

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20060432-CA	
v.)		
)	F I L E D	
Dennis Rosa-Re,)	(March 15, 2007)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2007 UT App 91</td></tr></table>	2007 UT App 91
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Third District, Salt Lake Department, 051902012
The Honorable Paul G. Maughan

Attorneys: Linda M. Jones, Michael Misner, and Heather Chesnut,
Salt Lake City, for Appellant
Mark L. Shurtleff and Christine F. Soltis, Salt Lake
City, for Appellee

Before Judges Bench, Davis, and McHugh.

DAVIS, Judge:

Defendant Dennis Rosa-Re appeals his conviction for forcible sexual abuse, a second degree felony. See Utah Code Ann. § 76-5-404 (2003). We affirm.

Defendant's sole argument on appeal is that the State improperly exercised its peremptory challenges to remove males from the jury in violation of the Equal Protection Clause of the United States Constitution, see U.S. Const. amend. XIV, § 1; Batson v. Kentucky, 476 U.S. 79, 89 (1986); see also J.E.B. v. Alabama, 511 U.S. 127, 146 (1994) (holding that "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender"); State v. Valdez, 2006 UT 39, ¶¶13-19, 140 P.3d 1219 (discussing history of Batson challenges). The State argues that Defendant's Batson challenge was untimely because it was not raised and addressed by the trial court before the jury was sworn and the venire dismissed. We agree. The question of whether Defendant's "Batson challenge was timely raised is a question of law," which we review for correctness. Valdez, 2006 UT 39 at ¶11.

In State v. Valdez, the Utah Supreme Court concluded that "a Batson challenge must be raised before the jury is sworn and before the remainder of the venire has been excused in order to be timely under Utah law." Id. at ¶47. In reaching its holding, the supreme court noted that the situation in Redd v. Negley, 785 P.2d 1098 (Utah 1989),

whereby an objection was made prior to the swearing of the jury but not addressed by the court until after the jury was sworn in and dismissed, will generally not meet the standard we set forth today. A Batson challenge must be raised both before the jury is sworn and before the venire is dismissed Obviously, if the grounds for the Batson challenge are not articulated until after the jury has been sworn and the remainder of the venire is dismissed, the trial court cannot cure a Batson violation.

Valdez, 2006 UT 39 at ¶33 n.19. Thus, in order to be timely, the grounds for a Batson challenge must be raised and addressed by the trial court prior to the swearing in of the jury and the dismissal of the venire. See also Mooney v. State, 105 P.3d 149, 153 (Alaska Ct. App. 2005) (aligning Alaska courts "with the courts that require defendants to raise Batson challenges before the remaining members of the jury venire are released and the jury is sworn"); State v. Parrish, 111 P.3d 671, 674 (Mont. 2005) ("[C]ounsel must raise a Batson challenge before the district court swears the jury and dismisses the venire."); see also Gaskin v. State, 873 So. 2d 965, 968 (Miss. 2004).

The rationale for such a bright line rule is clear. "[A] Batson challenge must be raised in such a manner that the trial court is able to fashion a remedy in the event a Batson violation has occurred." Valdez, 2006 UT 39 at ¶44. Otherwise, "to allow a Batson challenge to proceed after the venire has been dismissed is only to sanction abuse." Id. Furthermore, the rule requiring "that a Batson challenge be raised [and ruled upon] both before the jury is sworn and before the venire is dismissed, efficiently allows the trial court to determine the issues the Batson test is designed to resolve." Id. at ¶43.

Here, Defendant's trial counsel failed to conclude a Batson challenge prior to the empaneling of the jury. In a sidebar conference, trial counsel stated "we're probably going to need the record to make a Batson challenge. . . . [B]ecause of the sixteen perspective [sic] jurors that we had left after the for-causes, four were men, three were stricken by the [S]tate."

After the brief sidebar discussion, the trial court read the names of the jurors, and both Defendant's trial counsel and the prosecutor affirmed that these jurors made up the jury that they had selected. The trial court then swore in the jury and released the remaining members of the venire. Other than raising the Batson issue in the side-bar conference, Defendant's trial counsel never objected to the makeup of the jury. After the swearing in of the jury and release of the venire, Defendant's trial counsel then argued his Batson challenge, which the trial court denied.

Defendant's Batson challenge falls squarely within the holding and reasoning of Valdez. Defendant failed to resolve his objection to the makeup of the jury "before the jury [was] sworn and before the remainder of the venire ha[d] been excused." Id. at ¶47. As such, Defendant's Batson challenge was untimely, and we need not reach the merits of his claim. We therefore affirm Defendant's conviction.

James Z. Davis, Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

Carolyn B. McHugh, Judge