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Summary of Ford v. State of Nevada, 122 Nev. Adv. Op. 36

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Ford v. State of Nevada, 122 Nev. Adv. Op. 36 (Apr. 27, 2006)¹

CRIMINAL PROCEDURE—JURY SELECTION

Summary

Appeal from jury verdict in criminal trial on grounds that prosecutors impermissibly excluded jurors based on race in violation of *Batson v. Kentucky*.²

Disposition/Outcome

Supreme Court affirms trial court's overruling of Defendant Ford's *Batson* objection.

Factual and Procedural History

Defendant Ford was convicted by a jury of one count of conspiracy to commit robbery and one count of robbery with a deadly weapon. The prosecution had one key witness in the case, the victim of the alleged robbery, and the jury was forced to base its verdict upon this one person's word. Defendant Ford was African American. During jury selection, the prosecutor used three of his four peremptory challenges to exclude three African-American prospective jurors: Juror Wit, Juror And, and Juror Bri. Defendant Ford raised a *Batson* objection, arguing that the prosecutor's use of peremptory challenges was discriminatory.

The prosecutor explained that he dismissed Juror Wit because she had previously been arrested for domestic violence and because the prosecutor thought she would have had difficulty deciding the case based on one person's word. The prosecutor explained that because domestic violence cases often rely on one person's testimony, and Juror Wit previously experienced a dismissal in her case, she would seek evidence beyond the victim's testimony to convict despite her statement that she could remain impartial.

The prosecutor explained that he dismissed Juror And because she discussed her brother's arrest and conviction for assault and battery and, despite her statement that she could remain impartial, stated that her brother was wrongfully convicted because the witnesses testified untruthfully at trial. The prosecutor justified this exclusion because her answers evidenced a distrust of the jury system.

The prosecutor explained that he dismissed Juror Bri because he had also been arrested for domestic violence. Although he stated that he could remain impartial, he also stated that he was treated unfairly and was the victim in the case. The prosecutor justified this exclusion because the Juror's "history" supported an inability to remain impartial.

In addition, the prosecutor pointed out that he had not excluded two other African-American jurors. Defendant Ford responded that the prosecution permitted other non-African-American jurors to remain on the panel despite their answers that they or their family members had been arrested. The prosecutor justified his failure to exclude them on the grounds that their arrests were for DUIs, situations substantively different than domestic violence arrests. The court overruled Defendant Ford's *Batson* objection.

¹ By Denise S. Balboni

² 476 U.S. 79 (1986).

Discussion

In ruling on *Batson* objections, Nevada trial courts must undergo a three-part analysis. First, the opponent of the peremptory challenge must make out a prima facie case of discrimination. Second, the burden of production shifts to the proponent of the peremptory challenge to assert a neutral explanation for the challenge. Finally, the trial court must then decide whether the opponent of the peremptory challenge has proved purposeful discrimination.³

Under the first step, the court looks to the totality of the circumstances to determine the existence of a prima facie showing.⁴ However, this inquiry is moot when, as here, the state proffers reasons for its challenges before the court even has a chance to undergo the inquiry.⁵

Under the second step, the state need only proffer race neutral reasons for its peremptory challenges. The reasons given “need not be persuasive or even plausible.” The justification shall be deemed “neutral” when it is not inherently discriminatory. Here, the excluded jurors’ explanations to the prosecutors of their experiences led the prosecutor to conclude that they had a distrust of the jury system and that they would tend to be partial to the Defendant when the prosecution’s case rested on the testimony of a single witness. The district court therefore did not err in concluding that the prosecutor’s proffered justifications were “facially neutral.”

Under the third and final step, the court is called on to consider the persuasiveness of the proffered justifications and determine whether the defendant has proven purposeful discrimination.⁶ Although courts are not to accept “implausible or fantastic” justifications, the Supreme Court has recognized the practical difficulty in “ferreting out discrimination” involved at this step.⁷

Here, Defendant Ford appeals the trial court’s overruling of his *Batson* objection on two grounds: (1) a comparison of the voir dire responses provided by the excluded jurors with those provided by the non-excluded jurors reveals that the proffered race-neutral justifications were mere pretext; and (2) a comparison of the questions posed to excluded jurors with those posed to non-excluded jurors reveals an intent to discriminate. Defendant Ford’s arguments both focus on the third step of the *Batson* analysis, along lines similar to those argued in *Miller-El v. Dretke*, the Supreme Court’s most recent enunciation of *Batson*.

With regard to the first argument, when “a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.”⁸ Here, the prosecutor explained his exclusion of Juror And on the grounds that she stated that her brother had been treated unfairly in his criminal trial and that the victim spoke untruthfully against her brother. Two other, non-excluded jurors also had family members who had been convicted of crimes. However, the crucial distinction justifying Juror And’s exclusion was that both jurors who were not excluded stated that their family members had been treated fairly.

³ *Kaczmarek v. State*, 120 Nev. 314, 332 (2004).

⁴ *Libby v. State*, 113 Nev. 251, 255 (1997).

⁵ *Kaczmarek*, 120 Nev. at 332.

⁶ *Kaczmarek*, 120 Nev. at 333.

⁷ *Miller-El v. Dretke*, 545 U.S. ___, 125 S. Ct. 2317, 2324 (2005).

⁸ *Miller-El*, 545 U.S. at ___, 125 S. Ct. at 2325.

Next, the prosecutor explained his exclusion of Juror Bri on grounds that he was convicted of domestic violence, a conviction that typically relies on one person's word against another's, and Juror Bri also stated that he had been treated unfairly. Two other non-excluded jurors had been arrested for DUIs. The prosecutor's exclusion was justified because DUI arrests and convictions are fundamentally different from domestic violence arrests and convictions, and each of the two non-excluded jurors stated that they harbored no animosity regarding their arrests and felt they were treated fairly. Finally, the prosecutor justified his exclusion of Juror Wit on grounds that she had been previously arrested for domestic violence. Once again, this juror's exclusion was justified because domestic violence situations typically pit the victim against the accused in a he-said-she-said contest, and Defendant Ford's prosecution relied largely on the victim's testimony.

With regard to the second argument, the record does not support an allegation that the prosecution asked African-American jurors any substantively distinct set of questions. Rather, the prosecution asked all prospective jurors questions based on their previous answers.

Conclusion

Nevada Supreme Court affirms the trial court's overruling of Defendant Ford's *Batson* objection. Defendant Ford failed to prove intentional discrimination against the three excluded African-American jurors under *Batson*'s third inquiry.

Upon comparison of the voir dire responses provided by excluded and non-excluded jurors, Juror And's, Juror Bri's, and Juror Wit's exclusions are justified on racially neutral grounds. The state excluded only those prospective jurors who had been previously arrested or who had a family member who had been previously arrested, those who stated that they or their family members had been treated unfairly by the system, and/or those that had been arrested for domestic violence crimes.

Upon comparison of the questions asked of potential African-American and non-African-American jurors, Juror And's, Juror Bri's, and Juror Wit's exclusions are justified because the prosecutor did not ask inflammatory questions of them that he did not ask the rest of the panel.