SUPREME COURT COPY

No. S081700

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

WILLIE LEO HARRIS,

Defendant and Appellant.

SUPREME COURT
FILED
APR 11 2011
Frederick K. Ohlrich Clerk
Deputy

Automatic Appeal from the Superior Court
of Kern County
Case No. SC071427a
Honorable Roger D. Randall, Judge

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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DEATH PENALTY

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ARGUMENT

THE COURT ERRED IN NOT GRANTING A MISTRIAL FOLLOWING THE DETECTIVE'S MENTION THAT HARRIS REFERRED TO MANNING AS "THE BITCH," PREJUDICING THE JURY AGAINST APPELLANT IN BOTH THE GUILT AND PENALTY PHASES

In his opening brief, at pages 273-274, appellant argued that the court erred in not granting a mistrial after the lead detective quoted appellant as saying, in contravention to the trial court's *in limine* order, "I'm conniving just like you're conniving, but I didn't kill the bitch." (29 RT 6800.)

In his reply brief, at pages 39-42, appellant made the additional argument that, viewed in the context of the questions and answers leading up to the offending quotation, it is clear that the prosecutor was purposely encouraging the detective to violate the court's *in limine* order not to convey to the jury that appellant used the term "bitch" in relation to Alicia Manning. Indeed, the fact that the "slip" was purposeful places this case much closer to those in a failure to grant a mistrial was reversed. (E.g., *People v. Neverette* (2010) 181 Cal.App.4th 828, 834, citing *People v. Williams* (1997) 16 Cal.4th 153, 211; and *People v. Wharton* (1991) 53 Cal.3d 522, 565.)

Appellant has argued generally that the admonition was insufficient to cure the prejudice (AOB at 273-274). He now contends that the admonition, if anything, made matters worse, and was in any case an improper use of judicial notice. Although it was discussed by the court and counsel in terms of an instruction, it was phrased by the court as a matter of judicial notice:

> Ladies and gentlemen, you just heard the officer testify to a quotation from the defendant and I'll take judicial notice of something.
>
> Judicial notice is sort of like a stipulation, that the attorneys stipulate to certain facts, you accept them as true. Judicial notice is a notice by the Court that something is accurate or factual, such as that the 19th of May in 1997 was a Monday, for example. That would be judicial notice.
>
> I'll take judicial notice that in our society young African-American males frequently use the word bitch in a non-pejorative fashion, whereas it is generally true that Caucasian males and Hispanic males, if they use that word, are using it in an angry fashion with regard to females.
>
> Next question.
>
> (29 RT 6803-6804.)

This was an unauthorized use of judicial notice, and gave an additional imprimatur to what appellant will argue below was a deleterious instruction.

The Evidence Code describes two kinds of judicial notice, Mandatory Judicial Notice (Evid. Code §451[1]) and Permissive Judicial

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[1] Evidence Code section 451 provides as follows:

(continued...)

Notice (§452[2]). The "fact" that some young black men use "bitch" in a

---

[1] (...continued)
Matters which must be judicially noticed

Judicial notice shall be taken of the following:

(a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution.

(b) Any matter made a subject of judicial notice by Section 11343.6, 11344.6, or 18576 of the Government Code or by Section 1507 of Title 44 of the United States Code.

(c) Rules of professional conduct for members of the bar adopted pursuant to Section 6076 of the Business and Professions Code and rules of practice and procedure for the courts of this state adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(e) The true signification of all English words and phrases and of all legal expressions.

(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

[2] Section 452 provides as follows:

§ 452. Matters which may be judicially noticed

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(continued...)

non-pejorative fashion does not come close to fitting within either list of subjects suitable for judicial notice. Of those that could arguably come close, it does not fit within any reasonable definition of "The true signification of all English words and phrases and of all legal expressions." (§451, subd. (e)); "Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute"

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[2] (...continued)
(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

(§451, subd. (f)); "Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably the subject of dispute" (§452, subd. (g)); or "Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (§452, subd. (h)).

At best this was an instruction to the jury, not a taking of judicial notice, but as the term "judicial notice" was explained by the trial court, it became something the jury was instructed to accept as true. That, in turn, put the court's imprimatur on an insidious prejudice contained in the admonition itself, in its final paragraph:

> I'll take judicial notice that in our society young African-American males frequently use the word bitch in a non-pejorative fashion, whereas it is generally true that Caucasian males and Hispanic males, if they use that word, are using it in an angry fashion with regard to females.

The judge delivered this statement to a jury that, with the exception of one female African-American Correctional Officer -- who herself may have been called "bitch" any number of times in unpleasant situations – consisted entirely of Caucasian and Hispanics. The harm was in inviting, indeed encouraging, the jurors to view young African-America males, and

in particular defendant, as different, lesser, more deserving of disapproval, and more likely to be guilty.

Worse, it tended to grant the jurors permission to impose the death penalty by marginalizing and dehumanizing appellant. If someone is lesser than you, dehumanized in any fashion, it is much easier to wrap one's mind around the concept of imposing death as a penalty. This is especially so in this case, where, in his penalty phase closing argument, the prosecutor "accidentally" refers to appellant as "Willie Horton." (35 RT 7998-7999; see Appellant's Opening Brief at pp. 221, fn. 76; 298-299.)

Taken together, this double-barreled dehumanization of appellant granted the jury permission to impose the death penalty. "Dehumanization operates to cognitively distance people from the moral implications of their actions." (Craig Haney, *Death by Design*, Oxford Univ. Press (2005), at pp. 144-145, and studies cited in fn. 9.) The court's erroneous "judicial notice" played directly into the prosecution's narrative that Willie Harris was fundamentally different from the jurors. "'[C]ompassion can be blocked by a sense of distance and unlikeness.' Beyond preventing compassion, the tendency to regard other as defective, foreign, deviant, of fundamentally different facilitates their punitive mistreatment." (Haney, *op cit. supra,* at p. 148, quoting Martha Nussbaum, *Upheavals of Thought: The*

Intelligence of Emotions, Cambridge Univ. Press (2001).) Haney continues:

> "The more we can designate a person as fundamentally different from ourselves, the fewer moral doubts we have about condemning and hurting that person." In the case of criminal defendants – many of whom come from preexisting derogated categories in our society– their perceived status as defective or fundamentally different makes them easier to punish. (Haney, at 148, quoting S. Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 *Cornell L. Rev.* 655, 692 (1989).)

Moreover, the court's ill-conceived "judicial notice" fed into the insidious underlying narrative of the entire trial, that no self-respecting white college co-ed would ever engage in consensual sex with a black man, especially Willie Harris.

Had the court been serious about the effect of this "accidental" slip of the detective's tongue, it would have granted a mistrial. At the very least, it would have instructed the jury that it must not use Willie Harris's alleged use of that term to prejudice them in any way against him in their deliberations.

DATED: March 21, 2011

Respectfully submitted

RICHARD I. TARGOW
Attorney for Appellant Harris

DECLARATION OF SERVICE BY MAIL

Re: People v. Harris   No. S081700

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT SECOND SUPPLEMENTAL BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

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Willie Leo Harris, Appellant

Each said envelope was then, on March 21, 2011, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid.
I declare under penalty of perjury that the foregoing is true and correct.

DATED: March 21, 2011

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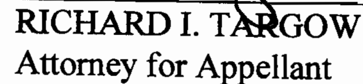
CERTIFICATE OF LENGTH OF SECOND SUPPLEMENTAL BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify under California Rule of Court 8.520(d), that the length of APPELLANT'S SECOND SUPPLEMENTAL BRIEF is 1576 words, well within the limits for a supplemental brief set forth in rule 8.520(d)(2).



RICHARD I. TARGOW
Attorney for Appellant

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Re: People v. Harris No. S081700

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Willie Leo Harris, Appellant

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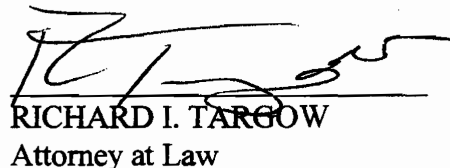
I declare under penalty of perjury that the foregoing is true and correct.

DATED: March 29, 2011



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