

POINTS AND AUTHORITIES

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Week Of	Topic	Guest Speaker	Ethics
Aug. 8, 2005	The Latest Cases on <u>Batson/Wheeler</u> Challenges (Part II of II)	Jerry Coleman San Francisco ADA	30

Evidence of Juror's Demeanor May Be Grounds for Removing Juror and Distinguishing Juror From Others of Similar Stated Views (Jury Selection Post-Johnson & Miller-El).

People v. Ward (2005) 36 Cal.4th 186 [30 Cal.Rptr.3d 464, 474-479] [Cites are to Cal.Rptr]

Facts: The prosecution exercised peremptory challenges against seven African-American jurors (including two challenges made during the selection of alternate jurors). The defense made several Batson/Wheeler motions. (At p. 474.) It wasn't clear whether the trial court found a prima facie showing of discriminatory purpose had been made to all the challenged jurors but the prosecution was, nevertheless permitted to give an explanation for the challenges. (At p. 475.) The trial judge denied the motions, noting among other things, the prosecution properly removed jurors based on the juror's demeanor or attitude in answering questions. (At pp. 474-479.)

1. A "trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (At p. 475.)
2. The court found the prosecutor's explanations for booting five of the jurors based on their hesitancy to imposing death as expressed during voir dire was proper. (At p. 476.) The court noted that "[a] prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty." (At p. 476.)
3. Without specifically describing the "demeanor" or "manner" of one of the jurors, the court found the prosecutor's explanation that the juror's demeanor suggested she was a "death skeptic" was valid in light of the trial judge's confirmation of that observation. (At p. 476.)
4. The court also found the prosecutor's explanation that one of the booted jurors expressed hostility toward the prosecution in response to questioning about his knowledge of gangs (a hostility confirmed by the trial judge) provided a neutral reason for challenging the juror. (At pp. 476-477.)
5. The court also upheld the removal of another juror (Rose B.) based on (1) the responses she gave in her juror questionnaire (i.e., that the death penalty is a "horrible thing"); (2) her unconventional appearance—i.e., wearing 30 silver chains around her neck and rings on every one of her fingers—which suggested that she might not fit in with the other jurors; and (3) her "body language" during questioning suggesting that she was "uptight with" the prosecutor. (At p. 477.)

The court held the first cited reason alone supported the denial of defendant's motion. (At p. 477.)

6. The court also found that the fact that five of the twelve sitting jurors were African-American, while not conclusive, was "an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a Wheeler motion. (At p. 477.)

Comparative Analysis

7. The court assumed that it could do a comparative analysis even though it had not been done in the trial court but found that two jurors who were permitted to remain were not similarly situated to the jurors who were booted. (At p. 477.)
8. One of the jurors booted worked in the probation department and was a group supervisor for 40-50 juvenile delinquents. This did not make this juror comparable to one of the jurors who remained on the jury who had a son who was arrested for drug possession and was involved in a fight in which he was stabbed. (At pp. 477-478.)

The fact only the booted juror was asked about his experience with gangs did not cast the prosecutor's reasons in an "implausible light." (At p. 478.) Given the booted juror's background, it was reasonable to ask the juror about his experience with gangs, while there was nothing in the seated juror's answers which suggested she would have had such experience. (At p. 478.)

9. The fact that the other seated juror served on a prior jury which did not reach a verdict did not render this juror similarly situated to Rose B. (the juror booted because the prosecutor felt she would not fit in due to her excessive use of jewelry). There was nothing to indicate the seated juror had an unconventional appearance or even that she had hung up the previous jury. (At p. 478.)

Moreover, the fact this seated juror stated she believed that LWOP was a more severe punishment than the death penalty did not establish that the prosecutor's reasons for striking other jurors were implausible, in light of the fact that, unlike Rose B. (the booted juror who described the death penalty as horrible), the seated juror did not indicate any reluctance to impose the death penalty. (At p. 478.)

10. The court also found that this seated juror was not similarly situated to Rose B. or other jurors struck by the prosecution because the juror expressed **no** reluctance to imposing the death penalty during questioning and exhibited less of a personal distaste or visceral reaction to the death penalty. (At p. 479.)
11. The fact the seated juror stated in her questionnaire that she thought her son had been treated unfairly by the criminal justice system did not show the prosecutor's reasons for removing the booted jurors were pretextual since the prosecutor struck no jurors based on their experiences with the criminal justice system and, in any event, the seated juror said she felt her son was treated unfairly because of the victim's links to law enforcement - a fact which made it unlike the circumstances in the case being tried. (At p. 479.)

Simply Claiming a Juror's Demeanor is Unacceptable May Be Insufficient to Establish Neutral Reason for Challenging Juror Where No Further Explanation Given.

People v. Allen (2004) 115 Cal.App.4th 542

Facts: The prosecutor excused two African-American jurors. The first juror was a

benefit authorizer with the Social Security Administration whose home had been burglarized. The second juror was a program analyst for Kaiser and said she had two cousins in law enforcement. The second juror did not answer a question posed on the juror questionnaire regarding whether she had any moral or religious principles that would make it difficult to determine guilt, but, on voir dire, explained that she did not answer the question because she did not understand what was being asked and confirmed she would base her decision on the law and evidence and common sense. (At pp. 545-546.)

The defense made a Batson/Wheeler motion and the trial judge found a prima facie case had been made. The prosecutor explained that he bumped the first juror in the following manner: "The first woman, her very response to your answers, and her demeanor, and not only dress but how she took her seat. I don't know if anyone else noticed anything but it's my experience, given the number of trials I've done, that that type of juror, whether it's a personality conflict with me or what have you, but they tend to, in my opinion, disregard their duty as a juror and kind of have more of an independent thinking." (At p. 546.)

As to the second juror, the prosecutor stated that the juror had questions as to what religious or moral convictions meant and that concerned her and that it gave the prosecutor concern that she "would question things that may be evident on their face and may not make the sort of juror that I would like for that reason." (At p. 546.)

The trial court then denied the defendant's motion without asking the prosecutor further questions or making any findings with respect to the prosecutor's explanations. (At p. 546.)

On appeal, the defendant claimed the reasons provided by the prosecutor were not sufficiently specific to adequately explain any possible race-neutral reasons for dismissing the jurors and that the trial court failed to make a sincere, serious and reasoned inquiry into the explanations provided. (At p. 547.)

1. A prospective juror may be excused based upon bare looks and gestures, hunches, and even arbitrary reasons. For example, courts have upheld peremptory challenges "where the juror's body language seemed angry and hostile" or of "jurors who looked nervous, who looked tired, who looked weird, who seemed unable to relate to the prosecutor, who had a very defensive body position, who were overweight and poorly groomed and seemed not to trust the prosecutor." (At p. 547.)
2. "[E]ven less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' [citation]—upon entering the box the juror may have smiled at the defendant, for instance, or glared at him." (At p. 547, citing to People v. Wheeler (1978) 22 Cal.3d 258, 275.)
3. Moreover, "[w]hen the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (At p. 548.)
4. However, "when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (At p. 548.)
5. When the reasons provided for removing the juror involve subjective judgments (e.g., whether or not the juror is attentive), there is a potential for abuse, and such reasons deserve careful scrutiny by the trial judge. (At pp. 548-549.)
6. In the instant case, the court found the explanation proffered by the prosecutor

for booting the second juror misstated the record and that it would have been helpful for the trial court to have further probed the prosecutor's reasons. However, the court assumed the prosecutor's explanation was justified. (At p. 550.)

7. The court found the trial judge erred in accepting the prosecutor's explanations as to the first juror since there was nothing in the record to give them content.

"[S]imply saying that a peremptory challenge is based on "her demeanor" without a fuller description of what the prospective juror was or was not doing provides no indication of what the prosecutor observed, and no basis for the court to evaluate the genuineness of the purported non-discriminatory reason for the challenge." (At p. 551.)

The prosecutor's explanations that the juror was removed because of "her dress" and "how she took her seat" without additional elaboration as to what it was about the juror's dress or how she took her seat which made her unacceptable do not provide for meaningful review." (At p. 551.) The prosecutor's reasons were simply too general or too vague to evaluate and do not demonstrate the challenge was based on legitimate grounds. (At p. 551.)

8. The prosecutor may not rebut the defendant's prima facie case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections. (At p. 552.)
9. The court noted that, as an alternative to asking more probing questions, the trial judge could have "placed his own observations on the record, [and] that may well have provided a sufficient basis for understanding the basis on which the peremptory challenge was made, at least if the prosecutor acquiesced in the court's recitation." (At p. 553, fn. 8.)

Removal of All Members of a Cognizable Group Does Not, By Itself, Establish a Prima Facie Case of Discriminatory Use of Challenges.

People v. Young (2005) 34 Cal.4th 1149, 1170-1174

Facts: The prosecution struck three African-American female jurors. Two African-American male jurors remained on the panel. (At p. 1171.)

1. The removal of all members of a cognizable group, standing alone, is not dispositive of whether defendant has established a prima facie case of discrimination. (At p. 1173, fn. 6.)
2. **Pertinent Expertise:** There were neutral reasons for striking a juror who worked as a therapist and testified for the prosecution as an expert in a sexual assault case because it was reasonable to believe the juror would have had difficulty setting aside her expertise in evaluating the evidence in the case. (At p. 1174.)
The court also noted the prosecution could justifiably fear (despite the juror's statements to the contrary) that the juror might be biased against the prosecution for vigorously cross-examining defense witnesses who were psychologists or psychiatrists. (At p. 1174.)
3. **Negative View of Government:** In addition to the reasons stated above, the prosecutor could permissibly have stricken the juror for her stated belief that crime had increased, in part, because of an increase in the double standard of our government[] system" - an apparently negative view of the government. (At p. 1174.)

4. **Connections With Attorneys:** The prosecutor could also have properly challenged a juror who stated she was a insurance claims specialist who assisted defense attorneys in preparation for litigation and arbitration - albeit it appeared the defense attorneys were civil defense attorneys who represented insurance companies - on the ground the juror might be overly defense oriented in evaluating and deliberating the charges against the defendant. (At p. 1174.)

Slight Delay in Making Batson/Wheeler Motion Does Not Render It Untimely and Defendants Cannot Complain About Batson/Wheeler r Violations Involving Alternate Jurors Who Do Not End Up Serving on the Jury.

People v. Roldan (2005) 35 Cal.4th 646, 699-703 [only]

Facts: The prosecution removed two African-American jurors. One had a general view against the death penalty and had a son in prison. The other stated had been detained for smoking marijuana and gave somewhat conflicting testimony regarding his status as a "peace officer," initially claiming he was a county probation peace officer, and then "clarifying" he was a group supervisor for the probation department and not a sworn peace officer. (At p. 700.)

The defense attorney did not make a Batson/Wheeler motion immediately after the second African-American juror was challenged; instead, he waited until after he, himself, excused another juror. (At p. 700.) The defense pointed out that two of the prosecutor's eight challenges had been made against African-American men. The court denied the motion on grounds no prima facie case had been made out and because the motion was untimely. (At p. 700.)

The defense made another Batson/Wheeler motion after the prosecution peremptorily challenged two more jurors during the selection of the alternate jurors. The motion was denied and neither juror ended up serving on the jury. (At p. 701.)

1. A Batson/Wheeler motion is untimely if first made after the jury has been sworn and the venire dismissed. (At p. 701.)
2. As a general matter, Batson/Wheeler must be timely made but it is not required "that such motions be made, on pain of waiver, immediately upon the exercise of the offending peremptory challenge and before any other challenges have been made." (At p. 702.) The motion, in the instant case, was made within a minute after the targeted juror was dismissed, and the defense had a reasonable explanation for its tardiness; the motion was timely. (At p. 703.)
3. Nevertheless, and assuming the low "reasonable inference" standard, the motion was properly denied because no prima facie showing had been made: the only showing in support of the motion was that two challenged jurors were African-American and that 2 of 8 peremptories had been used against African-American jurors. (At p. 702.)
4. There were neutral reasons for excusing the first African-American juror. The juror had a son in prison and expressed unfavorable views on the death penalty. (At p. 703.)

"[T]he use of peremptory challenges to exclude prospective jurors whose relatives and/or family members have had negative experiences with the criminal justice system is not unconstitutional." (At p. 703.)

It is proper to remove a juror who has "unfavorable" views regarding the death penalty. (At p. 703.)

5. There were neutral reasons for excusing the second African-American juror. The

contact with the criminal justice system and the juror's lack of candor. (At p. 703.)

6. The defendant cannot complain about any Batson/Wheeler violation regarding the removal of alternate jurors because no alternate jurors ended up serving on the jury. Moreover, any error in this circumstance could not possibly prejudice a defendant. (At p. 703.)

Attorney (Rather Than Defendant) May Impliedly Consent to Remedying Batson/Wheeler Violation By Methods Short of Dismissal of Entire Venire.

People v. Overby (2004) 124 Cal.App.4th 1237

Facts: During jury selection, after the prosecution bumped a black juror, the defense attorney asked the court to order the juror to remain in the courtroom and then made a Batson/Wheeler objection. The defense attorney did not request any specific remedy. The trial judge granted the motion and stated, as a remedy, that he was going to reseal the improperly challenged juror. When the trial judge asked if the attorneys wished to be heard on the court's decision, the defense attorney stated, "submit." The juror was then seated over the prosecutor's objection and voir dire resumed. The prosecutor then made her own Batson/Wheeler objection, which was denied. (At pp. 1242-1243.)

Later in the day, the prosecutor asked the trial judge to reconsider Batson/Wheeler motions and argued the jury venire should be dismissed. The motion for reconsideration was denied. At no time, during the motion, did defense counsel state she agreed the venire should be dismissed or indicate any dissatisfaction with the remedy chosen by the court. (At p. 1243.)

On appeal, the defendant argued that, the court's remedy could not be imposed absent his personal consent or waiver of his right to the dismissal of the panel (as a remedy for a Batson/Wheeler violation). (At p. 1243.)

1. In People v. Willis (2002) 27 Cal.4th 811, the California Supreme Court approved remedies short of dismissing the entire venire for a Batson/Wheeler violation, provided the alternate relief was acceptable to the complaining party: In "situations...in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial...with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve." (At p. 1242.)
2. The consent required by Willis need not be personally given by the defendant and may be granted by counsel. "The right to request a mistrial or to elect to continue with a particular jury is not one of the constitutional rights deemed to be so personal and fundamental that it may only be personally waived by the defendant." (At p. 1243.)
3. Defense counsel's conduct (e.g., asking that the challenged juror remain, declining to object to remedy proposed by the judge by saying "submit," and declining to indicate any dissatisfaction with the reseating remedy after having time and opportunity to reconsider it further) showed defense counsel implicitly consented to the remedy imposed by the trial court. (At pp. 1244-1245.)
4. The court noted, however, in future cases, "it would be preferable and advisable for the trial court to ensure that the record reflects the express consent of the prevailing party whenever an alternate remedy authorized by Willis...is employed."

Trial Judge Has Authority to Inform Counsel Not to Violate *Batson-Wheeler* Even Before Any Challenge to a Juror is Made.

People v. Bouldon (2005) 126 Cal.App.4th 1305

Facts: In a three codefendant case, during a discussion between counsel and the trial judge prior to the start of jury selection, the judge ordered each counsel "not to violate Wheeler." (At p. 1311.)

On appeal, the defendants argued that the trial court's order not to violate Wheeler contained an implicit threat to impose monetary sanctions of up to \$1,500 if counsel wrongly challenged venire members, and that this created a conflict of interest between defendants and defense counsel and chilled counsel's ability to zealously represent the defendants in exercising peremptory challenges due to a fear of incurring the wrath of the court. (At p. 1314.)

1. The court noted that the trial judge may have decided to issue the order based on the case of People v. Muhammad (2003) 108 Cal.App.4th 313, which held that a trial court does not have the power to imposed a monetary sanction (under Code of Civil Procedure Section 177.5) for a Wheeler violation unless preceded by a order not to engage in discriminatory use of jury challenges. (At pp. 1312-1313.)
2. The possibility that counsel will incur a financial sanction for violating Wheeler does not represent a serious impediment to a defendant's right to zealous representation by counsel. The court's order did no more than tell counsel they had to obey the law - something counsel is already required to do. (At p. 1314.)
3. Although the decisions in Willis and Muhammad anticipated that the order containing the threat of sanctions would issue after problematic conduct on the part of counsel became evident during voir dire, the judge's pre-emptive prophylactic order is authorized by a trial judge's "statutory and the inherent power to exercise reasonable control over all proceedings connected with the litigation before him," and to "take whatever steps [are] necessary to see that no conduct on the part of any person obstructs the administration of justice." (At p. 1314.)

NEXT WEEK: NEW CASES ON

ONE JUDGE RECONSIDERING THE DECISION OF ANOTHER JUDGE TO RELEASE A DEFENDANT ON HIS OWN RECOGNIZANCE

DEPRESSION AS A DEFENSE TO A CHARGE OF FAILURE TO UPDATE SEX REGISTRATION

WHETHER A DEFENDANT CAN BE CONVICTED OF AIDING AND ABETTING A CRIME WHEN

THE PRINCIPAL HAS NOT COMMITTED THE CRIME AND WHAT NEEDS TO BE PROVED TO ESTABLISH A VIOLATION OF HEALTH AND SAFETY CODE SECTION 11383, THE STATUTE PROHIBITING POSSESSION OF PRECURSORS.

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