STATE OF LOUISIANA	*	**NO. 2002-KA-1700**
VERSUS	*	**COURT OF APPEAL**
ERRAN FLEMING AND KEVIN TRAINOR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 401-182, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr.)

ARMSTRONG, J., CONCURS

BAGNERIS, J., DISSENTS WITH REASONS

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REVERSED AND REMANDED

In this joint first degree murder case, the State appeals the trial court's ruling quashing Defendants' indictments based on racial and gender discrimination in the selection of the grand jury foreperson in Orleans Parish from 1987 to 2000. We reverse.

STATEMENT OF THE CASE

On September 3, 1998, an Orleans Parish grand jury indicted Erran Fleming and Kevin Trainor for the July 7, 1998 murder of Kevin Wooldridge at his French Quarter residence during the course of an armed robbery. On July 11, 2001, the trial court granted Defendants' motion to quash their indictments, finding: (1) Defendants presented a *prima facie* case of discrimination in the selection of grand jury forepersons in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, and (2) former La.C.Cr.P. art. 413(C) was an unconstitutional local or special law in violation of La. Const. art. III, § 12. The State filed a direct appeal to the Louisiana Supreme Court pursuant to La. art. V, § 5 (D)(1). Finding the trial court's decision quashing the indictments was not properly before it, the Supreme Court reasoned: "having found that former La. C.Cr.P. art. 413(C) was unconstitutionally applied in violation of the Fourteenth Amendment and quashing the indictments on that basis, the trial judge should have refrained from also determining that La. C.Cr.P. art. 413(C) was unconstitutional under La. Const. Art. III § 12(a)(3) as a local or special law." *State v. Fleming*, 2001-2799, p. 5 (La. 6/21/02), 820 So. 2d 467, 470. The Supreme Court thus transferred the matter to this court to be treated as an appeal by the parties. These appeals followed.

On appeal, the State assigns the following three errors:

1. The trial court erred in quashing the indictment against the defendants

because these defendants did not suffer any constitutional injury: the body of individuals comprising the grand jury that indicted them constituted a fair representation of the Orleans Parish community; no evidence of substantial under-representation of a recognizable class or race was presented to the trial court; and the trial court did not doubt that the selecting judge exercised his discretion in good faith and without abuse.

2. The trial court erred in quashing the indictment against these defendants based on equal protection and due process violations by finding that the defendants established a *prima facie* case of discrimination in the selection of Orleans Parish grand jury forepersons from 1987 to 2000, when the only data presented to the court was incomplete and the relevant data does not show substantial under-representation of a recognizable class or race.

3. The trial court erred in quashing the indictment against these defendants based on due process grounds concerning the selection of Orleans Parish grand jury forepersons when the foreperson is selected from the ranks of already seated grand jurors, and the role of the foreperson in Louisiana is largely ministerial in nature.

The defendant, Mr. Trainor, assigns the following two errors:

1. The state waived its right to appeal the decision of the trial court by failing to call a single witness or present any evidence of a neutral non-discriminatory reason for the evidence presented.

2. The trial court committed reversible error in limiting its decision to the period 1987 through 2000.

DISCUSSION

At the outset, we dispose of Mr. Trainor's two arguments. First, we find no error in the trial court limiting its decision to 1987 to 2000 given Defendants' statistical evidence was limited to that thirteen-year period. Second, the State's failure to present rebuttal evidence in the trial court does

not preclude it from appealing the trial court's decision quashing the indictments; La. C.Cr.P. art. 912 expressly authorizes the State to appeal a judgment quashing an indictment.

The State's three arguments can be synopsized as alleging "errors in the trial court's finding that the defendants demonstrated a prima facie case of discrimination in the selection of grand jury forepersons between 1987 and 2000, in violation of the equal protection clause, and due process clause of the Fourteenth Amendment, and that the State failed to rebut that finding." *Fleming,* 2001-2799 at p. 3, 820 So. 2d at 469. In reviewing the State's arguments, we first set forth the factual basis for those claims, and then outline the legal framework within which those facts must be analyzed.

In 1998, when Defendants were indicted, former La. C.Cr.P. art. 413 (C) provided:

> In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.

La. C.Cr.P. art. 413(C)(repealed by La. Acts 2001, No. 281). Pursuant to this provision, both the grand jury members and the foreperson that indicted Defendants were selected by Orleans Parish Criminal District Court Judge Terry Alarcon.

Judge Alarcon testified for the defense at the hearing on the motions to quash regarding the selection process and criteria he used in selecting those grand jurors. As noted elsewhere, he selected seven African Americans and five whites jurors, and a female African American foreperson.

Another defense witness was Dr. Joel Devine. Dr. Devine, who was qualified as an expert in sociological statistics, testified regarding the application of various statistical calculations (absolute disparity, comparative disparity, chi square test, and Fisher Exact square) to data set forth in a chart prepared by Defendants. Defendants' chart correlated the race and gender of the selecting judge with that of the forepersons over the thirteen-year period from 1987 to 2000. Dr. Devine testified that the only data he received was Defendants' chart, and, on cross-examination, acknowledged that his conclusions were only as good as the data that he received. Although the State stipulated to the authenticity of the raw data on which Defendants' chart was based, the State objected to the chart itself as no testimony was offered regarding how it was composed.

In its written reasons for judgment, the trial court summarized Defendants' statistical data as including the following:

1 Defendants presented grand jury records, voter registration data, affidavits and statistics showing 25 grand jury forepersons were selected between 1987 and 2000 by Orleans Parish Criminal District

Court judges.

2 The statistical data revealed between 1987 and 2000, white judges selected whites as forepersons 74% of the time and blacks as forepersons 26% of the time, even though whites comprised an average of 44% of the registered voters in Orleans Parish (white registered voters in Orleans Parish decreased from 47% in 1987 to 32% in 2000) and blacks comprised an average of 58% of the registered voters in Orleans Parish (black registered voters in Orleans Parish increased from 53% in 1987 to 64% in 2000). Thus, whites were over-represented as forepersons by 30% and blacks were underrepresented by 32%.

3 Black judges selected blacks as forepersons 83% of the time and whites as forepersons 17% of the time.

4 Male judges selected males as forepersons 64% of the time even though males only comprised an average of 43% of registered voters in Orleans Parish. Male judges selected females as forepersons 36% of the time even though females comprised an average of 57% of the registered voters in Orleans Parish. Thus, female forepersons were underrepresented by 21%.

Given the State's failure to present any rebuttal evidence, the trial court appointed its own expert, Dr. Silas Lee, to examine Defendants' statistical data. Dr. Lee, who was qualified as an expert in statistics and sociological impact of statistics, opined that based on the numbers he saw "a pattern whereby white judges select a white as a foreperson and black judges select a black as a foreperson," showing a preference based on race and gender. He further opined that such discrimination or exclusion sometimes "happens automatically." In his written report, Dr. Lee concluded that judges are not immune from social categorization and discrimination.

Based on the above facts, the trial court found the Defendants'

statistical evidence demonstrated a *prima facie* case of discrimination in the selection of grand jury forepersons from 1987 to 2000, in violation of the equal protection and due process clauses. We separately address those constitutional violations.

Equal Protection Violation

To demonstrate an equal protection violation based on discrimination in the selection of the grand jury itself or the foreperson, a defendant is required to establish a *prima facie* case of purposeful discrimination. Under the seminal case, *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), a *prima facie* showing of purposeful discrimination is established by proving "over a significant period of time" that "substantial under-representation" has occurred of a "recognizable distinct class, singled out for different treatment under the laws." Sara Sun Beale, et al, *Grand Jury Law & Practice* § 3:12 (2d ed. 2003)("*Grand Jury*"). One method of establishing such purposeful discrimination is by satisfying the following three-prong test:

1. Those alleged to be discriminated against belong to an identifiable group in the general population.

2. The selection process is subject to abuse according to subjective criteria.

3. The degree of underrepresentation, as shown by comparing the proportion of the group at issue found in the general population to the proportion called to serve.

State v. Divers, 34,748, p. 12 (La. App. 2 Cir. 6/22/01), 793 So. 2d 308, 316, *writ denied*, 2001-2544 (La. 8/30/02), 823 So. 2d 937 (citing *Castaneda, supra*).

Applying that analysis to the facts of this case, the first two prongs are not at issue. First, it is undisputed that African Americans and women are both identifiable groups capable of being singled out for disparate treatment. Second, it is undisputed that the procedure in Orleans Parish under former La. C.Cr.P. art. 413(C) for selecting both the grand jury itself and the foreperson was subject to abuse according to subjective criteria that could include race and sex. Hence, the dispute is whether Defendants established the third prong, which requires a statistical showing of substantial under-representation over a substantial period of time.

Both sides argue that it is not necessary to resort to a statistical showing of under-representation in this case. The State argues that since the grand jury that indicted Defendants constituted a fair representation of the Orleans Parish registered voters--seven African American and five white jurors and an African American, female foreperson--Defendants suffered no constitutional injury. That argument is unpersuasive. The equal protection clause "forbid[s] the exclusion of cognizable or distinct groups from the jury pool;" it does "not require that each individual jury mirror the composition

of the community." *Grand Jury*, *supra.* at § 3:12.

Defendants argue that resort to a statistical showing of under-representation to indirectly establish purposeful discrimination is unnecessary because there is direct evidence of such discrimination in the selection of the *grand jury* through the testimony of the jury selector, Judge Alarcon. More particularly, they contend that Judge Alarcon's testimony supports a finding of discrimination through a system of exclusion by limited inclusion and establishes that he employed a quota system based on his knowledge of Orleans Parish demographics. We find Defendants' reliance on Judge Alacon's testimony to support an equal protection violation is misplaced for two reasons.

First, Defendants' characterization of Judge Alarcon's testimony as establishing he engaged in a quota system in selecting the grand jury is unsupportable. The gist of Judge Alarcon's testimony was that this was the first grand jury he selected as a newly elected judge. As a recent candidate, he was aware of the demographics of Orleans Parish. He was concerned that the African American population as well as males and females were represented on the grand jury. He expressly denied engaging in any type of scientific method of selection. He testified that he "basically looked for a balance on the Grand Jury that was consistent with the Orleans Parish

demographics." Responding to defense counsel's question if, in selecting the grand jury, he would replace an excluded African American male with another African American male to take his place, Judge Alarcon testified that he did not. Rather, he testified that as the juror's came in, the grand jury "gradually kind of took on a shape of its own." He further testified that the racial makeup of the grand jury was not his "primary factor" and that what he looked for was "fair, honest, intelligent people."

Although Judge Alarcon candidly acknowledged that he was concerned about race and gender and attempted to achieve a balance on this grand jury, that type of concern is not discriminatory. Indeed, in *Brooks v. Beto*, 366 F.2d 1, 23 (5th Cir. 1966), the court explained the logical necessity of such an awareness of race and gender, stating:

> To fairly represent the community, there must be an awareness of the make-up of that community. Even random selection from broad lists, such as voter registration records, . . . inescapably requires a basic preliminary test: do each, or all, or some, give a true picture of the community and its components? Of course that condition precedent may be satisfied only by testing this 'sample' against the known components—racial, economic, sociological, educational, etc. It is inevitable, therefore, that jury selectors be conscious of those components.

Id. Consequently, Judge Alarcon's admission that he was conscious of the racial and gender components of Orleans Parish demographic representatives was not an admission of discrimination in selecting this grand jury.

A somewhat similar issue was addressed in *Ramseur v. Beyer*, 983 F.2d 1215 (3rd Cir. 1992). In that case, the selecting trial judges mentioned that they employed race as a factor in an effort to pick a fair cross section of the community and to achieve "an even mix of people from background and races, and things like that." *Ramseur*, 983 F.2d at 1228. While finding this type of subjective sorting according to race objectionable, the federal court reasoned that it could not conclude it amounted to an equal protection violation because "it apparently was not motivated by a desire to discriminate purposefully against African-Americans, nor was it apparently an attempt expressly to limit the number of African-Americans" on the grand jury. *Ramseur*, 983 F.2d at 1228. Continuing, the federal court concluded that the judges' statements did not demonstrate a desire to limit proportionately the number of African-American jurors to a fixed figure, nor did those statements indicate the presence of purposeful, invidious discrimination. Rather, the court found the judges "apparently wished the non-invidious objective of a representative jury." *Ramseur*, 983 F.2d at 1229. By analogy, Judge Alarcon's testimony cannot be construed to constitute direct evidence of the jury selector's discriminatory intent or purpose sufficient to establish an equal protection violation.

The other reason Defendants' reliance on Judge Alarcon's testimony

is misplaced is because his testimony addressed only the selection of the grand jury itself, not the forepersons. The trial court's finding of an equal protection violation, however, is based on the selection of the forepersons. "This distinction is important in that while the treatment of discrimination as to the grand jury foreperson is given the same legal consequence as discrimination as to the entire grand jury, each matter is treated as a separate legal issue for the purposes of litigation." *Divers*, 34,748 at p. 8, 793 So. 2d at 314. "[A]lthough the selection of grand jury forepersons is regarded in the same manner as the selection of grand jurors, the federal and state courts have always considered those to be two separate issues." *Divers*, 34,748 at pp. 7-8, 793 So. 2d at 314. Hence, while the same standards are applied, separate analyses are required.

Acknowledging and addressing this distinction, the trial court at a hearing on the motions to quash questioned defense counsel regarding whether their challenge was to the selection of the entire grand jury or only the foreperson. Defense counsel replied that their evidence was designed to cover both issues; Judge Alarcon's testimony was designed to establish discrimination in selecting the grand jury, and Dr. Devine's testimony was designed to establish discrimination in selecting the foreperson. Again, for the reasons discussed above, we find Defendants' reliance on Judge

Alarcon's testimony to support an equal protection violation in selecting the grand jury itself misplaced.

Shifting our focus to the selection of the foreperson, the trial court was persuaded by Defendants' statistical evidence showing that in twenty-five of the thirty-one grand juries selected during the thirteen-year period (1987 to 2000), there was a correlation between the race and gender of the selecting judge and the race and gender of the individual selected as grand jury foreperson. Based on that evidence, the trial court found Defendants established a *prima facie* case of discrimination in the selection of forepersons during that period. We find Defendants' statistical evidence factually and legally flawed.

Factually, Defendants' statistical evidence was flawed because it was drawn from incomplete data. Of the thirty-one forepersons selected during that thirteen-year period, the races of six and the sexes of four forepersons were unknown. As the State stresses, these unknowns make it impossible to determine the disparity between the African Americans and female forepersons as compared to the African Americans and females in the voter registration population. Moreover, as the State argues, it is quite possible that "the missing data could prove no disparity at all in the race and gender of the forepersons." It is important to note that this is not a case in which

there were no African American or female forepersons on the grand jury during the relevant period. Rather, the record reflects (as shown in Defendants' chart from which the statistical data was derived) that the known statistical data showed there were ten African American and eleven female forepersons over the thirteen-year period.

Legally, as the State asserts, the focus of Defendants' statistical evidence on the selecting judge's race and gender is misplaced; the selecting judge's race and gender are irrelevant to an equal protection analysis. The equal protection clause does not protect individuals from having a judge of a particular race or gender select a foreperson of a particular race or gender; it protects individuals from being excluded from serving as grand jury forepersons because of their race or gender.

Although the state and federal jurisprudence has held that there is no magic formula for determining whether individuals of a certain race or gender have been under-represented, the jurisprudence has employed the following single method to evaluate a defendant's statistical evidence regarding jury exclusion:

> A determination is made first of the percentage of the relevant general population composed of the particular group or class allegedly singled out for discriminatory treatment. A similar finding must then be made of the percentage of the same group or class represented in grand jury venires or the office of grand jury foreperson. Finally, the two figures are compared, and if the result reveals a significantly large disparity, then there arises

a presumption of discrimination.

Bryant v. Wainwright, 686 F.2d 1373, 1376 (11th Cir. 1982). In this case, as noted above, Defendants' statistical evidence departed from that single method, and focused instead on the race and gender of the selecting judge. Resort to a comparison of the percentages derived by Defendants, using this method, with the percentages discussed in the jurisprudence, which generally were derived using the method described above, would be akin to comparing apples and oranges. *See Grand Jury, supra.* at §3:18 (noting that "most courts continue to employ the absolute disparity standard," which is the difference between the percentage of the population in the specified category and the percentage of the jurors that are in that category). We thus decline to engage in such a comparison.

Regardless, the jurisprudence holds that, even assuming such a comparison reflects a substantial disparity, courts must "look beyond the figures to other criteria such as the number of years involved, the size of the sampling, and the number of the class in the general population." *Bryant*, 686 F.2d at 1377. "The magnitude of a disparity may also depend on whether the statistics are based on one grand jury venire of thirty people, or on dozens of grand jury venires representing thousands of people." *Id.* Applying these factors to Defendants' statistical evidence in this case

logically leads to the conclusion that the magnitude of the statistical disparity reflected in Defendants' chart and Dr. Devine's statistical calculations was due largely to Defendants' division of the data into irrelevant subcategories based on the selecting judge's race and gender. Given that flaw in Defendants' statistical data coupled with the admitted incomplete nature of that data, the trial court's finding that Defendants established a *prima facie* case of discrimination in the selection of the forepersons is not supported.

In sum, we find Defendants failed to satisfy their burden of establishing a *prima facie* case of purposeful discrimination as to the selection of either the grand jury itself or the foreperson. The trial court thus erred in finding an equal protection violation.

Due Process Violation

Nor does the jurisprudence support a finding that Defendants' due process rights were violated by the selection of forepersons in Orleans Parish during the time period. Although the trial court mentions a due process violation, it does not expressly address that violation. On appeal, the State argues that because the foreperson was selected from the ranks of the already seated grand jurors and because the foreperson's function in Louisiana is largely ministerial in nature, Defendants' due process claim is precluded by

Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984). Defendants counter that *Hobby* is not controlling.

Under former La. C.Cr. Pro. art. 413(C), the foreperson in Orleans Parish was not selected from the general venire; rather, as in *Hobby* the foreperson was selected from the already empaneled grand jury. The procedure in Orleans Parish, however, was different from the one involved in *Hobby* and *Campbell v. Louisiana,* 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998), cited by Defendants, in that it was the trial judge that selected the entire grand jury. Although *Hobby* involved a randomly selected federal grand jury and this case involves a grand jury handpicked by the trial judge, that distinction does not dictate a different result. Given the nature of the selection of the foreperson in Orleans Parish at the time and the ministerial nature of that position, we find merit in the State's argument that *Hobby* precludes a due process claim based on the selection of the forepersons.

In *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998), the Texas court analogized the argument regarding discrimination in selecting the foreperson to discrimination in the selection of other clerical employees who perform ministerial duties, stating: "[o]ne would not contend, for example, that a defendant's conviction should be reversed because of the

discriminatory selection of a clerk who file-stamps court documents, a bailiff present in the courtroom during trial, or a court coordinator who arranges hearings and trials on the docket." *Mosley*, 983 S.W.2d at 256. We find this analogy insightful, and are persuaded that *Hobby* is applicable to this matter and precludes Defendants' due process claim.

DECREE

For the foregoing reasons, we reverse the trial court's decision quashing the indictments of Mr. Fleming and Mr. Trainor and remand for further proceedings.

REVERSED AND REMANDED