

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MSC No. 159346

COA No: 338733

Lower Case No. 16-010745-01

Wayne County Circuit Court

JACQUES JEAN KABONGO,

Defendant-Appellant.

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**DEFENDANT-APPELLANT'S REPLY BRIEF
FILED UNDER AO 2019-6**

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF JURISDICTION

This Reply is provided pursuant to MCR 7.312(E)(3).

STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THE TRIAL COURT WAS OBJECTIONABLY UNREASONABLE IN APPLYING *BATSON V KENTUCKY*, 476 US 79 (1986) TO THE CHALLENGES TO USE OF PEREMPTORY STRIKES FOR JUROR NO. 2 AND JUROR NO. 5?

Defendant-Appellant answers "Yes".

- II. WHETHER VIOLATIONS OF SPECIFIC FEDERAL CONSTITUTIONAL RIGHTS REQUIRE AUTOMATIC REVERSAL AS THEY CONSTITUTE STRUCTURAL ERROR WHEREAS VIOLATIONS OF STATE LAW RIGHTS THAT DO NOT ALSO INVOLVE FEDERAL CONSTITUTIONAL RIGHTS, ARE REVIEWED FOR HARMLESS ERROR?

Defendant-Appellant answers "Yes".

ARGUMENT

By restating the issues, the Plaintiff-Appellee attempts to avoid the critical substantive record presented in this case, that both the state and defendant interests in providing an impartial jury have been infringed creating objectively reasonable doubt in the fairness of this trial.

Before turning to the specifics of the reply argument, Defendant-Appellant notes that the voir dire record developed in *People v. Bell*, 473 Mich 275; (2005) substantially differs from the record presented by Kabongo. This difference is why *Bell* should be treated as dicta, because the impartiality of the sitting jurors in *Bell* was never in question.

In *Bell*, when counsel's exercise of a peremptory was challenged, Bell's attorney did not provide **any** race neutral justification for the challenge:

"The prosecutor noted that the current challenge was defense counsel's third consecutive strike on a Caucasian male and that defense counsel was attempting to exclude Caucasian males from the jury. Defense counsel replied that the prosecution's argument would have some merit if no other Caucasian males remained on the jury. Defense counsel also noted that the majority of the remaining jurors was Caucasian. Defense counsel offered no other explanation for his challenge." *People v. Bell*, 473 Mich 275; 702 N.W.2d 128, 131 (2005)

This case, as most, was a credibility contest between the two Detroit Police Officers, and the Defendant-Appellant, along with his witnesses, who had been present assisting him in repairs to one of his rental properties. The officers said Defendant-Appellant was properly open carrying a handgun while on his property as they drove by, but claimed that Defendant-Appellant had put his shirt over the gun when he walked out

into the street to remove something from a vehicle parked in front of the property, (though in police statements there was no reference to Defendant-Appellant being in the street). The Defendant-Appellant said he never put his shirt over the gun, and a witness stated that Defendant-Appellant only went to the curbside of the vehicle where the tools were to be retrieved and had no reason to walk out into the street.

Because the officers said they saw Defendant-Appellant in the street with his shirt over the gun, he was arrested for having the handgun. The police officers are Caucasian; Defendant-Appellant is African-American.

Defendant-Appellant sought to excuse a juror who also was Caucasian after she had explained two sources of conflicts: "My father, my brother, stepmother, all deputy sheriffs, and military police in my family, nephew and brother." (T I, 46; 25a), and, her expressed uncertainty "I hope I don't look at people's skin color. I don't believe I do. It's their actions." (T I, 84; 33a).

The prosecutor objected to Defendant-Appellant's peremptory citing *Batson* and the trial court denied the peremptory. Defendant-Appellant contends that the trial court's objectively unreasonable application of *Batson v Kentucky*, 476 US 79 (1986) was unequal, denied due process, and, failed to protect the right to an impartial jury, undermining any confidence in the result. The *Batson* violations are discussed in issue I, and the inherent unfairness and prejudice from the uneven and improper application of law discussed in Issue II.

I. THE TRIAL COURT WAS OBJECTIVELY UNREASONABLE IN APPLYING *BATSON V KENTUCKY*, 476 US 79 (1986) TO THE CHALLENGES TO USE OF PEREMPTORY STRIKES FOR JUROR NO. 2 AND JUROR NO. 5.

There is no question that the trial court engaged in *Batson* analysis for the prosecutor's challenge of the defense peremptory of juror No. 5 who was white and the defense challenge of prosecutor peremptory of Juror No. 2, who was Black. However, when applying *Batson*, the trial court made findings that had no basis in the record and were internally inconsistent demonstrating a less than good faith application of established law.

Juror No. 2.

Plaintiff-Appellee asserts that the trial court findings were not an abuse of discretion and are upheld by the record. (Pl-Ap, 18)

For example, when the defense challenged the prosecution's peremptory as to Juror No. 2, the prosecutor claimed:

With regards to juror number two she had what seemed, at least to me, to be a very difficult time with short-term memory. She could not remember the Court's first question when asked what her occupation was and she couldn't remember any of the additional questions after that. (TI, 146; 38a).

The trial court made findings

Juror number two did indeed have a difficult time with memory she did discuss senior moments. She had to kind of had to step back and reach back in her memory to recall things such as whether or not she had been the victim of a crime, such as — there were some

other specific ones. But I do remember she did seem to have a problem keeping up with this case. (TI, 148; 40-a).

Plaintiff-Appellee claims the record supported these claims and in the process cite to the same answers given by Juror No. 2 as Defendant-Appellant but with conclusions that do not match. (Pl-Ap, 25).

The first three claims made by the prosecution were not fact based. Those claims were: a) that Juror No. 2 had short term memory problems but short term memory was never inquired into and was never demonstrated; b) that she did not remember the first question but she had, when asked her occupation she replied "retired"; c) that she could not remember answers to any of the following questions but this was untrue as she, without any indication of any problems, quickly and promptly answered all remaining questions. Those answers included answers to questions for which she did not have to be reminded of as this exchange demonstrated:

THE COURT: I'm going to ask you your occupation, your marital status, and if you are married what your spouse does and your highest level of education?

POTENTIAL JUROR TWO: I'm retired.

THE COURT: And what are you retired from?

POTENTIAL JUROR TWO: Counseling.

THE COURT: Okay.

POTENTIAL JUROR TWO: I was a counselor and I retired a year ago.

THE COURT: Are you enjoying your retirement?

POTENTIAL JUROR TWO: Yeah.

I'm divorced. Level of education Bachelors in Criminal Justice Administration.

THE COURT: Thank you, juror number two. (T I, 39; 21a).

Not only did she answer every question, Juror No. 2 did not have to be prompted to provide details on marital status and level of education. This record shows a person who can and is keeping up with the case and who does not exhibit any short term memory problems.

Furthermore, the alleged "senior moment" was with respect to asking Juror No. 2 about the details of a crime inflicted *upon someone in her family, not her*, many years ago. Similarly, she could not recall when and why she had been pulled over some time long in the past. The claim of having to step back into time to recall minutia from years ago has nothing to do with keeping up with the case.

The actual record provides clear and convincing evidence that contradicts the findings of the trial court with respect to Juror No. 2. With willful disregard of the actual record made, the trial court unreasonably held:

the prosecutor's race neutral explanations to be credible. And in this case I will find that it was reasonable, her explanation is not improbable, there was a rationale that had some basis in accepted trial strategy. And so I'm going to deny the Batson challenge as to juror number two. (T I, 149; JA 41-a)

The alleged race-neutral reasons were simply untrue and belied by the record. When the race neutral reasons are actually considered it becomes clear that the prosecutor grossly mischaracterized Juror No. 2's answers which constitutes evidence of

discriminatory pretext. *Ali v. Hickman*, 584 F.3d 1174, 119 (9th Cir. 2009), cert. denied sub nom. *Cate v. Ali*, 559 U.S. 1045 (2010).

When comparative juror analysis is considered, it is seen that prosecutor's concern of memory problems was confined only to Juror No. 2. Juror No. 13, who was white, was also elderly and retired, however the prosecutor did not ask any questions pertaining to his memory concerns. (T I, 93; 34a).

Juror No. 2 was qualified to sit as a juror and her exclusion violated equal protection rights. *Bell*, supra at 293. ("A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender. It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal.").

Juror No. 5.

Similarly, Plaintiff-Appellee posits that the trial court's findings were not erroneous and were supported by the record. (PI-Ap, 30-31). When the actual record is considered, the reasons provided were both race neutral and in keeping with accepted strategy.

With respect to Juror No. 5, defense counsel advanced race neutral reasons that were supported by the record, a declaration of being a felon; an involved and close relationship with law enforcement officers; and, a hesitancy and uncertainty in her answer to whether she could be fair.

Juror No. 5 explained she had committed a felony when younger and could not remember all the details of the disposition of a crime she had committed. As a convicted felon, a juror is disqualified to serve. In prior cases where Juror No. 5 had been

summoned for jury duty, she had been excused and dismissed and not allowed to sit on the jury. Inconsistent with her rulings with respect to Juror No. 2, the trial court ironically forgave Juror No. 5 if she “couldn’t remember a conviction” (TI 178; 47-a), but then punished Juror No. 2 for having a memory lapse concerning the details of a crime committed years ago against someone in her family, but not herself. (TI, 148; 40-a).

Juror No. 5 answered the general question if any juror had any association with law enforcement yes, and explained the association: “My father, my brother, stepmother, all deputy sheriffs, and military police in my family, nephew and brother.” (T I, 46; 25a).

Defendant-Appellant sought to remove Juror No. 5 because of her extreme and extended close association with law enforcement in addition to her expressed uncertainty of “I hope I don't look at people's skin color. I don't believe I do. It's their actions.” (T I, 84; 33a).

The trial court’s finding that these reasons were pretext for race discrimination is unfounded by the record and the holding contrary to existing case law. The Michigan Court of Appeals has held that a potential juror’s association with law enforcement and public defender’s offices is a valid race-neutral reason for exercise of a peremptory challenge in Michigan. *People v Diallo*, No. 342800, unpublished, (July 23, 2019). The trial court cited *People v Tennille*, 315 Mich App 51 (2016) in reaching her decision. (TI, 178; 47-a). In *Tennille*, one of the jurors was excused for cause for have a close association with law enforcement.

Furthermore, it is an accepted and reasonable strategy of defense counsel to remove jurors with close association with law enforcement as explained by the Sixth

Circuit in *United States v Atkins*, 843 F.3d 625 (6th Cir., 2016) that when a juror is related to a police officer this is “a fact that often leads defendants to strike prospective jurors out of fear that jurors with close ties to police officers are more likely to uncritically believe police witnesses on the stand. See, e.g., *United States v. Thompson*, 528 F.3d 110, 116 (2d Cir. 2008); *Coombs v. Diguglielmo*, 616 F.3d 255, 257-58 (3d Cir. 2010).”

Here the trial court held association with law enforcement is neither strategic nor a race-neutral reason to remove a juror. The trial court finding is not supported by the record and the holding was unreasonable as well as erroneous. The record suggests that the trial judge acted in an arbitrary or irrational manner in the misapplication of established law. The trial court’s application of *Batson* was in bad faith and interfered with the ability to secure an impartial jury by declaring an acknowledged and accepted defense voir dire strategy to remove jurors who present circumstances that suggest they may be more sympathetic to law enforcement witnesses as compared to defense witnesses.

II. VIOLATIONS OF SPECIFIC FEDERAL CONSTITUTIONAL RIGHTS REQUIRE AUTOMATIC REVERSAL AS THEY CONSTITUTE STRUCTURAL ERROR WHEREAS VIOLATIONS OF STATE LAW RIGHTS THAT DO NOT ALSO INVOLVE FEDERAL CONSTITUTIONAL RIGHTS ARE REVIEWED FOR HARMLESS ERROR.

In *Rivera v. Illinois*, 556 U.S. 148 (2009) the United States Supreme Court ruled:

If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.

* * * *

Absent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal. States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*. Or they may conclude, as the Supreme Court of Illinois implicitly did here, that the improper seating of a competent and unbiased juror does not convert the jury into an ultra vires tribunal; therefore the error could rank as harmless under state law.

In *People v Bell*, this Court held that violation of a state provided peremptory challenge, without more, did not implicate any federal constitutional violation, citing, in footnote 13, *United States v. Martinez-Salazar*, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); and, *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988).

In *Martinez-Salazar*, there was no claim that a juror was not impartial, had there been such a claim, then reversal would be required as this infringes upon the right to an impartial jury.

In *Ross*, there was never a suggestion that any of the jurors that sat in deliberations was not impartial. Under that circumstance, the United States Supreme Court recognized that peremptory challenges are not of constitutional dimension and are merely a means to achieve the end of an impartial jury.

In Kabongo's case, there is objectively reasonable doubt about the impartiality of the jury who sat in deliberation; it is this circumstance, (not present in *Bell*, *Riveria*, *Martinez-Salazar* and *Ross*) that adds constitutional dimensions to this issue- the 6th Amendment right to an impartial jury and the 14th Amendment right to Equal Protection.

Concerning the Equal Protection claim, all other criminal defendants are allowed to exercise a peremptory challenge to remove jurors with close association with law enforcement-but not Defendant-Appellant Kabongo. This unequal treatment was accomplished by the trial court's abuse of discretion and bad faith application of case law.

It is because the denial of the peremptory challenge to remove Juror No. 5 infringed upon the 6th Amendment right to an impartial jury, Defendant-Appellant submits that automatic reversal is required. To be clear it is not the violation of state law that compels the result, it is the infringement of the 6th Amendment that requires reversal.

Criminal defendants enjoy a constitutional right to an impartial jury. U.S. Const. amend. VI; Michigan Const 1963, art 1, §14. This right "is a structural guarantee," *Carella v. California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring), and its "infracton can never be treated as harmless error." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (internal quotation marks omitted). The trial court's misapplication of *Batson* resulted in a

juror, whose circumstances reasonably suggest partiality, to deliberate, thereby precluding any confidence that Defendant-Appellant was tried before an impartial jury.

The infringement of Defendant-Appellant's right to an impartial jury is structural error. This Court's conclusions in *Bell* about the United States Supreme Court moving away from structural error to adopting harmless errors analysis must be reconsidered in light of *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), which provided guidance as to when an error is structural and not subject to harmless error analysis:

The Court recognized, however, that some errors should not be deemed harmless beyond a reasonable doubt. [*Chapman v. California*, 386 U.S. 18,] at 23, n. 8, 87 S.Ct. 824. These errors came to be known as structural errors. See [*Arizona v. Fulminante*, 499 U.S. [279,] at 309-310, 111 S.Ct. 1246 [113 L.Ed.2d 302 (1991)]. The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Id.*, at 310, 111 S.Ct. 1246. For the same reason, a structural error "def[ies] analysis by harmless error standards." *Id.*, at 309, 111 S.Ct. 1246 (internal quotation marks omitted)

The precise reason why a particular error is not amenable to that kind of analysis — and thus the precise reason why the Court has deemed it structural — varies in a significant way from error to error. There appear to be at least three broad rationales.

First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest....

Second, an error has been deemed structural if the effects of the error are simply too hard to measure....

Third, an error has been deemed structural if the error always results in fundamental unfairness....

These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. See e.g., *id.*, at 280-282, 113 S.Ct. 2078. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case. See *Gonzalez-Lopez*, *supra*, at 149, n. 4, 126 S.Ct. 2557 (rejecting as "inconsistent with the reasoning of our precedents" the idea that structural errors "always or necessarily render a trial fundamentally unfair and unreliable" (emphasis deleted)).

These rationales predominate in Defendant-Appellant's favor. 1) The right to an impartial jury is one of the specifically expressed rights by which the trial framework in this country is defined. 2) Courts have expressed concern about the inability to measure the effect of unwanted and not qualified juror on the jury. *State v. Mootz*, 808 N.W.2d 207, 225–26 (Iowa 2012); *State v. McLean*, 815 A.2d 799, 805 (Me.2002); *Angus v. State*, 695 N.W.2d 109, 118 (Minn.2005); *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236, 238-40 (2001). 3) As occurred in this case, the error did result in fundamental unfairness. Whenever the attempt to obtain impartial jurors is infringed, the result is fundamental unfair and lacks confidence.

Defendant-Appellant was denied the ability to secure an impartial jury, and the error rendered the process to assure impartiality defective: reversal of Defendant-Appellant's conviction and sentence is required.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant requests this Court find equal protection and impartial jury constitutional rights have been denied, each constituting structural error, the sentence and conviction must be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Administrative Order 2019-6, the undersigned does certify that the word count for this Defendant-Appellant's Reply Brief, including footnotes, is 3,195 words, which is within the 3,200 word limit provided for Reply Briefs.

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