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PERSPECTIVE

You still need a reason to use peremptory challenges

By Gregory M. Smith

On Feb. 9, the California Court of Appeal published *People v. Cisneros*, 2015 DJDAR 1603, which is a good reminder to all trial lawyers — criminal and civil — that they must have a reason to exercise a peremptory challenge to strike a juror; simply stating a preference for the next juror in line without any other reason is not enough.

Peremptory challenges cannot be used to strike prospective jurors on the basis of group bias — that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. See *People v. Wheeler*, 22 Cal. 3d 258, 276-77 (1978). This prohibition has been extended to include gender and sexual orientation, but not age or income. See *Di Donato v. Santini*, 232 Cal. App. 3d 721 (1991); *People v. Garcia*, 77 Cal. App. 4th 1269 (2000); *People v. McCoy*, 40 Cal. App. 4th 778 (1995); *People v. Burgener*, 29 Cal. 4th 833 (2003). Although these cases are usually criminal matters, the principles and the Batson/Wheeler rule are applicable in civil cases as well. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588 (1983).

Wheeler and *Batson v. Kentucky*, 476 U.S. 79 (1986), are the seminal cases on this issue. In *Batson*, the U.S. Supreme Court laid out a three-step test regarding the legality of the use of peremptory challenges. “First, a defendant must make a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial dis-

crimination.” *People v. Mills*, 48 Cal. 4th 158, 173 (2010) (internal citations and quotations omitted).

In *Cisneros*, the male defendant was accused of repeatedly threatening to kill his girlfriend. During voir dire, the prosecutor initially accepted a panel containing eight women and four men without using a single peremptory challenge. After defense counsel began exercising peremptory challenges, the prosecutor used four consecutive challenges to remove male jurors. At that point, the defense brought a Batson/Wheeler motion. The trial court found prima facie discrimination, but denied the motion after the prosecutor offered explanations for excusing each of the four jurors at issue.

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When the prosecutor’s next challenge was also used against a male, the Batson/Wheeler motion was renewed. The trial court made another finding of prima facie discrimination, but denied the motion after the prosecutor explained that she believed the next juror in line was a “better fit” and was also a male. The prosecutor struck at least one woman before using her next challenge on a man, which prompted a third Batson/Wheeler motion that was denied by the trial court for lack of prima facie discrimination.

Finally, the prosecutor struck another male, drawing a fourth Batson/Wheeler motion. The trial court found prima facie discrimination, but denied the motion because the prosecutor again explained the next juror in line was a “better fit” and was also male. The trial court explained that replacing one male with another believed to be more favorable to the case was a gender-neutral reason that did not

deny equal protection. A jury of 10 women and two men was empaneled and convicted Cisneros.

On appeal, the court held that the prosecutor improperly dismissed the jurors subject to the second and fourth Batson/Wheeler motions because she failed to state any gender-neutral reason to dismiss them. The court wrote, “Whenever counsel exercises a peremptory challenge, it necessarily means that he or she prefers the next prospective juror to the one being challenged (whether the individual qualities of the next person are known or unknown). It is, in effect, no reason at all. Thus, simply reciting this truism while striking a prospective juror who is a member of a protected class is not an adequate nondiscriminatory justification for the excusal.”

While, as the court reminded counsel, “the bar [is] not high” to justify the use of a peremptory challenge, counsel’s reasoning must be “adequate enough for the court to ensure it was not inherently discriminatory.” The court reversed the conviction and remanded Cisneros for a new trial.

Although none of us can know the prosecutor’s true motive for striking the jurors, we can all learn from her mistakes and from the guidance of this court. If ever faced with a Batson/Wheeler motion remember to state a reason — almost any will suffice — that is not “I prefer the next prospective juror.”



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