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### Summary of Brass v. State, 128 Nev. Adv. Op. 68

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*Brass v. State*, 128 Nev. Adv. Op. 68 (December 27, 2012)<sup>1</sup>

CRIMINAL LAW & PROCEDURE – *BATSON* CHALLENGES  
& SUFFICIENCY-OF-EVIDENCE

**Summary**

An appeal addressing whether a district court committed reversible error by dismissing a prospective juror before conducting a *Batson*<sup>2</sup> hearing, and whether there was evidence to support a kidnapping conviction.

**Disposition**

The Court held that when a defendant asserts a *Batson* violation, it is a structural error to dismiss the challenged juror prior to conducting the *Batson* hearing because it constitutes a predetermination of the challenge before actually hearing it. Further, the Court concluded the insufficiency-of-evidence argument pertaining to the kidnapping conviction had no merit.

**Factual and Procedural History**

In January 2009, Ernest Mitchell accused his brother in law, appellant Jermaine Brass, and Jermaine's wife, Katrinna, of breaking into his home and stealing his recently purchased tires and rims. Jermaine denied the accusation.

The day following the burglary, Jermaine's brother Ronnie Brass went to the victim's home. Katrinna answered the door, with Ernest following behind her to confront Ronnie. The argument continued outside where Ronnie made a gesture with his hands at which point an unidentified man appeared and shot Ernest several times, killing him. Katrinna testified that the shooter's face was covered, but his voice and complexion were consistent with Jermaine's. Jermaine and Ronnie were charged with (1) burglary, (2) grand larceny, (3) conspiracy to commit kidnapping, (4) first-degree kidnapping, (5) conspiracy to commit murder, and (6) murder with the use of a deadly weapon.

During voir dire, the defendant objected to the State's use of a peremptory challenge against prospective juror no. 173, noting she was the second African American stricken. Defense counsel argued this peremptory challenge was based on race in violation of *Batson v. Kentucky*.<sup>3</sup> The district court permanently excused no. 173 prior to holding a hearing. The district court then conducted a *Batson* hearing and concluded the State had race-neutral reasons for its peremptory challenges, denying the defense's *Batson* challenge. Jermaine was found guilty on all six counts.

**Discussion**

Justice Douglas wrote the opinion, with Justices Gibbons and Parraguirre concurring.

**I. Jermaine's claim of discriminatory jury selection**

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<sup>1</sup> By Joseph Sakai

<sup>2</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>3</sup> *Id.*

The Court affords great deference to the district court's determination of whether there has been discriminatory intent in the exercise of peremptory challenges when reviewing a *Batson* challenge.<sup>4</sup> Discriminatory jury selection that violates *Batson* constitutes structural error,<sup>5</sup> which necessitates automatic reversal because such error is "intrinsically harmful."<sup>6</sup>

The use of peremptory challenges in a racially discriminatory manner is a violation of the Equal Protection Clause,<sup>7</sup> and the Court uses a three-step *Batson* analysis to determine if there has been such a violation.<sup>8</sup> First, the opponent to the challenge must set forth a prima facie case of racial discrimination.<sup>9</sup> Next, the burden of production shifts to the proponent of the strike to proffer a race neutral explanation for the challenge.<sup>10</sup> Finally, if a race-neutral explanation is tendered, the trial court decides whether the opponent of the strike has proved purposeful racial discrimination.<sup>11</sup> The proponent of the strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges" and those reasons must be "related to the particular case."<sup>12</sup> A legitimate reason is one that does not deny equal protection.<sup>13</sup>

In the case at hand the district court dismissed prospective juror no. 173 prior to a hearing to determine if the State had race-neutral reasons for its challenges. The Court held that in so doing the defendants were afforded no adequate opportunity to respond to the State's race-neutral reasons or to show pretext, due to the permanent excusal of no. 173 before a *Batson* hearing. This dismissal prior to a hearing had the same effect as a racially discriminatory peremptory challenge because the defendants would be left with limited recourse even if they could prove purposeful discrimination. This discriminatory jury selection constituted a structural error intrinsically harmful to the framework of the trial, therefore the Court reversed.<sup>14</sup>

## **II. Jermaine's claim of insufficient evidence to support his kidnapping conviction**

The Court, in reviewing a criminal conviction for sufficiency of the evidence, determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution.<sup>15</sup> The jury's verdict will stand when there is substantial evidence supporting it.<sup>16</sup>

In Nevada a person is guilty of first-degree kidnapping if that person willfully "inveigles, [or] entices . . . a person by any means whatsoever . . . for the purpose of killing the person or inflicting substantial bodily harm upon the person . . . ."<sup>17</sup> The Court held the record reflected a specific plan on the part of the appellant to lure Ernest out of his home to shoot him. Justice Douglas concluded the insufficiency-of-evidence argument had not merit because a rational jury could find that Jermaine had willfully enticed Ernest from his home to kill him.

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<sup>4</sup> *Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008).

<sup>5</sup> *Id.* at 423, 185 P.3d at 1037.

<sup>6</sup> *Cortinas v. State*, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008).

<sup>7</sup> *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

<sup>8</sup> *Washington v. State*, 112 Nev. 1067, 1070, 922 P.2d 547, 549 (1996).

<sup>9</sup> *Purkett v. Elem*, 514 U.S. 765, 767 (1995).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 767.

<sup>12</sup> *Id.* at 768-9.

<sup>13</sup> *Id.*

<sup>14</sup> *See Cortinas v. State*, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008).

<sup>15</sup> *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007).

<sup>16</sup> *LaPierre v. State*, 108 Nev. 528, 530, 836 P.2d 56, 57 (1992).

<sup>17</sup> Nev. Rev. Stat. § 200.310(1) (2007).

### **Justice Gibbons' Concurrence**

Justice Gibbons, agreeing with the majority, stated that political affiliation is not a proper component as a basis for asserting a challenge to a juror in response to the State's striking an African-American juror because she was a registered Democrat.

### **Conclusion**

The Court reversed the judgment of the district court and remanded, based on the structural error related to the *Batson* challenge. The insufficiency-of-evidence argument was ruled to have no merit.