

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMARR ABDUL BARRON,

Defendant-Appellant.

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UNPUBLISHED

March 22, 2005

No. 251402

Wayne Circuit Court

LC No. 02-011466-01

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520(b). He was sentenced to 72 months' to 20 years' imprisonment. Defendant appeals as of right. We reverse and remand for a new trial.

The critical issue in this appeal involves the jury selection process and defendant's use of his peremptory challenges. During jury selection, after the prosecutor had exercised eight peremptory challenges and defendant had utilized eleven, the trial court announced that a jury had been selected. Defendant objected, asserting that he still had one remaining peremptory challenge that he wished to use. The court disagreed, stating that defendant had used all of his allotted peremptory challenges, and impaneled the jury as it then existed. On appeal, defendant argues that the trial court committed error mandating reversal when it permitted him to exercise only eleven of his twelve statutorily permitted peremptory challenges.<sup>1</sup> This Court reviews alleged violations of the proper jury selection process de novo. *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998).

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20. However, a defendant has no constitutional right to peremptory challenges. Rather, the right to peremptory challenges is granted by statute, MCL

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<sup>1</sup> There is no dispute that defendant was entitled to twelve peremptory challenges. MCR 6.412(E) provides that, when a charged offense is punishable by life imprisonment and a defendant is tried alone, the defendant is entitled to twelve peremptory challenges by right. In the present case, defendant was tried alone and was charged with CSC I, an offense punishable by life imprisonment, MCL 750.520b(2).

768.12, and court rule, MCR 6.412(E). *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). “[P]eremptory challenges have long been an important tool for ensuring a fair trial, both in fact and in appearance,” and “Michigan common law has long provided that peremptory challenges could be exercised at any time before the jury was sworn.” *Schmitz, supra* at 528. This Court retained this rule when jury selection procedures became subject to court rule. *Id.*; MCR 2.511(E); MCR 6.412(E).

Plaintiff concedes that the trial court miscounted the number of peremptory challenges defendant had utilized, but argues that the error does not require automatic reversal because the impaneled jury was impartial and defendant was not prejudiced. But in *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981), in which our Supreme Court disavowed the use of the “struck jury method,” the Court stated:

[W]e agree with the Court of Appeals that there is nothing in this record from which one could affirmatively find prejudice to the defendants from the selection process. However, given the fundamental nature of the right to trial by an impartial jury, and the inherent difficulty of evaluating such claims, a requirement that a defendant demonstrate prejudice would impose an often impossible burden. See *People v Gratz*, 35 Mich App 42; 192 NW2d 304 (1971). A defendant is entitled to have the jury selected as provided by the rule. Where, as here, a selection procedure is challenged before the process begins, the failure to follow the procedure prescribed in the rule requires reversal.

Relying on this quoted language from *Miller*, this Court held in *Schmitz, supra*, that the denial of the right to remove a venireman the defendant had previously “passed” was error requiring reversal. *Id.* at 529-532. The *Schmitz* Court noted that the only remedy for the denial of the right to use a peremptory challenge has been automatic reversal; there has been no requirement that the aggrieved party show resultant prejudice. *Id.* at 530. Thus, despite the fact that automatic reversal for a trial court’s error is not favored, the Court stated that “under controlling case law this error cannot be deemed harmless.” *Id.* at 524, 530.

Most recently, in *People v Bell (On Reconsideration)*, 259 Mich App 583, 597; 675 NW2d 894 (2003), this Court again reaffirmed that erroneous restriction of a defendant’s right to exercise his peremptory challenges constituted error requiring automatic reversal. In *Bell*, the trial court refused to allow the defendant to exercise two of his peremptory challenges because it concluded that the defendant’s challenges were based on race. *Id.* at 586. However, the court did not follow the three-step procedure applicable to a *Batson*<sup>2</sup> challenge and thus, erroneously restricted the defendant’s use of his peremptory challenges. *Id.* at 590-592. Following *Miller*, *Schmitz*, and other Michigan and federal case law, the Court concluded that the trial court’s error required reversal without a showing of prejudice.<sup>3</sup> *Id.* at 594-596.

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<sup>2</sup> *Kentucky v Batson*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

<sup>3</sup> We are cognizant that our Supreme Court granted the defendant’s application for leave to appeal in *Bell*. *People v Bell*, 470 Mich 870; 682 NW2d 85 (2004). The court of appeals panel in *Bell* noted that there has been disagreement in this Court as to the viability of *Miller* with  
(continued...)

Accordingly, we find that pursuant to *Miller*, *Schmitz*, and *Bell* the trial court's miscalculation of defendant's remaining peremptory challenges and subsequent wrongful denial of defendant's right to use his last peremptory challenge constituted error requiring reversal. Therefore, defendant's conviction is vacated and this case is remanded for a new trial. Because our resolution of this matter is determinative, this Court need not address defendant's remaining issues. However, we address two of defendant's remaining appellate issues because we find that errors were committed that are capable of being repeated upon retrial.

First, we agree with defendant that the trial court erred when it permitted a police officer to testify as to the contents of an anonymous tip. In *People v Wilkins*, 408 Mich 69; 288 NW2d 583 (1980), our Supreme Court considered this very question. In *Wilkins*, the trial court permitted a police officer to testify as to the content of an informant's tip. *Id.* at 71-72. This testimony was introduced not to prove the truth of the informant's tip, but rather to show why the police took the actions they did. *Id.* The Supreme Court, while agreeing that the officer's testimony was not hearsay, nonetheless found the testimony inadmissible. *Id.* at 72-74. The basis for the Court's ruling was that the police officer's state of mind, which was what the prosecution sought to establish through the challenged testimony, was not relevant.<sup>4</sup> In the present case, as in *Wilkins*, the prosecution apparently introduced the content of an informant's tip to show why the police took the actions they did. As in *Wilkins*, the police officers' state of mind was not relevant because it was not a fact of consequence to the action. Accordingly, this evidence was not admissible.

Second, we agree with defendant's assertion that the trial court erred in scoring him ten points for Offense Variable (OV) 12. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score, and scoring decisions for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 13 concerns a continuing pattern of criminal behavior. MCL 777.43, which governs the scoring OV 13, provides that, except for offenses related to membership in an organized criminal group, conduct is not to be scored in OV 13 which was scored in either OV 11 or OV 12. MCL 777.43(2)(c). In the present case, the offense of which defendant was convicted did not relate to membership in an organized criminal group. Yet the trial court scored both OV 12

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regard to automatic reversal for errors in the jury selection process in light of our Supreme Court's continuing disfavoring of the principle of error per se since *Miller* was decided. *Bell*, *supra* at 595-596 n 11 (Fitzgerald, J.), 597-598 (Zahra, J., concurring). Plaintiff asserts in its brief that this is the question regarding which our Supreme Court granted leave in *Bell*. We are unable to verify plaintiff's assertion at this time and decline its request to hold this case in abeyance until the Supreme Court has issued its decision in *Bell*.

<sup>4</sup> In order to be admissible, evidence must be relevant. MRE 402. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

and OV 13. Thus, the trial court abused its discretion when it scored the same conduct for both OV 12 and OV 13.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Richard A. Bandstra