CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Unzueta v Akopyan 11/18/19

Jury voir dire; *Batson/Wheeler* motion; Timeliness and Forfeiture Rule; ReTrial or Reinstatement of Judgment

On November 6, 2012 Zulma Unzueta filed her complaint against Dr. Akopyan, Adventist Health White Memorial Medical Center (White Memorial), and 50 Doe defendants alleging medical malpractice in the delivery of her first child. Unzueta alleged Dr. Akopyan's negligent administration of an epidural injection resulted in "paralysis of her right leg from the knee down." Dr. Akopyan served as the anesthesiologist during the birth of Unzueta's child, after which Unzueta's right leg was permanently paralyzed.

Jury selection began on February 6, 2017. The next day Dr. Akopyan's attorney, Packer, exercised four peremptory challenges to excuse prospective jurors R. Medina, J. Quintero, G. Henriquez, and R. Villarreal.

Medina was a civil engineering student, unmarried, without children, with no prior jury experience. She had "indifferent" medical experiences and no experience with childbirth or epidural treatment for pain.

Quintero was a sanitation worker for the City of Los Angeles, was married with four adult children, and was raising one grandchild. He had served on four

criminal and one civil juries, all of which reached verdicts. One of his children did not work because of a disability.

Henriquez was a child specialist, married, with no prior jury experience. Her husband was disabled and did not work. Henriquez had a pending workers' compensation case for an injury sustained in a workplace fall. She stated she would be able to distinguish between the standard of negligence at issue in Unzueta's case and the no-fault standard for workers' compensation.

Villareal was a children's social worker who supervised investigative teams responding to reports of child abuse. She had two adult children and no prior jury experience. As a supervisor, Villareal was responsible for deciding based on the social workers' investigations whether to file a petition in juvenile court regarding the child. Villareal had been criticized for decisions she made but strived to act in the best interests of the children.

Unzueta exercised all six of her peremptory challenges; Dr. Akopyan accepted the panel without exercising her final two peremptory challenges. On February 7, 2017 the jury panel was sworn. On February 8 voir dire continued for the selection of the alternate jurors. Packer exercised three peremptory challenges to excuse prospective jurors D. Winfrey, D. Zaldana, and A. Marquez.

Zaldana was a broadcast engineer, married, with three adult children. He had experience on one civil jury, which reached a verdict. A relative of Zaldana received heart surgery at one of the hospital's other locations, but "had items left in him" as a result of the surgery. Zaldana explained, "I have a doubt about medical practices," but promised to "be as objective as I can be." Zaldana's father had developed symptoms of Parkinson's disease about two months after having an angiogram performed. Zaldana questioned whether the symptoms were brought on by the angiogram test. Zaldana believed medical complications

could "arise in any circumstances" without "necessarily being the doctor's fault," although it may be "the doctor's responsibility."

Marquez was single and a sales associate at a hardware store, with no prior jury experience. He had previously broken an ankle, which was a painful injury and disrupted his daily living for three or four months. After the injury, Marquez "sat at home."

After Packer exercised peremptory challenges to excuse Winfrey, Zaldana, and Marquez, the trial court requested all jurors and prospective alternate jurors leave the courtroom so the court could speak with the attorneys.

Outside of the presence of the jury, the trial court stated, "Mr. Packer, the only peremptories you exercised yesterday were against Hispanic jurors. Today you have exercised peremptories against two Hispanic jurors. I find a prima facie case that you have violated the *Wheeler*/*Batson* rulings, and you are going to have to justify your peremptories right now." The court continued, "I'm surprised the plaintiffs haven't made a *Wheeler*/*Batson* challenge, but I would have from what I've seen."

Packer responded as to Marquez, "This is what's in my notes." The trial court noted, "For the record, it looks like just about five lines. . . . With just a couple of words on each line . . . ." Packer described his reasons for challenging Marquez: "He's single. He has no jury experience. I didn't know anything about him. Either I didn't get to him closely enough or the plaintiff didn't ask any questions, but he appeared to me to be disinterested in the case. He didn't volunteer anything during the course of questioning of the other jurors, many of whom had a lot of things to say about medicine and about chronic pain, about the things I asked about, the facts that we talked about. I felt that he, at this point, was completely unknown to me compared to the other jurors. That's why I

excused him."

The trial court responded, "Very well." Unzueta's attorney, Henriks, interjected, "Your Honor, we did notice yesterday that some very good jurors that . . . could have been very fair were challenged." The court responded, "You didn't make the motion." Henriks explained, "We're very desperate to get our expert and get the panel—and who has a medical condition. So out of that desperation. But we did notice. We didn't think it proper . . . ." Henriks added that "all of the defense's challenges" from the previous day were used to excuse jurors "because they're Hispanic" and "there was nothing wrong with them." The court responded, "Well, that water is under the bridge. I'm not going to ask counsel to justify yesterday's peremptories. That is past."

Packer reminded the court the panel as constituted included at least three Hispanic jurors. The court responded that "one juror improperly challenged justifies the *Wheeler*/*Batson* motion." However, the court reiterated, "That's yesterday's news. I'm not dealing with it now. Plaintiff, for whatever reason, failed to raise it. But today, based on what happened yesterday and today, that's why I raised it on my own motion."

The trial court did not ask Packer to explain his use of a peremptory strike to excuse Zaldana, and Packer did not provide an explanation. The court denied the *Batson*/*Wheeler* motion, finding Packer had justified his use of peremptory challenges as to the alternates.

On June 5, 2017 Unzueta moved for a new trial, arguing, among other things, the trial court failed to require Packer to justify the four peremptory challenges he exercised as to the Hispanic jurors on February 7. Unzueta also asserted the court erred by failing to elicit an explanation from Packer for his removal of Zaldana on February 8.

At the hearing on the motion, Henriks explained she had not made a *Batson*/*Wheeler* motion on February 7 because she "wanted to see if defense counsel was going to continue the pattern . . . ." Packer stated he challenged Zaldana because of the "history of his father's surgery which he felt was the cause of his father developing Parkinson's disease." Packer explained he was concerned Zaldana "believed that anytime there is an adverse outcome that somebody must have done something wrong." The trial court acknowledged it "didn't question Packer thoroughly enough regarding the challenges." The trial court "urged the Court of Appeal to look at this very closely and possibly the Supreme Court, if it gets that far, because this is—I just feel very, very conflicted about what happened." The court took the motion under submission.

As reflected in its July 10, 2017 minute order, the trial court denied Unzueta's motion for a new trial. With respect to Dr. Akopyan's late-proffered explanation for striking Zaldana, the court reasoned, "If a post-trial evaluation is permissible on remand following an appeal, it should be permissible at a hearing on a motion for a new trial, which occurs much more closely in time to the complained-of event." The court explained, "In light of the hearing on Unzueta's new trial motion, the court is satisfied that no *Wheeler*/*Batson* violation occurred. During the hearing which this court initiated, defense counsel pointed to several portions of the reporter's transcript as reasons for exercising a peremptory challenge against Zaldana. The court is more than satisfied that those reasons are not pretextual."

With respect to prospective jurors Medina, Quintero, Henriquez, and Villareal, the trial court found Unzueta had not made "a motion at any time," and "the language on which Unzueta relies in the transcript does not rise to the level of a motion." The court continued, "While the delay itself does not defeat the motion, it supports the notion that plaintiff did not actually make a motion at the

time she claims she did. This is regrettable. It appears that the court struck those four Hispanic jurors without questioning them. Had Unzueta made a proper motion, the court might have ordered defense counsel to justify his strikes and possibly have granted this motion." The court concluded, "Even though the court is denying this motion for a new trial, the facts are troubling. We are in need of appellate guidance."

Unzueta, who is Hispanic, contends Dr. Akopyan's exercise of six of her seven peremptory challenges to excuse Hispanic prospective jurors was based on race and deprived Unzueta of her federal constitutional right to equal protection and state constitutional right to a trial by a jury drawn from a representative cross-section of the community. Specifically, Unzueta argues the trial court erred in failing to evaluate whether Dr. Akopyan exercised her peremptory challenges as to the first four Hispanic prospective jurors based on their race.

Zulma Unzueta appeals from the judgment in favor of defendant. Unzueta raised issues related to *Batson v. Kentucky* (1986) 476 U.S. 79, and *People v. Wheeler* (1978) 22 Cal.3d 258.

The Second District Court of Appeal began its opinion by noting that, "'a party may exercise a peremptory challenge for any permissible reason or no reason at all' but 'exercising peremptory challenges solely on the basis of race offends the Fourteenth Amendment's guaranty of the equal protection of the laws'. Such conduct also 'violates the right to trial by a jury drawn from a representative cross-section of the community under article 1, section 16, of the California Constitution.'" (*People v. Smith* (2018) 4 Cal.5th 1134, 1146; accord, *People v. Armstrong* (2019) 6 Cal.5th 735, 765; *People v. Winbush* (2017) 2 Cal.5th 402, 433) "'The "Constitution forbids striking even a single prospective juror for a discriminatory purpose."'" (*People v. Hardy* (2018) 5 Cal.5th 56, 76; accord, *People*

v. Gutierrez (2017) 2 Cal.5th 1150, 1158)

The prohibition against the exercise of peremptory challenges to exclude prospective jurors on the basis of race or other group bias **applies to civil as well as criminal cases.** (*Di Donato v. Santini* (1991) 232 Cal.App.3d 721, 731; accord, *Holley v. J & S Sweeping Co.* (1983) 143 Cal.App.3d 588, 592)

A three-step procedure governs the analysis of *Batson/Wheeler* challenges. (*Smith,* at p. 1147; *Armstrong*, at p. 766; *Winbush,* at p. 433.) "'**First**, the defendant **must make a prima facie showing** that the prosecution exercised a challenge based on impermissible criteria,'" such as race. (*Smith*, at p. 1147; accord, *Hardy,* at p. 75; *Winbush*, at p. 433.) "A defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170; accord, *People v. Reed* (2018) 4 Cal.5th 989, 999.) "A 'pattern of systematic exclusion' of a particular cognizable group from the venire raises an inference of purposeful discrimination . . . ." (*People v. Avila* (2006) 38 Cal.4th 491, 549; accord, *Batson,* at p. 94)

"'**Second**, if the trial court finds a prima facie case, then the prosecution must **offer nondiscriminatory reasons** for the challenge.'" (*Smith,* at p. 1147; *Winbush,* at p. 433) "The prosecutor 'must provide a "'clear and reasonably specific' explanation of his or her 'legitimate reasons' for exercising the challenges." "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." **A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons**.'" (*Winbush*, at p. 434; accord, *Hardy,* at p. 76.) "'**Third**, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has **shown purposeful race discrimination**.'" (*Smith*, at p. 1147;

accord, *Hardy*, at p. 75; *Gutierrez,* at p. 1158) "'"The ultimate burden of persuasion regarding discriminatory motivation rests with, and never shifts from, the moving party."'" (*Smith*, at p. 1147; accord, *Winbush*, at p. 433.)

Dr. Akopyan contends Unzueta forfeited her *Batson/Wheeler* argument by failing timely to raise an objection to the first four peremptory challenges, and, when she did object, by failing to identify the four jurors, make a prima facie showing, and request the jury panel be discharged. Unzueta argues she joined in the trial court's sua sponte motion by asserting Dr. Akopyan's challenges to the first four prospective jurors were motivated by improper racial bias.

As the trial court observed, six of the seven peremptory challenges Packer made were to Hispanic prospective jurors. The court specifically identified all six jurors in finding a prima facie case of discrimination, stating, "The only peremptories Packer exercised yesterday were against Hispanic jurors. Today you have exercised peremptories against two Hispanic jurors." Henriks's response—that "yesterday . . . some very good jurors that . . . could have been very fair were challenged," and "all of the defense's challenges" were made "because they're Hispanic"—sufficiently identified the challenges she contended were discriminatory (those made "yesterday"), as well as the alleged discriminatory intent (challenges made "because they're Hispanic").

Although Henriks's articulation of Unzueta's *Batson/Wheeler* challenge was not a model of clarity, in contrast to the authorities cited by Dr. Akopyan, Henriks's colloquy with the trial court left no ambiguity as to which peremptory challenges she identified as racially discriminatory and on what basis. Because Unzueta sufficiently joined in the trial court's motion, she did not forfeit her argument the trial court's *Batson/Wheeler* analysis was incomplete.

Further, "neither forfeiture nor application of the forfeiture rule is

automatic." (*People v. McCullough* (2013) 56 Cal.4th 589, 593; accord, *In re S.B.* (2004) 32 Cal.4th 1287, 1293) As the Supreme Court explained in *S.B.*, the purpose of the forfeiture rule "is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." Here, Unzueta identified the peremptory challenges against the first four Hispanic prospective jurors as racially discriminatory, and the trial court addressed Unzueta's contention by finding her objection was untimely, describing the challenges as "water . . . under the bridge." Therefore, the purpose of the forfeiture rule is satisfied, and the Justices decline to find Unzueta forfeited her argument as to the exclusion of prospective jurors Medina, Quintero, Henriquez, and Villareal.

Dr. Akopyan alternatively argues any attempt by Unzueta to join the trial court's motion was untimely as to the peremptory challenges exercised the prior day because Unzueta did not raise her objection "at the earliest opportunity during the voir dire process." Unzueta contends her objection was timely because Packer's pattern of systematic exclusion of Hispanic jurors was not fully manifested on February 7.

"**A *Batson*/*Wheeler* motion is timely if it is made before jury impanelment is completed, which does not occur '"until the *alternates* are selected and sworn**.'"'" (*People v. Scott* (2015) 61 Cal.4th 363, 383; accord, *People v. McDermott* (2002) 28 Cal.4th 946, 970) As the Supreme Court has recognized, "discriminatory motive may become sufficiently apparent to establish a prima facie case only during the selection of alternate jurors, and **a motion promptly made before the alternates are sworn, and before any remaining unselected prospective jurors are dismissed, is timely not only as to the prospective jurors challenged during the selection of the alternate jurors but also as to those dismissed during selection of the 12 jurors already sworn.**" (*McDermott*, at p. 969; see *People v. Gore* (1993) 18 Cal.App.4th 692, 705)

While there may have been sufficient evidence to support a prima facie finding of group bias by the time Packer excused the fourth Hispanic juror on February 7, the showing of discriminatory bias was strengthened by Packer's request to excuse two additional Hispanic prospective jurors the following day. The trial court's motion, raised during the selection of alternate jurors and joined by Unzueta, was timely as to the prospective jurors Packer excused from the panel the day before.

Dr. Akopyan argues the four Hispanic prospective jurors challenged on February 7 were not within the scope of the court's sua sponte motion, so the trial court did not err by failing to elicit explanations for why they were excused. But the trial court's motion identified both the four Hispanic prospective jurors who were excused on February 7 and the two who were excused on February 8. **The court added its motion was "based on what happened yesterday and today**."

Contrary to Dr. Akopyan's assertion, the Supreme Court's holding in *Avila,* 38 Cal.4th 491, which addressed the scope of the trial court's mandatory review on successive *Batson/Wheeler* motions, supports Unzueta's position. There, the defendant objected to the excusal of the first Black prospective juror, but the trial court found the defendant failed to establish a prima facie case of group bias. When the defendant objected to the excusal of a second Black prospective juror, the trial court found the two excusals constituted a prima facie showing under *Batson/Wheeler*, and it elicited the prosecutor's explanation for excusing the second Black prospective juror, but not the first.

On appeal, the defendant argued the trial court erred in failing to require the prosecutor to state his reasons for excusing the first Black prospective juror after it found a prima facie case based on excusal of the second prospective Black juror. (*Avila,* at p. 548.) The Supreme Court rejected this contention, explaining the trial court had "no sua sponte duty to revisit earlier *Batson/Wheeler* challenges

that it had previously denied," although it had discretion to do so upon request when a subsequent challenge "casts the prosecutor's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors." The *Avila* court concluded, "If a trial court finds a prima facie showing of group bias at a later point in voir dire, the court need only ask the prosecutor to explain 'each suspect excusal.' Each suspect excusal includes the excusals to which the moving party is objecting and which the court has not yet reviewed." (*Avila*, at p. 551.)

Here, Unzueta had not previously challenged the four Hispanic prospective jurors excused on February 7. Thus, because the trial court identified the basis of its sua sponte *Batson/Wheeler* motion as the excusal of all six prospective jurors—not just the two excused on February 8—all six jurors were "suspect excusals . . . which the court had not yet reviewed." (*Avila,* at p. 551.) Further, as discussed, at the time of the court's sua sponte motion, Henriks specifically raised a concern about Packer's challenges to the first four Hispanic prospective jurors. **The fact the challenges were made on separate days is immaterial, as is the fact the challenges were made to both the jury panel and the alternates.** (*People v. Scott,* at p. 383; *People v. McDermott,* at p. 969.) Once the trial court found a prima facie showing of group bias, the court was required to elicit from Packer justifications for each of the six challenges forming the basis for the prima facie showing.

Unzueta contends we should remand for a new trial because given the passage of time Dr. Akopyan's attorney will not be able to recall the reasons for excusing the prospective jurors or the appearance and demeanor of the jurors, and the trial court will not have sufficient information on which to conduct a complete *Batson/Wheeler* inquiry. But it is for the trial court to determine in the first instance whether it can conduct a complete *Batson/Wheeler* analysis.

The Supreme Court's decision in *People v. Johnson* (2006) 38 Cal.4th 1096 is directly on point. There, after the United States Supreme Court held the trial court erred in finding there was no prima facie case of discrimination, the California Supreme Court on remand considered the appropriate remedy for the constitutional violation. The California Supreme Court concluded although jury selection had taken place over seven years earlier, the court and parties could rely on the jury questionnaires and a transcript of the jury selection proceedings, and therefore a limited remand was appropriate for the trial court to conduct the second and third steps of the *Batson/Wheeler* analysis.

In this case, although jury selection took place almost three years ago, as in *Johnson*, there is a transcript of the jury selection proceeding that will assist the trial court and parties in conducting a further *Batson/Wheeler* analysis. In addition, the parties' attorneys may still have their notes from the trial, which Packer referenced during his discussion of the reasons he challenged Marquez. On remand the trial court should require defense counsel to provide Packer's reasons for challenging the first four prospective jurors (Medina, Quintero, Henriquez, and Villarreal), evaluate the explanations, "and decide whether Unzueta has proved purposeful racial discrimination. **If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that defense counsel exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds defense counsel exercised his peremptory challenges in a permissible fashion, it should reinstate the judgment."**

The judgment is conditionally reversed, and the matter is remanded to the trial court to conduct a complete second and third stage *Batson/Wheeler* analysis. On remand, the trial court is to elicit defense counsel's justifications for the peremptory challenges to prospective jurors Medina, Quintero, Henriquez, and Villarreal, then make a sincere and reasoned evaluation of those explanations. **If**

the court finds, because of the passage of time or other reason, it is unable to conduct the evaluation, or if any of the challenges to the six Hispanic prospective jurors were based on racial bias, the court should set the case for a new trial. If the court finds defense counsel's race-neutral explanations are credible and he exercised the six peremptory challenges in a permissible fashion, the court should reinstate the judgment. In all other respects, the result is affirmed. Each party is to bear her own costs on appeal.

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