenses. (R 107-09).

For each conviction, the trial court sentenced Mr. Macial to an indeterminate term of one-to-fifteen years in the Utah State Prison. (R 116-18) (May 4, 1992 sentencing order). The court ordered the three sentences to run concurrently with one another. Mr. Macial was also ordered to pay $180 in restitution for his conviction on count I. (R 116). The court then stayed the sentences, releasing Mr. Macial to Adult Probation and Parole for thirty-six months. The restitution order remained one of the conditions of probation. (R 119).

STATEMENT OF THE FACTS

Of the nineteen people questioned during the jury selection process, three were excused for cause, four were peremptorily challenged by the State and four were peremptorily challenged by

Mr. Macial. (R 43). The remaining eight person jury, none of whom were apparently persons of color, convicted Louis Macial, a Hispanic male, of the three counts alleged in the information. (R 6-7, 43, 134-204).

The prosecutor peremptorily challenged Bettye English, the only black person in the jury selection pool, because "I [the prosecutor] found her, for lack of a better term, to be somewhat whiny. I don't think she would be a good juror with the other jurors. And that was the sole basis. It had nothing to do with her race or anything else." (R 216). The prosecutor did not believe that a lawsuit involving Ms. English, which alleged that she "was terminated from [her] job through discrimination[,]" was "something that was so personal that it would be embarrassing to speak of before the group." (R 203, 216). Previously, when the court had asked the jurors of their prior involvement in lawsuits, Ms. English approached the bench and used a note to explain her situation. The court accepted the prosecutor's explanation as a race-neutral reason. (R 216).

The court also determined that "Juror No. 11," a person[1] referred to by number rather than name out of concern for his privacy, could not sit as a juror. In a note shown privately to the

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[1] The trial court issued an order, for the purposes of appeal, which requested that the record refer to the juror by number rather than by name in an effort to protect the juror from the embarrassment or humiliation accompanying the public disclosure of his prior felony conviction. (R 196-97). Perhaps the same courtesy should be extended to Ms. English in light of her feelings of "embarrassment."

court, juror #11 revealed, "I have been convicted of sale of a controled [sic] sub. Exgpounged [sic] 1978." (R 179).

Following the trial court's reading of the jury selection statutes, it concluded that a prior felony conviction disqualified juror #11 from jury duty notwithstanding the fact that the crime had been expunged. (R 193, 196). The court further ruled that he would be biased and could be challenged for cause. (R 194).

Other facts relevant to the jury selection process are contained elsewhere in this brief. See infra Argument.

SUMMARY OF THE ARGUMENT

The State peremptorily challenged Bettye English, the only black juror, on the basis that her involvement in a discrimination lawsuit was not "something that was so personal that it would be embarrassing to speak of before the group." When the court had asked the jurors of their prior legal involvement, Ms. English approached the bench and used a note to explain her situation, rather than through an oral response.

By comparison, however, when another juror privately disclosed his involvement in a prior legal matter with a note, the court and the prosecutor recognized his need for privacy. This other juror, a convicted felon with an expunged crime, was later designated "Juror No.11" out of concern for the public humiliation accompanying a reference to him by name through the court record.

The irony of the disparate treatment cannot be ignored: the conviction of a juror, which is often exploited publicly by the

prosecution, was deemed to be a legitimate personal matter, but the lawsuit of another juror, which involved allegations of discriminatory termination, was discounted by the State because it did not seem "so personal that it would be embarrassing to speak of before the group." Juror No.11's privacy concerns regarding his expunged felony conviction were not cited as a reason for his exclusion, while at the same time, Ms. English's privacy concerns became a factor relevant to the State's use of its peremptory challenge. Privacy concerns should have either been viewed alike or ignored altogether.

A facially neutral rebuttal disclaimer constitutes an inadequate legal explanation. Since indirect discriminatory peremptory challenges are just as improper as blatant racist removals, a prosecutor's explanation must be neutral, related to the case being tried, clear and reasonably specific, and legitimate. The prosecutor's contention, that the sole black juror was "whiny" and would not "be a good juror with the other jurors" was vague and speculative. The State's explanation reflected no bias held by Ms. English and it was especially unacceptable in light of the apparently "pro-prosecution" circumstances in her background. Further, even if "whiny" properly characterized her, it was unrelated to the case and would have had no bearing on the guilt or innocence determination.

When a juror is improperly excluded, the harmless error analysis is inapplicable. Since courts do not invade the province of the jury, a new trial is required.

ARGUMENT

POINT

THE PROSECUTOR IMPROPERLY USED ITS PEREMPTORY CHALLENGE AGAINST A FEMALE, BLACK JUROR

In Powers v. Ohio, 499 U.S. ---, 113 L.Ed.2d 411, 111 S.Ct. 1364 (1991), the United Supreme Court reiterated the message of Batson v. Kentucky, 476 U.S. 79 (1986), the seminal opinion regarding the use of peremptory challenges:

> Batson "was designed 'to serve multiple ends,'" only one of which was to protect individual defendants from discrimination in the selection of jurors. Batson recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large.

Powers, 113 L.Ed.2d at 422 (citations omitted); Batson, 476 U.S. at 85 n.4 & 99 n.22 ("The standard we adopt under the Federal Constitution [U.S. Const. amend. XIV] is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race"); accord United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986) ("under Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown"); State v. Butler, 731 S.W.2d 265, 269 (Mo. App. 1987); Floyd v. State, 539 So.2d 357, 364 (Ala. Cr. App. 1987).

Utah's state supreme court has similarly recognized that the State's exclusion of even a single juror because of the individual's race is offensive. State v. Span, 819 P.2d 329, 340

(Utah 1991) ("The discriminatory peremptory challenge of a minority juror simply because a prosecutor believes that the juror's race may influence the juror's decision in the case is offensive regardless of the defendant's race"); State v. Cantu, 750 P.2d 591, 595 (Utah 1988) ("Cantu I") ("The defendant may rely on the fact that the use of peremptory challenges permits those who are of mind to discriminate to do so").

Given the sensitive nature of the involved issues, courts have also noted that "an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror." Floyd v. State, 539 So.2d 357, 361 (Ala. Cr. App. 1987). Nevertheless, "the trial judge must be careful not to confuse a specific reason given by the state's attorney for his challenge, with a 'specific bias' of the juror, which may justify the peremptory challenge." Id. (emphasis added).

As discussed below, the trial court in the case at bar erred when it mistakenly accepted the prosecutor's specified reason--that the female black juror was "whiny"--even though Ms. Bettye English's alleged whininess reflected no bias whatsoever as it pertained to the facts of the case. The prosecutor also failed to provide a clear and distinct, legitimately, related basis.

A. THE APPLICABLE ANALYTICAL FRAMEWORK

In State v. Harrison, 805 P.2d 769 (Utah App. 1991), the opinion set forth five considerations relevant to a peremptory

challenge analysis: (1) standing; (2) a proper objection; (3) a prima facie showing of improper discrimination; (4) the rebuttal explanation; and (5) the prejudicial effect. Id. at 774.

However, as predicted by the opinion, the Powers decision rejected "racial identity with excluded jurors as a standing requirement for such objections." 805 P.2d at 775 (citing Powers, 113 L.Ed.2d 411); Span, 819 P.2d at 340 ("no standing requirement exists which requires the defendant to be of the same race as the challenged juror").

The second and third considerations similarly require no analysis because:

> once a party accused of improper discrimination attempts to rebut that accusation with evidence that the challenged action was proper, the question of whether a prima facie case was made in the first place "is no longer relevant." Instead, the focus shifts to the ultimate issue of whether improper discrimination has occurred.

Harrison, 805 P.2d at 777 (citations omitted); accord Williams v. State, 548 So.2d 501, 504 (Ala. Cr. App. 1988) ("We follow the rule that, when the prosecution's explanations for its strikes are of record, we will review the trial court's findings of discrimination vel non, even though there has been no express finding by the trial court that a prima facie case has been established"); Gamble v. State, 357 S.E.2d 792, 794 (Ga. 1987).

In regards to the fourth consideration, the adequacy of the rebuttal, "[r]elying on Batson, it has been found that an explanation given by a prosecutor for the exercise of a peremptory

challenge must be '(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate.'" State v. Cantu, 778 P.2d 517, 518 (Utah 1989) ("Cantu II") (citing State v. Butler, 731 S.W.2d 265, 268 (Mo. App. 1987)); Gamble, 357 S.E.2d at 795.[2] The prosecutor's explanation in the present case did not meet the necessary requirements.

When the court had asked the jurors about their prior involvement in lawsuits, Ms. English requested to approach the bench and then responded to the court's inquiry with a note: "I, Bettye English, was attempting to sue the Board of Education because I was terminated from my job through discrimination because I did not have EEO involved --" (R 203). After the State had been apprised of the note's contents, the prosecutor reacted: "I felt, based on her unwillingness to speak before the rest of the group about a matter

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[2] Other comparable factors cast doubt upon the legitimacy of a purportedly race-neutral explanation:

> We agree that the presence of one or more of these 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 equally applicable to juror [sic] who were not challenged.

Cantu II, 778 P.2d at 518-19 (quoting State v. Slappy, 522 So.2d 18, 22 (Fla. 1988)); Floyd v. State, 539 So.2d 357, 362 (Ala. App. 1987).

that I didn't find -- I'm sure she felt that it was personal, naturally, but her note indicated she had a lawsuit against the school district. I didn't see it to be something that was so personal that it would be embarrassing to speak of before the group." (R 216).

B. THE PROSECUTOR'S EXPLANATION WAS NOT RACE NEUTRAL BECAUSE SIMILARLY SITUATED JURORS WERE TREATED DIFFERENTLY

The prosecutor's explanation must remain consistent with the treatment extended similarly situated jurors. See State v. Butler, 731 S.W.2d 265, 271 (Mo. App. 1987) (conflicting reasons do not suffice because "[t]he prosecutor cannot have in both ways"); People v. Turner, 726 P.2d 102, 109 (Cal. 1986); cf. Floyd v. State, 539 So.2d 357, 362-63 (Ala. Cr. App. 1987) (disparate treatment of the prospective jurors is improper).

In the case at bar, two jurors disclosed their involvement in a legal matter with a written note rather than through an oral response. Bettye English, the lone black juror, revealed her involvement in a discrimination lawsuit with a note. (R 203). Immediately after Ms. English had submitted her note, "Juror No. 11" approached the bench and conveyed a message of his own. (R 162).[3] Although juror #11 was subsequently excused, neither the court nor

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[3] See supra note 1. A distinction should also be noted that, in contrast to viewing juror #11's written note as a personal matter which should have been revealed to the public, both the prosecutor and the court instead focused on whether juror #11's expunged felony conviction disqualified him as a juror. (R 179-99).

the prosecutor viewed juror #11's written message as an improper attempt to protect his privacy.

Juror #11 is the convicted felon, an individual whose past history is typically emphasized by the prosecution and exposed in court for purposes of trial (e.g. impeachment) and sentencing (e.g. arrest record). See, e.g., Utah R. Evid. 609; Utah Code Ann. §§ 76-3-201, -401. Notwithstanding the prosecution's contention that he "didn't [view Ms. English's lawsuit as] "something that was so personal that it would be embarrassing to speak of before the group[,]" (R 216), juror #11's expunged felony conviction was, by comparison, atypically viewed as a personal and potentially embarrassing past legal matter worthy of protection. See (R 179-80; 185; 194-97).

Ms. English and juror #11 were treated differently, even though they had both revealed a personal legal matter with a note. The references to Ms. English's sensitivity and her reluctance to speak in public contrasts with the compassion extended juror #11, a convict whose past often becomes the subject of an "on-the-record" inquiry and humiliation. The jurors' past legal involvement--regardless of whether it pertained to a felony offense or a discrimination case--should have been viewed alike, and not as a potentially embarrassing situation for one juror and as a circumstance unrelated to the exclusion of another. Unlike the court's ability to seal and protect a convicted juror from the public disclosure of his crime, the improperly accepted peremptory challenge subjected Ms. English to open humiliation beyond that

already experienced in her discrimination lawsuit. Georgia v. McCollum, 505 U.S. ---, 120 L.Ed.2d 33, 44, 112 S.Ct. 2348 (1992) ("Regardless of who invokes the discriminatory challenge, . . . the juror is subjected to open and public racial discrimination"); Powers, 113 L.Ed.2d at 427 ("A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character"); see supra note 1.

C. THE PROSECUTOR'S EXPLANATION LACKED CLARITY, SPECIFICITY, AND LEGITIMACY

The prosecutor also deemed Ms. English, "for lack of a better term, to be somewhat whiny. I don't think she would be a good juror with the other jurors. And that was the sole basis. It had nothing to do with her race or anything else." (R 216). The court sided with the prosecutor:

> THE COURT: All right. You have made the record. I mean -- well, what [the prosecutor] has said to me, to my mind, justifies, for reasons other than race, his peremptory challenge. What he has said here corresponded with my observations of Ms. English's demeanor, and that's why I ruled that the reasons stated by [the prosecutor] are not made up, they are not pretentious but, in fact, made sense to me. That is the reason he did what he did rather than doing it for reasons of race.
>
> [DEFENSE COUNSEL]: Perhaps I ought to respond to that, because my perception of her demeanor was nothing like that. Of course, we all have different perspectives.

(R 216-17).

1. The prosecutor failed to cite a specific "bias" of the juror

"[T]he trial judge must be careful not to confuse a specific reason given by the state's attorney for his challenge, with a 'specific bias' of the juror, which may justify the peremptory challenge." Floyd v. State, 539 So.2d 357, 361 (Ala. Cr. App. 1987) (emphasis added); State v. Cantu, 778 P.2d 517, 518 (Utah 1989) (construing People v. Hall, 672 P.2d 854, 857 (1983) ("peremptories must be based on grounds reasonably related to case on trial or for reasons of specific bias")); see also People v. Wheeler, 583 P.2d 748 (1978). The trial court's focus in the case at bar was misplaced. No bias was suggested in the prosecutor's response.

Other than the generalized questions addressed to the jury pool as a whole, the State asked no questions of Ms. English which could have tested her impartiality. Cf. People v. Turner, 726 P.2d 102, 111 (Cal. 1986) (citation omitted) ("A prosecutor's failure to engage Black prospective jurors 'in more than desultory voir dire, or indeed to ask them any questions at all,' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias"); Cantu II, 778 P.2d at 518 (quoting Slappy, 522 So.2d at 22 ("factors that may cast doubt upon the legitimacy of a purportedly race-neutral explanation [include the] . . . failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, . . ."); Butler, 731 S.W.2d at 269

("Without some form of inquiry, a prosecutor could easily conceal his true reason for removing black jurors by simply inventing 'neutral' reasons for the strikes"); Floyd, 539 So.2d at 362. Absent the detection of bias and because of the lack of questioning, the State provided no legitimate reason for Ms. English's exclusion.

2. The prosecutor failed to state a clear and reasonably specific explanation

The State's assertion of Ms. English being "whiny" is so broad and nebulous that it failed to satisfy the "clear and reasonably specific" requirement for race-neutral explanations. See Cantu II, 778 P.2d at 518; Williams v. State, 548 So.2d 501, 504 (Ala. Cr. App. 1988); cf. People v. Turner, 726 P.2d 102, 110 (Cal 1986) ("the assertion that 'something in her work' would 'not be good for the People's case' is so lacking in content as to amount to virtually no explanation"); Williams, 548 So.2d at 507 ("The prosecutor's reasoning that she was 'docile' during voir dire questioning and was 'lacking the strength of conviction it would take to sit in judgment in a case of this magnitude' is also doubtful"); Batson, 476 U.S. at 106 (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically"). Moreover, the prosecutor's allegation was expressly rejected by defense counsel who stated, "my perception of her demeanor was nothing like that." (R 216-17).

Indeed, since Bettye English possessed a background apparently favorable to the prosecution, the State's decision to exclude the black juror merely because of her alleged "whininess" casts further doubt upon the legitimacy of the explanation. Ms. English has a daughter who works for the FBI and a son who "had an electric car stolen from the house, and someone broke into his truck and took a jack and CB and stuff like that." (R 164, 168). The State should not have been allowed to exclude her. Cf. Turner, 726 P.2d at 106 (citation omitted) ("On voir dire neither had expressed any views indicating partiality to the defense; on the contrary, both prospective jurors 'had backgrounds which suggested that, had they been white, the prosecution would not have peremptorily excused them'"); see also (R 140-53) (Ms. English, [who was a wife, a mother, and a grandparent], possessed characteristics common to other jurors who were not excluded).

In addition, the prosecutor's claim that Ms. English "would [not] be a good juror with the other jurors" finds no support in the record and is a more nebulous "conclusory nuance" than the "whiny" characterization. See People v. Washington, 234 Cal.Rptr. 204 (Cal. App. 4 Dist. 1987) (reversal required because the prosecutor's contentions that the juror--who "spoke softly," "would not be able to speak up [or to stand up] to the other jurors," and "didn't appear to be a decision maker"--was "neither supported by the record nor the law"); Williams, 548 So.2d at 506-07 ("The speculation that her [the prospective juror] having heard of appellant might prejudice her against the prosecution is just that--speculation

. . . [and her] connection, possibly negative, with 'law enforcement,' . . . also appears to be nothing more than speculation and is unsupported by voir dire examination"); Butler, 731 S.W.2d at 272 (prosecutor cannot speculate that because nurses are generally compassionate, the involved nurse would also be "inclined to feel sorry for defendants"). The State's rebuttal explanation failed to set forth a legitimate, race-neutral explanation.

D. THE PROSECUTOR FAILED TO STATE A REASON RELATED TO THE CASE BEING TRIED

"Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' . . . The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." Batson v. Kentucky, 476 U.S. 79, 98 (1986) (citation omitted); State v. Cantu, 778 P.2d 517, 518 (Utah 1989) (quoting State v. Butler, 731 S.W.2d 265, 268 (Mo. App. 1987) ("an explanation given by a prosecutor for the exercise of a peremptory challenge must be . . . 'related to the case being tried, . . .'")); Gamble v. State, 357 S.E.2d 792, 795 (Ga. 1987); Williams v. State, 548 So.2d 501, 504 (Ala. Cr. App. 1988); State v. Slappy, 522 So.2d 18, 22 (Fla. 1988); Floyd v. State, 539 So.2d 357, 362 (Ala. App. 1987).

As alluded to above, a female, black juror's alleged whininess is in no way relevant to a specific bias or to his or her ability to follow the law. Even if the characteristic befitted Ms. English's disposition, the State's purported and unrelated

justification fails. See, e.g., Butler, 731 S.W.2d at 272; Gamble, 357 S.E.2d at 796 ("The prosecutor's explanation that [the prospective juror] is a Mason is unpersuasive [as] [i]t is not clear how Masonic membership is related to this case"); Hill v. State, 787 S.W.2d 74, 78 (Tex. App. 1990) (reversal required when, in addition to striking a prospective juror because of his race, the prosecutor's explanations were based on assumptions and reasons unrelated to the case such as "I just didn't like the way he responded to my questions, his attitude, his demeanor").

E. THE COURT ERRED IN ITS ACCEPTANCE OF THE PROSECUTION'S REBUTTAL EXPLANATION

Indirect discrimination[4] is no more tolerable than blatant racism. Compare State v. Cantu, 778 P.2d 517, 519 (Utah 1989)

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[4] The subtle forms of improperly exercised peremptory challenges have also been recognized:

> Nor is outright pervarication . . . the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." . . . A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts." . . . Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels. . .

Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring), reprinted in State v. Slappy, 522 So.2d 18, 22-23 (Fla. 1988).

(emphasis added) ("we hold that race was an indirect but significant reason for the peremptory challenge and vacate defendant's conviction"), with Georgia v. McCollum, 505 U.S. ---, 120 L.Ed.2d 33, 44, 112 S.Ct. 2348 (1992) (the Constitution prohibits purposeful discrimination on the ground of race in the exercise of peremptory challenges). While the prosecutor's actions did not appear to be ill-willed, his stated justifications nonetheless failed to meet the necessary legal standards.

The trial court must not "discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor[.]" People v. Turner, 726 P.2d 102, 112 (Cal. 1986); Floyd, 539 So.2d at 362 ("intuitive judgment or suspicion by the prosecutor [is not enough and there is a] . . . danger [in] taking the explanations at face value rather than scrutinizing them carefully"); Williams, 548 So.2d at 504 ("When evaluating the reasons, the trial court had a duty to reject any explanation that did not meet these [the above] requirements").

The court here may have agreed with the prosecutor's assessment of Ms. English, but an apparently facially neutral explanation must still meet the necessary legal requirements. In light of the circumstances discussed above, her allegedly "whiny" demeanor failed to clearly and specifically state a legitimate race-neutral justification.

F. THE HARMLESS ERROR ANALYSIS IS INAPPLICABLE TO THE CASE AT BAR

The fifth consideration announced in the Harrison decision,

a harmless error analysis, is not actually supported by the cited authority. The Harrison opinion read in relevant part:

> if we had found clear error, Harrison's conviction could be affirmed only by showing that the error was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (quoted in Cantu I, 750 P.2d at 597.) This is a difficult showing to make, and prosecutors who are questioned in the future about possibly improper peremptory juror challenges would do well to consider this in formulating their responses, making sure that they meet the Batson requirements.

State v. Harrison, 805 P.2d 769, 780 (Utah App. 1991) (footnote omitted).

The unprecedented proposed language from Cantu I was supported only by a single justice in a plurality opinion. See Cantu I, 750 P.2d at 597 (Howe, J.). While the other members of the court were able to agree that the case should be remanded, in a fragmented set of opinions the court could not agree on what should occur upon remand. See id. at 597-98. Moreover, in the subsequent Cantu II opinion, no harmless error analysis was followed or even mentioned. See Cantu II, 778 P.2d at 519. Instead, the Utah Supreme Court explained:

> the fact that the juror was Hispanic was the ultimate predicate for the prosecutor's peremptory challenge. This reason for exclusion of the juror is neither neutral nor legitimate. Therefore, we hold that race was an indirect but significant reason for the peremptory challenge and vacate defendant's conviction. The matter is remanded for a new trial.

778 P.2d at 519.

The analysis there is consistent with the holding of Batson and its progeny. See, e.g., Batson v. Kentucky, 476 U.S. 79, 100 (1986) (emphasis added) (if "the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed"); Powers, 113 L.Ed.2d at 426 (no harmless error analysis is required because "we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race" and because "[a] prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings"); cf. Arizona v. Fulminante, 499 U.S. ---, 113 L.Ed.2d 302, 321, 111 S.Ct. 1246 (1991) (citing Vasquez v. Hillery, 474 U.S. 254 (1986) (no harmless error analysis for "structural errors" such as the "unlawful exclusion of members of the defendant's race from the grand jury that indicted him, despite overwhelming evidence of his guilt")); People v. Turner, 726 P.2d 102, 112-113 (Cal 1986) (Vasquez's reasoning is even more applicable, of course, to the systematic exclusion of Blacks from the jury that actually tried and convicted the defendant in the case at bar"); Powers, 113 L.Ed.2d at 428 (citing Holland v. Illinois, 493 U.S. 474, 107 L.Ed.2d 905, 110 S.Ct. 803 (1990) ("race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage")).

As the above authority indicates, the harm extends beyond its effect on the defendant. "The purpose of the jury system is to impress upon the criminal defendant and the community as a whole

that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood . . . if the jury is chosen by unlawful means at the outset." Powers, 113 L.Ed.2d at 426 (emphasis added); see also State v. Bailey, 605 P.2d 765, 768 (1980) (emphasis added) ("The State claims that the defendant has not proved he was prejudiced when he used his peremptory challenges to remove the challenged jurors. However, defendant cannot prove this empirically, and he is not required to do so").

Viewed another way, appellate courts have repeatedly refused to assume the fact finding role of the jury because a reading of the "cold record" cannot substitute for the jury's first hand observation of the witnesses and the events perceived in the "heat of trial." See, e.g., State v. Underwood, 737 P.2d 995, 996 (Utah 1987) (per curiam) (citations omitted) ("In reviewing a defendant's conviction, we do not substitute our judgment for that of the jury. It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses"). For reasons unknown, a single individual who was excluded as a prospective juror could have affected the entire decision making process. Cf. Bailey, 605 P.2d at 768 (construing Crawford v. Manning, 542 P.2d 1091, 1093 (Utah 1975) (in "a civil case where six of eight jurors could return a verdict, a similar error was held not harmless although there was a unanimous verdict, because the juror who remained when the appellant exhausted his peremptory challenges 'may have been a hawk amid seven doves and imposed his will upon

them'")); Utah Const. art. I, § 10 ("In criminal cases the verdict shall be unanimous"); see also State v. Julian, 771 P.2d 1061, 1064 (Utah 1989) ("This Court has repeatedly held that it is prejudicial error to compel a party to exercise a peremptory challenge to remove a prospective juror who should properly have been removed for cause").

A harmless error analysis is improper because an appellate court cannot truly recreate and retroactively perceive the circumstances pertinent to an individual's (or the collective jury's) deliberations. Questions of guilt or innocence are properly left for a trial by jury. Utah Const. art. I, § 12 (emphasis added) ("In criminal prosecutions the accused shall have the right to . . . trial by an impartial jury . . ."); Utah Code Ann. § 77-17-10 ("In a jury trial, questions of law are to be determined by the court, questions of fact by the jury").

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction and remand for a new trial.

SUBMITTED this 2nd day of September, 1992.

RONALD S. FUJINO
Attorney for Defendant/Appellant

JAMES A. VALDEZ
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 2nd day of September, 1992.

Ron S. Fujino
RONALD S. FUJINO

DELIVERED by _____

this _____ day of September, 1992.

_____

ADDENDUM

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a)(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except that he may possess such controlled substances when they are prescribed to him by a licensed practitioner; or

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 609. Impeachment by evidence of conviction of crime.

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

PART 2

SENTENCING

76-3-201. Sentences or combination of sentences allowed — Civil penalties — Restitution — Definitions — Resentencing — Aggravation or mitigation of crimes with mandatory sentences.

(1) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentences or combination of them:

(a) to pay a fine;

(b) to removal from or disqualification of public or private office;

(c) to probation unless otherwise specifically provided by law;

(d) to imprisonment; or

(e) to death.

(2) This chapter does not deprive a court of authority conferred by law to forfeit property, dissolve a corporation, suspend or cancel a license, or permit removal of a person from office, cite for contempt, or impose any other civil penalty. A civil penalty may be included in a sentence.

(3) (a) (i) When a person is adjudged guilty of criminal activity which has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitu-

PART 4

LIMITATIONS AND SPECIAL PROVISIONS ON SENTENCES

76-3-401. Concurrent or consecutive sentences — Limitations.

(1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. Sentences for state offenses shall run concurrently unless the court states in the sentence that they shall run consecutively.

(2) A court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

77-17-10. Court to determine law; the jury, the facts.

(1) In a jury trial, questions of law are to be determined by the court, questions of fact by the jury.

(2) The jury may find a general verdict which includes questions of law as well as fact but they are bound to follow the law as stated by the court.

ARTICLE I

DECLARATION OF RIGHTS

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.