

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20060717-CA
v.)	
)	F I L E D
Humberto Cenicerros-Barraza,)	(October 12, 2007)
)	
Defendant and Appellant.)	2007 UT App 325

Third District, Salt Lake Department, 061900578
The Honorable Timothy R. Hanson

Attorneys: Kimberly A. Clark and John Pace, Salt Lake City, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

Before Judges Bench, Greenwood, and Billings.

BILLINGS, Judge:

Defendant Humberto Cenicerros-Barraza appeals his conviction of aggravated sexual abuse of a child. See Utah Code Ann. § 76-5-404.1 (Supp. 2007). Defendant asks this court to reverse his conviction on grounds that the State violated the Equal Protection Clause in using its peremptory challenges to strike prospective male jurors. We affirm.

In Batson v. Kentucky, 476 U.S. 79 (1986), overruled in part, Powers v. Ohio, 499 U.S. 400 (1991), the United States Supreme Court held that a prosecutor's use of peremptory challenges based on race violates the Equal Protection Clause of the Fourteenth Amendment. See id. at 88. The Supreme Court has since extended Batson to prohibit peremptory challenges to exclude jurors based on gender, see J.E.B. v. Alabama, 511 U.S. 127, 146 (1994), and we refer to a gender-based objection to peremptory challenges brought under the Equal Protection Clause "as a Batson challenge," State v. Valdez, 2006 UT 39, ¶1 n.1, 140 P.3d 1219 (internal quotation marks omitted).

In Batson, the Supreme Court established a three-step analytical framework to apply when a court considers whether a

litigant's use of peremptory challenges violates the Equal Protection Clause. See id. at ¶15 (citing Batson, 476 U.S. at 93-97). The party challenging a peremptory challenge must first make out a prima facie case of purposeful discrimination. See id. The burden then shifts to the striking party to offer a gender-neutral explanation. See id. If a gender-neutral explanation is tendered, the trial court must then "determine whether the opponent of the peremptory challenge[] has proven purposeful discrimination." Id. (citing Purkett v. Elem, 514 U.S. 765, 767 (1995)).

Concerning the first step of the Batson analysis, the State concedes that it waived the issue of whether Defendant established a prime facie case. See State v. Higginbotham, 917 P.2d 545, 547 (Utah 1996). With regard to step two of the Batson analysis, Defendant invited any alleged error when he affirmatively represented to the trial court that the State's explanation as to the peremptory challenges was satisfactorily gender-neutral. See State v. Winfield, 2006 UT 4, ¶¶13, 16, 128 P.3d 1171. Specifically, when asked whether Defendant was satisfied with the State's explanation for the challenge, Defendant said, "I guess so. They're explanations, your honor. I think that what the State stated is sufficient enough that they used their challenges for [reasons] other than gender." We therefore assume the State's explanation was gender-neutral.

Batson's third and final step requires that once a gender-neutral explanation is tendered, the trial court must determine "whether the opponent of the peremptory challenge[] has carried his burden to prove purposeful discrimination." Valdez, 2006 UT 39 at ¶15 n.10. A determination of whether the opponent has demonstrated purposeful discrimination "generally turns on the credibility of the proponent of the strike and will not be set aside unless it is clearly erroneous." Higginbotham, 917 P.2d at 548; see also Hernandez v. New York, 500 U.S. 352, 365 (1991). Importantly, the burden of persuasion rests upon the challenging party--in this case, Defendant--to prove purposeful discrimination. See Batson, 476 U.S. at 93.

Here, Defendant argues the trial court clearly erred in determining that he had not proved purposeful gender discrimination. Defendant claims the evidence demonstrates that the State exercised its challenges to exclude men from the jury, and not, as the State asserted, to exclude individuals who did not have children. Defendant bases his claim on the fact that one of the four challenged male witnesses did not disclose whether he had children of any age, the three other male witnesses only informed the trial court that they did not have adult children, and one woman who remained on the jury actually did not have children. We conclude that the trial court did not

clearly err in finding that Defendant failed to meet his burden of persuasion. Prior to making its finding, the court made a specific inquiry as to what reasons other than gender supported the State's peremptory challenges. It evaluated those reasons and assessed the State's credibility, including the State's asserted, but ultimately mistaken belief that the now-contested female juror actually did have children. The court went so far as to ensure that the State's reasons were satisfactory to Defendant, and it noted that "[s]omebody who has children might be better attuned to evaluating the testimony of a child" and that it was not convinced that the removal of the men from the jury was necessarily advantageous to Defendant.

Accordingly, we affirm.

Judith M. Billings, Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

Pamela T. Greenwood,
Associate Presiding Judge