

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK HENRY ROBINSON,

Defendant-Appellant.

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UNPUBLISHED

October 20, 2009

No. 285416

Wayne Circuit Court

LC No. 06-009711-FC

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for five counts of felonious assault, MCL 750.82, two counts of felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. Basic Facts

The main question presented in this appeal concerns the constitutionality of the jury selection process employed by the Third Judicial Circuit Court for Wayne County.<sup>1</sup> When defendant's case was pending before the lower court, the Third Judicial Circuit employed a multi-step process for identifying and summoning individual jurors for jury service. First, the court, in April of each year, would receive a source list from the Secretary of State's office, which included the names of individuals who hold driver licenses or state identification cards and are statutorily qualified for jury service. Next, the Third Judicial Circuit would send this source list to Jury Systems, Inc. (JSI), a jury system vendor, which would apply a "suppression file" to the names on the list. The suppression file would remove names of individuals previously deemed ineligible to serve as a juror. Such individuals included those who had moved out of the country, individuals whose questionnaires were returned as undeliverable, individuals who had been excused due to age or for medical reasons, individuals who had been convicted of felonies, and individuals who had already served as jurors within the last twelve

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<sup>1</sup> The facts underpinning defendant's convictions involve allegations that defendant shot a firearm at a dwelling and into the air, and threatened some individuals with a firearm.

months or had been sent a questionnaire and not responded. JSI would then assign a district code, which corresponds to a district court in Wayne County, to each name remaining on the list.

Depending on demand, the Third Judicial Circuit would then direct JSI to randomly select a number of names from this list to receive qualification questionnaires. The questionnaires, which contained no reference to race, would be sent to the recipients through U.S. mail. Once the questionnaires were returned to the Third Judicial Circuit, the jury commission would review the questionnaires to determine the person's eligibility. Individuals who were sent a questionnaire and did not return it were added to the suppression file and eliminated from receiving further questionnaires in the future. Qualified potential jurors were sent a summons to appear in court.

In 2004 through 2005, a disproportionately low number of African-Americans were reporting for jury service. As a result, in 2005 the Third Judicial Circuit supplemented the service list with additional names from predominately African-American zip codes. Consequently, predominately white zip codes received a disproportionately low number of qualification questionnaires. However, at the time that the underlying source list for defendant's jury was created in April 2006, the Third Judicial Circuit had discontinued both its practice of over-sampling from African-American zip codes and its application of the suppression file.

A jury pool was convened in defendant's case on November 13, 2006. Before the jury was sworn, defense counsel challenged the array of the jury on the basis that only four potential jurors in the jury pool of 42 potential jurors were African-American. Ultimately, only three of the African-American venire members were seated in the jury. Defense counsel argued that the disparity between the jury pool's composition and the community's makeup was the result of a systematic problem. Apparently, the trial court noted the objection had been preserved, but did not issue a ruling.<sup>2</sup>

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<sup>2</sup> We note that there is no record of defendant's original objection and the trial court's ruling. Rather, we have inferred from the course of events and defense counsel's statement that this was what occurred. Only after the first witness had testified did the following exchange take place:

*Defense Counsel.* Your Honor, at side bar, I made a challenge to the array. And I would just like to put on the record the fact that I noted that out of the 42 people on the panel, there were four African-Americans. And my challenge was to the jury pool that would allow that to happen. And I believe there is disparity in the Wayne County Jury pool. And that disparity is a result of a systematic problem. And I believe the case law requires me to preserve that issue before the jury was sworn, and I did do that.

*Trial Court.* And the record will further reflect that all four of those African-Americans are now seated.

*Defense Counsel.* Three of them. One was excused, Ms. Keva Stewart.

(continued...)

Thereafter, the case went to trial and defendant was convicted. At sentencing, counsel renewed his objection to the array of the jury and indicated that defendant would be filing a motion for a new trial. The trial court noted the objection and stated that, should defendant move forward with his motion, then Chief Judge Mary Beth Kelly would preside over the motion pursuant to Local Administrative Order No. 2006-12.

On January 16, 2007, defendant moved for a new trial, arguing that the jury pool process utilized by the Third Judicial Circuit violated defendant's Sixth Amendment right to a fair jury composed of a representative cross-section of the community and his right to equal protection under the Fourteenth Amendment because it discriminated against African-Americans. That same day, the trial court reassigned the matter to Chief Judge Kelly pursuant to AO 2006-12 for the limited purpose of adjudicating the issues defendant raised. Three days later, defendant moved to disqualify Chief Judge Kelly, but this motion was denied.

Shortly thereafter, an evidentiary hearing was held on defendant's motion for a new trial, during which a single witness testified. The parties also stipulated the admission of a jury assessment report<sup>3</sup> for the Third Judicial Circuit Court of Wayne County. The report indicated that in 2004 through 2005, African-Americans comprised only 25.7 percent of the jury pool, compared to 39.6 percent of the Wayne County adult population, creating an average disparity of 13.9 percent.<sup>4</sup> The report further identified three sources in the jury selection process that contributed to the disparity: the original source list, the suppression file, and the fact that African-Americans tended not to respond to questionnaires at a higher rate than other zip code categories. Each of these factors contributed to the disparity 24 percent, 38 percent, and 38 percent, respectively.

After the hearing concluded, the trial court denied the motion. In her written opinion, Chief Judge Kelly concluded that defendant's Sixth Amendment claim failed because he had failed to show the underrepresentation of African-Americans was the result of a systematic exclusion from the jury selection process. With regard to defendant's equal protection claim, the court ruled that this claim also failed because defendant did not show that the selection procedures were susceptible to abuse, were not racially neutral, or otherwise showed the presence of any actual racial animus. This appeal followed.

## II. Right to Jury Drawn from Fair Cross-Section

Defendant first argues that he was denied his Sixth Amendment right to an impartial jury drawn from a cross-section of his community because there were only four African-Americans in the 42-person jury array. We disagree. We review de novo questions concerning the systematic

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(...continued)

<sup>3</sup> See Paula L. Hannaford-Agor & G. Thomas Munsterman, *Third Judicial Circuit of Michigan Jury System Assessment, Final Report* (National Center for State Courts, August 2, 2006).

<sup>4</sup> The study noted that this disparity increased to 20.7 percent when the selection was purely random, i.e., the when the source list was not supplemented with names from predominately African-American zip codes.

exclusion of minorities in jury venires. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003).

The Sixth Amendment and the Michigan Constitution guarantee “[a] criminal defendant . . . an impartial jury drawn from a fair cross section of the community.” *People v Hubbard*, 217 Mich App 459, 472; 552 NW2d 493 (1996); US Const, Am VI; Const 1963 Art 1, § 14. The fair cross section requirement, however, does not guarantee a defendant to a jury that “actually . . . mirror[s] the community . . . .” *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975). To establish a prima facie violation of the fair cross-section requirement, a defendant has the burden of proving:

(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 juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process. [*People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Once the defendant has established a prima facie case under this test, the burden then shifts to the prosecution to show that “a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group.” *Duren, supra* at 367-368.

There is no dispute on appeal that defendant has made a prima facie showing that African-Americans are a distinctive group and that a constitutionally significant disparity exists with regard to the representation of this group in the venires of the Third Judicial Circuit. Thus, the dispositive issue is whether this underrepresentation is due to a systematic exclusion of African-Americans in the Third Judicial Circuit’s jury selection process. “Systematic exclusion” means exclusion “inherent in the particular jury-selection process utilized.” *Id.* at 366. Exclusion of a particular group will not be systematic if a venire is disproportionate one or two times; however, a large discrepancy lasting over a year “manifestly indicates” that its cause is systematic. *Hubbard, supra* at 481, citing *Duren, supra* at 366. Further, the “influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans.” *Smith, supra* at 206. Rather, the group’s exclusion must be *due to* the system by which jurors are selected. *Duren, supra* at 367. Factors such as a greater number of juror questionnaires that are undeliverable, individual jurors who are exempted by reason of hardship or disqualified by their lack of eligibility, or any other socioeconomic reason that is not inherent in the jury selection process, are all factors beyond the control of the criminal justice system. *Smith, supra* at 226-228.

After reviewing the record, it is our view that the Third Judicial Circuit’s selection system does not systematically exclude African-Americans from jury pools. The evidence in the 2005 report showed that the disparity of African-Americans in the venires of Wayne County resulted from the use of the source list, the use of a suppression file, and the fact that low rates of African-Americans responded to qualification questionnaires. Defendant, however, did not submit any evidence to show that a disproportionate number of African-Americans were excluded from the source list, such that its use would systematically exclude African-Americans.

With regard to the suppression file, our review of the only witness's testimony reveals that the suppression file was not applied to the source list that was used to form the venire in defendant's case, nor was the practice of over-sampling used. Thus, it cannot be said that the suppression file caused a systematic exclusion in defendant's particular case.<sup>5</sup> And, finally, the fact that more African-Americans had higher no-response rates to questionnaires, is not due to the system itself, but is due to outside sources, such as demographic or socioeconomic changes. See *Smith, supra* at 226.<sup>6</sup> Accordingly, defendant has failed to meet his burden and his Sixth Amendment right to a jury drawn from a fair cross-section of the community has not be violated.

### III. Equal Protection

Defendant next contends that he was denied his Fourteenth Amendment right to equal protection of the law because the jury pool selection process intentionally discriminated against

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<sup>5</sup> On appeal, defendant devotes the bulk of his argument to the Third Judicial Circuit's use of the suppression file, in conjunction with the cessation of its efforts to supplement the jury pool with African-Americans, to argue that these practices systematically excluded potential African-American jurors from the venire. Even assuming that the suppression file was used, which it was not according to the sole witness at the evidentiary hearing, we would still not agree with defendant. First, defendant's suggestion that the Third Judicial Circuit should have continued its efforts to supplement jury pools with additional African-Americans is unfounded, as the Sixth Amendment does not require the courts to counteract outside influences. See *Smith, supra* at 226-227. Second, defendant's argument with respect to the Third Judicial Circuit's use of the suppression file is also unavailing. As noted, the evidence showed that the disparity of African-Americans in the venire resulted from three different sources: the source list, the suppression file, and the fact that low rates of African-Americans responded to questionnaires. With regard to the suppression file, it included all individuals who did not respond to questionnaires without reference to race, although it presumably included a high number of African-Americans solely for the reason that African-Americans had a high no-response rate. The report further indicated that once an individual did not respond, his or her name was placed in the suppression file where his or her name remained for future drawings of names, which compounded the problem. However, defendant has not presented any evidence that the use of the suppression file alone created a constitutionally significant underrepresentation of African-Americans in the venire. Thus, assuming that the suppression file was used, defendant's argument would nonetheless fail because he has not met the requisite burden.

<sup>6</sup> We note that defendant also relies on *Smith v Berghuis*, 543 F3d 326 (CA 6, 2008), where the Sixth Circuit Court of Appeals held that our Supreme Court's decision in *Smith, supra*, unreasonably construed the fair cross-section requirement of the Sixth Amendment. The court held that "[c]ontrary to the conclusion reached by the Michigan Supreme Court, the Sixth Amendment is concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel." *Berghuis, supra* at 341. Defendant's reliance on *Berghuis*, however, is unavailing. We are not obligated to follow the decisions of the lower federal courts, but must follow the precedent set by our Supreme Court unless the United States Supreme Court has addressed the federal question. See *Jaqua v Canadian Nat'l RR, Inc*, 274 Mich App 540, 546-547; 734 NW2d 228 (2007); *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

African-Americans. We disagree. We review defendant's equal protection claim de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

To make a prima facie case of discrimination in the context of jury selection, a defendant must

(1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral. [*People v Williams*, 241 Mich App 519, 527-528; 616 NW2d 710 (2000).]

“Furthermore, discriminatory effect is insufficient to establish a violation of the Fourteenth Amendment; defendant must show discriminatory intent.” *People v Glass (After Remand)*, 464 Mich 266, 284; 627 NW2d 261 (2001).

While defendant has established that African-Americans are a recognizable and distinct class and that underrepresentation of that class has occurred over a significant time period, he has not shown that the selection procedure is susceptible to abuse, not racially neutral, or otherwise has a discriminatory purpose. The Third Judicial Circuit employs a juror selection system that does not take race into account and is highly computerized to select potential jurors in a random fashion. Thus, as the trial court noted, the ability to manipulate the system on the basis of race is not present in the system.

Defendant, however, points to the fact that the Third Judicial Circuit stopped its over-sampling practice, in conjunction with its use of the suppression file, to argue that intentional discrimination is present. According to defendant, the Third Judicial Circuit knew that the disparity between the makeup of its jury pools and that of the community would increase if it ceased its over-sampling practice. This argument is unavailing. The possibility of an adverse effect alone is insufficient to establish that the selection process employs a purposeful device to exclude African-Americans from jury pools. See *Glass (After Remand)*, *supra* at 286. In fact, the over-sampling practice was not used in defendant's case and its cessation makes the selection system more racially-neutral than it previously was. And, although defendant contends that the use of the suppression file was susceptible to abuse, it was not applied in his particular case and he has, nonetheless, failed to support his assertion with any evidence from the record.

Finally, defendant's reliance on *Alston v Manson*, 791 F2d 255 (CA 2, 1986), is also unavailing. In that case, Connecticut's jury selection system was not racially neutral. It created a jury pool based on quotas that apportioned a greater percentage to smaller towns, as opposed to larger towns, thereby selecting against African-American individuals who undisputedly resided in larger urban areas. *Id.* at 256-258. The same facets unique to the selection procedure in *Alston* are not present here: The Third Judicial Circuit does not apply a quota system, but rather selects individuals at random using a highly computerized system that does not take race into account. Accordingly, defendant's equal protection claim fails because he has not made a prima facie showing of purposeful discrimination.

#### IV. Motion for Disqualification

Defendant also contends that Chief Judge Kelly did not have the authority under Local Administrative Order No. 2006-12 to assign this case to herself for the purpose of deciding whether the jury array violated defendant's constitutional rights. Specifically, defendant argues that our Supreme Court rescinded AO 2006-12 in an administrative order and that MCR 8.111 requires the original judge to decide the merits of defendant's claim. We disagree. Because defendant failed to properly preserve this issue, we review the court's decision to deny the motion for disqualification for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

AO 2006-12 permits the chief judge to reassign a case to him or herself for the limited purpose of adjudicating constitutional challenges to the composition of the jury.<sup>7</sup> On February 8, 2008, our Supreme Court issued an administrative order that specifically declared AO 2006-12 to be valid "to the extent that it reassigns all *general* constitutional challenges to the circuit's jury pool summoning and qualification procedures for the limited purpose of adjudicating the challenges . . . ." Administrative Order, 480 Mich cxxxix (emphasis in original). The Court further stated that AO 2006-12 is "not inconsistent with MCR 8.111 because these general issues are common to each case in the circuit, they implicate administrative policy and practice, and their resolution does not require dispositive rulings in individual cases." *Id.* at cxxxix-cxl. However, the Supreme Court rescinded AO 2006-12 "to the extent it postpones resolution of challenges to jury venires in individual cases until after trial and to the extent it purports to reassign resolution of issues unrelated to the Third Judicial Circuit's overall jury summoning and qualification procedures." *Id.* at cxl.

Given the foregoing, it is plain that defendant's argument misconstrues the Supreme Court's administrative order. It is clear that our Supreme Court considered AO 2006-12 in its entirety and did not rescind the portion of AO 2006-12 that gave Chief Judge Kelly the authority

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<sup>7</sup> AO 2006-12 states in full:

In all cases where a party challenges the demographic composition, including but not limited to a challenge relating to the racial or ethnic composition of the jury, the jury array, jury venire or jury pool, the trial judge shall forthwith inform the Chief Judge of said challenge. An order shall be entered reassigning the case to the Chief Judge but only for the limited purpose of adjudicating the challenge. The Chief Judge may hold the challenge in abeyance until after the disposition of the case. Upon adjudicating of the challenge, the case shall be reassigned by the Chief Judge, to the original trial judge for further proceedings. This Administrative Order does not extend to the resolution of issues relating to challenges for cause or the use of peremptory challenges that might arise in a specific case.

to consider defendant's constitutional challenge to the array of the jury, nor was her exertion of such authority inconsistent, or somehow invalidated by, MCR 8.111. Therefore, because there was no error,<sup>8</sup> defendant's contention that Chief Judge Kelly did not have the authority to assign the matter to herself is unavailing.

#### V. Attorney Fees

Finally, defendant argues that the trial court erred by ordering him to reimburse the county for the expenses of his court-appointed counsel without first considering his ability to pay. We do not agree. Our Supreme Court recently held that an ability to pay analysis is not required before imposing attorney fees against a defendant who had a court-appointed attorney. *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009). Therefore, there was no error and defendant is not entitled to relief on this basis.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Kathleen Jansen  
/s/ E. Thomas Fitzgerald

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<sup>8</sup> We note that defendant does not argue on appeal that his challenge should not have been held in abeyance until after trial. At the time of defendant's trial, our Supreme Court had not yet rescinded that portion of AO 2006-12 permitting such challenges to be held in abeyance. Nonetheless, even if it was error to not consider defendant's constitutional claims until after trial, it did not affect defendant's substantial rights, as we have already concluded that defendant's constitutional rights have not been violated.