STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD ANTWANE WILBURN, JR.,

Defendant-Appellant.

UNPUBLISHED
January 30, 1998

No. 200502
Berrien Circuit Court
LC No. 96-000818-FC

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant Leonard Antwane Wilburn, Jr., was convicted by a jury of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The jury found that defendant, who was the passenger in one moving vehicle, fired several shots at a second moving vehicle driven by the victim with the intent to kill him. The victim had a small bullet fragment embedded in his shoulder as a result of the incident, but was not seriously injured. However, the victim's vehicle was considered a complete loss due to the shattered windows and bullet holes. Defendant was sentenced by the trial court as an habitual offender, second offense, MCL 769.11; MSA 28.1083, to two years' imprisonment for felony-firearm followed by a life sentence for assault with intent to murder. We affirm defendant's convictions but remand for resentencing.

I

Defendant first claims that the trial court abused its discretion by denying his challenge of a juror for cause based upon the juror's admitted racial prejudice. MCR 2.511(D) provides several grounds for a challenge for cause, such as when the person: "(3) is biased for or against a party or attorney; (4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be; [or] (5) has opinions or conscientious scruples that would improperly influence the person's verdict." A juror who expresses an opinion referring to some circumstance of the case which is not positive in character, but swears that he can render an impartial verdict, may not be challenged for cause. *People v Roupe*, 150 Mich App 469, 474389 NW2d 449 (1986). The challenging party bears the burden of proving bias or prejudice.

Id. The trial court's decision on a challenge for cause will be reversed only where this Court finds a clear abuse of discretion. *People v Skinner*, 153 Mich App 815, 819; 396 NW2d 548 (1986).

During voir dire, defense counsel asked the prospective jurors whether any of them harbored racial prejudice or bias against African-Americans. One juror raised his hand and reluctantly admitted that he felt racial prejudice as the result of his upbringing. Defense counsel asked that the juror be excused for cause on that basis. After further questioning by the trial court, the juror indicated that he was eighty to eighty-five percent certain that he could act impartially in this case despite his prejudice. The court denied defendant's challenge for cause because MCR 2.511(D)(5) states that it is only grounds for a challenge for cause that the juror had opinions or conscientious scruples that absolutely "would," as opposed to that "might" or "could," improperly influence his verdict. The trial court's denial of defendant's challenge for cause was a clear abuse of discretion. The juror candidly admitted that he could not completely set aside his racial prejudice. Even if the juror promised to do his best, it is unlikely that he could truly disregard the feelings of racial prejudice that had been engrained in him since childhood. Because the indicia of the juror's impartiality did not outweigh his stated racial bias, the court abused its discretion. *Roupe, supra*, 150 Mich App at 474-475.

A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated a desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished to later excuse was objectionable. *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 333 (1995). Here, the first prong of the test was satisfied. However, defendant failed to satisfy the second prong by exhausting all of his peremptory challenges. Defendant was entitled to five peremptory challenges under MCR 6.412(E), but used only four. Under the circumstances, defendant had no reason for not peremptorily challenging the juror after his request to have the juror removed for cause was denied. At that point defendant had not used any of his peremptory challenges. Moreover, at the conclusion of voir dire, defense counsel stated that defendant was pleased with the jury panel. Therefore, reversal is not warranted in this case.

II

Defendant claims that he was denied his Sixth Amendment right to a jury which is representative of a fair cross section of the community because there were only two African-Americans in the jury array of forty-two. A criminal defendant has a Sixth Amendment right to a jury drawn from a fair cross section of the community. *Taylor v Louisiana*, 419 US 522, 527; 95 S Ct 692; 42 L Ed 2d 690 (1975). *Id.* In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which jurors are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in

> the jury-selection process. [*Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 587 (1979); *People v Hubbard (After Remand)*, 217 Mich App 459, 473; 552 NW2d 593 (1996).]

Questions of systematic exclusions of minorities from venires are reviewed de novo by this Court. *Hubbard, supra* at 472.

The first prong of the *Duren* test is satisfied in this case because the group alleged to be excluded, African-Americans, are considered a constitutionally cognizable group in considering whether the fair-cross-section requirement has been met. *Hubbard, supra* at 473. However, defendant did not satisfy the second prong by showing that the representation of African-Americans in venires from which jurors are selected in Berrien County was not fair and reasonable in relation to the number of such persons in the community. Defendant did not provide statistical information regarding the racial composition of Berrien County, nor did defendant provide information regarding what percent of the Berrien County venires were comprised of African-Americans. Therefore, it is impossible for this Court to determine whether the representation of African-Americans in the venires was fair and reasonable in relation to the number of African-Americans in the community. Furthermore, the fact that nineteen jurors were legitimately excused or failed to appear has no bearing on the fairness of the jury selection system used by the county. Although the trial court expressed its belief that a decrease in the number of "no-shows" generally improved the racial composition of the venire, the fact that some individuals have a legitimate excuse or simply fail to appear for jury duty does not constitute systematic exclusion.

III

Defendant also claims that the trial court abused its discretion by denying defendant's request for a substitution of appointed counsel. After the court began the jury voir dire, defendant asked the court for substitution of his appointed counsel on the ground that he did not believe that counsel was going to fight for his case because he told defendant that he was "already in a losing battle." The court denied defendant's request because defendant failed to state a specific reason to support his request. Although an indigent defendant is entitled to the appointment of a lawyer at the public expense, he is not entitled to a substitution of appointed counsel except upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991); *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989). Good cause exists where a legitimate difference of opinion exists between a defendant and his appointed counsel regarding a fundamental trial tactic. *Id.* However, a defendant's claim that he lacks confidence in his attorney, without the support of a substantial reason, does not amount to good cause, particularly where the request is belated. *Id.* The trial court's denial of a request for a new attorney is reviewed for an abuse of discretion. *Mack, supra* at 14.

Even if defense counsel expressed his concern regarding the strength of defendant's case, there is no indication on the record that defense counsel did not provide defendant with zealous representation. Defendant did not claim that he and defense counsel disagreed on a fundamental trial tactic, but merely expressed a lack of confidence in counsel's commitment to his case. Defense counsel's statement that defendant was in a losing battle does not constitute a "substantial reason" for

substitution of counsel, particularly when jury voir dire has already commenced. Therefore, the trial court did not abuse its discretion by denying defendant's request for substitute counsel.

IV

Finally, defendant claims that his sentence was disproportionate. The sentencing of an habitual offender is reviewed for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

At the time of trial, nineteen-year-old defendant had only been convicted of one felony—attempted carrying of a concealed weapon. Defendant had three juvenile offenses as well as three adult misdemeanors, but none of them were violent in nature. However, at the time of his sentencing, defendant had pending charges for assault with intent to murder, armed robbery, first-degree home invasion and felony-firearm. Therefore, there was an indication that the severity and violent nature of defendant's criminal activity were escalating. A sentencing judge may consider a defendant's juvenile record when determining a sentence. *People v Smith*, 437 Mich 293; 470 NW2d 70 (1991). A court may also consider pending criminal charges against the defendant provided the defendant is given the opportunity to test the accuracy of the allegations. *People v Ewing (After Remand)*, 435 Mich 443, 446 (Brickley, J), 473-474 (Boyle, J); 458 NW2d 880 (1990).

In this case, the trial court explicitly stated that it was not considering defendant's juvenile record or pending charges in determining defendant's sentence. As a result, defendant was not given an opportunity to rebut or explain the serious charges pending against him as required by *Ewing*. The crimes for which defendant was convicted in this case were very serious and warranted a severe penalty. In sentencing defendant to life, the court improperly considered defendant's "parental upbringing." Although a court may generally consider a defendant's social and personal history in determining the sentence, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), the court may not hold the defendant culpable for the criminal behavior of his parents or family members. In this case, the court improperly sentenced defendant to life because it did not believe that there was any hope that defendant could be rehabilitated in light of the fact that he had been raised by parents who both engaged in long-term patterns of criminal activity. While we are not convinced that the sentence imposed is necessarily disproportionate, neither are we satisfied by the reasons given to justify the sentence. Accordingly, we believe that defendant is entitled to be resentenced without consideration of the inappropriate factors.

Defendant's convictions are affirmed, but his sentence is vacated and we remand for resentencing.

/s/ Janet T. Neff
/s/ David H. Sawyer