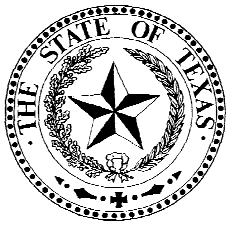
Affirmed and Opinion filed January 3, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00153-CR

JESSE DURAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 212th District Court
Galveston County, Texas
Trial Court Cause No. 00CR0264

O P I N I O N

Jesse Duran appeals a conviction for aggravated assault[1] on the ground that the trial court erred by granting the State's *Batson*[2] challenge to appellant's striking of a prospective juror. We affirm.

Appellant contends that granting the State's *Batson* challenge was in error because the State failed to make a prima facie showing of racial discrimination against the juror,

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1 A jury found appellant guilty and assessed punishment of five years confinement.

2 *See Batson v. Kentucky*, 476 U.S. 79 (1986).

appellant offered a race-neutral explanation for striking the juror, and the State failed to establish that appellant's reason for the strike was a mere pretext such that the strike was motivated by race.

The Equal Protection Clause of the United States Constitution prohibits counsel from using peremptory strikes to exclude persons from a jury solely by reason of their race. *See Powers v. Ohio*, 499 U.S. 400, 409 (1991).[3] To raise this equal protection claim, the movant must first make a prima facie showing that the striking party exercised a peremptory challenge on the basis of race. *Hernandez v. New York*, 500 U.S. 352, 358 (1991). Once the movant makes a prima facie case, the burden shifts to the striking party to articulate a race-neutral explanation for striking the juror in question. *Purkett v. Elem*, 514 U.S. 765, 767 (1995).

A race-neutral explanation simply means one based on something other than the race of the juror. *Hernandez*, 500 U.S. at 360. It must relate to the particular case to be tried, but need not rise to a level justifying the exercise of a challenge for cause. *Batson*, 476 U.S. at 98. Moreover, the explanation need not be persuasive, or even plausible. *Purkett*, 514 U.S. at 768 (1995). The issue is the facial validity of the striking party's explanation. *Id.* Unless a discriminatory intent is inherent in that explanation, the reason offered will be deemed race-neutral. *Id*.

Once a race-neutral reason is given, the trial court must determine whether the movant has carried his burden of proving purposeful discrimination. *Id*. at 768. There will seldom be much evidence bearing on that issue, and the best evidence will often be the demeanor of the attorney who exercises the challenge. *Hernandez*, 500 U.S. at 365. Factors the trial court may consider to determine whether the striking party's explanation for a peremptory challenge is merely a pretext include: (1) the reason given not being related to the facts of

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[3] Racial discrimination in the selection of jurors is prohibited because it casts doubt on the integrity of the judicial process, and places the fairness of the criminal proceeding in doubt. *Powers*, 499 U.S. at 409.

the case; (2) a lack of questioning or meaningful questioning of the challenged juror; (3) disparate treatment, *i.e.*, persons with the same or similar characteristics as the challenged juror not being struck; (4) disparate examination of venire members, *i.e.*, questioning of a challenged juror to evoke a certain response without the same question being asked of other panel members; and (5) an explanation based on a group bias where the trait is not shown to apply to the challenged juror specifically. *Whitsey v. State*, 796 S.W.2d 707, 713-14 (Tex. Crim. App. 1989).

Because the trial judge's findings turn largely on his evaluation of credibility, a reviewing court should ordinarily give those findings great deference. *Hernandez*, 500 U.S. at 365; *Ladd v. State*, 3 S.W.3d 547, 563 (Tex. Crim. App. 1999). A trial court's finding on the issue of discriminatory intent should thus not be overturned unless its determination is clearly erroneous. *Hernandez*, 500 U.S. at 369; *Ladd*, 3 S.W.3d at 563. Where there are two permissible views of the evidence, the trial court's choice between them cannot be clearly erroneous. *Hernandez*, 500 U.S. at 369.

In this case, the State made a *Batson* motion after appellant used four of his nine peremptory challenges to strike African-American jurors from the panel. The State claimed that appellant failed to ask juror no. 31 any questions before striking him. As his explanation for this strike, appellant claimed that he normally strikes all jurors who have a full beard and mustache because they are eccentric, basing his belief on a lifetime of experience. However, after the State pointed out that a white juror who had a beard and mustache was not struck by appellant, appellant explained that the white juror had a much neater full beard and mustache and was more neatly dressed.[4] The State requested to see appellant's notes on juror

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[4] *See Vargas v. State*, 838 S.W.2d 552, 556-57 (Tex. Crim. App. 1992), *remanded to* 859 S.W.2d 534, 534-35 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (holding that denial of *Batson* challenge was clearly erroneous because the record showed disparate treatment where a black paralegal was struck from the jury but a white paralegal was not struck).

no. 31, but appellant had none. The court did not find appellant's explanation race-neutral and put juror no. 31 back on the jury.[5]

Appellant's stated reasons for striking juror 31, which bore no relation to the facts of the case, his lack of questioning of the challenged juror, and his failure to strike another juror with similar characteristics all support the trial court's ruling.[6] In addition, the trial court had the benefit of evaluating the demeanor and credibility of appellant's counsel in exercising and defending the strike. Thus, viewed in the light most favorable to the trial court's ruling, we cannot find that the trial court's determination of discriminatory intent was clearly erroneous. Accordingly, appellant's sole issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 3, 2002.

Panel consists of Justices Yates, Edelman, and Draughn.[7]

Do Not Publish — TEX. R. APP. P. 47.3(b).

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5 Appellant claimed that he had no problem putting the juror on the jury but requested a new panel because the juror would then be prejudiced.

6 *See Young v. State*, 848 S.W.2d 203, 209 (Tex. App.—Dallas 1992, pet. ref'd) (finding that court's denial of *Batson* challenge was clearly erroneous where facts showed disparate treatment of prospective jurors on a racial basis); *Miller-El v. State*, 790 S.W.2d 351, 357 (Tex. App.—Dallas 1990, pet. ref'd) (holding that trial court's denial of *Batson* challenge was clearly erroneous where prosecutor's stated reason for striking the juror bore no relation to the facts of the case and prosecutor did not strike other jurors with the same or similar characteristics).

7 Senior Justice Joe L. Draughn sitting by assignment.