STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARLON BELL, Defendant-Appellant.	FOR PUBLICATION December 9, 2003 9:10 a.m. No. 233234 Wayne Circuit Court LC No. 99-009228 ON RECONSIDERATION Updated Copy February 13, 2004

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

ZAHRA, J. (*concurring*.)

I concur in the reversal of defendant's convictions because we are required to do so pursuant to *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981), and *People v Schmitz*, 231 Mich App 521, 531-532; 586 NW2d 766 (1998).[1] I write separately because I have serious concerns regarding the continued viability of *Miller, supra*. Since *Miller* was decided in 1981, our Supreme Court has set forth very specific criteria that must be established before error may be deemed reversible per se. *People v Cornell*, 466 Mich 335, 363; 646 NW2d 127 (2002); *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). When error occurs in the trial court, a reviewing court must determine whether the error was constitutional or nonconstitutional. *Cornell*, *supra* at 363. If the error is constitutional, the reviewing court must determine whether the error is structural or nonstructural. *Id.* If the error is nonconstitutional or, if constitutional, it is nonstructural, then the error is subject to harmless error analysis. *Carines*, *supra* at 774. Applying the above-described error review process, I conclude that the error in this case is nonconstitutional and, therefore, must be subjected to harmless error analysis. I therefore urge the Supreme Court to address whether *Miller* should be expressly overruled and whether the wrongful denial of the

[1] The Michigan Court of Appeals is bound by Michigan Supreme Court case law until the Supreme Court overrules or expressly modifies that case law. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Further, under MCR 7.215(J)(1), this Court must follow the rule of law established in *Schmitz*. *Dunn v Detroit Automobile Inter-Ins Exch*, 254 Mich App 256, 260-261; 657 NW2d 153 (2002).

right to remove a particular juror peremptorily amounts to structural error that is not subject to harmless error analysis.[2]

I. Defendant Was Not Denied a Constitutional Right

The United States Supreme Court has repeatedly held that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial. See *Frazier v United States*, 335 US 497, 505 n 11; 69 S Ct 201; 93 L Ed 187 (1948); *United States v Wood*, 299 US 123, 145; 57 S Ct 177; 81 L Ed 78 (1936); *Stilson v United States*, 250 US 583, 586; 40 S Ct 28; 63 L Ed 1154 (1919); see also *Swain v Alabama*, 380 US 202, 219; 85 S Ct 824; 13 L Ed 2d 759 (1965). The United States Supreme Court further held in *Ross v Oklahoma*, 487 US 81, 88; 108 S Ct 2273; 101 L Ed 2d 80 (1988), that the loss of a peremptory challenge does not constitute "a violation of the constitutional right to an impartial jury," because peremptory challenges are only "a means to achieve the end of an impartial jury."

Defendant was not denied his Sixth Amendment right to an impartial jury; an impartial jury is guaranteed through the removal of jurors for cause. So long as the trial court conducts an extensive and thorough voir dire and provides trial counsel a full and fair opportunity to explore and disclose whether any member of the proposed jury panel harbors bias that would disqualify that person from sitting on the jury, a defendant's Sixth Amendment right to a fair and impartial jury is protected. Where the impartiality of a juror is not established, the juror must be removed. Here, however, defendant did not challenge for cause either of the jurors in question. Thus, there is nothing in the trial court record that supports the conclusion that defendant's Sixth Amendment right to a fair and impartial jury was denied.

Likewise, defendant was not denied due process of law as guaranteed under the Fifth Amendment and the Fourteenth Amendment. Due process is afforded when a litigant receives that which state law provides. *Ross, supra* at 89. State law provides for the free exercise of peremptory challenges. However, the statutory right to remove jurors peremptorily is subject to the equal protection concerns defined in *Kentucky v Batson*, 476 US 79; 106 S Ct 1712; 90 L Ed

[2] Preliminarily, it is worth noting that courts from other jurisdictions that have faced this issue have often elected to remand the case for a proper application of the *Batson* three-step process. See *Edmonds v State*, 372 Md 314, 340-341; 812 A2d 1034 (2002); *State v Donaghy*, 171 Vt 435, 442; 769 A2d 10 (2000); *McKenzie v State*, 223 Ga App 108, 114; 476 SE2d 868 (1996); *State v Pharris*, 846 P2d 454, 465 (Utah App, 1993). Remand is a desirable course of action because great deference must be given to the trial court's credibility findings in assessing the reasons proffered in support of peremptory challenges. *People v Rice*, 468 Mich 919-920 (2003); *People v Knight*, 468 Mich 920 (2003). If, after proper application of the three-pronged *Batson* process, the court determines on remand that the defendant's exercise of peremptory challenges violated *Batson*, there would be no error resulting from the denial of the right to remove the challenged juror peremptorily. Remand is not a viable option in this case because it does not appear likely that the glaring deficiencies in the record can be cured on remand.

2d 69 (1986), and its progeny.[3] Significantly, state law also provides a standard for reviewing procedural errors in criminal cases. The Michigan Legislature, which granted defendant the right to peremptory challenges, has also stated that a criminal conviction ought not be set aside for a procedural error except where, "after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26.[4] The statutory provision granting peremptory challenges must be read in context with the statutory directive on procedural error in a criminal case. It is apparent that, to the extent that the statutory right to peremptory challenges is impaired, state law guarantees that a criminal conviction will only be set aside where the error results in a miscarriage of justice.[5] Thus, because state law dictates that a harmless error analysis must apply to procedural errors, such as errors involving peremptory challenges, the erroneous denial of the statutory right to remove a particular juror peremptorily, without more, cannot be a violation of the constitutional guarantee of due process of law.[6]

II. Nonconstitutional Error is Subject to Harmless Error Analysis

---

[3] The only constitutional limitation on the statutory right of a peremptory challenge is the prohibition against exercising peremptory challenges on the basis of gender, ethnic origin, or race, which is violative of the Equal Protection Clause. *United States v Martinez-Salazar*, 528 US 304, 315; 120 S Ct 774; 145 L Ed 2d 792 (2000) citing *JEB v Alabama ex rel TB*, 511 US 127; 114 S Ct 1419; 128 L Ed 2d 89 (1994), on remand 641 So 2d 821 (Ala Civ App, 1994) (gender); *Hernandez v New York*, 500 US 352; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (ethnic origin); and *Batson, supra* (race). However, in the present case, defendant claims he never exercised his peremptory challenges in an unconstitutional manner. Rather, defendant claims he was denied his right to the actual use of his peremptory challenges. Thus, this case does not turn on the equal protection concerns of *Batson.* Instead, the question presented is whether the erroneous denial of the right to remove specific jurors peremptorily "for any reason, not just an incorrect application of *Batson*—results in a violation of federal constitutional . . . law." *Haywood v Portuando*, 2003 US Dist LEXIS 4190, * 37 (SD NY, March 21, 2003).

[4] Interestingly, this Court in *Schmitz, supra* at 531, recognized that the Legislature mandated a harmless error approach to setting aside criminal convictions on the basis of procedural error in the trial court. Nonetheless the *Schmitz* panel ignored this legislative mandate, apparently because it concluded it would be difficult to establish prejudice relating to errors in the peremptory challenge process. *Id*.

[5] Our Supreme Court has interpreted the statutory phrase "miscarriage of justice" to require reversal of a criminal conviction only where " 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity, supra* at 495-496, quoting MCL 769.26.

[6] While I agree with the observation made in the majority opinion that the erroneous denial of the right to remove a particular juror peremptorily is a greater infringement on the statutory right of peremptory challenge than is a dilution of that right, I do not conclude that this distinction converts a statutory right into a constitutional right. Not all important rights are constitutionally guaranteed. Likewise, not all violations of important rights rise to constitutional violations.

The error in this case is, in my opinion, nonconstitutional error that is subject to harmless error analysis.[7] My conclusion is not altered by the United States Supreme Court's archaic dicta in *Swain v Alabama*, 380 US 202, 219; 85 S Ct 824; 13 L Ed 2d 759 (1965), overruled in part by *Batson, supra*, that the denial or impairment of the statutory right to peremptorily strike jurors constitutes error not subject to harmless error analysis. Significantly, the United State Supreme Court has recently retreated from *Swain*. In *United States v Martinez-Salazar*, 528 US 304, 317 n 4; 120 S Ct 774; 145 L Ed 2d 792 (2000), on remand 278 F3d 1357 (CA 9, 2002), the Supreme Court noted that "the oft-quoted language in *Swain* was not only unnecessary to the decision in that case . . . but was founded on a series of our earlier cases decided long before the adoption of harmless-error review."[8]

The Supreme Court's observations in *Martinez-Salazar* caused the United States Court of Appeals for the Seventh Circuit to reject the automatic reversal rule involving claims of error arising from the dilution of the right to peremptorily challenge jurors. *United States v Patterson*, 215 F3d 776, 781 (CA 7, 2000), vacated in part on other grounds 531 US 1033; 121 S Ct 621; 148 L Ed 2d 531 (2000), on remand 241 F3d 912 (CA 7, 2001) (stating "*Martinez-Salazar* . . . pulls the plug on the *Swain* dictum and requires us to address the harmless-error question as an original matter"). Unrestrained by the dicta of *Swain*, the United States Court of Appeals for the Seventh Circuit rejected the traditional view that errors concerning peremptory challenges always affect a substantial right, and instead applied a harmless error analysis:

> A right is "substantial" when it is one of the pillars of a fair trial. Trial before an orangutan, or the grant of summary judgment against the accused in a criminal case, would deprive the defendant of a "substantial" right even if it were certain that a jury would convict. For the same reason, a biased tribunal always deprives the accused of a substantial right. Deprivation of counsel likewise so undermines the ability to distinguish the guilty from the innocent that it always leads to reversal. But "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose v Clark*, 478 US 570, 579; 92 L Ed 2d 460; 106 S Ct 3101 (1986). It is impossible to group an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge. When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the *substantial* right. Peremptory challenges enable the defendants to feel more comfortable with the jury that is to determine their fate,

---

[7] Defendant properly preserved this issue for appellate review. Pursuant to *Carines, supra* at 774, defendant carries the burden of establishing that the preserved nonconstitutional error resulted in a miscarriage of justice under a "more probable than not" standard.

[8] I am also not troubled that, as observed in the majority opinion, the great weight of federal authority supports the conclusion that errors affecting the right to peremptory challenge are not subject to harmless error analysis. None of the federal cases cited in the majority opinion discuss whether the Supreme Court's retreat from *Swain* supports a departure from the error per se rule.

> but increasing a litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries. [*Patterson, supra* at 781-782 (citations omitted; emphasis in original).][9]

Before *Martinez-Salazar*, the District of Columbia Court of Appeals initially followed the *Swain* dicta and assumed that a defendant's right to peremptory challenge was so fundamental that any infringement of that right resulted in reversal as a matter of law without the need to show actual bias. E.g., *Wells v United States*, 515 A2d 1108, 1111 (DC App, 1986), overruled by *Lyons v United States*, 683 A2d 1066 (DC App, 1996) (en banc). But in *Lyons v United States*, 683 A2d 1066 (DC App, 1996) (en banc), the court reconsidered this issue after the Supreme Court's decision in *Arizona v Fulminante*, 499 US 279, 310; 111 S Ct 1246; 113 L Ed 2d 302 (1991), which distinguished trial errors from structural errors and concluded that only structural errors may never be deemed harmless. In *Lyons, supra* at 1071, the District of Columbia Court of Appeals rejected the automatic reversal rule and instead adopted a harmless error standard of review for errors alleging a dilution of the right to peremptorily challenge jurors. In concluding that a harmless error analysis applies, the court reasoned:

> Critical to the [Supreme] Court's distinction between these two types of errors is that the category of "structural defect" discussed in *Fulminante* is limited to fundamental constitutional errors. The Court repeatedly referred to those defects it deemed "structural" as "constitutional errors," "constitutional deprivations," or "constitutional violations." Subsequent decisions have made clear that *Fulminante*'s discussion of "structural defects" applied only to certain constitutional errors that were too fundamental to be harmless. . . .
>
> Since it has been settled for decades that the right of peremptory challenge is not a constitutional right at all, let alone a "basic" or "fundamental" constitutional right, it follows from *Fulminante* that any error relating to the use of peremptory challenges cannot be regarded as a "structural defect." [*Lyons, supra* at 1071 (citations omitted).]

---

[9] After *Patterson*, the United States Court of Appeals for the Seventh Circuit found structural error arising from the improvident use of a peremptory challenge by the prosecution. *United States v Harbin*, 250 F3d 532 (CA 7, 2001). *Harbin* is factually distinguishable from the present case. In *Harbin, supra* at 547, "[t]he government used that peremptory challenge, presumably for the purpose of obtaining a jury more favorable to the prosecution, on the sixth day of an eight-day trial, at which point [the prosecution] would have had significant opportunity to observe the demeanor of the juror, and to assess whether the alternate juror would be more favorable to its case." The *Harbin* court concluded that defendant was denied a fair and impartial jury because the prosecution manipulated the jury mid-trial to favor the prosecution. *Id.* The *Harbin* court also concluded defendant was denied due process because the prosecution was afforded a procedure that was not made available to the defense. *Id.* at 547-548. Thus, the *Harbin* court found structural error. *Id.* Because *Harbin* involved the manipulation of the jury by a litigant in the middle of trial, it may fairly be categorized as belonging to the limited class of cases involving the infringement of a substantial right. See *Patterson, supra* at 781-782.

In sum, recent directives from the United States Supreme Court support the conclusion that any error infringing upon the statutory right to peremptory challenge is subject to harmless error review.[10] Having determined that this case presents a preserved nonconstitutional error subject to harmless error analysis, reversal is warranted only if defendant establishes under a "more probable than not" standard that a miscarriage of justice occurred. *Lukity, supra* at 495. Defendant carries the burden of demonstrating that it is "more probable than not that the outcome would have been different without this error." *Lukity, supra* at 497. However, defendant produces no evidence that the two jurors who were not peremptorily removed from the jury at defendant's request were in any way biased or precluded him from receiving a fair trial. Defendant never attempted to challenge these jurors for cause, which he could have done had he thought that these jurors exhibited bias or a state of mind that would prevent the jurors from rendering a just verdict. MCR 2.511(D). Defendant has made no claim that the jury that sat was biased in any way, or that answers given in voir dire by these two jurors prohibited him from having a fair trial or impartial jury. Rather, the crux of defendant's argument is that he was denied peace of mind that the jurors selected would not only be impartial, but also favorably disposed to his defense. However, as observed by the Seventh Circuit Court of Appeals, "reduced peace of mind is a bad reason to retry complex cases decided by impartial juries." *Patterson, supra* at 782. Consequently, because there is no evidence to establish that the denial of defendant's right to remove the jurors in question affected the verdict, I would conclude that

---

[10] Neither the Michigan Supreme Court nor the United States Supreme Court has found structural error from error that is not of constitutional dimension. Furthermore, errors that require automatic reversal, i.e., "structural errors" have only been applied to certain constitutional errors in a "limited class" of cases. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000), quoting *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999), on remand 197 F3d 1122 (CA 11, 1999). The Court in *Neder* stated several examples of structural error:

> "Indeed, we have found an error to be 'structural' and thus subject to automatic reversal, only in a 'very limited class of cases.' *Johnson v United States*, 520 US 461, 468; 117 S Ct 1544; 137 L Ed 2d 718 (1997) (citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (complete denial of counsel); *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927) (biased trial judge); *Vasquez v Hillery*, 474 US 254; 106 S Ct 617; 88 L Ed 2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v Wiggins*, 465 US 168; 104 S Ct 944; 79 L Ed 2d 122 (1984) (denial of self-representation at trial); *Waller v Georgia*, 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984) (denial of public trial); *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993) (defective reasonable-doubt instruction). [*Duncan, supra* at 52, quoting *Neder, supra* at 8.]

The dilution or denial of the right to peremptory challenge has yet to fall under the "limited class of constitutional errors [that] are structural and subject to automatic reversal." *Duncan, supra* at 51, citing *Neder, supra* at 8.

the trial court's erroneous denial of defendant's right to peremptorily remove the jurors in question was harmless as a matter of law. However, I am duty-bound to follow the Michigan Supreme Court opinion in *Miller* and this Court's opinion in *Schmitz*, which reluctantly relied on *Miller*. I urge the Supreme Court to grant any application for leave filed in this case, and address this very significant question of law.

Wilder, J., concurred.

/s/ Brian K. Zahra
/s/ Kurtis T. Wilder