

Jurors' race a focal point for defense - Rival lawyers reject whites at higher rates

Dallas Morning News, The (TX) - August 22, 2005

- Author/Byline: Tim Wyatt, Jennifer LaFleur, Steve McGonigle and Holly Becka, Staff Writers
- Edition: SECOND
- Section: NEWS
- Page: 1A

Second of three parts

Nothing matters more than race to Dallas County defense lawyers when they play the high-stakes game of seating a sympathetic jury for their clients.

In fact, defense lawyers were more than three times as likely to reject whites as they were to reject blacks, according to an analysis of jury data by The Dallas Morning News.

But in following long-held, yet unproven, stereotypes that black jurors are softer on crime, defense lawyers are trampling a U.S. Supreme Court ban on race bias in jury selection.

"Most defense attorneys, if they're honest, will admit that they want to get rid of the whites because the prosecution is getting rid of the blacks," said David Baldus, one of the nationally recognized experts on race in jury selection who reviewed the newspaper's findings.

"It's a kind of discrimination that no one is really objecting to very much because everybody is doing it."

While defense lawyers say their jury selection tactics are motivated by a desire for a more diverse panel, they only occasionally challenge prosecutors who eliminate black prospective jurors, the newspaper also found.

'SUFFUSED WITH BIAS'

Defense attorneys prefer almost any black juror over a white one

Blacks serve on Dallas County juries in numbers that approximate their proportion of the population, but primarily because defense strikes against whites effectively cancel prosecutors' strikes against blacks, the newspaper's analysis showed.

Defense lawyers used only 6 percent of their peremptory, or discretionary, strikes against blacks. By contrast, they used 82 percent of their strikes against whites - eliminating more than a third of white eligible jurors.

Nothing was as significant as race in determining why defense lawyers rejected prospective jurors, according to the statistical analysis of factors in the jury selection process.

Nearly 20 years ago, The News revealed that prosecutors were excluding almost all blacks from jury service. The Supreme Court later ruled in a 1986 Dallas County murder case that the district attorney's office was "suffused with bias" at the time.

To determine whether there had been any change, The News spent two years collecting and analyzing data from 108 felony trials conducted in 2002 in Dallas County courts.

The analysis showed that defense attorneys were more likely to strike potential jurors who had been crime victims or who worked in law enforcement or had friends or family in law enforcement. But even when blacks and whites had similar backgrounds or relationships, defense attorneys rejected white prospective jurors more often.

Where prosecutors were more likely to strike those who are single, the defense was more likely to strike those who are married. Prosecutors strike people in blue-collar jobs at higher rates; the defense strikes people in white-collar jobs at higher rates.

Next to preferring almost any black person over a white person, the analysis showed, the defense works to seat those who readily admit that they consider rehabilitation the most important aspect of punishment.

Like prosecutors, defense lawyers say that if they choose members of one race over another, it's based on something other than skin color.

JR Cook said that if he prefers blacks over whites, it's only to put some people on the jury who may have an understanding of his client's perspective.

"When was the last time you got roused for being white?" the defense lawyer asked. "I'm not saying it's right. It's called reality."

For the judges who oversee jury voir dire - the group interview of prospective jurors by both sides - defense attorney strike patterns are no surprise.

"If there is a white male over the age of 35 wearing a suit, that guy's got zero chance of getting on the jury," state District Judge Robert Francis said. "The defense is striking him, and they're not going to ask him any questions."

Defense lawyers sometimes won't strike black prospective jurors even if the potential jurors acknowledge a bias that could hurt the defendant, judges and prosecutors noted.

"A black juror who is dressed in a coat and tie, who works for Bank of America, who graduated from Harvard, who lives in Preston Hollow - he's going to hang your client - but they leave him because he's black," said prosecutor Eric Mountin. "Instead, they get rid of some no-account white guy who probably has more in common with their client than this banker."

STRIKING WHITES

Supreme Court rulings also ban defense attorneys from race bias

In 1992, six years after the Supreme Court barred prosecutors from discriminating against even one potential juror on the basis of race, the high court ruled in an Ohio case that race bias by defense lawyers also violated jurors' rights.

Peter Barrett, president of the Dallas Criminal Defense Lawyers Association, strongly criticized prosecutors for rejecting black prospective jurors at a higher rate than whites. But, he argued, the newspaper's findings that defense lawyers rejected whites at a higher rate than blacks don't necessarily prove that defense attorneys are guilty of discrimination.

"You need to remember that jury selection is not picking jurors so much as eliminating jurors," said Mr. Barrett, who has practiced criminal law for 11 years. "And I tend not to eliminate people of color as often."

Mr. Barrett said he tries to have a cross-section of the community on a jury panel that includes men and women, Hispanics, blacks and whites.

"I don't perceive myself as striking more whites, but maybe I do - subconsciously," he said. "But I don't consciously agree with using stereotypes and profiles. I want people who can understand the issues - and that tends to be educated people."

Defense lawyer Kenneth Weatherspoon said he believes his colleagues "probably strike whites at a higher rate," but added that race plays the greatest role "where you see a white juror who lives in an all-white area" and has little contact with people of color.

Timothy Bray, an assistant professor of criminology at the University of Texas at Dallas, said that race bias by both sides, as shown by the strike rates, could in a "weird" way be proof that the system is working.

The pool of prospective jurors is not supposed to reflect the defendant's population; it should be a fair cross-section of the community, he said.

"These strike rates look alarming, but remember, the defense and the prosecutors have different goals in mind. To that end, one might imagine that the defense attorney has a little more of a stake in the race of the jurors. He has someone sitting next to him that is of a certain race," Mr. Bray said. "The dynamics of the defense is completely different from dynamics of the prosecution."

Although the Supreme Court banned all lawyers from using race or gender in their juror selections, prosecutors complain that their courtroom adversaries aren't held to the same standard.

"We, of all parties involved in the case, have to follow the rules," said Rick Jackson, a chief felony prosecutor. "Quite frankly, the defense bar does not. That's a fact of life. Their job is solely to see that their client gets the best defense."

But defense lawyer Cheryl Wattley said the high court's application of the same anti-discrimination rules to the defense clouded the original intent of curbing race bias against black jurors.

"What you have done is taken a ruling that was supposed to ensure minorities the opportunity to serve on the jury and then put a burden on a defendant to explain a strike of every Caucasian," she said.

CIRCUMVENTING BATSON

Vague legal guidelines make race-based strikes hard to prove

Under procedures established by the Supreme Court in its 1986 landmark ruling on race bias in jury selection, Batson vs. Kentucky, if either side suspects racially motivated strikes, it can request a formal review by the court.

But defense lawyers requested Batson hearings in only 16 of the cases reviewed by The News. Prosecutors raised Batson objections in just two of those cases. Trial judges rejected them all.

Of the cases appealed to higher courts, only five mentioned Batson, and none was overturned.

Defense lawyers readily admit that race bias is nearly impossible to prove.

"If you can't get out of a Batson challenge, you can't get out of your own way," said assistant public defender Mike Byck. "Just like a prosecutor can think of a reason [to overcome a Batson challenge], so can I."

Mr. Byck said lawyers will cite gestures, looks or body language that are impossible to disprove in a Batson challenge.

On occasion, however, Dallas County prosecutors have managed to successfully challenge defense lawyers for using discriminatory strikes.

In 2002, prosecutor John Kull convinced a judge that defense attorney Scott Becker removed a black juror for racial reasons in the trial of a white man accused of assaulting a black man in a road rage incident.

State District Judge Karen Greene ruled in Mr. Kull's favor and seated the 65-year-old black woman on the jury after Mr. Becker acknowledged that he hadn't asked her any questions - and had marked her for exclusion when she walked into the courtroom for jury selection.

Frequently, lawyers for both sides will avoid formal challenges of racial bias in favor of informal discussions. That can help prevent someone from being accused of racism in jury selection and creates an air of collegiality and trust between opponents, said state District Judge Keith Dean.

These informal hearings do not preclude an on-the-record challenge of a juror strike, Judge Dean said, but can make one unnecessary if the two sides have developed some degree of trust with each other.

"Ideally, everyone operates in good faith," he said.

Defense lawyers admit privately that they often forgo formal Batson objections because they usually don't work and they don't want to risk the repercussions of suggesting a prosecutor is racist.

But it's that courtroom chumminess that Houston appellate attorney Brian Wice finds so objectionable.

"One of the things you need to figure out early on is who you're working for," said Mr. Wice, who also handles appeals on Dallas cases. "Are you working for the court? Or do you represent that guy in the jumpsuit who had a bologna sandwich for lunch?"

Most important, he said, off-the-record hearings eliminate the possibility of race bias being raised on appeal.

"I think it's unconscionable," Mr. Wice said. "If you don't have a half-minute, two minutes, 10 minutes or 30 minutes to spend on your client [in a formal Batson challenge], shame on you."

AGREED EXCUSALS

Informal agreements between defense and prosecution hurt blacks

Another informal practice used by both sides in Dallas County courts that also eliminates potential jurors from service is known as the "agreed excusal."

These excusals occur just before both sides must begin using their limited number of peremptory strikes - 10 each for the defense and prosecution.

So-called "agrees" are prospective jurors who give ambiguous answers during questioning or are otherwise considered unpredictable - but have not specifically said anything to indicate they cannot follow the law, which would allow for an automatic dismissal by the trial judge.

So defense lawyers and prosecutors - sometimes along with the judge - will discuss and agree that such prospective jurors should be removed.

Doing this, both sides agree, keeps them from "burning" valuable peremptory strikes on a person neither side wants.

But these mutual agreements have a greater impact on black jurors. In The News' analysis of juror records from the 108 cases, the number of blacks excused by agreement nearly equaled the number of blacks excused for not being able to follow the law. Together,

these two groups represent about one in three black prospective jurors excused from jury service, the analysis showed.

Only about one in five white prospective jurors was eliminated for those two reasons.

Some legal experts say that eliminating agreed excusals could put more blacks on juries.

"What you are in essence doing [is] giving the prosecutor more strikes," said Robert Hirschhorn, a lawyer and nationally known jury consultant from Lewisville. He called agreed excusals "a dangerous practice."

Mr. Hirschhorn, who advises primarily defense attorneys, said that the relationship between the prosecution and defense in Dallas is much more congenial than in other big cities, and that "familiarity tends to promote a get-along attitude and not rocking the boat and not making waves."

Agreed excusals also lower the odds of any error in jury selection resulting in a conviction being overturned because most appeals are based only on the court record.

"There is nothing to complain about," Mr. Hirschhorn said. "There is no real issue on appeal."

But the president of the local defense lawyers association said agreed excusals are not the problem.

"It's a way to ensure that someone you don't want on the jury doesn't get there," Mr. Barrett said. "I don't think it favors either side."

The real problem, he said, is that the law barring race bias in jury selection has been rendered ineffective by trial and appeals court judges who for years have accepted virtually any reason to remove a juror, no matter how outrageous and racially suspect the excuse might sound.

"I've never had a juror put back on a jury" because of race bias, Mr. Barrett said. "The legal remedy for this is intellectually dishonest."

Indeed, the Dallas appeals court has not overturned a conviction based on race bias in jury selection in more than 12 years, and defense attorneys say they are justified in their cynicism that discrimination can ever be eliminated from the process.

Larry Mitchell, an appeals lawyer from Dallas, said he never thought the law against race bias would succeed among lawyers.

"I didn't think it was a good idea to try to do your social work in a jury room," he said. "Lawyers are going to try to win their cases the best they can. They're going to pick the best jury they can."

Peter Lesser, another longtime criminal defense lawyer, said race would remain a big factor in jury selection for both sides until society decides it's no longer relevant.

"Anybody who tells you society is race-neutral is lying, or they're very naïve," he said. "Race is involved in everything we do in this country."

"You need to remember that jury selection is not picking jurors so much as eliminating jurors. And I tend not to eliminate people of color as often."

Peter Barrett, president, Dallas Criminal Defense Lawyers Association

• Caption: PHOTO(S): (1-2 RICHARD MICHAEL PRUITT/Staff Photographer)1. Jury services clerk Donna Barrance shuffles juror sheets at the request of a defense attorney. Either side can turn to the tactic to change the seating order of potential jurors, but some judges say it is discriminatory.2. Bruce Adams, a bailiff in state District Judge Faith Johnson's court, calls potential jurors to enter the courtroom for questioning by attorneys. An analysis showed that defense attorneys rejected white eligible jurors more than three times the rate they struck blacks. CHART(S): SERGIO PECANHA, TOM SETZER/Staff Artist) A LOOK AT DEFENSE STRIKES.

• Series: *STRIKING DIFFERENCES*

• Record: 1180112318

• Copyright: Copyright 2005 The Dallas Morning News